

Introduction

1. This is intended as a brief guide to the principle features of insolvency law and practice in Guernsey. The paper covers the following topics:-

- 1.1. The general features of the Guernsey regime.
- 1.2. The various types of insolvency procedure available in Guernsey.
- 1.3. Key considerations to consider when dealing with assets in any form of Guernsey insolvency.
- 1.4. Obtaining evidence in Guernsey for a foreign insolvency.

General Features of the Guernsey Regime

2. The law governing the conduct of insolvency proceedings in Guernsey is contained in The Companies (Guernsey) Law, 1994, as amended ("the 1994 Law"), and the customary law rules and procedures, partly governed by statute, which together make up the regimes known as Desastre and Saisie proceedings.

3. The procedure for a Desastre is the creation of the customary law and the proceedings have developed on a case to case basis, although certain features are now governed by statute. A Desastre is a procedure intended to achieve equality between creditors, subject to certain preferential claims, and to result in an orderly distribution of an insolvent's assets. The procedure only deals with the distribution of an insolvent's moveable assets and has no application to immovable property situate in the Island of Guernsey.

4. The distribution of an insolvent's immovable property is governed by Saisie proceedings. Saisie proceedings were originally the creation of the customary law but to a large extent the procedures concerning the rules and practice of Saisie proceedings have been simplified and codified in the Saisie Proceedings Simplification Ordinance 1952.

5. The 1994 Law contains the procedure for winding up a company and the grounds on which a petition for winding-up can be initiated.

6. The 1994 Law, Desastre proceedings and Saisie proceedings are the essential elements of the framework of insolvency proceedings in the Island of Guernsey. However, it should always be borne in mind that the conduct of insolvency can be affected by a range of other legal rules and principles arising from the body of law underpinning the conduct of commercial dealings in Guernsey.

7. Of particular importance are the principles relating to

7.1. the nature of proprietary rights in movable and immovable property (and the distinction between the two types of property); and

7.2. the acquisition and enforcement of security under the customary law, the Law of Property (Miscellaneous Provisions) (Guernsey Law) 1979 ("The 1979 Law") and the Security Interests (Guernsey) Law 1993.

Winding Up - under the 1994 Law

8. Winding up is the process by which the affairs of the company are brought to an end, its assets realised, its liabilities determined and any available funds distributed to those legally entitled to them. Part XV of the 1994 Law deals with how a company may be wound up voluntarily and Part XVI deals with compulsory winding up.

9. A company may be wound up voluntarily where the period (if any) fixed by its Articles for the duration of the company expires, or if an event occurs on the occurrence of which the Articles provide that the company shall be dissolved, provided that in each case the company resolves in general meeting that it be wound up voluntarily.

10. Alternatively, a company may be placed into voluntary liquidation if it passes a special resolution to that effect.

11. Once a voluntary liquidation has started the powers of the Directors cease unless the Liquidator or the company in General Meeting sanctions their continuance. Further, the company should not carry on in business except as far as may be expedient for the beneficial winding up of the company.

12. In all of these cases the company must appoint a liquidator at a general meeting who must realise the company's assets and discharge the company's liabilities and, having done so, distribute any surplus amongst the members according to their respective entitlements.

13. The 1994 Law contains provisions requiring the filing of accounts by the liquidator at general meetings on the expiration of each year after the commencement of the voluntary winding up and the holding of a final meeting to approve the Liquidator's final accounts prior to the dissolution of the company. Notice of the holding of the Final Meeting has to be lodged at the Greffe, the Public Registry, and the company is deemed to be dissolved three months after the date of the notice.

14. Section 89 of the 1994 Law allows a company by special resolution to delegate powers to its creditors, or a committee thereof, relating to the winding up subject to certain rights of appeal.

15. A company may be compulsorily wound up by the Court under Part XVI of the 1994 Law. Such an application is normally instigated by a creditor of the company when the company is unable to pay its debts although a petition for the compulsory winding up of a company may be brought on a number of grounds including a petition based on the grounds that it is just and equitable that the company should be wound up.

16. A company may also enter into compulsory winding up upon passing a special resolution to that effect.

17. The Compulsory Winding up procedure commences by a petition to the Court, the petitioning creditor having to satisfy the Court that the company should be wound up.

18. If a creditor petitions the Court for the compulsory winding up of the company on the ground that the company is unable to pay its debts then the company is deemed to be unable to pay its debts if a written demand for payment, served through the office of Her Majesty's Sergeant, for a sum exceeding £750 has remained unpaid for 21 days, or if it is otherwise proved to the satisfaction of the Court that the company is unable to pay its debts.

19. An application for the compulsory winding up of a company can be made to the Court by the company itself, or any member or creditor thereof, or any other interested party. The Guernsey Financial Services Commission can also initiate winding up proceedings.

20. On the granting of an application to wind up the company the Court must appoint a liquidator nominated by the Applicant or, where no person has been nominated, make such appointment as it thinks fit. The Court must be satisfied that the person taking office as liquidator is qualified to be appointed.

