
R
T
R

Editor
Christopher Mallon

Law Business Research

THE RESTRUCTURING REVIEW

Reproduced with permission from Law Business Research.

This article was first published in *The Restructuring Review* (published in November 2008 – contributing editor Christopher Mallon).

For further information please email Adam.Sargent@lbresearch.com

The Restructuring R

Editor
CHRISTOPHER MALLON

LAW BUSINESS RESEARCH LTD

PUBLISHER
Gideon Robertson

MARKETING MANAGER
Adam Sargent

EDITORIAL ASSISTANT
Nick Drummond-Roe

PRODUCTION EDITOR
Jonathan Cowie

SUBEDITORS
Sebastian Perry
Jonathan Allen
Kathryn Smuland

EDITOR-IN-CHIEF
Callum Campbell

MANAGING DIRECTOR
Richard Davey

published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2008 Law Business Research Ltd

© Copyright in individual chapters vests with the contributors

No photocopying, copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of

November 2008, be advised that this is a developing area

enquiries concerning reproduction should be sent to Law Business Research, at the address above. enquiries concerning editorial content should be directed to the publisher – gideon.roberton@lbresearch.com

ISBN 0-9542890-9-9

printed in Great Britain by
encompass print Solutions, Derbyshire
Tel: +44 870 897 3239

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

AdvokATFiRMæThAAviNd viSLie AS

ANd ReAS NeoCLEoUS & Co LLC

BAk eR & MCK eNZie

BAião, CASTRo & ASSo CiAdoS –

So CiedAde de AdvOGAdoS, Ri

ChioMëNTi STudio LeGALe

CoLLAS dAy

dReW & NApieR LLC

dUNdAS & WILSoN LLP

FORBES HARE

GARRIGUES

GÖRG LAWYeRS

GüR LAWFiRM

hAMiLTon AdvokATByRÅ

kYRiAkidES GeoRGopouLoS & dANioLoSiSSAiAS LAWFiRM

MCMiLLAN LLP

SCheLLeNBerG WiTTMeR

SChÖNheRR ReChTSANWÄLTe GMBh

SeRGio BeRMudeSLAWoFFiCe

SkAddEN, ARpS, SLATe, MeAGHeR & FLoMLLP

SoLoMoN hARRiS

vAN MeNS & WiSSeLiNk Nv

WeiL, GoTShAL ANd MANGeSLLp

WhiTe & CASe LLP

WILLiAMFRy

CoNTeNTS

| | | |
|-------------------|--|-----|
| Preface | | vii |
| | <i>Christopher Mallon</i> | |
| Chapter 1 | AUSTRIA..... | 1 |
| | <i>Wolfgang Höller</i> | |
| Chapter 2 | BRAZIL..... | 10 |
| | <i>Ricardo Tepedino and Marcelo Lamego Carpenter</i> | |
| Chapter 3 | BRITISH VIRGIN ISLANDS..... | 20 |
| | <i>William Hare</i> | |
| Chapter 4 | CANADA..... | 29 |
| | <i>Paul Macdonald, Jeff Gollob, Nicholas Scheib and Lisa Kerbel Caplan</i> | |
| Chapter 5 | CAYMAN ISLANDS..... | 41 |
| | <i>Laura Hatfield and Sam Dawson</i> | |
| Chapter 6 | CYPRUS | 49 |
| | <i>Maria Kyriacou</i> | |
| Chapter 7 | ENGLAND & WALES | 60 |
| | <i>Christopher Mallon and Christian Pilkington</i> | |
| Chapter 8 | FRANCE | 78 |
| | <i>Jean-Dominique Daudet de Cassini and Lionel Spizzichino</i> | |
| Chapter 9 | GERMANY..... | 88 |
| | <i>Christian Bärenz and Carsten Müller-Seis</i> | |
| Chapter 10 | GREECE | 99 |
| | <i>Leonidas C Georgopoulos and Christina C Papanikolopoulou</i> | |

