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Restructuring and Insolvency guide – Q&A

Guernsey

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BIGGER PICTURE

1. Legal framework

1.1 What domestic legislation governs restructuring and insolvency matters in your jurisdiction?

Parts XXI to XXIV of the Companies (Guernsey) Law 2008, as amended, contain the main statutory provisions relating to corporate insolvencies and reorganisations of Guernsey companies. The Companies Law also contains the procedures applicable to protected and incorporated cell companies.

1.2 What international / cross-border instruments relating to restructuring and insolvency have effect in your jurisdiction?

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

As set out in more detail in question 5.2, Section 426 of the UK Insolvency Act 1986 has been extended to Guernsey by the Insolvency Act 1986 (Guernsey) Order, 1989.

1.3 Do any special regimes apply in specific sectors?

Separate provisions dealing with the insolvency or winding-up of partnerships, limited partnerships, trusts and foundations are set out in the specific legislation applicable to each. Equally, the Guernsey Financial Services Commission has the power to appoint administration managers to licensed entities pursuant to powers afforded to it under the protection of investors laws which could be used to handle the collapse of regulated entities.

1.4 Is the restructuring and insolvency regime in your jurisdiction perceived to be more creditor friendly or debtor friendly?

Guernsey has historically been and remains a predominantly creditor-friendly jurisdiction.

1.5 How well established is the legal regime and infrastructure relevant to restructuring and insolvency in your jurisdiction (e.g. extent of recent legislative changes, availability of specialist judges / courts / advisers)?

The Royal Court of Guernsey is the principal court of first instance in Guernsey (equivalent to the High Court in England). It has unlimited civil jurisdiction in Guernsey and is divided into five divisions. For the purposes of insolvency law, the relevant division is known as the Ordinary Division.

The Ordinary Court has sittings dedicated to commercial matters, including restructuring and insolvency applications. The level of expertise within the judiciary and court system in relation to insolvency and restructuring matters is high. Guernsey is well serviced by expert legal counsel and insolvency practitioners/other advisers.

On 9 February 2017, the Committee for Economic Development recommended the enactment of amendments to Guernsey's existing insolvency regime. The States of Guernsey subsequently approved the Companies (Guernsey) Law 2008 (Insolvency) (Amendment) Ordinance 2020. The ordinance introduces a number of updates to Guernsey's existing insolvency regime to improve the efficiency of process and to fill various gaps that currently exist. The changes are expected to come into force together, with an initial set of rules in 2022.

2. Security

2.1 What principal forms of security interest are taken over assets in your jurisdiction?

Immovable (real) property: The most common form of security over real estate in Guernsey is taken as a hypothèque (a legal right over the debtor's property in favour of the creditor), by either:

- a rente hypothèque, securing a fixed annual sum; or
- a hypothèque, conventionnel (bond).

In practice, 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, which confers priority to the creditor over all other claimants to the immovable property belonging to the debtor at the time the bond is registered; or
- a specific charge, which confers priority to the creditor over only 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 a party to any enforcement proceedings either to make good the value of the claim or to surrender the property to the enforcement proceedings. However, any successor in title that was a bona fide purchaser for value at arm's length more than three years before the commencement of proceedings can limit its liability to the price paid by it for the property to the defaulting debtor. Also, 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 that would otherwise make it guarantor.

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 before being registered on the public records at the registry of the Royal Court. A bond which is not ratified by the contract court is invalid. Non-registration of the bond at the Greffe will render the security ineffective.

Movable (personal) property: The most common forms of security over tangible movable property are as follows:

- lien – the right to retain another's property if an obligation is not discharged;
- pledge – a bailment or deposit of personal property with a creditor to secure repayment for a debt or engagement;
- landlord's right to priority for unpaid rent that is secured by movable property on the demised premises (tacite hypotheque);
- reservation of title clause; and
- mortgage (eg, over a ship or aircraft).

The most common form of security over intangible movable property is a security interest under the Security Interests (Guernsey) Law, 1993. 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 (eg, securities) or policy documents (eg, a life insurance policy).

To be valid, a security agreement must:

- be in writing, dated and signed by the debtor and the secured party;
- contain provisions regarding the collateral sufficient to enable its precise identification;
- specify the events that constitute default; and
- 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.

2.2 How can those security interests be enforced (and what factors could complicate or prevent this process)?

Security in intangible movable property: For Guernsey situs assets, the court will generally be involved in the enforcement process, save in respect of intangible movable property, where security is often taken by way of assignment or possession. Enforcement of a security interest over, for example, securities or shares is often undertaken without recourse to the court.

