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New Law Journal: Overview of restructuring in the Channel Islands

SEPTEMBER 2022

In the last of a three-part series on Jersey and Guernsey law in the New Law Journal, Senior Associate Karen Stachura provides an overview of restructuring procedures available in the Channel Islands, with input from Partner Michael Adkins, Group Partner Simon Hurry and Of Counsel James Tee.

This article was first published in the New Law Journal and an online version of the publication can be viewed here.

The first part of the series - insolvency in the Channel Islands - can be viewed here, and the second part - fraud in the Channel Islands - can be viewed here.

Jersey

Jersey does not have a corporate rescue process allowing a company to be restructured and trade out of financial difficulty, unlike other jurisdictions such as UK administration.

The main options for a financially distressed Jersey company are largely found under the Companies (Jersey) Law 1991 (the CJL). These provisions are based on the UK Companies Act 1985 (the UK Act) and the Royal Court of Jersey (RCJ) has followed guidance from the English courts in relation to the UK Act when considering similar provisions under the CJL.

Scheme of arrangement

Part 18A of the CJL provides that a Jersey company can enter into a scheme of arrangement (SOA) with its creditors or shareholders. A SOA enables a Jersey company to reach a formal compromise or arrangement with its creditors or members to achieve a stated rescue strategy.

Subject to obtaining the required level of votes at a creditors' or shareholders' meeting (75% in value of creditors, or 75% of the voting rights of shareholders), a SOA can be implemented to support an arrangement which is then sanctioned by the RCJ. Once sanctioned, it is binding on all creditors or shareholders and the company, orthe liquidator of the company.

The CJL specifically envisages a SOA for the purposes of reconstruction of a company or the amalgamation of two or more companies, under which all or part of the company concerned in the SOA is to be transferred to another company.

Creditor arrangements

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As an alternative to a SOA, the CJL has a mechanism under which an arrangement entered into between a company and its creditors immediately before or during a creditors' winding up of the company will be binding on the:

- Company, if approved by special resolution; and
- Creditors, if approved by 75%in number and value of them.

The main benefit of a creditor arrangement is that it does not require the approval of a time-consuming (and costly) application to the RCJ and, although an objecting creditor cannot prevent an arrangement, it can cause the terms of the arrangement to be varied by the RCJ.

Pre-pack transfer of assets

The just and equitable (J&E) winding up jurisdiction of the RCJ (available as an insolvency procedure, as detailed in our earlier article) has been employed in recent years to effect a pre-packaged sale of a business as a going concern.

The RCJ has innovatively extended the scope of article 155 of the CJL to enable it to make bespoke orders, such as authorising liquidators of a group of companies to enter into an agreement to sell the assets and/or business of the companies to a purchaser, it being in the best interests of the creditors to do so.

Other options

The only Jersey procedure with a suspensory measure to promote reconstruction is a remise de biens (governed by the Loi (1839) sur les remises des biens). This is an ancient customary law procedure which enables the RCJ to sell Jersey-situate property of a distressed debtor. As long as the secured creditors have been paid in full, with payment (however small) to unsecured creditors, the company can be discharged from all other debts and start afresh.

Guernsey

Guernsey's statutory restructuring mechanisms under the Companies (Guernsey) Law 2008 (Companies Law) are broadly similar to English equivalents, but generally less prescriptive so allow for more flexibility.

The restructuring options available in Guernsey vary, depending on the legal structure of the company, i.e. cellular or non-cellular. Here, we discuss schemes of arrangement (SOA) and pooling. There are separate statutory mechansims for company mergers, amalgamations and migrations, which can be used instead of or combined with a SOA.

Schemes of arrangement

Part VIII of the Companies Law provides for SOA, similar to Jersey.

The process is similar to that in England. A First Hearing is convened whereby the Royal Court of Guernsey (RCG) sets the voting classes (of creditors and/or members), convenes the relevant meeting/s and approves the SOA documentation. Once

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the meeting is held, and if the SOAis approved, a Second Hearing is convened to confirm the voting and formally approve the SOA.

The Companies Law prescribes that the "majority in number" are needed to agree a proposed SOAbefore the RCG will consider approving it. This is defined as representing 75% of the voting rights of the members or 75% of the value of creditors.The RCG confirmed that the four-part test used in England applies in Guernsey when considering a SOA. As such, English authorities, practice statements and commentary are persuasive, and Guernsey SOA documentation resembles the documentation expected in England.

Pooling

The RCG has made orders pooling the insolvent estates of Guernsey and Jersey companies, allowing them to be treated as one for the purpose of distributing dividends to creditors. In the case of In the matter of Heulin-Shipping (Guernsey) Limited, Unreported Judgment 46/2015 (followed by a decision of the RCJ two months later) the RCG held that two insolvent companies (incorporated in Guernsey and Jersey) can be treated as a single entity, where their affairs are so intermingled that the expense of unravelling them would adversely affect distributions to creditors.

The RCG made the order for pooling pursuant to section 426 of the Companies Law, which allows a liquidator to seek directions from the RCG during the course of a liquidation to assist them in conducting the liquidation.

The pooling order enabled the liquidators to provide 100% of the priority element of the claims to the employees, which would have been impossible if the Guernsey company had been treated separately from the Jersey company.

Pooling is therefore a useful tool enabling the RCG to achieve the best outcome for the creditors of a Company and shows both Courts' willingness to co-operate together for the benefit of creditors.

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