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RESTRUCTURING AND INSOLVENCY

Restructuring and insolvency in Guernsey: overview

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FORMS OF SECURITY

1. What are the most common forms of security granted over immovable and movable property? What formalities must the security documents, the secured creditor or the debtor comply with? What is the effect of non-compliance with these formalities?

Immovable property

Common forms of security and formalities. Immovable property is defined as property that cannot be moved from one place to another and which follows or is associated with the land. Parcels of land are by their nature immovable, as are all those things attached to the land such as:

- Houses and other buildings including mills, presses and glasshouses.
- Trees, shrubs and other produce of the land until such time as they are separated from it.

Personal effects that have become permanently attached to immovable property also form part of that immovable property. Other property classified as immovable includes the usufruct of real estate, servitudes of the land, actions leading to a claim on immovable property, *rentes foncières* (that is, perpetual ground rents payable as a fixed annual sum and redeemable at the will of the debtor), and all things that are situated outside Guernsey and which are classified as immovable according to the law of the land in which they are situated.

Other than *rentes foncières*, security over real estate in Guernsey is taken as a *hypothèque* (that is, a legal right over the debtor's property in favour of the creditor), by either:

- *Rente hypothèque*, securing a fixed annual sum.
- *Hypothèque conventionnel* (bond).

In practice, *rentes hypothèque* are almost unknown and the bond has become the dominant form of security over real estate. The bond is a personal obligation to create a charge over the corpus of the debtor's assets (but in practice focused on immovable property) by acknowledging the debt to the creditor and (if appropriate) including a covenant to repay the sum with interest. The bond can be either a:

- **General charge.** A general charge confers priority to the creditor over all other claimants to the immovable property belonging to the debtor at the time the bond is registered.
- **Specific charge.** A specific charge confers priority to the creditor only over the immovable property specified in the bond.

Bonds are classified as movable property in Guernsey and do not confer any legal title in the immovable property owned by the debtor at the date the bond is registered. However, any successor in title of that immovable property is, by virtue of the bond's prior registration, on notice of the creditor's claim and becomes guarantor to the creditor of the bond. Therefore, the successor will be made party to any enforcement proceedings to either make good the value of the claim or surrender the property to the enforcement proceedings. However, any successor in title who was a bona fide purchaser for value at arm's length more than three years before commencement of proceedings can limit his liability to the price paid by him for the property to the defaulting debtor. In addition, a successor in title to immovable property acquired by the debtor after the bond's registration date is not held to be on notice and is, therefore, not subject to the rule which would otherwise make him guarantor.

Bonds are subject to a limitation period (known as a prescription period under Guernsey law) of six years from the date on which the claim falls due. For an on-demand bond, the six years runs from the date on which the demand is made. However, for a bond in which periodic payments are payable with effect from the time of the advance, each payment will interrupt the running of the prescription period.

A bond must be in writing and must be consented to by the debtor before the Royal Court of Guernsey sitting as a contract court (Contract Court) before being registered at the registry of the Royal Court (Greffe).

Documents (other than a testamentary disposition) consented to before the Contract Court do not need to be signed by the parties. However, this is frequently required by a creditor.

Following ratification by the Contract Court:

- The bond is assessed for document duty of 0.5% of the secured amount, the fees of the Contract Court and registration fees.
- The document duty and fees are paid.
- The bond is registered in the Greffe, and available for public inspection to anyone wishing to conduct a search against the debtor.

Effects of non-compliance. A bond which is not ratified by the Contracts Court is invalid. Non-registration of the bond at the Greffe will render the security ineffective.

Movable property

Tangible movable assets. The most common forms of security over tangible movable property are:

- Lien. This is the right to retain another's property if an obligation is not discharged.
- Pledge. This is a bailment or deposit of personal property with a creditor to secure repayment for a debt or engagement.
- A landlord's right to priority for unpaid rent which is secured by movable property on the demised premises (*tacite hypotheque*).
- Reservation of title clause.
- Mortgage (for example, over a ship and aircraft).

Intangible movable assets. The most common forms of security over intangible movable property are:

- **A security interest under the Security Interests (Guernsey) Law 1993 (Security Interests Law).** This can be created by a security agreement over any intangible movable property (other than a lease). The security interest can be created by the secured party being in possession of, under a security agreement:
  - certificates of title (such as securities); or
  - policy documents (like a life insurance policy).

  If title to collateral is assigned, express notice in writing of the assignment must be given to the assignees.

  To be valid, a security agreement must:
  - be in writing;
  - be dated;
  - identify and be signed by the debtor;
  - identify the secured party;
  - contain provisions regarding the collateral sufficient to enable its precise identification at any time;
  - specify the events which constitute default;
  - contain provisions regarding the obligation, payment or performance to be secured, sufficient to enable it to be identified.

  Failure to comply with any of these requirements does not necessarily render the security agreement void, but takes it outside of the scope of the Security Interests Law.
- **A security under the Law of Property (Miscellaneous Provisions) (Guernsey) Law 1979 (Property Law).** This is a set-off agreement and an assignment with a proviso for reassignment. It relates to agreements under which, in respect of mutual dealing between them, any debt from one party is to be set off against any debt from the other. In this case, unless the parties have expressly or by implication agreed differently, the only action which can be taken in relation to what would otherwise be those mutual debts, is in respect of the balance due after the set-off.