The rights of a secured creditor on the enforcement of the security interest over intangible movable property should be described in the transaction documents giving rise to the security interest.

The Security Interests Law allows for a power of sale or application of the collateral to arise when an event of default occurs, provided that a notice specifying the particular event of default complained of has been served on the debtor.

On a sale or application of the collateral, the secured party must take all reasonable steps to ensure that the sale or application is made:

- within a reasonable time; and
- for a price corresponding to the value on the open market at the time of the sale of the collateral being sold or, where there is no open market, the best price reasonably obtainable.

The proceeds of the sale or application must be applied by the secured party in the following order:

- in payment of the costs and expenses of the sale;
- in discharge of any prior security interest;
- in discharge of all moneys properly due in relation to the obligations secured by the security agreement; and
- in payment, in due order of priority, of secured parties whose security interests were created after its own and on whose behalf (as well as on its own behalf) it was, immediately before exercising its power of sale or application, holding possession of documents or exercising control of collateral (whether by itself or through some other person on its behalf).

The balance (if any) is paid to either:

- the debtor; or
- where the debtor has become insolvent or has been subject to any other judicial arrangement consequent on insolvency, the Office of His Majesty's Sheriff or other proper person.

Security over immovable property: The enforcement procedure of saisie is the means by which a judgment creditor (whether secured or unsecured) pursues moneys due to that creditor from a debtor owning real estate in Guernsey. The saisie procedure enables the creditor to have the debtor's real estate vested in it following necessary process substantially contained in the Saisie Procedure (Simplification) (Bailiwick) Order 1952, as amended.

The procedure involves three stages that can be completed within a minimum timeframe of six months:

- Preliminary vesting order (PVO): Under a PVO, a judgment creditor can evict, let or carry out repairs to the debtor's property. If there is a tenant, the judgment creditor can require that the rent paid by the tenant be paid to the creditor or that the judgment debtor in occupation pay a rent to the judgment creditor. These rights are exercisable only after notice in writing by the Office of His Majesty's Sheriff that the PVO has been served on the debtor. At this stage, the creditor has no obligations to other creditors that may exist. The creditor can apply any rent it receives in reduction of its judgment debt, but ownership of the real estate at this stage is still vested in the debtor, which may sell its real estate, provided that it can either:
  - repay the creditor and any other secured creditors from the proceeds of the sale; or

  - come up with an arrangement with the other creditors whereby they cancel or release their charges secured against the real estate.
- Interim vesting order (IVO): On the making of an IVO, the judgment creditor holds the real estate on trust for all creditors of the debtor. The judgment creditor opens a register and all persons that are owed money by the debtor and wish to participate in the saisie have the opportunity to enrol their names in that register together with the sums due to them. Those creditors which have enrolled are then marshalled in order of priority. The creditor with priority over all other enrolled claimants will be the first holder in date order of any registered claim (eg, a bond) against the debtor's real estate. Subsequently, registered claims rank in order of the date of registration and other unsecured judgment creditors rank in order of the date of their judgment.
- Final vesting order (FVO): All creditors that appear on the marshalled list are summoned before the court before making the FVO. At this stage, each creditor is asked by the court in reverse order of priority to confirm whether the creditor wishes to take the property, subject to paying all those creditors that appear above that creditor in the list, or whether that creditor wishes to renounce its claim in its entirety. The first-registered creditor is therefore guaranteed either:
  - the payment of the debt due to that creditor and appearing on the marshalled list; or
  - the vesting of the real estate in that creditor free from all other debts.

Following a vesting of the real estate under an FVO, the real estate is the property of that creditor. All other rights of the creditor against the debtor under the claim are extinguished, although the real estate may not, on resale, be equivalent to the total amount of the claim. Although the debtor is not formally entitled to any surplus, as the debtor has renounced its rights to its real estate in satisfaction of all claims registered in the saisie proceedings, in practice the Guernsey courts expect the creditor taking the property under an FVO to undertake to pay over any balance after the debt is paid in full.

3. Restructuring

3.1 Are informal workouts available in your jurisdiction? If so, what forms do they typically take, and what are the benefits and drawbacks as compared to formal restructuring proceedings?

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; and
- creditors to evaluate the information and consider proposals to address the company's financial difficulties.

The participating creditors should agree to cooperate 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 coordinate information and action among the participating banks; and
- accountants to investigate the company's financial position and to evaluate information obtained.

The benefit of the informal approach is flexibility as to the form of the restructuring and also in respect of timing and costs.

