States of Guernsey
Finance Sector
Development

Supplemental consultation paper

From: Finance Sector Development

Date: 16th August 2016

Should the Royal Court have a statutory power to wind up a foreign company?

Finance Sector Development is seeking views from industry, including the finance sector, on the issue of whether the Royal Court should have a statutory power to compulsorily wind up foreign companies in certain circumstances, where there is a sufficient connection to Guernsey.

There are a number of foreign companies which carry on business in Guernsey and/or which have assets under control here. FSD is seeking industry views on whether it would be appropriate, and increase the attractiveness of Guernsey as a business jurisdiction of choice, for the Royal Court to have a power under the Companies (Guernsey) Law, 2008 to wind up foreign companies in limited circumstances.

One high level question on this issue was asked as part of the Commerce and Employment Department's public consultation paper of October 2014 on Options for Reforming Guernsey's Insolvency Regime. 11 of 13 Respondents supported the proposal in principle that the Royal Court should have jurisdiction to wind up foreign companies with a place of business in Guernsey. The Department was, however, of the view that this aspect of the Insolvency Law Project required further consultation given that the proposal could have implications beyond insolvency.

Responses by email to laura.stockwell@gov.gg are welcomed by 13th September 2016.

The position in other jurisdictions

Different approaches have been adopted in other common law, or common law influenced, jurisdictions. Some jurisdictions (including, for example, the UK, Cayman, Hong Kong, Jersey and the Isle of Man) require or permit the registration of foreign companies in certain circumstances, typically where they have a place of business or own assets in the jurisdiction.

Some of these jurisdictions provide that a registered foreign company can be wound up by the local courts in certain circumstances (for example Cayman). Some jurisdictions do not

allow the winding up of foreign companies even where they are registered (for example Jersey and the Isle of Man).

Other jurisdictions allow for all foreign companies (i.e. registered or unregistered) to be wound up in certain circumstances (including for example, the UK, Hong Kong, Singapore, BVI, Australia and the Bahamas). It is understood that Bermuda is considering introducing such a statutory provision. Statutory or case law criteria for the court to have jurisdiction typically require a sufficient connection with the jurisdiction, such as a place of business or assets within the jurisdiction.

Position in the UK

The provisions of the Insolvency Act, 1986 relating to the winding up of foreign companies apply to insolvency proceedings in England, Wales and Scotland. As jurisdictions with wide powers to wind up foreign entities[1], and a body of jurisprudence, it is appropriate to briefly set out the position under that legislation.

In order for a foreign company to be wound up, the courts have required that the company has a sufficient connection with the jurisdiction, such as a place of business or assets within the jurisdiction.

The court has discretion to make or refuse an order, or to make an order subject to conditions. Generally, the court must be satisfied that there is a reasonable possibility of the winding-up order being to the benefit of the petitioner. The court may decline to order a winding up where it considers that the courts of another country would provide a more appropriate forum.

A foreign company can be wound up in England and Wales or Scotland even if it has been dissolved or has otherwise ceased to exist as a company in the country of its registration.

If the EU Insolvency Regulation does not apply[2], the applicable legislation is section 221 of the Insolvency Act 1986. There is a body of jurisprudence in England and Wales on the exercise of the powers under section 221[3], and (assuming the Court finds that it has

[1] The UK Companies Act 2006 defines any association or company in the United Kingdom which is not registered under the Act to be an "unregistered company". The definition of "unregistered company" therefore includes foreign companies.

[2] If the foreign company is incorporated in another EU member state, there is a presumption that this is where its "centre of main interests" is and where insolvency proceedings should be started.

[3] An important case on this is *Stocznia Gdanska SA v Latreefers Inc (No 2) [1998] EWHC 1203 (Comm)* which held, in summary, that the court will have jurisdiction to wind up a foreign company if there is a sufficient connection with the jurisdiction, there is a reasonable possibility (if a winding-up order is made) of benefit to those applying for the winding-up order, and that one or more persons interested in the distribution of assets of the company are persons over whom the court can exercise a jurisdiction.

jurisdiction) there are three circumstances in which an unregistered company can be wound up, broadly these are where a company has ceased to carry on business, is unable to pay its debts, or where it would be just and equitable to do so.

It is therefore possible in the UK for shareholders in a foreign company with a sufficient connection to the UK to petition for the winding up of a company on the ground that to do so would be just and equitable.[4]

Questions

1. Do you have any practical experience of the winding up of a foreign company in a jurisdiction other than Guernsey? If so, please identify the advantages, disadvantages and any difficulties in the existence and exercise of such powers.

2. Do you believe that a power for the Royal Court to wind up a foreign company, in limited circumstances, would make Guernsey more or less attractive as a jurisdiction for business, or do you believe it would have no impact? Please comment in particular on the fact that some key competitor jurisdictions for international finance business do not have such provision.

3. Can you provide any practical examples (anonymised if necessary) where the absence of a power for the Royal Court to wind up the affairs of a foreign company in Guernsey was problematic, or where such a power would be appropriate and desirable?

4. If you believe that the Royal Court should be able to wind up a foreign company in limited circumstances, what do you believe should be the criteria for the Court having jurisdiction? Potential criteria might include a place of business in Guernsey, the presence of assets in Guernsey, or a more general 'sufficient connection' test leaving the Court a wider discretion.

5. Assuming the Court has jurisdiction, in what circumstances should the Court be permitted to exercise its powers? Potential circumstances might include where the company has been dissolved, where it has ceased to carry on business or where it is unable to pay its debts.

6. Please identify any necessary, or desirable, consequential amendments to legislation that would be required? For example, in the UK there are additional provisions regarding the winding up of foreign open ended investment companies (e.g. a petition for the winding up of a foreign open ended investment company may also

[4]Hong Kong case law has held that this applies to the winding up of <u>insolvent</u> companies only and that it would be "exceptional" for a court to accept jurisdiction over the just and equitable winding up of a <u>solvent</u> foreign company on a shareholder's petition given that shareholders have accepted the primary jurisdiction of the state of incorporation when acquiring shares in the company *Re Yung Kee Holdings Ltd [2012] 6 HKC 246*

be presented by the depositary of the company under the Open-Ended Investment Companies Regulations 2001).

7. Please identify any provisions in other jurisdictions, relevant case law and/or any other matters that you believe should be reviewed and taken into account in considering this issue.