  The legal right to a debt or other chose in action can be assigned to a third party. For an assignment to be effective:
  - the assignor must execute it in writing; and
  - express notice in writing of the assignment must be served on the debtor, trustee or other person from whom the assignor would have been able to claim the debt or chose in action.

  Failure to comply with any of these requirements does not necessarily render the assignment void.

CREDITOR AND CONTRIBUTORY RANKING

2. Where do creditors and contributories rank on a debtor's insolvency?

Pari passu principle

The *pari passu* principle of distribution generally applies on a company's insolvency. Therefore, subject to any preferential payments, all creditors participate in the common pool of assets in proportion to the size of their admitted claims.

The *pari passu* principle only applies:

- To provable debts payable to the general body of creditors.
- Within each separate class of preferential, ordinary and postponed creditors (*see below, Order of priority on a liquidation*).

The principle does not affect the rights of:

- Secured creditors.
- Suppliers of goods under agreements reserving title.
- Creditors for whom the company holds assets on trust (as these assets do not belong to the company).

Order of priority on a liquidation

Subject to the payment of secured creditors, a liquidator must apply the company's assets in the following order of priority:

- **Expenses of the winding-up.** This includes the liquidator's fees, costs, charges and other expenses reasonably incurred in the winding-up proceedings.
- **Preferential debts.** This includes rent due to landlords, salaries, unpaid income tax and unpaid social security contributions. Rent due to a landlord has priority among preferential debts. Other classes of preferential debt rank equally among themselves, unless the company's assets are insufficient to meet them, in which case they are paid *pari passu* (*see above, Pari passu principle*). A preferential creditor has no priority to a secured creditor.
- **Ordinary debts.** These include trade creditors.
- **Postponed debts.** Two categories of creditor are postponed until the claims of all other creditors for valuable consideration in money or money's worth are satisfied (*Partnership (Guernsey) Law 1995 (Partnership Law)*):
  - a creditor who lends money to a sole trader or firm on the terms that the rate of interest payable on the loan varies with the profits of the business; and
  - sellers of the goodwill of a business in consideration of a share of the profits.
- **Surplus.** Any surplus is distributed among the contributories according to their rights and interests in the company under the articles of association (including any holders of fully paid shares). Every shareholder who is liable to contribute to the assets of the company in the event of it being wound up is a contributory.

Secured creditors' assets do not form part of the body of assets available for distribution to creditors on liquidation.

Order of priority on an administration

The administration regime does not involve distributing a company's property. It is instead designed as a mechanism to collect in and realise the company's property under the protection of the administrator. However, it may be possible for an administrator to persuade the court to allow distributions. In this case, the order of priorities is likely to be the same as in a liquidation.

Secured creditors

With regard to immovable property, secured creditors are entitled to be repaid from the realisation of the property to which their security relates. Claims are prioritised so that the earliest charge registered (in time) will prevail subject to any agreement as to subordination.

Claims by unsecured creditors are ranked in order of priority at the time when their claim is registered in the enforcement proceedings but after all secured creditors have been paid.

Secured creditors who have a security interest granted under the Security Interests Law are entitled to the proceeds of sale of the

collateral. The secured creditor must apply the proceeds of sale in the following order:

- Costs and expenses of the sale.
- Discharge of any prior security interest.
- Discharge of all monies properly due in respect of the obligation secured by the security agreement.
- Payment, in order of priority, of secured parties whose security interests were created after his own and on whose behalf he was holding possession of documents or exercising control of collateral.
- Payment of the balance to debtor or, where he is insolvent, to the Sheriff or other proper person.

UNPAID DEBTS AND RECOVERY

3. Can trade creditors use any mechanisms to secure unpaid debts? Are there any legal or practical limits on the operation of these mechanisms?

In addition to the forms of security discussed in *Question 1*, a creditor may obtain security over a debtor's immovable property by registering a claim made in proceedings commenced in the Royal Court in the Livre des Hypothèques, Actes de Cour et Obligations. It is not necessary for a creditor to have obtained judgment before registering the claim, although the leave of the Court to register the claim is required. Document duty of 0.5% of the amount of the claim is payable on registration.

4. Can creditors invoke any procedures (other than the formal rescue or insolvency procedures described in *Questions 6 and 7*) to recover their debt? Is there a mandatory set-off of mutual debts on insolvency?

Compromise or arrangement

Under sections 105 to 112 of Part VIII of the Companies (Guernsey) Law 2008, a compromise or arrangement can be reached between the insolvent company and its creditors or members. An arrangement includes a reorganisation of the company's share capital by the consolidation of shares of different classes, or the division of shares of different classes, or both.

An application to the court for approval of a compromise or arrangement can be made by the:

- Company or any creditor or member of the company.
- Liquidator, if the company is being wound up.
- Administrator, if the company is subject to an administration order.

It is advantageous to seek an arrangement or compromise once the company has entered into a formal insolvency process, rather than before. This is because:

- Once an administration has begun, there is a moratorium on commencement or continuation of any proceedings against the company.
- Under a liquidation, it may be possible to apply to the court for a stay of proceedings against the company during the application to the court for approval of the compromise or arrangement.