21. There are no statutory rules governing or regulating the appointment of suitable persons as liquidators of a company but in practice the Royal Court of Guernsey will appoint suitably qualified insolvency practitioners in the Island or from outside the Island either on their own or jointly with local liquidators.

22. There are no state funded liquidators under Guernsey Law and Liquidators must look to the assets of the Company for the payment of their fees in the absence of any funding arrangements with, for example, one of the creditors of the Company.

23. Once appointed, the liquidator has extensive powers to bring in the company's assets, pay off its debts and distribute any surplus subject to the control of the Royal Court. The Court may also restrain any action pending against the company on the application of a creditor.

24. Upon the appointment of a Liquidator the powers of the Directors cease unless sanctioned by the Liquidator or the Court. The company must cease to carry on its business except in so far as it is expedient for the beneficial winding up of the company.

25. Once the Liquidator has realised the company's assets his accounts are examined before a creditors meeting held before a Commissioner appointed by the Court. Any dispute over a claim is resolved by the Court. Otherwise a date is fixed by the Commissioner for the distribution of the company's assets. Once the distribution has taken place the Liquidator causes an application to be made to the Court for the dissolution of the Company.

26. There is no concept of receivership under Guernsey law. However, The Companies (Guernsey) (Amendment) Law, 2005, has now introduced administration orders into Guernsey Company law. Previously, such orders only existed in respect of a Protected Cell Company established under the Protected Cell Companies Ordinance, 1997. See also the Incorporated Cell Companies Ordinance, 2006.

Desastre Proceedings

27. Desastre proceedings are triggered when a judgment creditor attempts to execute a judgment obtained in the Royal Court of Guernsey, or a foreign judgment registered in Guernsey, against the moveable assets of the judgment debtor.

28. A judgment creditor intending to execute judgment against the moveable assets of a judgment debtor instructs an officer of the Court, Her Majesty's Sheriff, to seize assets or cash belonging to the debtor under the authority usually granted in the Act of Court recording the fact of the judgment.

29. Once any assets are so seized a further Order from the Royal Court is required for the sale of those assets. Once Her Majesty's Sheriff has realised the proceeds of the sale of such assets a further Order is required in order to authorise Her Majesty's Sheriff to pay over the proceeds thereof to the judgment creditor. If during this procedure it appears to the Court that there are insufficient assets belonging to the debtor to satisfy the judgment debt and any other claims against the debtor known to Her Majesty's Sheriff (whether such claims are subject to a judgment or not) then the judgment debtor is placed "En Desastre".

30. The Desastre procedure is concerned only with the distribution of any funds realised by the sale of the debtor's assets between the debtor's creditors subject to any customary or statutory rules as to priority such as the Preferred Debts (Guernsey) Law 1983. There are no legal effects upon the debtor of the declaration of the Desastre other than the enforced sale of his goods in Guernsey to meet the claims of his creditors.

31. Although the sale of the debtor's goods is effected by Her Majesty's Sheriff the actual workings of the Desastre proceedings are run by the judgment creditor supervised by a Commissioner appointed by the Royal Court. 3 2 . Once a Desastre has been declared of the debtor publications are made to convene a creditors meeting to approve any claims against the debtor and to agree the distribution of the debtors funds amongst the creditors subject to any priorities. Although the main workings of a Desastre are dealt with out of Court, at any time any matter in dispute may be referred to the Royal Court for directions by any creditor of the debtor, the debtor himself or the Commissioner appointed by the Court to approve the accounts.

33. Once the debtor's assets have been distributed the Desastre is at an end. The Desastre does not have any other consequences for the debtor and if further assets come to light successive Desastres may be declared if claims remain outstanding.

Saisie Proceedings

34. Saisie proceedings are the method by which a judgment debt may be executed over immovable property owned by a company or an individual. Although Saisie proceedings were extensively simplified in 1952 these proceedings remain complicated. Saisie proceedings are intended only to govern the distribution of a debtor's immovable property within the Island of Guernsey amongst those creditors of the debtor who wish to pursue their claims against the debtor's immovable property.

35. Any creditor who has taken a judgment against a debtor can initiate Saisie proceedings as of right. Once a creditor has elected to start Saisie proceedings a Preliminary Vesting Order is granted (PVO) that confers certain rights and obligations upon the judgment creditor. The next stage of the proceedings, the Interim Vesting Order (IVO) vests the entirety of the judgment debtor's realty in the judgment creditor as trustee for the creditors who wish to claim against the immovable property. Notices are published in La Gazette Officielle requiring any creditor who wishes to claim against the realty to enter details of his claim on a register maintained at the Greffe.

36. Any creditor (with or without a judgment) who takes a PVO or who enters his claim on the register is deemed irrevocably to have elected to pursue his claim against the debtor against that debtor's immovable property only and can make no future claim against the debtor's moveable assets.