| | | |
|-------------------|---|-----|
| Chapter 11 | GUERNSEY..... | 111 |
| | <i>Jason Romer</i> | |
| Chapter 12 | IRELAND | 121 |
| | <i>Michael Quinn</i> | |
| Chapter 13 | ITALY | 130 |
| | <i>Andrea Bernava, Giulia Battaglia and Antonio Tavella</i> | |
| Chapter 14 | JAPAN..... | 145 |
| | <i>Shinichiro Abe</i> | |
| Chapter 15 | MEXICO | 160 |
| | <i>Thomas S Heather</i> | |
| Chapter 16 | NETHERLANDS..... | 172 |
| | <i>Marien Schelhaas</i> | |
| Chapter 17 | NORWAY | 185 |
| | <i>Ylva Cordia Dariés</i> | |
| Chapter 18 | POLAND..... | 197 |
| | <i>Lech Giliciński & Radosław Illing</i> | |
| Chapter 19 | PORTUGAL..... | 211 |
| | <i>Ana Paula Matos Martins and Cristina Bonito</i> | |
| Chapter 20 | SCOTLAND..... | 225 |
| | <i>David Gibson and Sián Aitken</i> | |
| Chapter 21 | SINGAPORE | 237 |
| | <i>Sushil Nair</i> | |
| Chapter 22 | SPAIN..... | 253 |
| | <i>Antonio Fernández and Juan Verdú</i> | |
| Chapter 23 | SWEDEN | 266 |
| | <i>Lars Eric Gustafsson and Dagd Mø</i> | |

| | |
|-------------------|---|
| Chapter 24 | SWITZERLAND..... 280 <i>Vincent Janneret, Olivier Hari and Elera Sampedo</i> |
| Chapter 25 | TURKEY..... 295 <i>İlkay Yelkenci</i> |
| Chapter 26 | UNITED STATES 304 <i>Sally McDonald Henry, Bennett Silveberg and Miriam Marton</i> |
| | APPENDICES |
| Appendix 1 | ABOUT THE AUTHORS..... 330 |
| Appendix 2 | CONTRIBUTING LAW FIRMS' CONTACT DETAILS 347 |

Chapter 11

GUERNSEY

*Jason Romer**

I OVERVIEW OF 2007/2008 RESTRUCTURING & INSOLVENCY ACTIVITY

i Liquidity and state of the financial markets

At this moment, the world is experiencing the effects of a global economic crisis. With more entities becoming victims of the 'credit crunch' every day, it is impossible to predict what the next day might bring. Given the severity and widespread reach of this crisis, these statements are unlikely to seem either shocking or controversial. With this said, the financial markets of Guernsey have, to date, absorbed the effects of the credit crunch with remarkable success.

The Bailiwick of Guernsey incorporates the island of Guernsey as well as a number of other islands including Alderney, Sark, Herm, Jethou and Brecqhou. As an international finance centre, Guernsey's four key markets are: banking, insurance, funds and fiduciary administration. Given the continued growth in the financial markets over the past years, Guernsey has continued to expand its finance industry and secured its place as one of the leading financial centres. Following the explosion of the US subprime mortgage crisis back in 2007, many financial markets have effectively ground to a halt. However, Guernsey is yet to suffer a severe downturn in banking activities, with total deposits held within Guernsey banks having increased by 8.7 per cent over the first quarter of 2008 to a new highest level of £129.5 billion. By the end of June 2008, deposits in Guernsey banks were 18.5 per cent higher than the level for that same period in 2007. It is also worthy of noting that local inter-bank activity increased during the second quarter of 2008 to £1,076 million.

While banking appears to be sustaining consistent growth, investment within the island also continued to do well throughout 2008. The first quarter of the year saw an

* Jason Romer is a partner at Collas Day. The author acknowledges the assistance of Brandon Doffing in collating this article.

increase of £25.6 billion (14.4 per cent) in the amount of funds under management and administration in Guernsey, with the second quarter of 2008 seeing a further £3.4 billion (1.7 per cent) increase. These figures tend to imply that, despite international uncertainties, Guernsey continues to retain its status as a preferred domicile for investment funds.

ii Impact of specific regional and global events

Even with the above figures, it is clear that Guernsey's position as a leading finance centre does not offer it immunity from the current economic turmoil. Banks within Guernsey are generally subsidiaries of an international parent bank, allowing the Guernsey subsidiary to be exposed to any crisis felt by the parent bank even if it is not triggered from within Guernsey.

The troubles at Northern Rock in the UK impacted its Guernsey subsidiary, which had lent a substantial portion of its balance sheet to its parent bank. Carlyle Capital Corporation Limited, a mortgage-backed security fund which was listed on Euronext and went into liquidation earlier this year, was a Guernsey mutual fund. The Guernsey subsidiary of Landsbanki, an Icelandic bank, recently went into administration following problems with the Icelandic economy and its banking system (these examples are discussed in more detail *infra*).