The drawbacks include:

- ensuring continuity of process when dissenting positions arise; and
- ensuring that all parties are bound to the process sufficiently to see it through to a conclusion.

Informal restructurings in Guernsey may be aided by the availability of the purpose trust, a vehicle than can and has been used to successfully achieve a number of restructuring outcomes.

3.2 What formal restructuring proceedings are available in your jurisdiction, and what are the benefits and drawbacks of each?

Administration: 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; or
- 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.

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); and
- considers that the making of an order may achieve either:
  - the survival of the company as a going concern; or
  - 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:

- it 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 £750 and the debt remains outstanding for 21 days after the demand has been made; or
  - the court is satisfied that the company is otherwise unable to pay its debts; or
- the 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; and
  - all other circumstances that the directors know, or ought to know, affect the value of the company's assets and liabilities.

An administration order can only be made by the court.

Scheme of arrangement: Under the Companies (Guernsey) Law 2008, as amended, a compromise or arrangement can be reached between the insolvent company and its creditors or members. Schemes of arrangement will specifically deal with different categories of debt and the compromise thereof. It is quite possible therefore that certain categories of debt will survive the procedure.

3.3 How, by whom and on what grounds are formal restructuring proceedings initiated? What are the main preconditions for success?

Administration: 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; and/or
- 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; and
- 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 will ask for an explanation of the urgency of the matter. The registrar of companies will then give 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 of the making of the order, send notice of the order to:
  - all of 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; and
- 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.

Scheme of arrangement: 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;
- the liquidator, if the company is being wound up; or
- the administrator, if the company is subject to an administration order.

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 effect of the compromise arrangement. 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; and
- the different interests of the relevant creditors or members are such that those members or creditors should be treated as belonging to a different class.

3.4 What are the effects of the commencement of formal restructuring proceedings, both for the debtor and for creditors?

Administration: The administrator takes into his or her 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; and
- any matter arising in the course of the administration.

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

An administrator can:

- remove any director of the company and appoint any person to be a director; and
- call any meeting of the company's members or creditors.

Any company function that could interfere with the administrator's performance of his or her function cannot be performed without the administrator's consent.

Scheme of arrangement: An arrangement includes a reorganisation of the company's share capital by the consolidation of shares of different classes, the division of shares of different classes or both. The process closely resembles an English law scheme of arrangement.

Creditors or members, or both, involved in a proposed scheme will broadly be categorised by reference to their respective rights against the company. Classes will generally be confined to those whose rights against the scheme company are "not so dissimilar as to make it impossible for them to consult together with a view to their common interest" per Sovereign Life Assurance Company v Dodd [1892] 2 QB 573.

A court-approved compromise or arrangement is binding on all creditors and members, and on 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.

3.5 Does a moratorium or stay apply and, if so, what is its scope? Are there exceptions?

Administration: There is a limited moratorium in administration proceedings. 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; and
- 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.

However, the rights of secured creditors are unaffected by an administration order.

Schemes of arrangement: By their very nature, there is no moratorium in schemes of arrangement. It can be advantageous to seek an arrangement or compromise once the company has entered into a formal insolvency process, rather than before, because once an administration has begun, there is a moratorium on the commencement or continuation of any proceedings against the company.

3.6 What process do restructuring proceedings typically follow (including likely length of process and key milestones)?

Administration: The Companies (Guernsey) Law 2008, as amended, 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 timeframes on administration orders. Currently, all administrations in Guernsey must be concluded by either the survival of the company as a going concern or it being moved into liquidation.

Schemes of arrangement: The process for obtaining sanction of the court for a scheme is broadly the same as that in the United Kingdom. The steps to be taken are as follows:

- **Application**: The company files an application with the court to convene a meeting of the members of the company (or a class of members) for the purpose of considering and voting on the proposed scheme.

- **Notice**: Notice of the meeting must be sent to each creditor or member and must be accompanied by a statement explaining the effect of the scheme and any material interests of the directors of the company. Every notice summoning the meeting that is given by advertisement must either include such a statement or state where and how creditors or members entitled to attend the meeting may obtain copies of such a statement.
- **Meeting**: At the court-convened meeting of creditors/members, a majority in number representing not less than 75% in value of the members (or class thereof) present and voting (in person or by proxy) must approve the scheme before it can be sanctioned by the court.
- **Court sanction**: A further application is then made to the court seeking sanction of the agreed scheme. In exercising its discretion, the court may consider whether:
  - the interests of different creditors or members are such that they should be treated as belonging to a different class thereof;
  - each creditor/member (or class thereof) was properly represented by those attending the convened meeting and the majority is acting in good faith in the interests of the creditor/member (or class thereof) and not oppressively towards the minority; and
  - the scheme is such that an intelligent and honest person might approve.
- Once sanctioned by the court, the scheme becomes binding on all creditors/members (including secured and preferential creditors).

