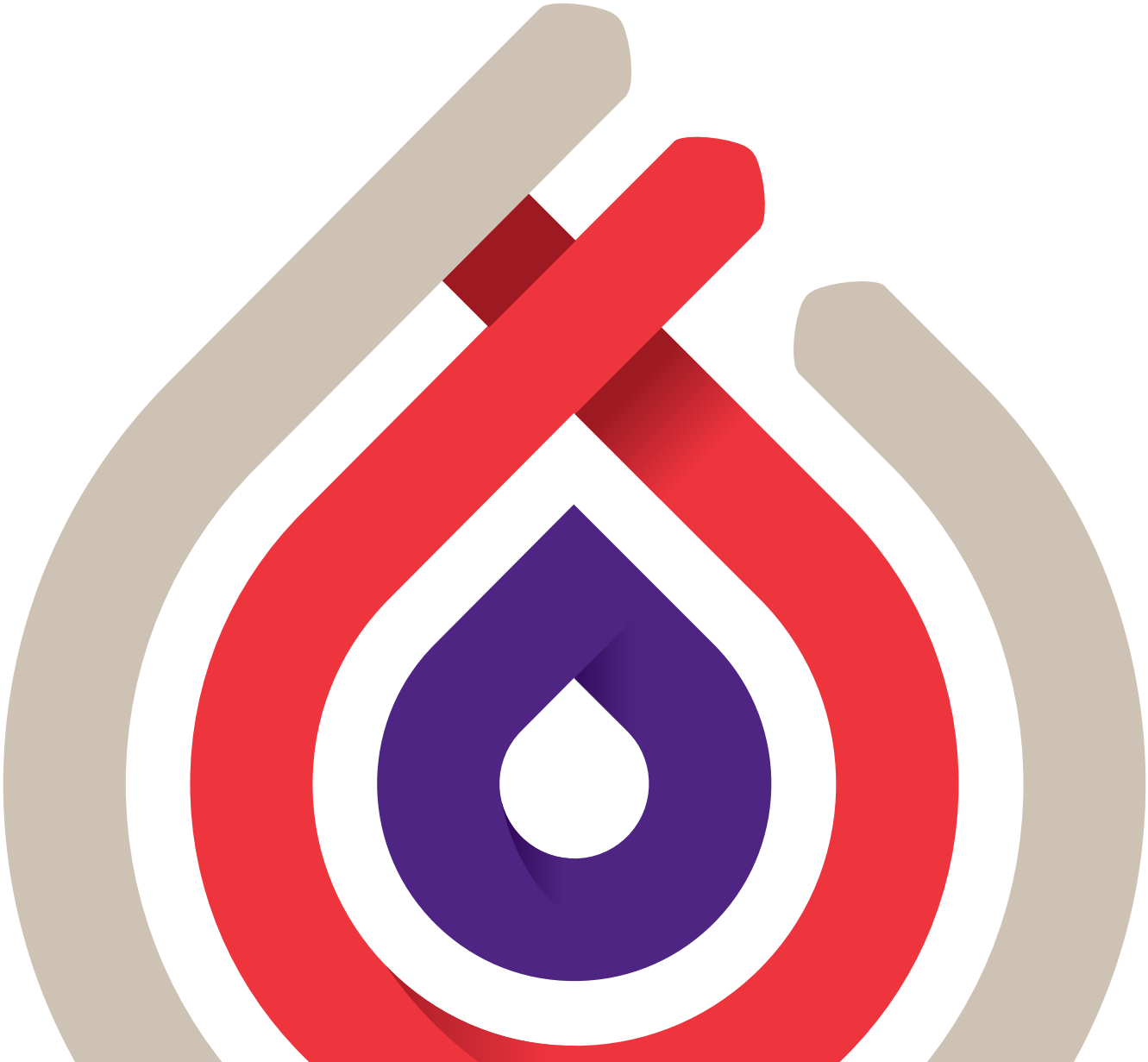
Grant Thornton

Guernsey Insolvency Law Reform

The States today approved the Companies (Guernsey) Law, 2008 (Insolvency) (Amendment) Ordinance, 2020 ("the Ordinance"). It is anticipated that the Ordinance will come in to force shortly, following Regulations by the Committee for Economic Development (the "Committee").