The court can order a meeting of the creditors or members. If a meeting is ordered, every notice summoning the meeting that is sent to a creditor or member must be accompanied by a statement explaining, among other things, the compromise arrangement's effect. If the notice summoning the meeting is given by advertisement, it must state where the creditors and members entitled to attend the meeting can obtain copies of such a statement.

The court can approve the compromise or arrangement if a majority in number representing 75% in value of the members or creditors (or relevant class of members or creditors) voting at the meeting agree.

In exercising its discretion, the court can consider whether the:

- Majority is acting in good faith in the interests of the relevant creditors or members.
- Different interests of the relevant creditors or members are such that those members or creditors should be treated as belonging to a different class.

A court-approved compromise or arrangement is binding on all creditors and members, and the company. If a company is being wound up, the agreement is binding on the liquidator and shareholders. In an administration, the agreement is binding on the administrator and shareholders.

Debt recovery proceedings

A creditor can commence court proceedings for recovery of the debt in either the:

- Petty Debts Court, for amounts of GB£10,000 or less.
- The Royal Court, for amounts in excess of GB£10,000.

Judgment is enforced by Her Majesty's Sheriff who has power to seize and sell the debtor's property in satisfaction of the judgment.

Restructuring

It may be possible to achieve a debt or corporate restructuring outside a formal rescue or insolvency procedure. The company or its creditors usually initiate this process, although this is not a requirement. There are no formal stages; the process depends on the nature of the restructuring.

There may be an informal moratorium for an agreed standstill period, to enable:

- The company to provide information.
- Creditors to evaluate the information and consider proposals to address the company's financial difficulties.

The participating creditors should agree to co-operate with each other and refrain from taking steps designed to improve their position in relation to other participating creditors. The company should refrain from acts that would prejudice participating creditors' positions.

It may also be prudent to appoint:

- A lead bank to establish one or more committees representative of the main classes of creditor and co-ordinate information and action among the participating banks.
- Accountants to investigate the company's financial position and to evaluate information obtained.

Set-off

There is no statutory requirement for the set-off of mutual debts on insolvency. The liquidator will take account of any agreement between the company and any creditor as to set-off.

STATE SUPPORT

5. Is state support for distressed businesses available?

There is no state support scheme for distressed businesses.

RESCUE AND INSOLVENCY PROCEDURES

6. What are the main rescue/reorganisation procedures in your jurisdiction?

Administration

Objective. An administration order can be made by the court under sections 374 to 390 of Part XXI of the Companies (Guernsey) Law 2008 for the purpose of achieving either:

- The survival of the company and the whole or any part of its undertaking as a going concern.
- A more advantageous realisation of the company's assets than would be effected on a winding-up.

An administration order must specify the purpose for which it is made.

Initiation. An application must be made to the court, supported by an affidavit seeking an order that the company be placed into administration and setting out the reasons why it should be placed into administration. The application can be made by all or any of the following parties, together or separately:

- The company.
- The company's directors.
- Any member of the company.
- Any creditor of the company, including any contingent or prospective creditor.
- The Guernsey Financial Services Commission (GFSC), in respect of supervised companies and companies engaged in financial services businesses.
- A liquidator, in the case of a company in respect of which the court has made an order for winding-up or which has passed a resolution for voluntary winding-up.
- An incorporated cell company.
- A protected cell company.

Notice of an application for an administration order should, unless the court orders otherwise, be served on:

- The company.
- The GFSC, in respect of supervised companies and companies engaged in financial services businesses.
- Each incorporated cell, in the case of an incorporated cell company.
- Any persons as the court may direct, including any creditor.

Notice of an application for an administration order should also be delivered to the Registrar of Companies at least two clear days before making the application, or as soon as reasonably practicable before the application. If short notice is given, the court asks for an explanation of the urgency of the matter. The Registrar of Companies then gives notice of the application in such manner and for such period as he thinks fit.

If an administration order is made, the administrator should:

- Immediately send notice of the order to the company.
- Immediately send a copy of the order to the Registrar.
- Within 28 days after the making of the order, send notice of the order to:
  - all the company's creditors;
  - the company's incorporated cells, if the order is in respect of a protected cell company;
  - the company's incorporated cell company, if the notice is in respect of an incorporated cell; and
  - the GFSC, in the case of a supervised company or a company engaged in financial services business.
- Send a copy of the order to such other persons as the court may direct within such time as the court may direct.

Every invoice, letter and other document issued by a company in administration must state that the company is in administration and the name of the administrator. The Registrar of Companies will also publicise the fact that a company has been placed into administration.

Substantive tests. The court can grant an administration order if it both:

- Is satisfied that the company does not satisfy, or is likely to become unable to satisfy, the solvency test (*see below*).
- Considers that the making of an order may achieve either:
  - the survival of the company as a going concern;
  - a more advantageous realisation of the company's assets than would be effected on a winding-up.

A company satisfies the statutory solvency test if the:

- Company is able to pay its debts as they become due. A company is deemed unable to pay its debts if either:
  - Her Majesty's Sergeant has served on the company a written demand for payment of a due debt of more than GB£750 and the debt remains outstanding for 21 days after the demand has been made;
  - the court is satisfied that the company is otherwise unable to pay its debts.
- Value of its assets is greater than the value of its liabilities. In determining whether the value of a company's assets is greater than the value of its liabilities, the directors can rely on valuations of assets or estimates of liabilities that are reasonable in the circumstances, and must have regard to both:
  - the company's most recent accounts;
  - all other circumstances that the directors know, or ought to know, affect the value of the company's assets and liabilities.