The impact on banks in particular has led to many governments across the world taking action through the nationalisation of certain banks. The UK government, for example, has taken steps to introduce a nationalisation plan for banks costing in the region of £400 billion. The US has also recently discussed the possibility of large-scale nationalisations in an attempt to encourage a more advantageous economic market. This approach has been met with strong mixed reactions in many instances. For Guernsey, the possibility of nationalising a bank is simply unrealistic. Guernsey's government, the States of Guernsey, governs the Bailiwick of Guernsey with a population of approximately 65,000. The relative size of funds available to the States of Guernsey in comparison to that of the assets of Guernsey banks means this would seem unrealistic, particularly where the States are not a lender of last resort.

II GENERAL INTRODUCTION TO THE RESTRUCTURING AND INSOLVENCY LEGAL FRAMEWORK

i Taking and enforcement of security

Security in Guernsey is often significantly different to security in other jurisdictions. The manner in which security is taken and the way it must be enforced is dependant upon the type of asset to be secured.

The Security Interests (Guernsey) Law, 1993 ('the Security Law') governs the creation of security in securities, life policies, debts, cash deposits and other choses in action (other than a lease). Security over securities (which includes shares, stock, debentures, debenture stock and bonds) is created by taking possession of certificates of title pursuant to a security agreement. Life policies similarly may be secured by possession of the policy itself. A bank may take security over the bank account of one of its customers where that customer is the debtor and the bank has control over the account under a security agreement. Rights in general may be secured where the secured

party has title to the collateral pursuant to a security agreement. The Security Law sets out a number of formal requirements for security agreements, such as the necessity to be in writing, identify the parties involved and set out the events of default. Where security interests are granted to more than one party over the same subject matter, priority is determined by the order of creation. There are no registration requirements in Guernsey to perfect a security interest under the Security Law. In the current financial climate, a key advantage to holders of security under the Security Law is that insolvency of a debtor does not affect the power of a secured party to enforce their security.

A debt over realty (as opposed to personalty) is secured by way of a registered 'bond', a creation of Norman customary law. A bond can only charge real estate owned by the debtor at the date of the registration. Priority of a bond depends upon the date of registration. A bond is enforced by way of *saisie* proceedings. The process historically could last years, but now takes approximately six months and consists of three stages: preliminary vesting order, interim vesting order and final vesting order. A creditor may seek court permission to execute against the debtor's realty and have the realty vested in the creditor's name (preliminary vesting order). The creditor then summons the debtor to court to require him to pay the sum due and, if this is not paid, the creditor applies for the debtor to be divested of the realty (interim vesting order). The creditor may then either:

- a have the realty vested in himself and undertake to settle the claims of all other creditors; or
- b offer the realty to all creditors in reverse order of priority with each creditor having the option to either take the realty and settle all creditor claims of greater priority, or renounce their claim.

Security over personal property is difficult in Guernsey unless the secured party retains possession of the asset. The concept of a 'floating charge' is not recognised in Guernsey. The only alternative is to take possession of the secured assets, which causes clear practical difficulties. Enforcement of security over personal property is achieved by way of *endicastre* proceedings. *Endicastre* is a declaration of the Royal Court that the debtor is in a state of financial disaster (this is not the same as bankruptcy). All personal assets of the debtor arrested by HM Sheriff are realised, with the net proceeds being distributed among the creditors (subject to certain preferences). After distribution of the net proceeds, the debtor remains liable to pay the balance due to any creditor.

ii Statutory insolvency regimes

Guernsey has been reasonably sheltered from insolvencies in previous downturns. However, recent high-profile events (discussed *infra*) have focussed the minds of Guernsey bankers and other creditors dealing with Guernsey counterparties.

The Companies (Guernsey) Law 2008 ('the Companies Law'), which came into force on 1 July 2008, governs the insolvency procedures applicable to Guernsey companies. The Companies Law sets out the manner in which a company may be subject to administration or become wound up (either voluntarily or compulsorily). There is no equivalent of administrative receivership available in Guernsey. However, it is possible under the Companies Law to put the cell of a protected cell company into receivership.

