Court and Out of Court Restructuring Options in Jersey and Guernsey

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This article provides an overview of the different restructuring options for Jersey and Guernsey companies. It covers the creditors' winding-up, "just and equitable winding-up" and *Désastre* procedures in Jersey, as well as schemes of arrangement and administration and voluntary and compulsory liquidations in Guernsey. It also looks at pooling estates, setting aside transactions and cross-border issues.

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Jersey

The main insolvency procedures for Jersey companies are:

- Creditors' winding-up under the Companies (Jersey) Law 1991, as amended (Companies Law).
- *Désastre* under the Bankruptcy (*Désastre*) (Jersey) Law 1990, as amended (*Désastre* Law).

The Companies Law also contains provisions relating to:

- "Just and equitable winding-up".
- Summary winding-up where a company is solvent (similar to a members' voluntary winding up).
- Schemes of arrangement.

These are broadly similar to the equivalent procedures under the UK Insolvency Act 1986 and the UK Companies Act 1985.

In addition to schemes of arrangement under the Companies Law, Jersey also has the option of out-of-court restructuring transactions. These restructuring transactions can involve, for example,

- Debt-for-equity swaps (with the agreement of all affected creditors).
- Group reorganisations.
- Enforcement of security and set-off provisions.

There are no Jersey law corporate rescue procedures equivalent to English law administration or US Chapter 11 bankruptcy procedures. Insolvency proceedings in Jersey do not combine parent and subsidiary companies' assets into a single pool. The insolvency is on a company-by-company basis. As there is no company rescue procedure such as administration in Jersey, there continues to be an increasing use of the "just and equitable winding-up" procedure under the Companies Law (*see below, Just and equitable winding-up*).

In addition to the statutory insolvency, there are also Jersey customary-law insolvency and liquidation procedures, including:

- *Remise des biens*.
- *Cession générale*.
- *Adjudication de renunciation*.
- *Dégrèvement* (for immovable property).
- *Réalisation* (for movable property).

However, these procedures are only mentioned for completeness, as it is unlikely that any of these procedures would be used for an insolvent company in preference to a *désastre* or winding-up. These procedures are principally aimed at individuals rather than companies.

Solvent Liquidation: Summary Winding-Up

Where a Jersey company is able to discharge its liabilities as they fall due (that is, it is cashflow solvent), it can be wound up using the summary winding-up procedure. A summary winding-up is commenced by:

- Each director signing a statement of solvency using the prescribed wording (with different options), which confirms the company's cashflow solvency.
- A special resolution for the summary winding-up being passed by the shareholders within 28 days of the statement of solvency being signed, with a copy of the special resolution being filed with the Jersey Companies Registry.

In a summary winding-up:

- The liquidation can be conducted by the directors, although a liquidator may be appointed by special resolution to conduct the liquidation instead.
- The directors or liquidator can only take actions that are necessary to realise the company's assets, discharge its liabilities and distribute realisations to the shareholders.

A summary winding-up is completed on the filing with the Jersey Companies Registry of a further statement of solvency signed by the directors or the liquidator (if appointed) stating that the company has no assets and no liabilities, after which the company is dissolved.

Insolvent Liquidation: Creditors' Winding-Up

A creditors' winding-up is a winding-up initiated by the company shareholders where the statement of solvency required for a summary winding-up cannot be given. However, it cannot be used where the company has been (or is subsequently) declared by the court *en désastre* (*see below, Désastre*). Its purpose is to facilitate an orderly and fair distribution of the assets of a company that recognises its own insolvency by treating the claims of all unsecured creditors equally and rateably. Despite its name, a creditors' winding-up cannot be started by the creditors, and instead requires a special resolution of the shareholders, with a copy of the special resolution being filed with the Jersey Companies Registry. However, there are current proposals for the relevant statutory provisions to be amended to enable other applicants to apply to the Royal Court of Jersey for a creditors' winding-up order. These applicants would then be the same as for a *désastre*, that is, either:

- The company.
- A creditor (of a given amount).
- The Jersey Financial Services Commission (JFSC) (in the case of a regulated entity).

The making of such an order is at the discretion of the court.

In a creditors' winding-up:

- The company ceases to carry on its business, except in so far as it is advantageous for the winding-up.
- The corporate state and capacity of the company continues until it is dissolved.
- The company's shares cannot be transferred (and the company's shareholders cannot change) without the permission of the liquidator.
- No action can be taken or proceeded with against the company, except with the permission of the court, and subject to such terms as the court may impose. However, this does not prevent the enforcement of pre-existing security interests or set-off provisions (*see below*).

The directors must give at least 14 days' notice in calling a creditors' meeting, which must be held immediately after the shareholders' meeting for the passing of the special resolution for the creditors' winding-up. At the creditors' meeting, the directors must give a statement verified by affidavit as to the affairs of the company. The creditors and/or the shareholders can nominate a person to be the liquidator for the purposes of the creditors' winding-up. The creditors can also appoint a liquidation committee.

Once a liquidator has been appointed, all the powers of the directors cease, except in so far as allowed by the creditors. Subject to this, the liquidator has all the powers that the directors had in relation to the company, although such powers must be exercised for the benefit of the winding-up.