3.7 What are the roles, rights and responsibilities of the following stakeholders in restructuring proceedings? (a) Debtor, (b) Directors of the debtor, (c) Shareholders of the debtor, (d) Secured creditors, (e) Unsecured creditors, (f) Employees, (g) Pension creditors, (h) Insolvency officeholder (if any), (i) Court.

In administration, the debtor's corporate state and powers continue until dissolution. Although the directors of the debtor technically remain appointed, they are denuded of their powers, or at least the exercise of them, without sanction of the administrator.

In an administration, there are no formal reporting requirements vis-à-vis creditors or the court, and in practice, an administrator may prepare six-monthly or annual reports to the court (depending on the complexity or length of the assignment) as part of the fee approval process. Additional informal reporting to creditors on a periodic basis is common. The conclusion of an administration requires an application for discharge of the order to the Royal Court, at which a detailed report will be expected that is usually sent to creditors.

With respect to employees, an administration has no statutory effect on contracts of employment. Further, the commencement of 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.

There are no specific statutory procedures regarding pension claims in Guernsey insolvencies and such claims are not given any priority status.

More details on the roles, rights and responsibilities of stakeholders in an administration are covered elsewhere in this Q&A.

3.8 Can restructuring proceedings be used to "cram down" and bind dissentient creditors to a transaction supported by other creditors? Are creditors separated into classes for the purposes of voting in the proceedings? What are the relevant voting thresholds? Is "cross-class cramdown" available?

This can be done by way of a scheme of arrangement. Creditors or members, or both, involved in a proposed scheme will broadly be categorised by reference to their respective rights against the company. Classes will generally be confined to those whose rights against the scheme company are "not so dissimilar as to make it impossible for them to consult together with a view to their common interest".

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. A court-approved compromise or arrangement is binding on all creditors and members, and on the company

3.9 Can restructuring proceedings be used to compromise secured debt?

The rights of secured creditors are unaffected by an administration order. Secured assets will effectively fall outside of the insolvency estate and, if they are dealt with by the officeholder, will be dealt with in collaboration with the security holder.

3.10 Can contracts / leases be disclaimed or otherwise addressed through restructuring proceedings?

At present, there is no concept of disclaimer in Guernsey's insolvency law; but proposed reforms (see question 9.1) will introduce this concept in insolvency appointments.

3.11 Can liabilities of third parties (e.g. guarantors) be released through restructuring proceedings?

In theory, these liabilities could be compromised via a scheme of arrangement.

3.12 Is any protection and/or priority afforded to the providers of new money in the context of restructuring proceedings (i.e. is "DIP financing" available)?

There is no statutory provision in Guernsey specifically dealing with the priority afforded to providers of new money in restructuring proceedings, but it frequently is so afforded by way of contractual arrangements.

3.13 How do restructuring proceedings conclude?

Administration: Currently, all administrations in Guernsey must be concluded through either:

- the survival of the company as a going concern; or
- it being moved into liquidation.

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; or
- 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; or
- 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.

Schemes of arrangement: A scheme will be concluded once the court-approved arrangement has been effected.

4. Insolvency

4.1 What types of insolvency proceeding are available in your jurisdiction, and what are the benefits and drawbacks of each?

Compulsory liquidation: 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

Voluntary liquidation: 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

Unlike compulsory liquidation, voluntary liquidation is an out-of-court process.

4.2 How, by whom and on what grounds are insolvency proceedings initiated? Can the instigating party (or any other parties) select the identity of the relevant insolvency officeholder?

Compulsory liquidation: 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 Guernsey Financial Services Commission (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; or
- 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 of 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 the 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; and
- fix a date for distribution of the company's assets.

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 such extent as is beneficial for winding up the company;
- make capital calls (ie, 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; and
- 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.

Voluntary liquidation: 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; or
- an 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, by ordinary resolution, will appoint a liquidator and fix his or her 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.

4.3 What are the effects of the commencement of insolvency proceedings, both for the debtor and for creditors?

Compulsory liquidation: On the appointment of a liquidator, all powers of the company's directors cease, except to the extent that the court or the liquidator agrees to their continuance. Any person that 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 insofar 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 of 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: The liquidator realises the company's assets and discharges the company's liabilities. Having done so, he or she 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; and
- 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 of 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 that wishes the process to be supervised by the court.