A company may have a court administration order made against it if (i) it does not satisfy the solvency test (as explained *infra*); and (ii) the making of the order may achieve the survival of the company or a more advantageous realisation of the company's assets. An application may be made by a number of parties, including the company itself, the directors, any member, any creditor and the Guernsey Financial Services Commission ('GFSC') (in respect of supervised companies and those engaged in financial services). The administration order sets a period during which the affairs, business and property of the company will be managed by an individual appointed by the court. Collas Day represented Ernst & Young administrators of Messenger Insurance PCC Limited, which was the first administration to take place in Guernsey. Once the administration order is in place, no proceedings may be commenced against the company except with the consent of the administrator or leave of the court. The administrator has the power to do all things necessary for the management of the affairs of the company, including selling property, borrowing money and granting security. An administration order is then discharged (or varied) by the court if it appears the purpose has been achieved or it is otherwise desirable to discharge the order. To date, very few administration orders have been made, but in such troubling times they may slowly become a more regular occurrence.

Voluntary winding-up occurs either by a company achieving its fixed period or a specified event, or by the company passing a special resolution that it be wound up. Upon commencement of voluntary winding up, the company must cease to carry on business except as may be expedient for its beneficial winding up. The company must appoint a liquidator, who is then responsible for realising and distributing the company's assets and winding up its affairs. The liquidator must call a general meeting on each anniversary of the winding up (until the winding up is complete) to produce accounts of his acts, dealings and conduct for the preceding year. Once the company's affairs have been fully wound up, the liquidator will produce at a general meeting the final accounts of the winding up, noting whether there are any issues of misappropriation, misfeasance or fraudulent or wrongful trading. On the expiration of three months after notice is given to the Registrar that the final meeting has taken place, the company is automatically dissolved.

Compulsory winding up involves the company being wound up by an order of the court for one of a number of reasons, including if the company has suspended business for one year, the company is unable to pay its debts, or it is considered just and equitable for the company to be wound up. An application for compulsory winding up may be made by the company itself, by any director, member or creditor, or by any other interested party. Once an order is made, the powers of the directors cease and the court must appoint a liquidator, either nominated by the applicant or as it sees fit (as applicable). The liquidator is then empowered to carry out various activities expedient for the beneficial winding up of the company, such as bringing or defending civil actions, carrying on business as necessary and making calls of capital. Once the court and creditors have approved the liquidator's final accounts and all assets have been distributed accordingly, the court will declare the company dissolved.

iii Methods of restructuring

Restructuring in Guernsey has been made more straightforward and efficient by the introduction of the Companies Law.

The Companies Law introduced the power of a company to enter into arrangements and reconstructions with its creditors (or any class of creditors) or its members (or any class of members). The situations in which arrangements may be used are not limited under the Companies Law, meaning they can be used for any purpose provided the required procedures have been adhered to. The Companies Law specifically states that an 'arrangement' includes a reorganisation of the company's share capital by the consolidation of shares of different classes, or by the division of shares into different classes. Following an application by the company, a creditor, a member, the liquidator or administrator, the court may order a meeting of any creditors or members. Those called to such a meeting will be given a statement setting out the proposed arrangement and its effects. A majority of 75 per cent in value of the class involved is required to approve the arrangement, at which point the court may sanction the arrangement. Following a court sanction, the arrangement is then binding upon all creditors, class of creditors, members or class of members involved.

Where a compromise or arrangement for the reconstruction of a company (or companies) or the merger of two or more companies involves the transfer of the whole or any part of the undertaking of one company to another, the court may make provision for a number of matters. These include transferring property or liabilities, continuation of legal proceedings and the dissolution of a transferring company. This authority allows the courts to offer assistance in what are often complicated areas of a reconstruction or merger.

The takeover of a company is possible where a scheme or contract involves the transfer of the shares (or any class of shares) in that company to any person. Previously, under Guernsey law there were no minority 'squeeze-out' rights. Now, if the intended transferee has received agreement from 90 per cent of the holders of the shares to transfer their shares, the remaining 10 per cent may be served with a notice and forced to transfer their shares on the same basis set out in the contract. Any shareholder in this minority may apply to the court to avoid the forced transfer, and the court may choose to grant such relief if it sees fit.