Consent and approvals. An administration order can only be made by the court.

Supervision and control. The administrator takes into his custody or control all the property to which the company is or appears to be entitled. The administrator manages the company's affairs, business and property in accordance with any court directions.

The administrator can do all things necessary or beneficial for the management of the company's affairs, business and property. The administrator can apply to the court for directions in relation to:

- The extent or performance of any function.
- Any matter arising in the course of his administration.

The administrator is deemed to act as the company's agent in performing his functions.

Protection from creditors. During the period between the presentation of an application for an administration order and the making of such an order, or the dismissal of the application (and during the period for which an administration order is in force):

- No resolution can be passed or order made for the company's winding-up.

- No proceedings can be commenced or continued against the company except with the court's leave (or, if an administration order is in force, with the administrator's leave). Rights of set-off and secured interests, including security interests and rights of enforcement, are unaffected.

On the making of an administration order, any extant application for the company's winding-up is dismissed.

Length of procedure. The Companies (Guernsey) Law 2008, as amended (Companies Law), does not state how long an administration order can remain in force. The court can make an administration order on any terms as it thinks fit, which may include a time limit. However, courts rarely impose time frames on administration orders.

Conclusion. An administrator can:

- Remove any director of the company and appoint any person to be a director.
- Call any meeting of the company's members or creditors.

Any company function that could interfere with the administrator's performance of his function cannot be performed except with the administrator's consent.

An administration has no statutory effect on contracts of employment. Further, the commencement of an administration does not automatically terminate contracts and the company will continue to incur tax liability as it would have had it not been placed into administration.

The administrator can apply to the court for the administration order to be discharged and should apply for the administration order to be discharged if it appears that either:

- The purposes specified in the order have been achieved or are incapable of being achieved.
- It would be desirable or beneficial to discharge or vary the order.

The court can grant or dismiss the application, adjourn the hearing conditionally or unconditionally, or make an interim or any other order it thinks fit.

The court can further discharge an administration order on application by a creditor or member, or the GFSC, in any of the following circumstances:

- The company's affairs, business and property are being or have been managed by the administrator in a way which is unfairly prejudicial to the interests of its creditors or members generally.
- Any actual or proposed act or omission of the administrator is, or would be, prejudicial.
- It would otherwise be desirable or beneficial for an order to be made.

Within seven days of a court order discharging an administration order, the administrator must send a copy of the order to the Registrar of Companies.

On the discharge of an administration order, the company may be released from any procedure or placed into liquidation.

7. What are the main insolvency procedures in your jurisdiction?

Compulsory liquidation

Objective. Under sections 406 to 418 of part XXIII of the Companies (Guernsey) Law 2008 a company may be wound up by the court and a liquidator appointed. The liquidator's role is to collect and realise the company's assets and to distribute dividends according to a statutory order of priority (*see Question 2, Order of priority on a liquidation*).

Initiation. An application, supported by an affidavit, must be made to the court seeking an order that the company be wound up and setting out the reasons why.

The company, any director, member or creditor, or any other interested party can make the application. In certain limited circumstances, the GFSC or the States of Guernsey Commerce and Employment Department can make an application.

There is no explicit obligation to initiate proceedings, although directors' fiduciary duties may require them to consider doing so where the company has no prospect of avoiding an insolvent liquidation.

An application for an order for the compulsory winding-up of the following companies will not be heard unless a copy of the application is served on the GFSC at least seven days before the application hearing:

- A supervised company or a company engaged in a financial services business.
- A company of any other class or description prescribed by the GFSC.

A liquidator must also send a copy of the compulsory winding-up order to the Registrar of Companies within seven days after being appointed. The Registrar of Companies publicises the fact that the company has been placed into liquidation. It is also good practice for the liquidator to contact all known creditors.

If a company has been placed into compulsory liquidation and the liquidator has realised the company's assets, the liquidator must apply for the appointment of a court commissioner to examine his accounts and distribute the funds derived from the company's assets. The commissioner must both:

- Arrange a creditors' meeting to examine and verify the financial statements and the creditors' claims and preferences.
- Fix a date for distribution of the company's assets.

Substantive tests. The court can wind up a company if the:

- Company has by special resolution resolved that the company be wound up.
- Company does not commence business within one year beginning on the date of its incorporation.
- Company suspends business for a year.
- Company has no members.
- Company is unable to pay its debts.
- Company has failed to comply with a direction of the Registrar of Companies to change its name.
- Company has failed to hold a general meeting of its members under specified provisions of the Companies Law.
- Company has failed to send its members a copy of its accounts or reports under specified provisions of the Companies Law.
- Court is of the opinion that it is just and equitable that the company should be wound up.

A company is deemed unable to pay its debts if either:

- A statutory demand for payment of a due debt of more than GB£750 has been served on the company and the debt remains outstanding for 21 days after the demand has been made.
- The court is otherwise satisfied that the company fails to satisfy the solvency test (see Question 6, *Administration*: Substantive tests).

Consent and approvals. Where a company is wound up by special resolution a majority of 75% of voting members is required to pass a special resolution.