The liquidator realises the company's assets, discharges its liabilities and distributes realisations to the creditors. The liquidator can seek funds from creditors for the purposes of funding the liquidation. All costs and expenses properly incurred in a creditors' winding-up, including the liquidator's remuneration, are payable out of the company's assets in priority to all other claims.

Once the affairs of the company have been fully wound up, the liquidator prepares an account of the creditors' winding-up to be laid before meetings of the shareholders and the creditors. After a return is made by the liquidator to the Jersey Companies Registry confirming the holding of these meetings, the company is normally dissolved within three months.

Just and Equitable Winding-Up

A Jersey company may be wound up by the Royal Court of Jersey under Article 155 of the Companies Law, if the company has not been declared *en désastre* (*see below, Désastre*) and the court is of the opinion that it is just and equitable, or expedient in the public interest, to do so (as opposed to a test of solvency). The application to the court for such a winding-up may be made by either:

- The company, a director, a shareholder, the Chief Minister, the Minister for Treasury and Resources or the JFSC, on just and equitable grounds.
- The Chief Minister, the Minister for Treasury and Resources or the JFSC, on public interest grounds.

If the court orders a company to be wound up, it may appoint a liquidator and direct the conduct of the winding-up.

In the absence of a rescue procedure such as administration in Jersey, there continues to be an increasing use of the just and equitable winding-up procedure. There have been various cases in which the Royal Court has ordered the

just and equitable winding-up of Jersey companies, which were summarised in the case of *Representation of Maltese Holdings and Zollinger Investments [2012] JRC 239*. In that case it was held that just and equitable winding-up remains a discretionary remedy and the words "just and equitable" should be given a flexible interpretation.

There is a wide jurisdiction for the court to order a just and equitable winding-up, and reasons why this may be appropriate may include:

- Loss of the substratum of the company (*In the matter of Leveraged Income Fund Limited 2002/209; EVIC v Greater Europe Deep Value Fund II Limited [2012] JRC 146; In re Myfuel Ltd [2013] (2) JLR N25*).
- Deadlock in the management of the company (*Bisson v Barker [2008] JRC 193*).
- A desire to keep an otherwise insolvent company trading for the benefit of the company's clients and creditors (*Representation of Poundworld [2009] JRC 042*).
- A need for investigation into the company's affairs (*In the matter of Belgravia Financial Services Group Limited [2008] JRC 161*).
- Special circumstances applicable to the winding-up of regulated companies (*Centurion Management Services Limited [2009] JRC 227 and Horizon Investments Limited [2012] JRC 039*).
- To facilitate a pre-packaged sale of an otherwise insolvent business (*Re Collections Group [2013] JRC 096*).
- Where an insolvent group based in multiple jurisdictions requires winding up but has no shareholder support (*Re Huelin-Renouf Shipping Limited [2013] JRC 164*).

It is likely that this procedure will continue to be used in special circumstances such as those set out above (although creditors' winding-up and *désastre* remain the main insolvency procedures for Jersey companies).

Désastre

An application to the Royal Court of Jersey to declare the property of a company *en désastre* under the *Désastre* Law can be made by:

- The debtor.
- A creditor with a liquidated claim against the debtor of at least GBP3,000 that is not subject to any reasonable defence, set-off or counterclaim.
- The JFSC, in the case of certain regulated entities, on just and equitable grounds.

The application must be made in the prescribed form, together with a supporting affidavit. Under the Bankruptcy (*Désastre*) Rules 2006, the application cannot be made unless the applicant has given the Viscount (a court officer who conducts the *désastre*) at least 48 hours' notice of the intention to make the application. In practice, it is advisable to provide draft documents to the Viscount one week in advance and to ensure their support of the application.

The court has discretion to start the *désastre* if the company has realisable assets but is unable to discharge its liabilities as they fall due (that is, it is cashflow insolvent). External funding may be required for the *désastre* and the court may require a creditor applying for a declaration to indemnify the Viscount against the costs of the *désastre*.

After the commencement of the *désastre*:

- All the property and powers of the debtor, save those held on trust by the debtor for another person, immediately vest in the Viscount. This is the most important difference between a *désastre* and a creditors' winding-up where title to the debtor's property does not vest in the liquidator.
- The company's shares cannot be transferred (and the company's shareholders cannot change) without the permission of the Viscount.
- A creditor who has a debt provable in the *désastre* does not have any other remedy against the debtor or its property in respect of the debt, and cannot commence or continue any action or legal proceedings to recover the debt, except with the consent of the Viscount or the court. However, this does not prevent the enforcement of pre-existing security interests or set-off provisions (*see below*).

When the debtor's property vests in the Viscount, it vests subject to security interests and all *hypothecs* (the Jersey equivalent of mortgages) and secured debts to which the property was subject before the vesting. On the sale of immovable property, all *hypothecs* secured against it are extinguished, but the holders of the *hypothecs* have preferential rights in relation to the sale proceeds.

The Viscount has wide powers under the *Désastre* Law. The Viscount realises the company's assets, discharges its liabilities and distributes realisations to the creditors. All costs and expenses properly incurred or payable by the Viscount in a *désastre*, including commissions levied by the Viscount against the value of assets realised and distributed, are payable out of the liquidated value of the company's assets in priority to all other claims.

