Changes to Guernsey's corporate insolvency regime

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The Finance Development Unit of Guernsey's Commerce and Employment Department has issued a draft ordinance for consultation in respect of amendments to the island's corporate insolvency regime.

Below is a summary of the key amendments that the Ordinance proposes to make to the law:

Administration

Exit from administration – Only the Court can bring the administration to an end by either making a winding up order or discharging the administration. The proposal is that the Court should have the power to permit dissolution of the company at the same time as discharging an administration order. This reform will essentially streamline the current process by removing the step of liquidation in circumstances where the affairs of the company have been effectively wound up in the course of the administration, with a significant cost and time saving.

Creditors' Committee Procedures in administration – There is currently no obligation in Guernsey to call a meeting of creditors when conducting an administration. The proposal is that administrators will be obliged to call at least one initial meeting of the company's creditors within a set number of days after appointment. They will also be required to send notice of their appointment to creditors with an explanation of the process and its aims. Whilst this often happens in practice, having some additional structure to the administration process will be of benefit to practitioners and may result in more efficient administrations.

Duty to report delinquent officers of the company – The new regime proposes that an administrator (and a liquidator) is under an obligation, before he vacates his office, to report any breach of the Companies Law by any officer of the company to the Registrar of Companies or report any grounds for the Court to disqualify any officer. Whilst this amendment generally reflects the current position that a liquidator should bring such matters to the Commissioner's attention in his report before a company is dissolved, having the report actually go to a statutory officer may lead to an increase in investigation of such conduct.

Winding up

Requirement for independence in an insolvent voluntary winding up – This amendment neatly deals with the potential problems created by the convergence of two existing aspects of Guernsey insolvency. First, there is no qualification hurdle for appointment as a liquidator of a Guernsey company. Second, insolvent companies can be voluntarily wound up. At present it is therefore entirely possible for a director, shareholder or other connected person being appointed to realise and distribute the assets of an insolvent company, regardless of any conflict between their personal interests and those of creditors.

Under this proposal, a liquidator appointed to an insolvent company in a voluntary winding up must be independent, however on application, the Court will have the power to approve the appointment of a liquidator who does not meet the requirement of

independence. In terms of ascertaining 'solvency', a director certification system (backed up by penalties) is proposed. If no solvency declaration is properly made, the independence requirement is enlivened.

Voluntary winding up and creditor protection – Where an insolvent company is being voluntarily wound up, notice of a liquidator's appointment should be sent to creditors with the aim of explaining the process; a liquidator should be required to call at least one initial meeting of creditors and there should be an ongoing statutory obligation to report to creditors and shareholders.

Winding up of foreign companies – Guernsey is a financial offshore centre with a significant number of foreign companies carrying on business in Guernsey and/or which have assets under control here. The amendment proposes that the Royal Court should have a statutory power to compulsorily wind up an insolvent foreign company and that the statutory provisions should reflect the position in English Law.

Powers of liquidators and administrators – It is also proposed that Liquidators and administrators will be given specific powers to request a statement of affairs from the officers of a company. Further, a liquidator may apply to the Court for an order compelling the officers of a company to produce documents and information. This amendment will not only formalise an application that can already be made to the Court but will enable the Court to impose sanctions for an officer's failure to comply. This should result in greater compliance with the liquidator's request from the outset.

Liquidators will also be given the statutory power to disclaim onerous property under the proposed reforms.

Transactions at an undervalue and the setting aside of extortionate credit transactions – Whilst there are existing provisions dealing with preference payments in liquidation, it is proposed that liquidators and administrators should be permitted to "claw back" transactions at an undervalue.

The Committee also proposes that liquidators and administrators should be able to apply to the Court to ask that extortionate credit transactions be set aside. These are credit transactions which the company enters into in the run up to insolvency, for instance where the company takes out a loan at an extortionate rate of interest, allowing that loan creditor a greater recovery than they would be entitled to had the loan been on reasonable market terms.

These changes will bring Guernsey's regime broadly into line with that of the UK and Jersey.

Conclusion

The amendments contained in the draft ordinance are a welcome modernisation of the corporate insolvency regime, which will be familiar to UK and other on-shore practitioners. This will ensure that those doing business in the Bailiwick can have a better understanding, and perhaps certainty, as to what the outcome may be should things go wrong.

At the same time, these modernisations will be helpful to practitioners and their advisers. Most significantly, the ordinance also contemplates insolvency rules which will flesh out the current procedure. They will assist liquidators and administrators in extending their available powers and give greater rights to creditors.

More certainty invariably means less costs and greater recoveries, and that is better for everyone.

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