37. Once the register has closed the claims against the realty are marshalled according to their priority. At a subsequent Court hearing each claimant must elect in reverse order of the priority of his or her claim whether or not to accept the vesting of the realty. Any claimant who declines to accept the vesting of the realty forfeits his claim. Any claimant who accepts the vesting of the realty is obliged to pay all claims ranking above his own within 15 days.

38. One of the notable features of this procedure is that the claimant in whom the realty is finally vested takes that realty in full satisfaction of his claim and is under no obligation to account to the debtor if the realty is worth more than the amount of any outstanding claim.

39. These proceedings are complimentary to liquidation proceedings in the sense that there is nothing in the company law that prevents a liquidator from realising those assets of a company which happen to comprise immovable assets within the Island of Guernsey. If there is a conflict between the pursuit of Saisie proceedings by a creditor of the company and the activities of a liquidator then the Court can regulate both sets of proceedings under the 1994 Law.

Renunciation

40. The procedure for a Desastre is the same for an individual as it is for companies. Desastre proceedings do not have any consequences other than the distribution of assets for an individual and so, for example, the declaration of a Desastre does not prevent an individual from holding particular office or, as a matter of law, from obtaining credit.

41. However, the procedure for Renunciation, little used in practice, enables an individual to apply to the Court for a Declaration of Insolvency. A committee of creditors is appointed under the supervision of a Commissioner of the Court to ascertain the extent of the debtor's estate and to question him in connection with his assets and liabilities. Once this procedure has taken place the Court may grant the Declaration of Insolvency subject to certain conditions having been satisfied the effect of which is to discharge the debtor from the debts owed before the Declaration.

42. The legislation dealing with Renunciation also contains provisions dealing with the setting aside of transactions and investigation into the debtor's estate.

Partnerships

43. Part V of the Partnership (Guernsey) Law, 1995 sets out the procedure for the dissolution of a partnership and Part IV of the Limited Partnerships (Guernsey) Law 1995 sets out the procedure for the dissolution of a limited partnership.

Dealing with Assets - Immovable Property

44. Immovables are known locally as realty and include land and buildings. There are specific rules governing when fixtures and certain crops closely associated with land are treated as movables or not.

45. It is possible to take security over immovable property in the Island and such charges are known locally as Bonds or Hypotheques. These charges are registered at the Greffe and searches can be made to ascertain what charges exist on immovable property. It is also possible to register certain agreements against realty at the Greffe, including leases.

46. Judgments of the Royal Court for liquidated sums can also be registered as Hypotheques as of right and thus become a charge over the immovable property of the judgment debtor. The Court can also grant interim registrations against realty before any judgment has been obtained by a creditor.

47. Title to immovable property can only be transferred before the Royal Court and in practice this is dealt with at a special Conveyancing Court held twice a week.

Moveables

48. The general view is that movables cannot be the subject of a mortgage or charge but security interests over intangible moveables can be created if the parties have complied with the provisions of the Security Interests (Guernsey) Law, 1993. There is no register of security interest agreements under the 1993 legislation.

49. There are also specific statutory provisions governing the recognition of agreements for Set-Off and Assignments in both liquidations and Desastre proceedings under the 1979 Law.

50. Ships registered in Guernsey can be mortgaged under the Merchant Shipping legislation as it applies to Guernsey.

51. Chattels or tangible movables may be the subject to "gage" or "nantissement" under the customary law, which are concepts analogous to pledge.

Adjustment to Prior Transactions

52. In the case of winding up proceedings the 1994 Law contains provisions for the Court to make adjustments where it can be shown that transactions entered into before the insolvency were to the prejudice of the general body of creditors. Such transactions include payments of particular creditors in preference to others and a disposal of assets for no consideration or for a consideration that is grossly inadequate. These provisions subject to time limits and special rules exist for transactions between "connected persons" as defined in the legislation.

53. In certain situations there may also be customary law remedies for attacking transactions outside liquidation where the intent of the transaction was to defeat a creditor's claim.

Obtaining Evidence and Assistance

54. As a matter of customary law using principles of international comity and by statute the Royal Court has recognised and made Orders in aid of foreign insolvencies both in relation to bankruptcies and foreign liquidations.

55. Under the Royal Court's inherent jurisdiction the Royal Court has recognised foreign trustees in bankruptcy and liquidators and granted them locus standi where they enter an appearance in proceedings before the Royal Court of Guernsey in order to take control of assets which they intend to realise for the benefit of the foreign insolvency procedure.

56. The Insolvency Act 1986 (Guernsey) Order 1989 extends Sub-sections (4), (5), (10) and (11) of Section 426 of the Insolvency Act 1986 to the Bailiwick of Guernsey. Thus the 1989 Order can be invoked on behalf of insolvencies in the United Kingdom, the Bailiwick of Jersey and the Isle of Man to request the assistance of Courts in the Bailiwick of Guernsey.

Rider

This paper is intended as a general review and aide memoire. It does not create a retainer or lawyer-client relationship and does not provide comprehensive or specific legal advice concerning the matters contained within it. This paper should not be relied upon as giving or providing advice on any individual case.