Although there is no statutory requirement to do so, the Viscount often calls creditors' meetings and reports to the creditors on progress. The Viscount distributes realisations from the debtor's property to the creditors in accordance with their respective claims and may pay interim dividends for this purpose. When all of the debtor's property has been realised, the Viscount provides the creditors with a report and accounts relating to the *désastre* and pays a final dividend. After the Viscount has filed a notice of the date of payment of the final dividend with the Jersey Companies Registry, the company is normally immediately dissolved.

Pooling

The Jersey Court has made orders pooling the insolvent estates of companies in circumstances where it:

- Would be impossible, impracticable and disproportionate to seek to identify individual rights and unravel asset and liability positions between the companies.
- Is in the best interests of the creditors for there to be such a pooling.

Pooling orders have been made where:

- Related Jersey companies were both in creditors' winding-up procedures (*Re Corebits Services Limited (in liquidation) and Zoombits Limited (in liquidation) [2011] JRC 166*).
- Related Jersey and Guernsey companies were in just and equitable, and insolvent winding-up procedures, respectively (*Representation of Huelin-Renouf Shipping Limited (In Liquidation) [2015] JRC 206*).

- A Jersey company in a *désastre* procedure was related to entities in insolvency proceedings in England (*Royco Investments Company Limited [1994] JLR 236*)

Setting Aside Transactions

Under the Companies Law and the *Désastre* Law, the liquidator (in a creditors' winding-up) or the Viscount (in a *désastre*) have the power to apply to the court to challenge transactions entered into by the company during the relevant challenge periods, such as transactions at an undervalue and preferences.

If a company enters into a transaction at an undervalue (that is, a gift or sale of assets for significantly less than market value) within five years before the start of insolvency proceedings, on application of the liquidator or the Viscount, the court may order that the transaction be unwound if the company was cashflow insolvent at the time or became cashflow insolvent as a result of the transaction. However, the court will not make any order in respect of a transaction at an undervalue if it is satisfied that the company entered into the transaction with reasonable grounds and in good faith for the purpose of carrying on its business.

If a company gives a preference to any person within 12 months before the commencement of insolvency proceedings, on application of the liquidator or the Viscount, the court may order that the transaction be unwound if the company was cashflow insolvent at the time or became cashflow insolvent as a result of the transaction.

A preference is any act by a company that has the effect of putting one of the company's creditors into a better position than it otherwise would have occupied in the event of the company's insolvency (such as providing new security or repaying one creditor in advance of other creditors). However, the court will not make any order in respect of a preference unless the company, when giving the preference, was influenced by a desire to put the beneficiary into a better position than it otherwise would have occupied in the event of the company's insolvency. Unless the contrary is shown, this influence is presumed if the beneficiary is an associate or connected with the company.

Certain other transactions may be set aside by the liquidator (in a creditors' winding-up) or the Viscount (in a *désastre*), including:

- Onerous property (including unprofitable contracts), to release the company from all liability in respect of the onerous property from the date of commencement of insolvency proceedings.
- Extortionate credit transactions, which may be set aside or varied if the company was provided with credit on grossly exorbitant terms within three years before the start of insolvency proceedings.

Schemes of Arrangement

Under Article 125 of the Companies Law, the court may allow a compromise or arrangement (scheme) between a company and its creditors or shareholders (or a class of either). On application of the company (or its creditor, shareholder, or liquidator if it is being wound up), the court may call a meeting, after which the scheme becomes binding if approved by the court and agreed to by a majority in number of the creditors or shareholders (or a class of either) representing either:

- 75% in value of the creditors (or class of creditors).

- 75% of the voting rights of the shareholders (or class of shareholders).

Such a scheme is binding on all the creditors (or class of creditors) or on all the shareholders (or class of shareholders), as well as on the company itself and, where the company is in the course of being wound up, on the liquidator and all contributories. A scheme is concluded when the court order approving the scheme is filed with the Jersey Companies Registry.

The provisions of the Companies Law relating to schemes of arrangement are based on the UK Companies Act 1985 and so English case law on schemes under the UK provisions is highly persuasive in Jersey.

Out-of-Court Restructuring Transactions

In recent years, there have continued to be numerous out-of-court restructuring transactions involving Jersey companies. These transactions have generally involved one or more of the following elements:

- Debt-for-equity swaps (with the agreement of all affected creditors).
- Group reorganisations (including the intra-group transfer of assets and the establishment of new Jersey holding companies and/or Jersey special purpose vehicles to be used for particular purposes in the restructuring).
- Enforcement of security and set-off provisions

Article 56 of the Security Interests (Jersey) Law 2012 (Security Interests Law) provides that, if the grantor of a security interest becomes bankrupt or the grantor or its property is subjected to Jersey or foreign insolvency proceedings, that does not affect the power of the secured party to appropriate or sell collateral, or otherwise act in relation to collateral in connection with enforcement. This is subject to Article 59 of the Security Interests Law, which provides that in the case of the bankruptcy of the grantor of a security interest, the security interest is void as against the Viscount (or liquidator) and the grantor's creditors, unless the security interest is perfected before the grantor becomes bankrupt. Therefore, perfected security interests created under the Security Interests Law generally remain enforceable following the start of the grantor's insolvency proceedings.