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.

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; and
- 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.

4.4 Does a moratorium or stay apply and, if so, what is its scope? Are there exceptions?

Compulsory liquidation: 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 (ie, before the winding-up order is made) for an order restraining an action or proceeding pending against the company.

Voluntary liquidation: 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.

4.5 What process do insolvency proceedings typically follow (including likely length of process and key milestones)?

Compulsory liquidation: The Companies Law contains no provision as to the length of liquidation. In practice, the court does not impose timeframes.

A liquidation can conclude once the liquidator has fully wound up the company's affairs. A company is dissolved at the end of a liquidation.

In a compulsory liquidation, the liquidator must apply to the court within 15 days of the day of final distribution of the company's assets (as set at a commissioner's hearing) for an order declaring that the company is dissolved.

Voluntary liquidation: 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 or her acts and dealings, and of the conduct of the winding-up during the preceding year.

In a voluntary 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; and
- 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.

4.6 What are the respective roles, rights and responsibilities of the following stakeholders during the insolvency proceedings? (a) Debtor, (b) Directors of the debtor, (c) Shareholders of the debtor, (d) Secured creditors, (e) Unsecured creditors, (f) Administrator, (g) Employees, (h) Pension creditors, (i) Insolvency officeholder, (j) Court.

In a compulsory liquidation, the company's corporate state and powers continue until dissolution. Although the directors of the company technically remain appointed, they are denuded of their powers, or at least the exercise of them, without sanction of the liquidator.

Currently, Guernsey's statutory insolvency procedures prescribe very light-touch reporting and engagement with creditors. Compulsory liquidation is light on formal obligations to report or hold meetings. Informal arrangements are common, as is periodic reporting to the court when seeking fee uplifts or approvals. The process is concluded by way of a commissioner's hearing at which final accounts are approved. Notice of that meeting is advertised and normally given to creditors, which can seek referral of disputes to the Royal Court. Guernsey Insolvency Practice Statement 4 provides guidance as to suggested best practice around meetings.

Insolvency appointments have no statutory effect on contracts of employment. However, an officeholder is likely to terminate employment contracts as part of the winding up and payments due to employees may attract priority.

There are no specific statutory procedures regarding pension claims in Guernsey insolvencies and such claims are not given any priority status.

More details on the roles, rights and responsibilities of stakeholders in a compulsory liquidation are covered elsewhere in this Q&A.

4.7 What is the process for filing claims in the insolvency proceedings?

Guernsey currently has no formal rules regarding the proving of debts in insolvencies (albeit that changes are proposed). In practice, liquidators will advertise for claims and seek the submissions of formal proofs supported by evidence of the underlying claim.

The commissioner's hearing process in compulsory liquidation presents an opportunity for creditors to challenge decisions regarding claims. The commissioner may refer any dispute to the Royal Court for determination

4.8 How are claims ranked in the insolvency proceedings? Do any claims have "super priority" and is there scope for subordination by operation of law (e.g. equitable subordination)?

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 applies only:

- to provable debts payable to the general body of creditors; and
- within each separate class of preferential, ordinary and postponed creditors (see below).

The principle does not affect the rights of:

- secured creditors;
- suppliers of goods under agreements reserving title; or
- creditors for which 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: These include the liquidator's fees, costs, charges and other expenses reasonably incurred in the winding-up proceedings.
- Preferential debts: These include rent due to landlords, salaries, unpaid income tax and unpaid social security contributions (subject to various statutory limits). 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). A preferential creditor has no priority to a secured creditor.
- Ordinary debts: These include the claims of 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):
  - creditors that lend 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 that 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.

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 that 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 moneys 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 its own and on whose behalf it was holding possession of documents or exercising control of collateral; and
- payment of the balance to debtor or, where it is insolvent, to the Office of His Majesty's Sheriff or other proper person.

Equitable subordination: Where sums are owed to such parties as genuine debts of the company, Guernsey has no specific statutory provisions in this regard, save where such transaction would otherwise fall foul of a statutory prohibition or remedy (eg, a preference).

4.9 What is the effect of insolvency proceedings on existing contracts? Is the counterparty free to terminate? Can they be disclaimed?

There is no automatic termination of contracts in either liquidation or administration in Guernsey. 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. An officeholder is unlikely to adopt employment contract and may seek to terminate them on appointment. Payments due to employees may attract priority as set out at question 3.3.