Supervision and control. The court and liquidator supervise the procedure. On hearing a compulsory winding-up application the court may grant the application on such terms and conditions as it thinks fit, dismiss the application, or make such other orders as it thinks fit.

On the making of a compulsory winding-up order the court will appoint a liquidator nominated by the applicant or, where no person has been nominated, make such appointment as it thinks fit. The liquidator can:

- Bring or defend civil actions on behalf of the company.
- Carry on the business of the company to the extent beneficial for winding up the company.
- Make capital calls (that is, demand money promised by an investor).
- Sign all receipts and other documents on behalf of the company.
- Do any other act relating to the winding-up.
- Do any court-authorised act.

A liquidator of a company can seek the court's directions in relation to any matter relating to the winding-up.

Protection from creditors. There is no statutory moratorium on creditors' claims on the making of a compulsory winding-up order, although a creditor can apply to the court on the making of an application for a compulsory winding-up order (that is, before the winding-up order is made) for an order restraining an action or proceeding pending against the company.

Length of procedure. The Companies Law contains no provision as to the length of liquidation. In practice, the court does not impose time frames.

Conclusion. On the appointment of a liquidator all powers of the company's directors cease, except to the extent the court or the liquidator agree to their continuance. Any person who subsequently purports to exercise the powers of a director is guilty of an offence.

On the making of a compulsory winding-up order the company must cease to carry on business except so far as is necessary for the beneficial winding-up of the company. The company's corporate state and powers continue until its dissolution.

Any transfer of a company's shares made after the commencement of a winding-up is void, unless it is a transfer made to or with the approval of the liquidator.

A liquidation has no statutory effect on contracts of employment. However, a liquidator is likely to terminate employment contracts as part of the winding-up and payments due to employees may attract priority. Commencement of the winding-up does not automatically terminate contracts and the company will continue to attract tax liability.

A company is dissolved at the end of a liquidation. Within 15 days from the day of final distribution of the company's assets, the liquidator must apply to the court for an order declaring that the company is dissolved.

On dissolution, the company cannot undertake any business or contract debts or obligations. Any member of a company who causes the company to do so is personally liable in respect of any debt or obligation undertaken. A company that has been dissolved following liquidation cannot be restored.

Voluntary liquidation

Objective. Under sections 391 to 405 of Part XXII of the Companies (Guernsey) Law 2008 the members of a solvent or insolvent company can decide that it should be wound up and appoint a liquidator. The liquidator's role is to collect and realise the company's assets and to distribute dividends according to a statutory order of priority. See above, *Compulsory liquidation: Objective*. Unlike compulsory liquidation a voluntary liquidation is an out-of-court process.

Initiation. A company can be voluntarily wound up if either the:

- Period (if any) fixed by the memorandum or articles for the duration of the company expires.
- Event (if any) occurs on which the memorandum or articles provide that the company should be dissolved.

A company can be wound up voluntarily if it passes an ordinary or special resolution that it be wound up voluntarily, and the winding-up commences on the passing of the resolution.

The company will by ordinary resolution appoint a liquidator and fix his remuneration. If no liquidator is appointed the court can, on the application of any member or creditor, appoint a liquidator.

The company should deliver a copy of the ordinary resolution that the company be voluntarily wound up to the Registrar of Companies within 30 days of the resolution. The registrar gives notice of the fact that the company has passed a special or ordinary resolution for the voluntary winding-up.

Substantive tests. There are no specific grounds for a company to be placed into voluntary liquidation, but see above, *Initiation*.

Consent and approvals. Where a special resolution is passed this requires a majority of not less than 75% of voting members. An ordinary resolution requires a simple majority (that is more than 50%) of voting members.

Supervision and control. The liquidator realises the company's assets and discharges the company's liabilities. Having done so, he distributes any surplus among the members according to their respective entitlements. A voluntary liquidator is not controlled by the court.

A company being voluntarily wound up can, by special resolution, delegate to its creditors the power to:

- Appoint a liquidator.
- Enter into any arrangement regarding the powers to be exercised by the liquidator and the manner in which they are to be exercised. A creditor or shareholder of a company which has entered into such an arrangement can, within 21 days from completion of the arrangement, apply to the court for an order that the arrangement be set aside. The court can set aside, amend, vary or confirm the arrangement.

A member of a company can also apply to the court for directions concerning any aspect of the winding-up.

If a resolution for its voluntary winding-up has already been passed, the court can still make an order that the company be compulsorily wound up. This application is unusual but might be made by a creditor who wishes the process to be supervised by the court.

Protection from creditors. There is no statutory moratorium on creditors' claims on the making of a voluntary winding-up order. Unsecured creditors can prove in a liquidation, although they are only paid once all claims have been proved and the final dividend declared. Secured creditors can also enforce their security.

Length of procedure. The Companies Law contains no provision as to the length of liquidation. However, after one year from the date of a voluntary winding-up, and in each further year, the liquidator must summon a general meeting if the winding-up is not

complete. At the meeting, the liquidator should set out an account of his acts and dealings, and of the conduct of the winding-up during the preceding year.

Conclusion. From the commencement of a voluntary winding-up the company ceases to carry on business unless beneficial for winding up the company. The company's corporate state and powers continue until dissolution.

On the appointment of a liquidator, all powers of the directors cease, except to the extent that the company by ordinary resolution, or the liquidator, approves their continuance. Any person who subsequently purports to exercise any powers of a director is guilty of an offence.