Contractual close-out netting provisions or set-off provisions are enforceable under Article 2 of the Bankruptcy (Netting, Contractual Subordination and Non-Petition Provisions) (Jersey) Law 2005 (Netting Law), subject to certain legal rules to the contrary (including Article 34 of the *Désastre* Law, see below). This is the case despite the bankruptcy (such as a creditors' winding-up or *désastre*) of a party to the agreement or of any other person or the lack of any mutuality of obligation between a party to the agreement and any other person.

In the absence of such contractual provisions, mandatory set-off under Article 34 of the *Désastre* Law would apply between the insolvent debtor and its creditors following a declaration of *désastre* or commencement of a creditors' winding-up, although this requires mutuality between the parties (that is, that there must have been "mutual credits, mutual debts or other mutual dealings").

Cross-Border Insolvency

Article 49 of the *Désastre* Law allows the Royal Court of Jersey to assist the courts of certain listed countries and territories (currently the UK, Guernsey, the Isle of Man, Republic of Ireland, Finland and Australia) in all matters relating to the insolvency of any person to the extent it thinks fit. However, if a foreign court outside of this list seeks assistance, the Royal Court may be willing to assist on the basis of comity, a right under customary law allowing the

court to exercise its inherent jurisdiction to provide such assistance as it considers appropriate to other countries and jurisdictions. This has been demonstrated in various cases including those involving:

- British Virgin Islands provisional liquidators (*Re Tacon [2007] JRC 065*).
- South African personal representatives of an insolvent estate (*Representation of Van Zyl and Joseph (18 January 2008, unreported)*).
- A voluntary petition for Bankruptcy (*Smith v Nedbank Private Wealth Ltd. [2018] JRC 156*).
- The Ontario Court seeking assistance in the reorganisation of a group of companies with a Jersey company as the ultimate holding company (*Lydian Investments Limited [2020] JRC 049*).

A letter of request from the foreign court to the Royal Court is always required.

As established in a line of Jersey cases (such as *In re OT Computers Ltd 2002/29 (31 January 2002)*), it may be possible to put a Jersey company into English law administration by making an application for a letter of request from the Jersey court to the English court. This is a non-statutory discretionary remedy that requires the approval of both courts. It is generally only available where the Jersey company has its management and/or economic activities based in England. It is necessary to show in the application why both:

- English law administration would achieve the best possible outcome for the debtor and creditors.
- Local alternatives, such as a creditors' winding-up or *désastre*, would not be as beneficial to the debtor and creditors.

A recent example of the Royal Court's willingness to provide assistance to facilitate cross-border insolvency proceedings is the case of *Matthew David Smith and Ors [2021] JRC 047*, an application by the joint administrators of the Arcadia Group for recognition in Jersey, in which the Royal Court demonstrated its willingness to provide assistance by providing remedies that are not ordinarily available in Jersey, including a moratorium preventing claims or enforcement against group companies in Jersey in substantially the same terms as provided for under the UK Insolvency Act 1986.

When considering applications to assist other courts in insolvency matters, in exercising its discretion, the Royal Court may have regard to where the debtor's centre of main interests (COMI) is and, to the extent it considers it appropriate, to the current provisions of any model law on cross border insolvency prepared by UNCITRAL and the rules of private international law.

Guernsey

Before the introduction of the Companies (Guernsey) Law, 2008, as amended (Companies Law), Guernsey's insolvency law had very limited statutory provisions and was reliant on the still surviving customary law derived from *la coutume de Normandie* (the customs of medieval Normandy). These customary law procedures have been either supplemented and/or superseded by Part VIII of the Companies Law, which deals with arrangements and reconstructions, and Parts XXI to XXIV, which deal with administration and provisions relating to both voluntary and compulsory liquidations. This legislation means that, from a corporate law perspective, Guernsey's statutory restructuring regimes are broadly in line with English law insolvency law principles, while at the same time being intentionally less prescriptive to enable the Royal Court of Guernsey to take a pragmatic and more flexible approach when required.

Personal insolvency is not dealt with in the Companies Law, as Parts VIII and XXI to XXIV relate to corporate structures only. Personal insolvency is largely dealt with under customary law procedures but is presently the subject of reform whereby proposed new insolvency legislation is anticipated to address personal insolvency. The timeframe for implementation of this legislation is presently unknown but is anticipated in 2022.

On 15 January 2020, the States of Guernsey passed the Companies (Guernsey) Law 2008 (Insolvency) (Amendment) Ordinance 2020 (Insolvency Ordinance). Insolvency Rules will also be created to support the changes brought about by the Insolvency Ordinance. The Insolvency Ordinance explains that the Committee can, by regulation, make insolvency rules and can create an Insolvency Rules Committee (IRC) for the purpose of creating the rules. This IRC has been formed and is currently drafting the Insolvency Rules to support the substantive insolvency laws. However, the Insolvency Ordinance has not yet been enacted. The Insolvency Rules as currently drafted will cover:

- Meetings of creditors.
- The duty to report delinquent officers.
- A declaration of solvency (in relation to voluntary liquidations).
- The resignation of liquidators.
- Powers to attack antecedent transactions.
- The power to disclaim assets.
- Other rules in relation to the power to make distributions in an administration.

The Guernsey Insolvency Practice Statements (GIPS) were released by the Association of Restructuring and Insolvency Experts (ARIES) in 2017 in response to the proposed reform, to assist with some of the issues highlighted. The GIPS provide voluntary "best practice" guidance in the absence of the Insolvency Rules, on issues such as creditor meetings, office holder investigations and director misconduct.

