COLLAS CRILL

Cross-border recognition of insolvency proceedings in Guernsey

OCTOBER 2021

As corporate groups and assets increasingly span multiple jurisdictions, insolvency proceedings rarely remain confined to a single forum. For office holders pursuing assets or information in Guernsey, securing the Guernsey Royal Court's assistance can be critical. Here, we examine the procedural requirements and practical advantages of cross-border recognition in Guernsey, highlighting why Section 426 of the UK Insolvency Act 1986 generally offers significantly greater flexibility than the common law alternative.

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

- 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 in Guernsey?

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

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.

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 to recognition of foreign proceedings in Guernsey

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.

The UK Supreme Court's decision in *Kireeva v Bedzhamov* [2024] UKSC 39 is a further limit on the common law route. The court held that, under the immovables rule, a foreign trustee's powers have no effect in relation to land situated in England and that common law assistance, including the appointment of a receiver, cannot be given in respect of such land. Assistance with immovable property is available only where a statutory gateway such as section 426 applies.

The decision is not binding in Guernsey, but it is likely to be highly persuasive before the Royal Court. Office holders from outside the UK, the Isle of Man and Jersey should therefore expect real difficulty realising Guernsey real property through common law recognition alone.

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.

Take home points: S.426 v common law

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.

About Collas Crill

We are a leading offshore law firm. We are easy to do business with and give practical advice to overcome tough challenges. Through our network of offices, we practise British Virgin Islands, Cayman Islands, Guernsey and Jersey law.

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.

COLLAS CRILL

For more information please contact:



James Tee

Partner (Advocate)^ | Guernsey

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



Michael Adkins

Partner (Advocate) | Guernsey

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



Ben Newton

Associate (Advocate) | Guernsey

t: +44 (0) 1481 734849 | **e:** ben.newton@collascrill.com

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.