The rules in relation to contracts are the same as in a compulsory liquidation (*see above, Compulsory liquidation*).

As soon as the company's affairs are fully wound up, the liquidator should both:

- Prepare an account of the winding-up, giving details of the liquidation and the disposal of the company's property, among other things.
- Call a general meeting to present and explain the account.

After the meeting, the liquidator must give notice to the Registrar of Companies of the holding of the meeting and its date. The Registrar of Companies publishes the notice along with a statement that the company will be dissolved. The company is dissolved three months after the notice is delivered.

On dissolution, the company cannot undertake any business or contract debts or obligations. Any member of a company who causes the company to do so is personally liable in respect of any debt or obligation undertaken. A company that has been dissolved following liquidation cannot be restored.

STAKEHOLDERS' ROLES

8. Which stakeholders have the most significant role in the outcome of a restructuring or insolvency procedure? Can stakeholders or commercial/policy issues influence the outcome of the procedure?

Administration and compulsory liquidation

The Companies (Guernsey) Law 2008 does not provide for any category of stakeholder to have a more significant role than any other category, but both processes are largely creditor driven.

Voluntary liquidation

In a solvent voluntary winding-up the process is largely driven by the shareholders, rather than the creditors. Both administration and compulsory liquidation are largely creditor driven. In practice, secured creditors are capable of exerting considerable influence in the outcome of both of these processes. In a voluntary liquidation the creditors can exercise an important influence, as the company can, by special resolution, delegate certain important powers to its creditors (*see Question 7, Voluntary liquidation: Supervision and controls*).

In addition, a member of a company which is being voluntarily wound up can apply to the court for directions concerning any aspect of the winding-up.

LIABILITY

9. Can a director, partner, parent entity (domestic or foreign) or other party be held liable for an insolvent debtor's debts?

Director

The main ways in which a company's directors or other parties can be held liable are as follows:

- **Undertaking business after compulsory liquidation.** Any company member who causes or permits the company to undertake business, or contract debts or obligations, after the company's compulsory liquidation, is personally liable in respect of any debt or obligation undertaken.
- **Misfeasance and breach of fiduciary duty.** Any past or present company officer (or any other person) who, directly or indirectly, has been concerned in or has participated in the promotion, formation or management of the company, can be liable if it appears that they have:
  - appropriated or otherwise misapplied any of the company's assets;
  - become personally liable for any of the company's debts or liabilities; or
  - otherwise been guilty of any misfeasance or breach of fiduciary duty in relation to the company.

  In this case, the liquidator or any creditor or member of the company can apply to the court for an order that the person concerned:
  - repay, restore or account for the money or property or contribute an appropriate sum to the company's assets; and
  - pay interest on the amount, at such rate and from such date as the court thinks fit, in respect of the default, by way of indemnity, compensation or otherwise.
- **Fraudulent trading.** The court can declare that any persons, who knowingly carried on the business with an intent to defraud creditors, or for any fraudulent purpose, must make any contribution to the company that the court directs. That person will also be guilty of a criminal offence.
- **Wrongful trading.** On the application of a liquidator, creditor or member of a company, the court can declare that a person is liable to make any contribution to the company's assets as the court directs, if all of the following can be shown:
  - the company has gone into insolvent liquidation;
  - at some time before the winding-up commenced, the person against whom the action is brought should have known that there was no reasonable prospect of the company avoiding insolvent liquidation;
  - that person was a director of the company at the time.

  A person is not liable for wrongful trading if it can be shown that he took every step to minimise the potential loss to creditors that he ought to have taken. This is assessed objectively and subjectively.

Partner

In a partnership, every partner is liable jointly and severally with the other partners for all debts of the partnership incurred while he is a partner. After a partner's death his estate is also severally liable for such debts so far as they remain unsatisfied.

In a limited partnership, every partner is liable jointly and severally with the other partners for all debts of the limited partnership incurred while he is partner. Each general partner is jointly and severally liable for all debts of the partnership without limitation.

Each limited partners' liability is generally limited to the amount that they agreed to contribute to the partnership (as set out in the limited partnership agreement). However, a limited partner may incur unlimited liability if they become involved in the conduct or management of the partnership.

The States of Guernsey have recently approved draft legislation that introduces limited liability partnerships to Guernsey. The draft law is expected to receive Royal Assent and come into force before July 2014. Under the new law, members (partners) will not be liable for the debts of the LLP, and in the ordinary course their liability is limited to the capital that they agreed to contribute to the LLP.

Parent entity (domestic or foreign)

Guernsey recognises and maintains the limited liability of companies. As such, there is no mechanism by which debts/assets are pooled across a group in insolvency. However, a group company may be liable by virtue of challenges to antecedent transactions (*see Question 10*).

Other party

See above regarding misfeasance.

See also *Question 10*.

SETTING ASIDE TRANSACTIONS

10. Can an insolvent debtor's pre-insolvency transactions be set aside? If so, who can challenge these transactions, when and in what circumstances? Are third parties' rights affected?

Preferences

Applicability. If a company has given a preference before or during a winding-up, a liquidator can apply to the court for an order restoring the position to what it would have been if the company had not given the preference. This applies if the preference was given within the six months before either (whichever is earlier):

- Any application for the compulsory winding-up of the company.
- The company passing any resolution for the voluntary winding-up of the company.