The Insolvency Ordinance is set to modernise Guernsey insolvency law, bringing the jurisdiction further into line with English insolvency law and other offshore jurisdictions. These changes will affect all new liquidations and administrations when the Insolvency Ordinance comes into force and when a decision is made by the Committee for Economic Development to enact the new amendments.

The statutory solvency test is set out in section 527 of the Companies Law, and requires a company to prove solvency by satisfying that either the:

- Company is able to pay its debts as they become due (cash flow test).
- Value of the company's assets is greater than the value of its liabilities (balance sheet test).

The solvency test also imposes other solvency requirements on Guernsey companies that are supervised by the Guernsey Financial Services Commission (GFSC), under a non-exhaustive list of laws and regulations.

The restructuring options available to companies in Guernsey vary depending on the legal structure of the company, such as whether it is a cellular or non-cellular company. The Companies Law provides for separate insolvency regimes for both cellular and non-cellular companies. Cell companies are Guernsey limited liability companies that are subdivided into separate cells that do not have separate legal identity but that do have separate assets and liabilities, meaning that the assets of one cell are not available to the creditors of another cell in the event of that

cell's insolvency. In most respects, the regimes are the same with minor differences to take into account the cellular structure.

However, cells of protected cell companies may enter into a procedure that is known as "receivership" in Guernsey but that is more akin to a liquidation. A receiver has the same powers as a liquidator to realise assets, bring actions and distribute to the cell's creditors, and the receivership is a terminal process with the cell ultimately being dissolved. More generally, there are also number of court-driven and out-of-court driven regimes in relation to non-cellular companies (*see below*).

Schemes of Arrangement and Administration

Both the two principal restructuring regimes, schemes of arrangement and schemes of administration, are court-driven procedures.

Schemes of Arrangement. Part VIII of the Companies Law governs schemes of arrangement, which enable a Guernsey company to reach a formal compromise or arrangement with creditors or members to achieve a stated turnaround/rescue or reconstruction strategy.

Guernsey has seen a number of high-profile schemes of arrangement, including in relation to two listed companies, Assura Group Limited and Friends Life Group Limited. These were subject to scheme applications which were approved in late January and early April 2015 respectively. In approving these schemes, the Royal Court confirmed the principle from *Re Montenegro Investments Limited (in administration) [2013-14] GLR 345* that the four-stage test prescribed by English case law applies in Guernsey. Equally, at the jurisdictional stage, the Royal Court follows English case law authorities on class composition issues. As such, English authorities, practice statements and commentary are persuasive, and Guernsey scheme documentation resembles the documentation expected in England.

In the decision of *Re Puma Brandenburg Limited 24 February 2017*, Sir Richard Collas, Bailiff (as he then was) stated that the court will be, "slow to differ" from the majority in the exercise of its discretion, particularly in circumstances where scheme shareholders, "in commercial matters ... are much better judges of their own interests than the courts".

In the Guernsey Court of Appeal decision in *Puma Brandenburg [2017]* it was stated (at paragraph 8) that: "In the applications under Part VIII of the Companies Law which have come before the Royal Court, decisions of the courts of England and Wales on the comparable provisions of what is now Part 26 of the Companies Act 2006 have been taken (rightly, in our judgment) to offer guidance on the interpretation and operation of the relevant sections of the Companies Law".

Judge Russell Finch (as he then was) in *NYX Gaming Group Limited (5 January 2018)* again confirmed the four elements (set out in previous authorities) that needed to be satisfied at the approval hearing before a scheme could be approved by the court.

A scheme can be either creditor-led or member-led, but a proposal must be put to the relevant stakeholders through a meeting summoned at the direction of the Royal Court for the purpose of approving that proposal. An amendment has been made to the Companies Law to define the meaning of the "majority in number" needed to agree a proposed compromise or arrangement before the court will consider approving the compromise or arrangement, as representing "75% in value". This means:

- For members: 75% of the voting rights of the members or class of members.
- For creditors: 75% of the value of the debts owed to the creditors or class of creditors.

There are specific provisions for company mergers, and it is also possible to use a scheme to amalgamate, migrate or convert companies. However, a Guernsey company cannot be migrated into the UK because there is no statutory regime in the UK that allows this to occur. Solvency is not a relevant factor for a court to take into account when deciding whether to approve a scheme, although specific provisions are made if the company is in liquidation or administration and is proposing a scheme.

Schemes of Administration. This court-based statutory procedure is set out in Part XXI of the Companies Law and provides protection to creditors and a "breathing space" (known as a moratorium) for the company while the company continues to trade and do business under the management and control of the administrator. The administrator's powers are comprehensively set out in Schedule 1 to the Companies Law. The administrator acts as agent of the company in much the same way as an English administrator.

Administration is a secured-creditor-friendly process and is the only insolvency process in Guernsey that allows the debtor to continue to trade while in an insolvency process. The administrator can, at any stage, apply to the court to discharge the administration order and secure their release from liability. Following the enactment of a practice direction in 2015, the administrator must obtain approval for their proposed remuneration on appointment.