The ability of a counterparty to terminate will be determined by the specific contractual terms, but there is currently no statutory prohibition on termination. The proposed changes to the Companies Law (see question 9.1) may see a prohibition on the withdrawal of essential supplies to a company in insolvency.

The validity of retention of title clauses will again be determined on their specific construction, but there is no specific statutory bar to their enforcement. The location of the relevant goods will also be relevant, especially where the contracts themselves are governed by the law of another jurisdiction and the goods are located in that jurisdiction.

4.10 Can transactions entered into by the debtor prior to be insolvency be challenged and set aside? What are the relevant grounds / look-back periods / defences?

Preferences: 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 had the company not given the preference. This applies if the preference was given within the six months before either (whichever is earlier):

- an application is made for the compulsory winding up of the company; or
- the company passes a 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; and
- 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:

- the reference period is two years (rather than six months); and
- 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 a significant direct or indirect proprietary, financial or other interest in connection with the company; or
- another person had any such interest in or connection with that person and the company.

The court can make any order it thinks fit to restore the position to what it would have been had the company 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; and
- influenced in deciding to give a preference by a desire to enhance the position of the person to which 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; and
  - 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 it 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; and
- set out the extent to which any person whose property the order vests in the company (or on whom the order imposes obligations) can 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; or
- require a person to pay to the liquidator a sum:
  - in respect of a benefit received by that person at a time when it was not a creditor of the company; and
  - that it 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 to be set aside by a liquidator or other person. However, a creditor may be entitled to bring a Pauline action (ie, a form of relief under which a fraudulent disposition can be set aside). The principal grounds for bringing a Pauline action are as follows:

- The person bringing the action was a creditor at the time of the transaction;
- The debtor was insolvent at the time of the transaction, measured on the balance-sheet test of insolvency; and
- The transaction was carried out by the debtor with the intention, or for the substantial purpose, of defrauding its 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; or
- the third party acquired title for no value.

4.11 How do the insolvency proceedings conclude? Can any liabilities survive the insolvency proceedings?

Currently, all administrations in Guernsey must be concluded by either:

- the survival of the company as a going concern; or
- it being moved into liquidation.

A liquidation can conclude once the liquidator has fully wound up the company's affairs. A company is dissolved at the end of a liquidation.

Schemes of arrangement will specifically deal with different categories of debt and the compromise thereof. It is quite possible that certain categories of debt will survive the procedure.

Formal insolvency proceedings in Guernsey will result in either:

- the end of the company's life via a liquidation; or
- its survival as a going concern. If an administration does secure survival as a going concern, it is possible that certain debts will also survive the process if they can be shown to not preclude the company's successful continuation.

5. Cross-border / Groups

5.1 Can foreign debtors avail of the restructuring and insolvency regime in your jurisdiction?

Currently, it is not possible for foreign entities to avail of the insolvency procedures set out in the Companies Law. However, proposed changes to the regime (see question 9.1) will grant discretion to the Royal Court to wind up foreign registered entities.

5.2 Has the UNCITRAL Model Law on Cross Border Insolvency or the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments been adopted or is it under consideration in your country?

No.

5.3 Under what conditions will the courts in your jurisdiction recognise and/or give effect to foreign insolvency or restructuring proceedings or otherwise grant assistance in the context of such proceedings?

Recognition of foreign proceedings can essentially be divided into two types:

- 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 can 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 officeholder applying to the court in his or her 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 cooperate in foreign insolvency proceedings – particularly where:
  - there is a sufficient connection between an officeholder 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 that 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.

5.4 To what extent will the courts cooperate with their counterparts in other jurisdictions in the case of cross-border insolvency or restructuring proceedings?

There has been little practical experience of this in Guernsey, but the Royal Court has a proven track record of showing flexibility and practicality in insolvency cases. There is no reason to assume that it would not be amenable to adopting such protocols or arrangements in appropriate circumstances.

The Guernsey courts will generally cooperate with other courts when there are concurrent proceedings in other jurisdictions. However, each case is treated on its merits.

5.5 How are corporate groups treated in the context of restructuring and insolvency proceedings? If there is no concept of a group proceeding (or consolidation), is there any regime through which insolvency officeholders must / may cooperate?

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, save in very exceptional circumstances where the affairs of the entities are intermingled and it is to the benefit of all creditors to do so. However, a group company may be liable by virtue of challenges to antecedent transactions.

5.6 Is your country considering adoption of the UNCITRAL Model Law on Enterprise Group Insolvency?

No.

5.7 How is the debtor's centre of main interests determined in your jurisdiction?

The concept of centre of main interests is not known in Guernsey law. Currently, only a Guernsey registered entity is capable of availing of the procedures set out in the Companies (Guernsey) Law 2008, as amended.

