Insolvency overhaul: With more powers come more responsibilities

January 2020

On 15 January 2020 the States of Guernsey approved the long-awaited final version of the Companies (Guernsey) Law, 2008 (Insolvency) (Amendment) Ordinance, 2020 (the **Ordinance**). The decision of when the amendments will come into force, and whether they will come into force together or in stages, will rest with the Committee for Economic Development.

The Ordinance will bring some radical changes to both administration and winding up procedure.

Administrators can distribute without court approval

Administrators will no longer have to seek Court approval to distribute property to secured and preferred creditors. Distributions to other creditors will still require an application to the Royal Court, but this change should reduce the cost of administrations.

Companies can be dissolved when in administration

Until now, companies have had to move from administration to compulsory winding up before they could finally be dissolved. This requirement is being removed, meaning considerable savings for the administration process. If a company in administration has no assets remaining to distribute to creditors, then upon the discharge of the administration order the Court can order that the company be dissolved directly.

Administrators must call an initial meeting of creditors

Within 10 weeks of an administration order, administrators must now call a meeting of creditors. Notice of that meeting will have to explain to creditors the aims of the administration and the likely process to be followed. The conduct of these meetings may be specified in future regulations.

Distinction between solvent and insolvent voluntary winding up

Until now, Guernsey has been unusual amongst offshore jurisdictions by not differentiating between a solvent or insolvent voluntary winding up. However, the Ordinance will change this. To avoid the more onerous procedure, directors may make a declaration of solvency in the five weeks preceding the resolution to voluntarily wind up the company.

If such a declaration is not made then there will be restrictions on who can perform the role of liquidator: excluding directors, former directors, shadow directors, managers, secretaries and members of the company or certain companies connected to the company,

and their family members.

If such a liquidator is appointed over a company which made a solvency declaration, and later discovers that the statement was not correct, then they will need the sanction of the creditors or the court to continue in their role.

Companies going through the more onerous insolvent procedure will be required to call an initial meeting of the creditors. Although the Ordinance does not specify the content of that meeting, the notice must contain an explanation of the likely process for the winding up.

More statements of affairs

A statement of affairs contains:

- particulars of assets, debts and liabilities;
- the identities and addresses of creditors;
- details of any security held by creditors; and
- such further information required by the requesting insolvency practitioner.

Until now, statements of affairs could only be required by administrators, and from a closed list of individuals, such as officers, former officers and employees.

Under the Ordinance, administrators can now ask any person to submit a statement of affairs with the Court's permission. Liquidators will also now gain the power to require statements of affairs in the same way.

Duty to report delinquent officers of a company

If an administrator or liquidator believes there are grounds for the Court to make a disqualification order in relation to an officer or former officer of a company then they will now be subject to a duty to report that officer to the Registrar of Companies (and the Commission, if the company is supervised).

Disqualification orders are made against individuals who are judged by the Court to be unfit to be concerned in the management of a company.

Although no punishment is dictated for insolvency practitioners who fail to make these reports, this positive obligation seeks to increase the likelihood of sanction for unfit officers which include, amongst others; directors, secretaries, liquidators and administrators.

Winding up of non-Guernsey companies

The Ordinance gives the Court the power to compulsorily wind up companies which are based outside of Guernsey. The Court may only wind up a non-Guernsey company in the following circumstances:

- if the company has ceased to carry on business or is only carrying on business for the purpose of winding up its affairs;
- if the company is unable to pay its debts within the meaning of section 407 of the law; or

- if the Court is of the opinion that it is just and equitable to wind the company up.

The Court or the liquidator will be able to exercise any powers or to do any act that it could do if it were winding up a Guernsey company.

Liquidators' powers to recover documents and interrogate officers

The Ordinance gives liquidators some strong new powers to seek information.

The Ordinance gives liquidators the power to apply to Court to require officers, employees or others to produce documents and information relating to the company.

Liquidators will also now have the power to apply to Court to order examinations of officers or former officers. These examinations will be conducted by Court-appointed 'Inspectors'. Examinations will take place in private, under oath or affirmation, and the officer will have the same rights, and be bound by the same duties, as a witness before the Court in civil proceedings.

The statements made in these examinations can then be used in civil proceedings against the officer (and to a very limited extent, criminal proceedings).

Creditors will be able to force liquidators to apply for an examination if one half (in value) of them request it.

Liquidators' power to disclaim onerous property

The Ordinance will empower liquidators to disclaim onerous property, including:

- unprofitable contracts;
- property which would be difficult or impossible to sell;
- property with onerous liabilities; or
- any real property outside the Bailiwick.