The procedure requires an application (with an accompanying supporting affidavit) to be made to the Royal Court of Guernsey seeking an order that the company be placed into administration. Before making an administration order, the court must first be satisfied, among other things, that the company is, or is likely to become, insolvent (either on the cash flow test or balance sheet test (*see above*) and that (at least) one of the following two statutory purposes can be satisfied:

- The survival of the company or cell, and the whole or any part of its undertaking, as a going concern.
- A more advantageous realisation of the company or cell's assets than would be the case on a winding-up.

On the making of an administration order, any extant application to wind up the company is dismissed. Regardless of the making of an administration order, secured creditors can continue to enforce their rights, as can creditors who can set off their claims against claims brought by the company who are unaffected by the moratorium in place. An administration order may allow a company to realise assets for distribution to creditors, without facing debt recovery proceedings and other enforcement measures from those creditors.

Under the Insolvency Ordinance, one of the more useful changes to the law in relation to administrations has been the express power to make distributions to secured and preferred creditors without needing court approval. Previously there was some doubt as to whether an administrator could make a distribution to a secured creditor, despite the fact that the Guernsey Companies Law specifies that an administration order will have no effect on the rights of secured creditors. This ambiguity has now been cleared up and distributions can even be made to unsecured creditors with court approval. The Insolvency Ordinance also allows a company in administration, where there are no assets to distribute to creditors, to go straight into dissolution without the need for an expensive interim liquidation. An administrator could in those circumstances potentially distribute all the assets to the secured and preferred creditors and, if there are no assets left over for unsecured creditors, apply immediately to go into dissolution. This may avoid a considerable amount of costs.

A further protection for creditors has been introduced with the requirement for the administrators to send a notice to all creditors inviting them to a meeting and explaining the aims and likely process of the administration. This meeting must be held within ten weeks of the date of the administration order, unless the court orders otherwise.

A third insolvency procedure available in Guernsey is *désastre*, a collective court-driven procedure derived from customary law, which allows for a distribution of the debtor's personal property among its creditors after a judgment has been obtained against the debtor by the creditor. *Désastre* is not addressed in detail as it is beyond the scope of this article.

Voluntary and Compulsory Winding-Up (Liquidation)

Guernsey's liquidation regime is contained in Part XXII of the Companies Law (as it relates to voluntary liquidation) and Part XXIII of the Companies Law (as it relates to compulsory liquidation). The liquidation regime is supported by the Royal Court's willingness to exercise its inherent jurisdiction in most circumstances where necessary to assist a liquidator in the performance of their statutory and common law functions.

A voluntary or compulsory liquidation can take a number of forms, depending on the legal structure of the company. However, in both voluntary and compulsory liquidations, once a liquidator is appointed, the company must cease to trade and conduct business except where beneficial for the winding-up of the company. Liquidation is a terminal process and as such the liquidator's primary function is to realise the assets and distribute to creditors *pari passu* and then to members in accordance with their respective rights. Generally, secured creditors sit outside the liquidation and can deal with their secured assets in accordance with their security rights.

Voluntary Liquidation. Guernsey's voluntary liquidation process is given by the company's constitutional documents and the relevant legislation applicable to these documents. Under Part XXII of the Companies Law, the shareholders of the company can decide (by ordinary or special resolution) to wind up the company and appoint a liquidator. The resolution, once passed, commences the voluntary winding-up process. The process is therefore not court driven and creditors have no say in the appointment of the liquidator or in the running of the process generally. There is no requirement for the company or liquidator to call a creditors' meeting. However, creditors can apply to the Royal Court to wind up the company compulsorily and would then be able to remove the current liquidator and seek to appoint their own choice at that stage.

Under the Insolvency Ordinance, where a company is to be placed into a members' voluntary winding-up, the directors must declare the company is able to satisfy the statutory solvency test. If they are unable to make that declaration, the company must be wound up by an independent third party (unconnected to the directors or members of the company), which will normally be a professional insolvency practitioner. This ensures that where a company is insolvent, and the creditors of that company are at risk of being prejudiced, an independent insolvency professional will be appointed to make sure that creditors are adequately protected and that the assets of the company are preserved pending distribution to the creditors.

In addition, if a declaration of solvency is not signed by the directors, the liquidators must call a meeting of all creditors within one month of their appointment unless in their opinion there are no assets for distribution.

There is no distinction between solvent or insolvent voluntary liquidations (apart from the new requirements regarding the appointment of an independent liquidator). Accordingly, by definition, if the company is solvent there would be a return to the members once the assets have been realised.

Under section 400 of the Companies Law, as soon as the company's affairs are fully wound up, the liquidator:

- Prepares an account of the winding-up, giving details, among other things, of the conduct of the liquidation and the disposal of the company's property.
- Calls a general meeting of the company at which the account is presented and explained

After the meeting, the liquidator gives notice to the Registrar of Companies of the holding of the meeting and of its date, the details of which are then published by the Registrar of Companies, including notice that the company is to be dissolved in such manner and for such period as the liquidator thinks fit. The company is then dissolved on expiry of three months after this notice is given.

Compulsory Liquidation. Compulsory liquidation is a court-driven process. The process can be instigated by a creditor or certain other parties (such as a company director or member, a partner or general partner of a limited partnership, a trustee of a unit trust, or the GFSC) and may be related to the solvency of the company and/or its inability to pay debts as they fall due. A corporate structure can also be wound up on just and equitable grounds. In all cases, a liquidator is appointed to realise the assets of the company and distribute them to creditors after scrutiny from a Commissioner of the Royal Court.