A company gives a preference to a person if both:

- That person is one of the company's creditors or is a surety or guarantor for any of the company's debts or other liabilities.
- The company does, or permits to be done, anything which improves that person's position in the liquidation.

Connected persons. If the person given the preference is connected to the company, both:

- The reference period is two years (rather than six months).
- The company is presumed, unless the contrary is shown, to have been influenced in deciding to give the preference by a desire to improve the position of the person given the preference.

A person is connected with the company if the company knew, or ought to have known, that either:

- That person had any significant direct or indirect proprietary, financial or other interest in connection with the company.
- Another person had any such interest in or connection with that person and the company.

Court order. The court can make any order it thinks fit to restore the position to what it would have been if the company had not given the preference, if the court believes that the company was both:

- At the time of giving the preference, unable to pay its debts.
- Influenced in deciding to give a preference by a desire to enhance the position of the person to whom the preference was given.

A court order can:

- Require any property transferred in connection with the preference to be vested in the company.
- Require any property to be vested in the company if it represents in any person's hands the:
  - application of the proceeds of sale of property in connection with the preference;
  - money transferred in connection with the preference.
- Release or discharge any security given by the company.
- Require any person to pay, in respect of benefits received by him from the company, any sums to the liquidator as the court may direct.
- Provide for any surety or guarantor whose obligations to any person were released, reduced or discharged by the preference to be under new or amended obligations to that person.
- Order that security be provided for the discharge of any obligation imposed by or arising under the order.
- Set out the extent to which any person whose property the order vests in the company (or on whom the order imposes obligations) is able to claim in the liquidation for debts or other liabilities which arose from, or were released, reduced or discharged by the preference.

A court order will not:

- Prejudice any interest in property acquired from a person other than the company in good faith, for value and without notice of the existence of circumstances enabling an order to be made.
- Prejudice an interest deriving from such an interest.
- Require a person to pay to the liquidator a sum both:
  - in respect of a benefit received by that person at a time when he was not a creditor of the company;
  - that he received in good faith, for value and without notice of the existence of circumstances enabling an order to be made.

Fraudulent dispositions

The Companies Law does not provide for a fraudulent disposition (*see Question 9*) to be set aside by a liquidator or other person. However, a creditor may be entitled to bring a Pauline action (that is, a form of relief under which a fraudulent disposition can be set aside). The principal grounds for bringing a Pauline action are:

- The person bringing the action must have been a creditor at the time of the transaction.
- The debtor must have been insolvent at the time of the transaction, measured on the balance sheet test of insolvency.
- The transaction must have been carried out by the debtor with the intention, or for the substantial purpose, of defrauding his creditors.

A Pauline action does not give rise to any entitlement to compensation.

Dispositions by insolvent companies

If an insolvent company disposes of its property to defeat the claims of its existing creditors, the transaction can be set aside if either the:

- Third-party recipient of those funds was party to the fraud.

- Third party acquired title for no value.

CARRYING ON BUSINESS DURING INSOLVENCY

11. In what circumstances can a debtor continue to carry on business during rescue or insolvency proceedings? In particular, who has the authority to supervise or carry on the debtor's business during the process and what restrictions apply?

Administration

During the period an administration order is in force, the administrator can do all things necessary or beneficial for the company's management of the affairs, business and property, including carrying on the business. Further, carrying on the business must be with a view to achieving the purpose for which an administration order was made. The administrator takes control of all the property to which the company is, or appears to be, entitled, but must manage the company's affairs, business and property in accordance with any directions given by the court.

Compulsory and voluntary liquidation

On the making of a compulsory winding-up order, the company must cease to carry on business, except to the extent it is beneficial for winding up the company. Any transfer of shares after the resolution to wind up a company is void unless the liquidator approves the transfer. The liquidator can carry on the company's business as necessary for the beneficial winding-up of the company.

ADDITIONAL FINANCE

12. Can a debtor that is subject to insolvency proceedings obtain additional finance both as a legal and as a practical matter (for example, debtor-in-possession financing or equivalent)? Is special priority given to the repayment of this finance?

The Companies Law does not preclude a company subject to an administration, compulsory liquidation or voluntary liquidation from obtaining additional finance. The Companies Law does not provide for special priority to be given to the repayment of additional finance.

Administration

Administrators have a specific power to raise or borrow money to assist in achieving the purpose for which the administration order was made. Further, in obtaining or seeking to obtain additional finance and therefore incurring more debt for the company, an administrator should ensure that this is not unfairly prejudicial to the interests of the company's creditors or members.

Compulsory and voluntary liquidation

In a compulsory or voluntary liquidation a liquidator can only carry on the company's business, which may include obtaining additional finance, to the extent it is beneficial for winding up the company (which would only be the case in a limited set of circumstances).

MULTINATIONAL CASES

13. What are the rules that govern a local court's recognition of concurrent foreign restructuring or insolvency procedures for a local debtor? Are there any international treaties or EU legislation governing this situation? What are the procedures for foreign creditors to submit claims in a local restructuring or insolvency process?