These powers have been available to liquidators in other jurisdictions for some time, and will be a welcome addition to the liquidator's arsenal. They give liquidators a cheap method of dealing with onerous property and should lead to significant savings in the cost of winding up.

Other parties who have an interest or owe a liability in respect of the disclaimed property may apply to Court for an order that it vest in a trustee. However, those who have lost out because of the disclaimer will ultimately rank as creditors of the company and will have to prove for the loss they have suffered in the winding up.

Insolvency Rules

Although some non-binding guidance for insolvency practitioners has previously been published by ARIES, the Ordinance contemplates the publishing of a set of binding insolvency rules to govern matters of practice and procedure in relation to Guernsey's insolvency regime, including the proving of debts and the disclaiming of assets.

The legislation contemplates the formation of an Insolvency Rules Committee (which we understand has already sat informally in relation to the drafting of the Ordinance) which the Committee for Economic Development must consult when making the new insolvency rules.

Audit Exemption

Companies in winding up will now be exempt from the requirement to have their accounts audited and liquidators will not be obliged to conduct the audits for financial years prior to their appointment.

Reversing transactions at an undervalue

If a company entered into a transaction:

- at an undervalue;
- in the past six months; and
- at a time when it was insolvent, or which caused the company to become insolvent,

then administrators or liquidators can apply to Court under the new Ordinance for an order attempting to restore the company to the position it would have been in if it had not entered into the transaction.

If the person who entered into the transaction was connected to the company, then the time period is extended to cover transactions in the preceding two years.

If the Court is not satisfied that the transaction at an undervalue was entered into by the company in good faith for the purpose of carrying on its business, and that there were reasonable grounds for believing the transaction would benefit the company, then it may make an order attempting to restore the company to the position it would have been in, had it not been for the transaction.

Such an order may be subject to a penalty and may include:

- requiring property be vested back in the name of the company;
- requiring property purchased with proceeds of the transaction be vested in the name of the company;
- releasing security given by the company;
- ordering a person who received the benefit of the transaction to pay a sum back; or
- reinstating released security.

Such a court order may affect persons who were not party to the original transaction but should not prejudice their interests in property acquired in good faith, for value, without notice of the transaction at an undervalue.

Parties who lose out as a result of the reversing of the transaction may be permitted by the Court to claim in the liquidation for their loss, to an extent dictated by the Court.

Extortionate credit transactions

If a company was party to an 'extortionate' transaction involving the provision of credit to the company in the past three years, then the administrators or liquidators may apply to the Court for an order that:

- the transaction be wholly or partly set aside;
- the transaction be varied;
- the company be compensated by another party to the transaction;
- security be surrendered to the liquidator or administrator; or
- such other order as the Court thinks fit.

A transaction is extortionate if its terms required grossly exorbitant payments to be made (whether contingent or definite) or if it otherwise grossly contravened ordinary principles of fair dealing.

Regulations re supply of utilities to companies in administration or liquidation

The Ordinance contemplates the Committee for Economic Development putting regulations in place regarding the supply to companies in administration or liquidation of utilities, communications services or a variety of information technology hardware and services.

These regulations will aim to see that those supplies continue to such companies, and may require suppliers to continue their supply, even if debts which predate the liquidation/administration remain unpaid.

Suppliers may be permitted to require a personal guarantee from the liquidator/administrator for payment of charges in respect of the supply.

Conclusion

The new Ordinance will deliver some of the significant extra powers which insolvency practitioners have been expecting for some time. Hopefully this will lead to increased strength for liquidators when pursuing information and significant savings in the insolvency process, which will ultimately benefit creditors. However, parties to transactions will have to examine their counterparties carefully to avoid falling foul of the new powers to disclaim property and reverse transactions.

If you have any questions about how the new insolvency regime might affect you or your business, get in touch with Collas Crill's Guernsey insolvency team.

Should you also be interested in the winding up of Jersey companies, our Jersey insolvency team have published the following guides:

Collas Crill guiding you through... A creditors' winding up of a Jersey company

Collas Crill guiding you through...Winding up a Jersey company on just and equitable grounds

For more information please contact:

Jack Crisp
Professional Support Lawyer // Guernsey
t:+44 (0) 1481 734837 // e:jack.crisp@collascrill.com

James Tee
Partner † // Guernsey
t:+44 (0) 1481 734284 // e:james.tee@collascrill.com

Quentin Bregg
Senior Associate // Guernsey
t:+44 (0) 1481 734841 // e:quentin.bregg@collascrill.com