In contrast to administration, the liquidator's powers are more limited, as the company cannot trade, although those powers are clearly set out in section 413 of the Companies Law and also derive from common law. Wherever necessary, a liquidator can seek directions from the court on matters arising in the course of the liquidation. On appointment, the liquidator must seek approval of their proposed remuneration from the court and update the court when that is exceeded or when further work and fees are contemplated.

Pooling

The Royal Court of Guernsey has made orders pooling the insolvent estates of Guernsey and Jersey companies, allowing them to be treated as one for the purpose of distributing a dividend to creditors. The decision of the Royal Court of Guernsey delivered on 24 August 2015 (which was followed by a decision of the Jersey Court on 7 October 2015) held that where the affairs of two insolvent companies (incorporated in Guernsey and Jersey respectively) are so intermingled that the expense of unravelling them would adversely affect distributions to creditors, the companies can be treated as a single entity.

The pooling order made by the Royal Court enabled the liquidators, once they had concluded adjudication of claims, to provide to the employees 100% of the priority element of the claims, which would have been impossible if the Guernsey company had been treated separately from the Jersey company (*in the matter of Huelin-Renouf Shipping (Guernsey) Limited (in liquidation) unreported 46/2015*).

Powers and Functions of Liquidators

A liquidator has the power to commence insolvency-specific actions against third parties under the Companies Law in relation to:

- **Preferences.** This may apply where the company has been influenced by the desire to prefer a third-party creditor over other creditors.
- **Misfeasance.** This may apply where a director or former director has misapplied or misappropriated company funds.
- **Production of Documents and Information.** Until the new amendments under the Insolvency Ordinance there was no statutory power or authority allowing a liquidator to demand documents from

directors or employees of the company, or to interview directors or former directors. There was common law authority outlined in the decision of *Re Med Vineyards* allowing a director to be interviewed, but the extent of such powers was uncertain and had recently been doubted by Lieutenant Bailiff Marshall QC in *Re X (a Bankrupt), Brittain v JTC (Guernsey) (2015)*.

Under the Insolvency Ordinance, a liquidator can now demand (by court order if necessary) that all directors, former directors, employees and those who were employed by the company within the past 12 months (before commencement of the liquidation) must provide all the documents that the liquidator might reasonably require to perform their duties. In addition, the liquidator can now apply to the Guernsey Court to interview an officer or former officer of the company about matters such as:

- the formation of the company, its business and affairs; and
- their conduct or dealings in relation to the company.

In addition, a liquidator may require a statement of affairs (summarising assets and liabilities and providing the names of creditors) from past and present officers of the company, present employees and those employed in the year preceding the commencement of the liquidation.

- **Breaches of Fiduciary Duty.** This may apply where such a breach has caused loss to the company.
- **Fraudulent and Wrongful Trading.** The test for fraudulent and wrongful trading is the same in Guernsey as under English law.
- **Transactions at an Undervalue.** Before the Insolvency Ordinance, there was no power to bring an action to avoid a transaction at undervalue under Guernsey law. Liquidators in Guernsey had to rely on a customary law device known as a Pauline action (or *actio pauliana)* which has its origins in Roman and Justinian law and which, in the UK, has legislative effect in section 423 of the Insolvency Act 1986. This customary law principle, which allows a liquidator to reclaim assets that have been fraudulently transferred by a company to a third party in order to place assets beyond the reach of creditors, was confirmed in the Jersey case of *Re Esteem JLR 53 (2002)* and referred to in the Guernsey case of *Flightlease Holdings (Guernsey)* Limited (2005) by Lieutenant Bailiff Southwell as well as the Deputy Bailiff in *Batty v Bourse GLR 54 [2017]*.

  However, the Insolvency Ordinance incorporated a section modelled on section 238 of the UK Insolvency Act 1986, which provides the Guernsey Court with the jurisdiction to make various orders against third parties where property has been transferred to them for no consideration, or for consideration that is considerably less than that provided by the third party.

  There are three important criteria that must be met before the court can take action:

  - the transaction must have occurred within the six months (or two years where the third party is connected to the company) before the company entered insolvency;
  - the company must be insolvent at the time of the transaction or as a result of it; and
  - the transaction at undervalue cannot have been entered into in good faith for the purposes of carrying on the business of the company and where there were reasonable grounds for believing the transaction would be of benefit to the company.

  The Guernsey Court can make various orders, including that property be returned to the company, but cannot take action against a third party who had acted in good faith, paid full value and who had no

knowledge of the circumstances giving rise to the action, except where these third parties were party to the transaction themselves.

Pauline actions will still be useful to liquidators or administrators where the transactions lie outside the six month or two-year period outlined above.

- **Extortionate Credit Transactions.** The Guernsey Court has the power to set aside transactions and/or amend the terms of the provision of credit where credit transactions occur within three years of the insolvency and involve grossly exorbitant terms in relation to the provision of credit and/or grossly offend the principles of fair dealing. As with transactions at undervalue, these provisions are closely based on the UK Insolvency Act 1986, in this case section 244.