An amalgamation is achieved where two or more corporate bodies merge or amalgamate to form and continue as one corporate body. Generally the directors of the amalgamating bodies are required to submit the amalgamation proposal, declare that it is in the best interests of the body corporate and it will satisfy the solvency test. Subsidiaries of the same company are able to carry out a 'short form' amalgamation. The rights and obligations of the amalgamating bodies corporate automatically become rights and obligations of the newly formed body.

iv Role of directors

The Companies Law does not specifically codify the role and duties of directors. The Guernsey courts have, from time to time, used English and commonwealth legal authorities (which are of persuasive authority in Guernsey) for general guidance when determining the duties, powers, status and liabilities of directors. The role of a director is

fiduciary role, therefore duties are owed by that individual to the company. The general management of the company is the responsibility of the directors, who may be liable for failure to carry out this duty. Directors are required to act with honesty, for a proper purpose and in the best interests of the company. While acting as a director, a person must exercise such skill and care as would be expected of someone of his particular skill, knowledge and experience.

Upon the administration or winding-up of a company, the directors will often be partially or completely divested of their duties, with the management of the company becoming the responsibility of the administrator or liquidator (as applicable). If, in the course of winding up a company, it appears that any business of the company had been conducted with the intent to defraud customers or for any fraudulent purpose, the court may order any director or officer who knowingly participated in the fraudulent trading to be personally liable. Directors may also find themselves liable for 'wrongful trading' once a company has gone into liquidation, where that director knew (or ought to have known) there was no reasonable prospect of the company avoiding liquidation but allowed the company to continue. The court may also declare a director personally liable where such director has appropriated or otherwise misapplied and of the company's assets, has become personally liable for a debt of the company or has otherwise been guilty of misfeasance or breach of fiduciary duty. Where a director is found personally liable, the court may then order that director to make such contribution to the company's assets as the court sees fit. Applications for the above orders may be brought by any liquidator, member or creditor of the company. Directors thought to be unfit to manage a company may be disqualified by the court from holding office for up to a maximum of 15 years.

v Clawback procedures

During the winding up of a company, the liquidator is required to uncover any evidence of misappropriation of the company's assets, misfeasance or fraudulent or wrongful trading. Statutory provisions within the Companies Law allow application to the court to unwind voidable transactions entered into prior to or during insolvency proceedings.

Where a company does anything, or permits anything to be done, that improves the position of a creditor or guarantor of the company, this action may be deemed to have been a 'preference'. Upon application to the court, any preference may be unwound by the court if it was given within the six months (or two years if the transaction is with a 'connected party') immediately preceding entry into winding-up procedures (whether by resolution or court order). If the court is of the opinion that the company was at the time of giving the preference, or became as a result of giving the preference, unable to pay its debts and the company was influenced by a desire to improve that person's position in the company's liquidation, then the court may make such order as it sees fit for restoring the position of the company to what it would have been if the company had not given the preference.

The court is also able to unwind transactions where the business of a company has been carried on with the intent to defraud creditors or for any fraudulent purpose. In this instance, every individual knowingly involved in the company carrying on in such manner may be forced by the court to make such contributions to a company's assets as the court sees fit.

III RECENT LEGAL DEVELOPMENTS

i Companies (Guernsey) Law 2008

The Companies Law came into force on 1 July 2008. Previously, the main legislation was the Companies (Guernsey) Law, 1994. Since 1994, various changes had been brought in to make Guernsey companies more flexible and versatile, including the creation of special types of companies such as the Protected Cell Company (Guernsey was the first to have this legislation) and the Incorporated Cell Company. This considerably assisted the investment funds and insurance industries. In addition, there has been, for several years, the ability to migrate a company to Guernsey, to emigrate a company from Guernsey and to amalgamate one or more companies.

As set out *supra*, the Companies Law facilitates compromises and arrangements between a company and its creditors (or any class of them) or its members (or any class of them). This should assist in insolvency or possible insolvency situations. Previously, despite a proposal being supported, for example by the vast majority of creditors, a minority could block a proposal.

The Companies Law specifically sets out the procedures to be followed for a company to be struck off, enter into administration or be wound up (either voluntarily or compulsorily). The law also introduces a new test known as the 'solvency test', which is utilised in a number of areas within the law, including the insolvency procedures. To satisfy the insolvency test a company must be able to pay its debts as they become due, have assets greater than liabilities and, in the case of supervised companies (namely those regulated by the GFSC), satisfy other requirements as to solvency established under other applicable laws.

In tandem with these developments in Guernsey's Company Law, a new Companies Registry was launched and is operational. There was established a new office of the Registrar of Companies who took over the role previously undertaken by HM Greffier and his staff.