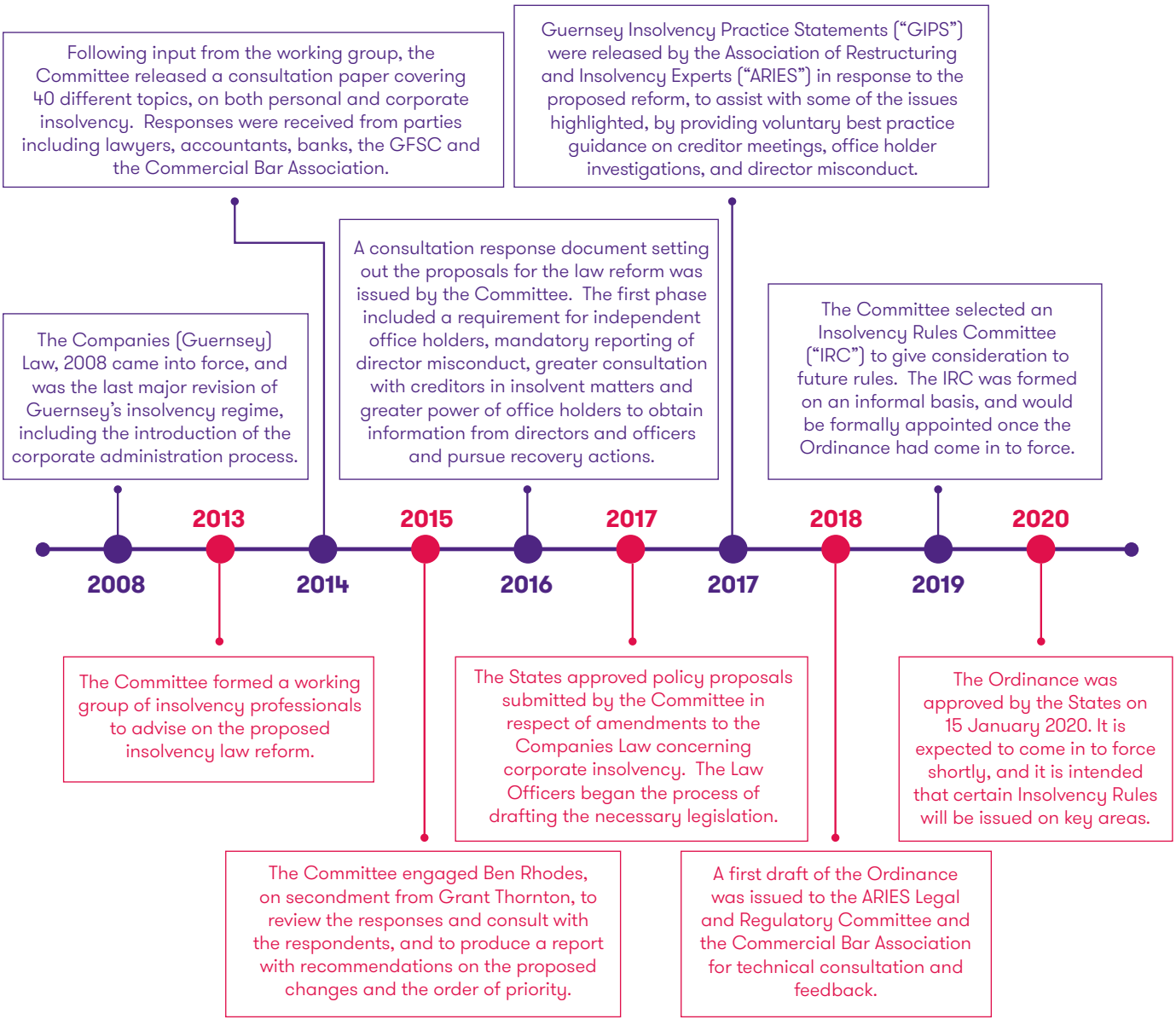
Background to the insolvency law reform

Guernsey's insolvency regime has remained largely unchanged for many years. Whilst it is workable in its current form and, thanks to a flexible and pragmatic Court, is used successfully on many cases; the law suffers deficiencies in certain areas, leading to uncertainty and unpredictability.

Deficiencies in the current corporate insolvency regime include:

- Lack of independence required for Liquidators of insolvent companies
- Minimal requirement to consult with creditors in insolvent Liquidations
- No positive obligation on Liquidators and Administrators to report director misconduct to the Registrar and the Regulator
- Insufficient powers for Liquidators or Administrators to obtain information from directors and officers and pursue recovery action for stakeholders
- No proof of debt procedure

History of the insolvency law reform



Changes per the Ordinance

The Ordinance covers the following:

Distinguishing between solvent and insolvent Liquidations

The Ordinance requires directors of a company to make a declaration of solvency stating that the company satisfies the solvency test, to distinguish between whether a Voluntary Liquidation is solvent or insolvent. If no declaration of solvency is made, the Ordinance requires that an independent Liquidator is appointed (e.g. not a director or former director) and the Liquidator will be required (subject to certain exceptions) to report to creditors and hold a meeting of creditors.

