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New Law Journal: Overview of insolvency in the Channel Islands

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In the first of a three-part series on Jersey and Guernsey law in the New Law Journal, Partner Michael Adkins, Group Partner Simon Hurry, along with Of Counsel James Tee and Senior Associate Karen Stachura provide a quick overview of insolvency in the Channel Islands and guide you through the options available to you.

The second article in the series - fraud in the Channel Islands - can be viewed here, and the third article - restructuring in the Channel Islands - can be viewed here.

Insolvency in the Channel Islands – what are your options?

Jersey

The two key pieces of legislation governing insolvency in Jersey are the Companies (Jersey) Law 1991 and the Bankruptcy (*Désastre*) (Jersey) Law 1990 (**BDJL**). The former is principally based on UK's Companies Act 1985, the latter on Jersey's ancient customary law.

A Jersey company is deemed insolvent if it is unable to pay its debts as they fall due: the 'cash flow' test. Unlike other jurisdictions, it is not necessary that the company's liabilities exceed its assets.

Jersey does not have a statutory rescue procedure such as administration, although a court-supervised 'pre-pack' sale of a company's business is a potential option.

There are three procedures that may be used to wind up an insolvent company.

1. A creditors' winding up (CWU)

A CWU results in the appointment of an insolvency practitioner (**IP**) to administer the winding up for the benefit of the creditors. The CWU regime was expanded to include creditors from 1 March 2022 – prior to that, a CWU could only be initiated by shareholders of the company.

The key aspects of the new regime are as follows:

- A creditor may apply to the Royal Court of Jersey (**RCJ**) for a CWU if it has a claim against the company exceeding the prescribed minimum (£3,000) and the company is cash flow insolvent, which is established when:
  - the creditor has evidence of the company's insolvency; or

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  - the creditor served a statutory demand on the company and it failed to pay the sum or reasonably dispute the debt within 21 days.

- A creditor must ordinarily provide the company with at least 48 hours' notice of applying for the CWU.
- A creditor can seek the appointment of a provisional liquidator pending determination of the CWU to preserve the assets and records of the company

***2. Désastre* proceedings under the BDJL**

Prior to 1 March 2022, *désastre* proceedings were the only insolvency procedure available to creditors. A creditor can apply to the RCJ for an order that the company's assets be declared *en désastre* (in disaster). A successful application vests the assets of the company (wherever situated) in the hands of the Viscount of Jersey, the chief executive officer of the RCJ, who then facilitates the distribution of its assets to its creditors.

3. A winding up on just and equitable grounds (J&E)

A J&E application can be made to the RCJ by the company, a director or a shareholder where:

- shareholders have lost trust and confidence in the management;
- the purpose /main object of the company has been lost;
- there is deadlock between the members and/or management; or
- it is in the creditors' interests to allow the company to trade.

If successful, an IP is appointed to administer the winding up. Taking the lead from jurisprudence in England and Wales, the J&E regime is flexible and results in a bespoke order tailored to particular needs.

In the absence of a statutory rescue procedure, a fourth option is for a Jersey company to be placed into administration under the UK Insolvency Act (**IA**). This can potentially facilitate a better return for the company's creditors.

Guernsey

The Guernsey insolvency regime stems from both customary law and legislation. The Companies (Guernsey) Law 2008 (CGL) provides procedures that will be familiar to practitioners in England and Wales, being based on the IA.

The starting point under the CGL is whether the company passes the solvency test, which ascertains the solvency of a company by assessing whether it:

- is able to pay its debts as and when they fall due;
- has more assets than liabilities; and
- complies with all its regulatory financial adequacy requirements, where regulated by the Guernsey Financial Services Commission (GFSC).

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Assuming the company is or is likely to be insolvent may determine whether it should be placed into administration or liquidation.

Administration

The CGL provides for the administration of a company for the better realisation of its assets or for its survival.

The Royal Court of Guernsey (RCG) can make an administration order when the company is insolvent or is likely to become insolvent. Orders are ordinarily granted for a year, thereafter the Administrator must return to the RCG.

Once an application for an administration order is made, the company has the benefit of a moratorium.

If the company is rescued by the Administrator, the administration can be brought to an end. If it is not, the company is placed into liquidation.

Liquidation

A company may be wound up compulsorily by the RCG and a liquidator appointed. The liquidator's role is to collect and realise the company's assets and to distribute dividends in line with a statutory order of priority.

The RCG may make a winding-up order in several circumstances, the most common where the company is 'unable to pay its debts', the test for which is that:

- a creditor has served a written demand for payment on the company for a sum exceeding £750 and the company fails to pay within 21 days; or
- it is proved to the satisfaction of the RCG that the company fails to satisfy the 'solvency test'.

Once appointed, the liquidator takes control of the company's affairs and has all necessary powers to wind it up. When the assets of the company are distributed, the company is then dissolved.

Quirks

- Guernsey has no moratorium pursuant to the compulsory liquidation regime.
- In theory, anyone can be liquidator of a Guernsey company – no registration or qualifications are required; although the RCG will ensure any compulsory appointee is sufficiently skilled for the appointment.
- There is no advertising requirement for winding-up applications, and no formal process to set aside statutory demands.
- UK IPs frequently use section 426 of the IA to be recognised in Guernsey. This is useful due to the wide-ranging powers granted to IPs under the IA, which the RCG can apply when it hears letters of request.
- Guernsey has no fixed or floating charges, and security is only available to a handful of asset classes.

A PDF of the article can be downloaded here.

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