IV SIGNIFICANT TRANSACTIONS AND HOT INDUSTRIES

i Northern Rock

Northern Rock is a UK high street bank that sought liquidity support from the Bank of England in September 2007 and was subsequently nationalised in February 2008, following a widely publicised run on the bank. The bank experienced significant liquidity problems due to a severe tightening of the wholesale credit markets, on which it relied for the majority of its funding.

Northern Rock has, as do many UK and international banks, a subsidiary based in Guernsey, namely Northern Rock (Guernsey) Limited ('NRGL'). The role of NRGL was to take deposits and place them all with the parent bank based in the UK, a process known as 'upstreaming' (discussed *infra*). Therefore, although NRGL remained solvent, the fact its deposit base was held by the parent bank meant NRGL was exposed to any default of the parent bank. This highlighted the risk taken by Guernsey banks who lend large portions of their balance sheet to their parent, allowing the Guernsey bank to potentially suffer substantial losses through no fault of its own. Following the run

on the bank, the UK government declared that it would be guaranteeing all Northern Rock depositors and that this would include NRG L's deposit with its parent. This, along with the subsequent nationalisation of the parent, brought much needed certainty to the position of NRG L. Although all deposits were eventually guaranteed, the Northern Rock crisis reawakened previous talks of introducing a deposit protection scheme in Guernsey.

ii Carlyle Capital Corporation

Carlyle Capital Corporation Limited ('CCC') was a Guernsey based, US mortgage-backed bond fund that listed on Euronext in July 2007. In March 2008, it joined the likes of Bear Stearns and Northern Rock to become one of the first casualties of the financial markets decline.

CCC was a unit of the private equity firm Carlyle Group. The fund borrowed large sums and invested heavily in US government agency AAA-rated residential mortgage-backed securities. Following the collapse of the subprime mortgage market, the fund's assets became illiquid and CCC was unable to service its debts. Then, in an effort to assist the international banking markets, the US Federal Reserve, Bank of England, European Central Bank and other central banks offered to swap problematic mortgage-backed securities for new central bank-backed loans. After CCC defaulted on its debt, its lenders saw this as an opportunity to seize the funds' illiquid assets to then exchange for the highly liquid central bank-backed loans. This ultimately caused CCC to enter into a compulsory winding-up under the previous companies law in Guernsey.

iii Landsbanki

On 6 October 2008, Collas Day was instructed by the directors of Landsbanki Guernsey Limited ('LGL'), the Guernsey subsidiary of an Icelandic bank, to act as legal counsel for the administration of the bank. An administration order was subsequently granted by the Royal Court at midnight that same day, demonstrating the effectiveness of the administration regime in Guernsey.

Landsbanki Islands h.f., the parent bank of LGL, went into receivership in Iceland as a result of problems with the Icelandic economy and banking system. This had a substantial knock on effect for all subsidiaries and products of Landsbanki Islands h.f. This included a UK subsidiary, Heritable Bank, which has also gone into administration and the internet banking service, Icesave. It has become clear that numerous UK councils had deposits with Icelandic banks and could potentially lose substantial sums of public funds. For the independent UK retail investor, the collapse of Icesave may not cause a complete loss as the UK government have guaranteed each investor will receive all of their money back. The Icelandic authorities too have guaranteed the deposits to a certain extent.

The speed at which the administration order was granted in Guernsey is thought to have been a vital step in protecting the interests of depositors. The quick and effective process allowed the administrator to prevent a run on LGL at the same time as preventing any money being moved upstream to the parent bank. This example demonstrates why having a speedy and effective administration regime in Guernsey is so important.

iv Hot industries

With the credit markets all but dried up and the securitisation and structured finance markets all but silent, the question is where is the work coming from?

At a time when traditional financing is slower, we at Collas Day have seen an increased number of middle eastern and Asian investment funds. There is not only a fight to the East but also a fight to quality. This is quality of promoter, quality of jurisdiction, quality of legal regime and a quality regulatory regime. Although it is clearly going to be tough and the financial landscape has been turned upside down and inside out, Guernsey remains well placed to attract business from the Middle East and Asia and those seeking the 'badge of quality'. Not only will Guernsey continue to diversify jurisdictionally in terms of the markets that it serves, but will also diversify in terms of the products it offers. Small generally means flexible and the Guernsey regime is flexible - the forthcoming intellectual property regime demonstrates Guernsey's strength in maximising the value on the assets it administers in an innovative but robust way.

