

Collas Crill explains... Cross border recognition of insolvency proceedings

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There are two ways in which the Guernsey Royal Court can provide assistance to foreign insolvency practitioners:

- If the foreign insolvency proceeding is in England & Wales, Scotland, Northern Ireland, the Isle of Man or Jersey, statutory recognition pursuant to section 426 of the UK Insolvency Act 1986, by way of an extension in to the Bailiwick of Guernsey via the Insolvency Act 1986 (Guernsey) Order, 1989.
- If the foreign insolvency does not originate in one of the aforementioned jurisdictions then the Royal Court has power under common law to recognise foreign insolvency proceedings.

How does section 426 work?

S.426 provides for reciprocal assistance of the courts listed above in relation to insolvency matters. There is a two stage process which must be followed, and this process differs slightly depending on where it is started.

Insolvencies commenced in the foreign jurisdiction

The first step is to make an application to the appropriate foreign court for the issuing of a letter of request seeking the assistance of the Royal Court.

The second step is to then make a separate application in the Royal Court for an order giving effect to the letter of request. There is no automatic right to this being granted, but there must usually be compelling reasons not to do so for it to be rejected. The most common basis for rejection that is considered, albeit rarely upheld, is that it would offend Guernsey public policy to do so.

Once granted, the Royal Court has the flexibility to decide whether to apply the foreign or Guernsey insolvency law to the matter at hand. The ability to use either jurisdiction's law is a huge advantage over a simple recognition at common law. This makes some allowances for the potential office holders to access powers which would not ordinarily be available to them under Guernsey law, but would be available to them under the foreign law.

Insolvencies commenced in Guernsey

The process is effectively the same for Guernsey office holders seeking recognition in those foreign jurisdictions where s.426 also applies (i.e. England etc), and the same guidelines apply in terms of whether or not to grant the application, including whether or not it would offend public policy in that jurisdiction. Given a Guernsey liquidator's statutory investigatory powers are somewhat limited, this ability to apply provisions of the foreign law is of significant advantage.

The common law approach

The common law approach to recognition of foreign proceedings in Guernsey is broadly to cooperate, as far as possible, in recognition of those proceedings, but the extent of that assistance and cooperation is limited to the use of only the powers available under Guernsey's domestic law. The common law process is based on a 'sufficient connection' test, which was set out in English authority, and was then applied, for the first time, in the Guernsey matter of *Roy Terry Junior and Durette Bradshaw Plc v Bank of Butterfield (Guernsey) Limited* (2006).

In this matter, the Royal Court held that there is a 'sufficient connection' where:

- the office holder is appointed in the jurisdiction where the company is incorporated or individual domiciled;
- if the defendant submits to the jurisdiction by whose order the appointment was made;
- that there *might* be a sufficient connection where the order of the foreign court is recognised by the law of the place where the company is incorporated; or
- the office holder is appointed in a jurisdiction where the management and control of the company is exercised or where it carries on business.

Even if there is sufficient connection, the Royal Court still has the discretion as to whether or not to grant the relief sought.

Take home points

There are two ways to have foreign insolvency proceedings recognised. The first by way of s.426, if it applies, and then, failing that, under common law. The first option is, generally, the most effective and flexible and provides practitioners with some much needed assistance in terms of their powers and abilities. The common law approach is still effective, but must be exercised with caution given the limitations on the powers, being those which are only available under Guernsey's domestic law.

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For more information please contact:



James Tee

Partner | Guernsey

t: +44 (0) 1481 734284 | **e:** james.tee@collascrill.com



Michael Adkins

Partner | Guernsey

t: +44 (0) 1481 734 231 | **e:** michael.adkins@collascrill.com