- **The Power to Disclaim.** The main purpose behind this new power is to allow a liquidator to release the company from unprofitable contracts as well as responsibility for property (including real property in Guernsey) that cannot easily be sold or is likely to incur liabilities for the liquidator. For the disclaimer to be effective, a notice must be served by the liquidator on various government entities including Her Majesty's Receiver General, as well as any person interested in the property to be disclaimed and any person who may incur liability in respect of the disclaimed property.

  There are protections in place for persons affected by any disclaimer in that they can force the liquidator to make a decision about whether to disclaim the property or contract, and they can also apply to the court for relief, including the vesting of the property in the interested party. The new legislation also makes it clear that any person who suffers loss as a result of the disclaimer then ranks as an unsecured creditor of the company.

- **Winding Up Non-Guernsey Companies.** The power now exists (similar to section 221 of the UK Insolvency Act) to wind up non-Guernsey companies. According to the legislation, a foreign company can be wound up where:

  - it has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs;
  - it is unable to pay its debts under section 407 of the Guernsey Companies Law; or
  - the court is of the opinion that it is just and equitable that the company should be wound up.

  The case law in the UK (which is of persuasive authority in Guernsey) suggests that only foreign companies that have a "sufficient connection" to Guernsey will be wound up in Guernsey. As many such companies undertake financial business in Guernsey, it is difficult to conceive of many circumstances in which that would not be the case. Clearly, what a "sufficient connection" is will need to be defined and tested, and will undoubtedly depend on the facts of each case.

- **Supplies of Gas, Water, Electricity and IT.** This amendment again brings Guernsey into line with the UK in relation to the maintenance of essential services, and allows the Insolvency Committee to make rules preventing the provider of essential services (such as electricity and water) from making it a condition of continued supply that the company in liquidation pay all previous invoices up front. However, these providers can ask that the liquidator or administrator personally guarantees payment of all future invoices post the commencement of the liquidation. This strikes the balance of protecting these service providers in relation to future payments but stops them from threatening to withhold services unless all previous invoices are paid.

- **Duty to Report Delinquent Officers of the Company.** A duty has now been imposed on both liquidators and administrators to make a report to the Registrar of Companies and the Guernsey Financial Services Commission (for supervised companies) if they consider that there are grounds for making a disqualification order against a present or past officer of the company. This report must be submitted within six months of the administrator or liquidator vacating office.

Appointment

While there are no statutory restrictions on who can take court appointments in Guernsey, the Royal Court must be satisfied that the proposed insolvency practitioner (whether Guernsey-based or foreign) is reputable and has the appropriate credentials.

In administrations, the person making the application for an administration order can nominate their preferred administrator. Once sworn in by the Royal Court of Guernsey, the administrator is responsible for managing the business and restoring it to health (in which case the administration ends). Failing this, the administrator realises the assets as best they can and winds up the company. While there is no statutory restriction on who can be nominated, the Royal Court preference is to swear in a Guernsey-based administrator for companies in Guernsey.

In liquidations, joint appointments are now commonplace, with larger complex liquidations proceeding with a joint appointment of a local Guernsey liquidator and an overseas insolvency practitioner, as overseas insolvency practitioners often have access to greater resources, enabling the liquidation to be handled more efficiently. In a compulsory liquidation, the nominated liquidator (chosen by the parties themselves) is sworn directly into office by the Royal Court and then conducts the winding-up. At the conclusion of the process, the:

- Liquidator's accounts are examined by a court-appointed Commissioner.
- Assets are distributed according to the priority of the respective claims.
- Company is dissolved.

Most applications relating to court-driven insolvency procedures are heard by the Royal Court of Guernsey in Ordinary Court every second Tuesday morning, and the application can be made on very short notice. Special sittings can also be arranged with the Greffe (Guernsey Registry) in certain circumstances.

Guernsey's Interaction with Other Jurisdictions

Section 426 of the UK Insolvency Act 1986 has been extended to Guernsey on limited terms by an order of the Privy Council and it is therefore possible for the Guernsey and UK courts to seek reciprocal insolvency assistance from one another by a letter of request process. However, because the Guernsey insolvency regimes are very similar to UK procedures, this process is rarely used (compared to Jersey, which does not have an administration regime, for example). Instead, cross-border insolvency matters in Guernsey often involve applications for recognition in Guernsey by foreign-appointed insolvency and regulatory office holders seeking assistance from the Guernsey court to recover assets held within the jurisdiction (although potentially not information following a recent decision of the Guernsey court (*X (a bankrupt) judgment 36/2015 Royal Court of Guernsey, 6 July 2015*).

In the *X (a bankrupt)* judgment, the Royal Court held that it preferred the minority views of the Board of the Judicial Committee of the Privy Council in *Singularis v PricewaterhouseCoopers* that, for a foreign liquidator to exercise their powers in Guernsey, those powers must be expressly set out in Guernsey statute. It is insufficient for the foreign

liquidator to look for equivalent powers in Guernsey common law. This can be seen as taking the concept of modified universalism in insolvency proceedings a stage further than the rest of the common law world.

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Recent transactions

- Advising Eurohypo on the amendment and restatement of GBP800 million and GBP400 million facilities with Jersey property unit trust and company obligors.
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Publications.

- Various client briefings and publications, member of the editorial board of International Corporate Rescue.
- Co-author of the Guernsey chapter of *International Asset Tracing in Insolvency* (Toube, 2009).
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