

## New developments in Guernsey insolvency: the Guernsey Insolvency Rules

Insights - 09/12/2022

Historically, Guernsey's insolvency law had limited operational provisions (compared to English law) and was largely developed by a bespoke and flexible application of common and customary law principles by the Royal Court. The old regime will now be updated and revised by the Companies (Guernsey) Law, 2008 (Insolvency) (Amendment) Ordinance 2020 (**Ordinance**) which was passed on 15 January 2020, enacted on 8 December 2022 and comes into force on 1 January 2023.

The Insolvency Rules have been developed by the Insolvency Rules Committee (**IRC**) to supplement and to provide helpful additional background and context to the changes which will be implemented by the Ordinance and to provide insolvency practitioners and industry related parties with further guidance on their practical application. The Rules have been drafted by the IRC, which includes Alex Horsbrugh-Porter, and is based upon input and feedback from insolvency practitioners and lawyers in Guernsey.

It was considered that there were (among others) the following deficiencies in the previous corporate insolvency regime:

1. a lack of independence for liquidators of insolvent companies
2. during the course of an insolvent liquidation there was minimal requirement to consult with creditors
3. there is no positive obligation on liquidators and administrators to report director misconduct to the Guernsey Company Registry and/or the Guernsey Financial Services Commission where appropriate
4. there are insufficient powers for liquidators or administrators to obtain information from directors and officers; and
5. there is no proof of debt procedure

The initial Insolvency Rules have been prepared with these issues in mind and will address the following topics:

1. meetings of creditors and shareholders
2. a duty to report delinquent officers
3. a requirement for a declaration of solvency; and
4. the power to disclaim assets

We examine below the applicable amendment implemented by the Ordinance and thereafter a brief analysis of the proposed content of the applicable Insolvency Rule.

## **Meetings of creditors and shareholders**

### **Ordinance**

Meetings of creditors and shareholders are governed by the Ordinance. Section 386A of the Ordinance details the applicable provisions relating to meetings of creditors and shareholders and will require liquidators to call an initial meeting of creditors and to send an explanation to creditors of the aims and likely process of the administration. The Ordinance specifically gives the IRC the power to make regulations in respect of these meetings.

During the course of a winding up, where a liquidator becomes aware that despite a declaration of solvency having been made the company does not in fact satisfy the solvency test, then pursuant to section 398A of the Ordinance, the liquidator will be required to convene a meeting of creditors.

Section 398B addresses the scenario where a declaration of solvency has not been made and a liquidator is required to convene a meeting of creditors, unless he is satisfied that there will be no distribution to creditors.

The Ordinance also inserts provisions relating to circumstances prior to dissolution of a company where a final meeting of shareholders is called, but no quorum is present.

### **Insolvency Rule**

The Insolvency Rule covers the following:

- the requirement for a meeting to be held and the specific circumstances when the requirement can be dispensed
- convening meetings of creditors and general meetings, including the required timeframes for each

- notice of creditor meetings and content of notices
- location of creditor meetings
- quorum at creditor meetings
- chair of creditor meetings
- voting at creditor meetings
- suspension and adjournment of creditor meetings
- proxies (including a standard form)
- minutes
- electronic communication regarding creditor meetings

## **Reporting delinquent officers**

### **Ordinance**

Previously there was no positive obligation upon liquidators or administrators to report delinquent officers. Under the Ordinance (Sections 387A and 421E), administrators and liquidators will now have a duty to report to the Guernsey Registry and, in the case of regulated entities, to the Guernsey Financial Services Commission, if it is considered that there may be grounds for a disqualification order.

### **Draft Insolvency Rule**

The Insolvency Rule provides full information on the detail on the format of the report as well as introducing standard form reports, which creates a welcome standard from a reporting perspective.

## **Declaration of solvency**

### **Ordinance**

In order to distinguish whether a voluntary liquidation is solvent or insolvent, section 391A of the Ordinance requires directors to make a declaration of solvency. If a declaration of solvency is not made, the Ordinance requires that an independent liquidator is appointed (for example, a person that is not a director or former director of that company) and the liquidator will be required (subject to certain exceptions) to report to creditors and hold a meeting of creditors.

These amendments have been created in order to ensure that liquidators of insolvent companies are independent and will be required to investigate the cause(s) of insolvency, together with the

actions of officers of the company and to ensure that liquidators of an insolvent company communicate adequately with creditors.

## Insolvency Rule

The Insolvency Rule covers the format of the declaration of solvency in standard form. It is also proposed that the definition of "solvency" is consistent with section 527 of The Companies (Guernsey) Law, 2008 (the **Law**).

## | Disclaiming onerous property

### Ordinance

Provisions within the Ordinance provide the power to liquidators to disclaim onerous property, even though (as a function of their office) he or she may have exercised rights of ownership over the property (for instance by taking possession or endeavouring to sell it).

The amendments by the IRC preserve existing contractual rights relating to (i) close out netting, (ii) set-off, or (iii) compensation and in addition any rights of enforcement and also unaffected.

## Insolvency Rule

The Insolvency Rule addresses (i) the terms of the notice of disclaimer, (ii) details of a non-effective notice of disclaimer to interested persons for information, and (iii) those circumstances when a notice of disclaimer is presumed valid and effective.

## | Conclusion

The Insolvency Rules are a welcome addition to the operation of the corporate insolvency regime in Guernsey, by assisting insolvency practitioners and lawyers by creating certainty and predictability within the existing framework. These additions also work to the benefit of creditors and stakeholders, to reduce costs which should assist with increasing returns for creditors.

*Alex Horsbrugh-Porter advised on the amendments both as a member of the Insolvency Rules Committee and as a member of the Legal and Regulatory committee of ARIES, the pan-Channel Islands industry body.*

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