Recognition

Guernsey is not a signatory to the UNCITRAL Model Law on Cross-Border Insolvency 1997 and is not a member of the EU (so Regulation (EC) 1346/2000 on Insolvency proceedings (Insolvency Regulation) does not apply). However, the Royal Court has a long history of providing assistance to overseas insolvency office holders in appropriate circumstances.

Recognition can essentially be divided into two types:

- Firstly, section 426 of the UK Insolvency Act 1986 has been extended to Guernsey by the Insolvency Act 1986 (Guernsey) Order, 1989. As a result, the Royal Court is able to provide judicial assistance to the courts of England and Wales, Scotland, Northern Ireland, the Isle of Man or Jersey in insolvency matters. The procedure under section 426 involves the office holder applying to the court in their home jurisdiction for an order that the home court sends a letter of request to the Guernsey Court for assistance. Generally the Guernsey Court must comply with the request unless it offends public policy or the outcome is oppressive. In addition, section 426(5) provides the court with the means to apply the insolvency law of either Guernsey or the foreign jurisdiction in relation to similar matters falling within its jurisdiction.
- The second type of recognition is under the common law. This is an area that has been subject to substantial development in other jurisdictions in recent decisions, particularly that of the Privy Council in *Singularis*. However, the broad position, remains that Guernsey will co-operate in foreign insolvency proceedings, particularly where there is a sufficient connection between an office holder, appointed in the jurisdiction where the company is incorporated or individual domiciled, and the company or individual has submitted to the jurisdiction of the court by which the appointment was made. Although the Royal Court still retains discretion under the common law, where there is a sufficient connection the court will typically grant the relief sought albeit the availability of "as if" type relief is tempered so that the Guernsey court cannot grant relief unless it has a common law power to do so.

Money judgments

Where a creditor obtains a money judgment the court can recognise and enforce that judgment, either under statute in the form of the Judgments (Reciprocal Enforcement) (Guernsey) Law 1957 or at common law.

To enforce a judgment under the Judgments (Reciprocal Enforcement) (Guernsey) Law 1957, the judgment must be all of the following:

- The judgment of a Superior Court of a Reciprocating County (England and Wales, Isle of Man, Israel, Jersey, the Netherlands, Netherlands Antilles, Northern Ireland, Republic of Italy, Scotland and Surinam.
- Final and conclusive.
- For a sum of money other than in respect of taxes, fines or penalties.
- Within the jurisdiction of the court of the Reciprocating County to have granted.

- The application for recognition must be brought within six years of the date of the judgment.

Judgments granted by courts other than in Reciprocating Countries must be sued on as a civil debt.

Concurrent proceedings

The Guernsey courts will generally co-operate with other courts when there are concurrent proceedings in other jurisdictions. However each case is treated on its merits (*see above, Recognition*).

International treaties

Guernsey is not part of the EU and is not party to any insolvency-specific international treaties (the UNCITRAL Model Law on Cross-Border Insolvency 1997 or the Insolvency Regulation).

Procedures for foreign creditors

There are no special procedures that foreign creditors must comply with when submitting claims in Guernsey insolvency proceedings. Each case is treated on its merits.

REFORM

14. Are there any proposals for reform?

On 9 February 2017 the Committee for Economic Development recommended the enactment of amendments to Guernsey's existing insolvency regime. On 31 March 2017 Guernsey's legislative body directed that legislation necessary to give effect to the reforms should be drafted. The draft is expected in late 2017. The key reforms are as follows:

- The creation of a basic set of insolvency rules covering the key procedural issues that not currently legislated for.
- The ability to end an administration by dissolution. The current system requires liquidation if a company cannot be rescued.
- The expansion of office holders' investigatory powers.
- A potential increase in the level of reporting required by office holders.
- The introduction of statutory provisions dealing with transactions at an undervalue.

2017 also saw the introduction of a series of Guernsey Insolvency Practice Statements (GIPS). Based closely on UK Statements of Insolvency Practice, GIPS have no force of law but are designed to provide a framework for good practice in insolvency proceedings in the following areas:

- Investigations into the affairs of insolvent companies.
- Reports on the conduct of directors and the disqualification of delinquent direcotrs..
- Convening and holding creditors meetings in insolvent liquidation.
- Pre-packaged sales of businesses.

ONLINE RESOURCES

W *www.guernseylegalresources.gg*

Description. This website is a joint initiative of the Royal Court of Guernsey and the Law Officers of the Crown and provides access to legislation and judgments of the Royal Court and Court of Appeal.

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Recent group transactions

- Acted for the Long Port Group, a leading commercial and residential property developer based in Guernsey with interests in both Guernsey and the UK. The firm assisted in negotiations with Lloyds Banking Group in relation to the non-performing parts of the Group. Despite significant efforts to refinance, parts of the Group were placed into Guernsey administration in December with Deloitte as office holders.
- Acting for EY as joint administrators of the MITCO Group of Companies holding commercial real estate assets in Germany (Mitco Group). The Mitco Group was subject to historic loans from the Nationwide Building Society sold as part of a wider portfolio sale.
- The firm acted on behalf of office holders from KRyS Global Limited in the first application to discharge an administration order in Guernsey to facilitate a voluntary winding-up of a Protected Cell Company.
- Successfully secured orders on two separate applications under Guernsey's Protection of Investors and Company Law legislation to place two regulated entities into administration, and one company into compulsory liquidation. The three companies which were the subject of the applications formed part of the Providence investment group.