The purpose of these changes is to ensure that Liquidators of insolvent companies are independent and therefore better placed to investigate the cause of insolvency and the actions of the directors, and to ensure that Liquidators of an insolvent company communicate adequately with creditors.

Administration process

The Ordinance allows an Administrator to apply to Court to distribute assets to unsecured creditors in certain circumstances; and to dissolve the company following discharge of the Administration Order if there are no further assets to realise or distribute, without having to convert the Administration to a Liquidation. Administrators should also be required to hold an initial meeting of creditors after appointment (subject to certain exceptions) and to provide a report to creditors.

The purpose of these changes is to streamline the Administration process and reduce unnecessary cost, and to ensure better communication with creditors.

Director conduct, investigations and recovery action

Under the Ordinance, Administrators and Liquidators will have a duty to report to the Registry (and the GFSC in respect of regulated companies) if it is considered that there may be grounds for a disqualification order. There is currently no positive obligation upon Administrators and Liquidators to do so.

The Liquidator will also be able to compel the production of documents from directors and officers, appoint an Inspector of the Court to examine directors and officers of a company, and will able to request a statement of affairs to be produced.

Under the Ordinance, a Liquidator or Administrator may pursue recovery in respect of transactions at undervalue (for example, the transfer of assets from the company to a related party prior to liquidation at minimal consideration) and extortionate credit transactions (for example, exorbitant interest charged on related party loans).

The purpose of these changes is to give Administrators and Liquidators greater power to properly investigate matters and to take recovery action for the benefit of creditors.

Winding up of non-Guernsey companies

Compulsory winding up will be available for companies that are not registered in Guernsey.

Guernsey is a Specialist Finance Centre with companies administered here or holding assets here that may not be registered in Guernsey. The purpose of these changes is to allow for such companies to be wound up locally if required.

Other changes

Companies in Liquidation should not be required to carry out audits or to conduct audits for the financial year in which the Liquidator is appointed. This will avoid incurring further cost.

Liquidators or Administrators may require that utility suppliers continue to supply the company, despite being unpaid for arrears. Liquidators should also have the power to disclaim onerous property including leaseholds.

Creation of Insolvency Rules

Insolvency Rules will be created to support the changes brought about by the Ordinance. The Ordinance explains that the Committee may by regulation make insolvency rules and may create an Insolvency Rules Committee ("IRC") for the purpose of creating the rules. The Committee has formed an informal IRC which has been drafting proposed Insolvency Rules. The IRC can formally be appointed once the Ordinance has come in to force.

The initial Insolvency Rules are expected to cover: meetings of creditors, duty to report delinquent officers, declaration of solvency, resignation of liquidators, and disclaiming assets.

Other important Insolvency Rules include those related to a creditor proof of debt procedure. 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 Insolvency Rules, on issues such as creditor meetings, office holder investigations, and director misconduct. ARIES consulted with its members and other interested parties prior to release of the GIPS. It is anticipated that the Insolvency Rules will, where possible, interact with or formalise the GIPS in order to maintain consistency.

Personal insolvency

Whilst personal insolvency was covered by the States consultation, there is currently no proposed reform of the personal bankruptcy law in Guernsey.

For the time being, the island therefore continues to rely on the ineffective procedure of Désastre.

It is hoped that once the corporate insolvency law reform has drawn to a close, progress can be made on the much needed reform of Guernsey's personal insolvency process.

Conclusion

A modern and effective corporate insolvency regime is important for the financial services industry and the broader business community. The proposed changes to Guernsey's insolvency regime will make it more robust and will enhance Guernsey's reputation as a safe place to do business.

About the author

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Ben Rhodes is a Recovery and Reorganisation and Forensic Investigation Services Director of Grant Thornton in the Channel Islands. Ben is a UK Licensed Insolvency Practitioner and Fellow of INSOL International.

Ben was seconded to the States of Guernsey in 2015 to advise on the proposed reform of the Guernsey insolvency law. Ben is one of four industry members of the proposed Insolvency Rules Committee. Ben sits on the Executive Committee and the Legal and Regulatory Committee of ARIES, and was heavily involved in the drafting of the GIPS.

Professional qualifications & memberships:

- FCA (Fellow of the Institute of Chartered Accountants in England and Wales)
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- FABRP (Member of the Association of Business Recovery Professionals)
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