5.8 How are foreign creditors treated in restructuring and insolvency proceedings in your jurisdiction?

There are no special procedures that foreign creditors must comply with when submitting claims in Guernsey insolvency proceedings.

6. Liability risk

6.1 What duties do the directors of the debtor have when the company is in the "zone of insolvency" (or actually insolvent)? Do they have an obligation to commence insolvency proceedings at any particular time?

Once the directors of the company become aware that it is unlikely to remain solvent, they must, through their fiduciary duty to act in the best interests of the company by maximising its value, have regard predominantly to the interests of the company's creditors. We anticipate that the recent Supreme Court judgment in BTI 2014 LLC v Sequana SA will be highly persuasive with regard to the timing of when this duty crystallises.

The duty is still owed to the company itself, and not the creditors. This becomes more apparent when assessed against the test of wrongful trading (as to which see below). The directors must always bear in mind that the Royal Court of Guernsey has the capacity to make adjustments to what are called 'antecedent transactions' under the preference and wrongful trading provisions of the law and to punish directors for breaches of their duties.

6.2 Are there any circumstances in which the directors could incur personal liability in the context of a debtor's insolvency?

The liquidator (or any creditor or member of the company) may apply to the court for an order against the director in his or her personal capacity where, in the course of the winding up of a company, it appears that any director:

- has appropriated or otherwise misapplied any of the company's assets;
- has become personally liable for any of the company's debts or liabilities; or
- has otherwise been guilty of any misfeasance or breach of fiduciary duty in relation to the company.

Any claim must be brought within six years of the date of breach.

The test for a breach of fiduciary duty is a subjective one. In Carlyle Capital Corporation Limited (in Liquidation) v Conway, HH Marshall LB held that:

- "There is no fiduciary duty to make an objectively 'right' decision"; and
- "... a decision (whether right or wrong) reached by directors cannot be a breach of fiduciary duty if they have honestly made it in what they consider to be the interests of the company, and that therefore a claim for breach of fiduciary duty will only lie where it is shown that the directors did not honestly consider their action to be in the best interests of the company".

If a claimant is successful in proving misfeasance or a breach of duty, the court may order the delinquent director to:

- repay, restore or account for such money or property;
- contribute sums towards the company's assets; and/or
- pay interest upon such amount, at such rate and from such date as the court thinks fit in respect of the default, whether by way of indemnity or 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. Such persons 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; and
- 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 or she took every step to minimise the potential loss to creditors that he or she ought to have taken. This is assessed objectively and subjectively.

6.3 Is there any scope for any other party to incur liability in the context of a debtor's insolvency (e.g. lender or shareholder liability)?

Lenders: There are no statutory provisions in Guernsey whereby lenders might be subject to such liability; nor have there been any reported Guernsey cases in which lenders have been held liable for the insolvency of a borrower/debtor.

Members: Any company member that 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.

Otherwise, a member should be protected from liability for the debts of a company, save that members can be found liable as a result of any of the remedies against antecedent transactions set out above and/or where it can be demonstrated that the member has been acting as a shadow director.

7. The Covid-19 pandemic

7.1 Did your country make any changes to its restructuring or insolvency laws in response to the Covid-19 pandemic? If so, what changes were made, what is their effect and are they temporary or permanent?

Guernsey has not enacted any specific changes to its insolvency legislation as a result of the COVID-19 pandemic.

8. Other

8.1 Is it possible to effect a "pre-pack" sale of assets, and is it possible to sell the assets free and clear of security, in restructuring and insolvency proceedings in your jurisdiction?

A series of Guernsey Insolvency Practice Statements (GIPS) (based closely on the UK Statements of Insolvency Practice (SIP)) were introduced in 2017. While the GIPS have no force of law in Guernsey, they provide a framework for good practice in insolvency proceedings in several areas. One of those areas is pre-packaged sales of businesses (GIPS 5).

Historically, the Royal Court has only sanctioned one pre-pack in Guernsey, in Esquire Realty Holdings Limited. In doing so, it made it clear that it had been comforted by the parties' compliance with the UK SIP 16 (as it was then).

8.2 Is "credit bidding" permitted?

There are no formal statutory provisions; but in practice, it can and has been used effectively. The officeholder will use his or her discretion in relation to credit bids, having regard to the overriding duty to act in the best interests of creditors as a whole. Directions may be sought from the court where uncertainties arise, but there is little precedent on this point.