V INTERNATIONAL

i UK insolvency

The Insolvency Act 1986 (Guernsey) Order, 1989 extended Subsections 4, 5, 10 and 11 of Section 426 of the UK Insolvency Act 1986 ('the Insolvency Act') to apply in the Bailiwick of Guernsey. This provides for statutory assistance within Guernsey for insolvencies in the UK, Isle of Man and Jersey.

The Insolvency Act as adopted within Guernsey requires the courts of Guernsey to offer assistance to foreign insolvencies when requested to do so. Upon giving such assistance, the Guernsey courts may either apply the insolvency law of the requesting jurisdiction or that of Guernsey. In making this decision, the Guernsey courts will look to UK common law as to the nature of the assistance available and whether the Guernsey court should exercise its discretion to give such assistance.

Given Guernsey's strong ties to the UK and presence of many UK companies in Guernsey, this assistance is an important benefit in efficient insolvencies across the different jurisdictions.

ii European Union

Guernsey's position as a British crown dependency places it in a unique position, allowing it to benefit from the Common Customs Area and the Common External Tariff while not forming part of the European Community ('EC'). The result is that any directives or regulations implemented by the EC do not have effect in Guernsey, unless an equivalent law is passed to bring Guernsey in line with the EC. The EC Regulation on Insolvency Proceedings and the UNCITRAL Model Law do not apply to Guernsey.

iii Enforcement of foreign insolvency proceedings

The Guernsey courts are generally prepared to recognise foreign insolvency and bankruptcy proceedings. As such, foreign liquidators, trustees and similar office holders in a foreign insolvency have been authorised to assert right to title over Guernsey

situs property. Authority in this respect is not an automatic right and is subject to the discretion of the Guernsey courts. The courts are limited in their powers of insolvency over foreign debtors and are unable to wind up companies unless they are incorporated within the Bailiwick.

VI OUTLOOK

i Upstreaming

As mentioned *supra* many Guernsey banks are in fact subsidiaries of a larger, often international, parent bank. A common exercise for Guernsey banks is to lend large portions of their balance sheets to their overseas parent, giving the parent a source of liquidity. This concept is known as 'upstreaming'.

Figures show that 13 of the 24 banking subsidiaries in Guernsey place more than 50 per cent of their assets intra-group. Given the size of Guernsey, there are a limited number of lending opportunities for banks in Guernsey, especially considering the large size of the banking industry located here. Also, some Guernsey banks are specifically established to help fund their group. Current policies do not restrict the practice of upstreaming, as it is recognised as an important activity for banks. Even though upstreaming is important, it also produces potential issues if the parent bank were to default and become unable to repay the subsidiary's loan. Upstreaming occurs internationally, with certain jurisdictions placing significant restrictions on the practice.

As a result of the current economic conditions and the effect on Guernsey of such high-profile cases as Northern Rock, the GFSC have recently produced a consultation paper on upstreaming. Given the GFSC's recognition of the importance of upstreaming, the suggested proposal is to limit parental upstreaming to a maximum of 85 per cent of the Guernsey bank's assets, as opposed to a more restrictive requirement. There is clear balance to be struck between the flexibility of the regulatory regime and protection for local depositors.

ii Deposit protection scheme

With the recent occurrences in the banking sector, the GFSC have recognised the necessity to create an appropriate deposit protection scheme ('DPS') for the depositors of Guernsey banks. Deposit banks in Guernsey generally include subsidiaries of building societies whose target market include Guernsey and UK resident savers and investors. The proposed DPS seeks primarily to protect individual retail depositors (irrelevant of residency), as opposed to corporate or trust depositors, as a bank-funded scheme. This is to avoid the DPS becoming an excessive burden on local banking resources and protect the most vulnerable type of depositor. The scheme is intended to guarantee deposits up to a maximum of £35,000 per person. As yet this scheme has not been introduced and remains in the consultation stage. It is expected to be introduced late 2008 to early 2009.

For smaller jurisdictions, it does seem odd for the government to promise to protect depositors where the value of such deposits may substantially exceed funds available to such government. The solution in Guernsey must surely seek to put in place a pragmatic answer to a question that in the current environment no-one really has any solid answers for.