9. Trends and predictions

9.1 How would you describe the current restructuring and insolvency landscape and prevailing trends in your jurisdiction? Are any new developments anticipated in the next 12 months, including any proposed legislative reforms?

On 31 March 2017, the States of Deliberation approved proposals for the reform of Guernsey insolvency law by way of amendment to the Companies (Guernsey) Law 2008, as amended.

The approved amendments cover the following key areas, among others:

- the introduction of the ability for administrators to make distributions to unsecured creditors out of administration without the need for a subsequent liquidation;
- the introduction of the ability for companies to be dissolved at the end of administration directly rather than through a liquidation;
- the introduction of a requirement for independence in the appointment of voluntary liquidators to insolvent companies;
- increased reporting requirements and protection for creditors in all processes;
- the introduction of a power to create a rules committee that in turn is given formal power to prescribe rules relating to the process by which debts should be proved in liquidation;
- the introduction of a procedure whereby liquidators may disclaim onerous assets;
- the creation of a wider body of insolvency rules, together with a committee for their review, to govern procedural matters in insolvency and to keep up to date with developments;
- the introduction of a mandatory requirement for officeholders to report delinquent conduct by officers and former officers;
- the creation of a statutory offence in relation to transactions at an undervalue undertaken by a company in the run-up to insolvency; and
- the creation of a statutory power for liquidators to require the production of a statement of affairs (currently only administrators have this power), together with a strengthening of officeholders' information-gathering powers.

A draft of the law has been produced together with a draft initial set of insolvency rules. Enactment was given force on 1 January 2023.

10. Tips and traps

10.1 What are your top tips for a smooth restructuring and what potential sticking points would you highlight?

When considering a restructuring involving a Guernsey (or any offshore) entity, it is important to engage a team that understands the local landscape early on in the process.

The coordination of appointments in cross-border cases can be critical. Establishing a realistic timeframe to secure an appointment in each jurisdiction should be a priority.

Guernsey's security laws are very different from those applicable in some onshore jurisdictions and understanding the nature of the rights afforded to secured creditors is very important.

The limits on the moratorium in Guernsey and the exclusion of secured claims from it mean that early engagement with secured creditors is vital in any restructuring.

Understanding the availability of recognition of a particular onshore procedure in an offshore jurisdiction is also key to a successful restructuring. The best-formulated onshore plan can often risk being undermined if it cannot be given effect in a relevant offshore jurisdiction.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

About Carey Olsen

Carey Olsen is a leading offshore law firm advising on the laws of Bermuda, the British Virgin Islands, the Cayman Islands, Guernsey and Jersey from a network of nine international offices.

We provide legal services in relation to all aspects of corporate and finance, trusts and private wealth, investment funds, insolvency, restructuring and dispute resolution.

Our clients include global financial institutions, investment funds, private equity and real estate houses, multinational corporations, public organisations, sovereign wealth funds, high net worth individuals, family offices, directors, trustees and private clients.

We work with leading onshore legal advisers on international transactions and cases involving our jurisdictions.

In the face of opportunities and challenges, our clients know that the advice and guidance they receive from us will be based on a complete understanding of their goals and objectives combined with consistently high levels of client service, technical excellence and commercial insight.

Our Restructuring and Insolvency practice

Our restructuring and insolvency lawyers apply their knowledge of insolvency, corporate and banking law, regulatory guidance and litigation to the full spectrum of cross-border restructuring, recovery and insolvency matters involving our offshore jurisdictions.

We work in partnership with the world's leading insolvency practitioners, onshore law firms, accountancy and forensic practices, advising the whole spectrum of stakeholders, including liquidators, receivers, creditors, investors, directors and professional service providers. Our institutional client base includes private equity, venture capital, banking, real estate, financial services, corporate and private trusts and investment managers.

Our lawyers have been involved in a very significant number of the major formal insolvency proceedings in recent years in the jurisdictions in which we practice, and have played a key role in the development of the law in many key areas. They have a practical and deep technical understanding of the issues that can arise in restructuring situations, whether around merger, acquisition, reorganisation, workout or recapitalisation activities. They focus their advice on furthering our clients' commercial aims; typically preserving the assets of a business or the value of an investment, and building a viable restructuring transaction, exit strategy or litigation plan.

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The Mondaq Comparative Guides are part of a series of publications that provide an overview of some of the key points of law and practice on multiple topics and allow readers to compare regulatory environments and laws across multiple jurisdictions. Carey Olsen has provided the restructuring and insolvency guides for Bermuda, the British Virgin Islands, the Cayman Islands, Guernsey and Jersey.

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