

Keeping the courts open in the Crown Dependencies and Overseas Territories

The authors outline some of the measures taken in the Crown Dependencies and Overseas Territories to meet the challenges that the pandemic has brought to financial and insolvency professionals



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The rapid and largely unheralded global spread of COVID-19 has transformed the world in a few short months. Measures intended to shield the vulnerable have greatly reduced freedom of movement and triggered very significant economic challenges, to which we are all trying to adapt.

As financial and insolvency professionals seek to navigate these uncharted waters, many of the businesses they work with will have cross-border and offshore connections. In that context, this article seeks to outline some of the measures taken in the British Virgin Islands (BVI), Cayman Islands (Cayman), Guernsey and Jersey (together, the Crown Dependencies and Overseas Territories (CDOTs)), to meet the challenges that the COVID-19 pandemic has brought.



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Overview

The positive news is that the governments, courts and professionals within the CDOTs have reacted very quickly, to ensure that the CDOTs remain fully functional and open for business.

In common with many larger countries, all four CDOTs temporarily closed their borders to minimise the spread of the virus. They also quickly implemented measures, including amendments to their courts' practice and procedures, to ensure that they remain fully functioning and well placed to deal with the increasing demand for insolvency and restructuring solutions as the world's economic challenges develop.



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Court administration and hearings

The starting point: courts within the CDOTs remain open for business, virtually, at this time. The previous use of technology has been enhanced and extended to all matters coming before their courts. For example, cases are being managed electronically by way of electronic filing, and hearings are taking place remotely, either by video-conferencing or tele-conferencing, or in applicable cases, administratively, on the papers.

All of the CDOTs' appeal courts have begun sitting remotely. For example, in Cayman, part-time non-resident Grand Court Judges and the entire Court of Appeal are now permitted to convene from overseas. In support of the principle of open justice, some hearings in Cayman and Guernsey are being live-streamed and are open to the public.

Procedural deadlines and other time limits

Time, in relation to procedural deadlines in court proceedings, continues to run in the ordinary way. If it becomes apparent to a party that it will not be able to meet procedural deadlines, it should consider seeking to agree necessary extensions with the other parties, or by making an application to the court directly. Other deadlines, including the statute of limitations also remain unaffected by the pandemic, so it remains important to keep these closely monitored.

Swearing and Service of documents

Several of the CDOTs, including Jersey and Cayman, have put in place legislation to enable documents to be notarised or sworn remotely, over a video call, rather than having to be present in person. In the others, it remains practicable to do this in person.

Several of the CDOTs have also put in place temporary measures loosening the requirement for physical service of court documents. In the BVI service may be effected by emails sent to legal practitioners and limited companies. In Guernsey, service of documents to local companies can be arranged via the Court Registry and the rules also provide that it is open to the Court to proceed if it is satisfied that the party has notice of the document.

Jersey has issued a new practice direction under which parties should reach an agreement on alternative service where necessary. Such agreements shall be in writing and sent to the Master of the Royal Court for ratification and subsequent publication. Further measures are in place to deal with instances where agreement on the method of service is not reached.

There are no temporary service rules in Cayman, but lockdown restrictions are already being eased there and some process servers have already resumed business. If, for any reason, physical service is not possible, it is highly likely that the Cayman court would be amenable to make an order permitting substituted service, for example, via email.

Changes to insolvency legislation

As matters stand, none of the CDOTs have made changes to their insolvency legislation, to deal with the impact of the COVID-19 crisis, although all are keeping this under review.

It is worth bearing in mind that Guernsey had already introduced significant amendments to its corporate insolvency laws in January 2020, which are not COVID-19 driven. These are expected to come into effect shortly. Similarly, the Cayman government recently circulated a bill improving and modernising its restructuring regime, and this is also likely to come into force soon.

It is also worth bearing in mind that although the CDOT's wrongful trading rules have not been modified, they are all more relaxed than the equivalent English rules. For example, in Jersey, Guernsey and the BVI, once a director concludes (or should have concluded) that there was no reasonable prospect of the company to avoid bankruptcy, he/she has a duty to take **reasonable** steps to minimise the potential loss to the company's creditors. By contrast, the UK equivalent test is that the director must take **every** step. In Cayman, the position is dealt with solely through the prism of fraudulent trading, which requires proof of intention to defraud creditors, such that it rarely arises in practice.

Restructuring options available in the CDOTs

CDOTs have globally recognised robust legislative and judicial frameworks to effectively facilitate cross-border insolvencies and restructurings, with effective procedural rules in place to deal with the unprecedented challenges faced by both legal practitioners and the courts at this time.

In Cayman and the BVI the primary route to restructuring is to impose a moratorium on creditor claims by appointing

provisional liquidators over a company, and then using that breathing space to enable a scheme of arrangement to be implemented. In Cayman, there is a statutory basis for a company to seek the appointment of provisional liquidators over itself, to implement a restructuring¹. In the BVI, the Courts have very recently come to the same result and held that, notwithstanding the lack of a specific statutory gateway, it still has the jurisdiction to appoint "soft touch" provisional liquidators to aid the company's reorganisation². Schemes of arrangement can also be used by the existing company management, without any appointment of provisional liquidators, if no moratorium is required.

Guernsey maintains a broad range of restructuring mechanisms. While informal, consensual restructuring is popular, parties can also effect restructuring by way of court supervised processes. Schemes of arrangement operate in a similar way to those in the UK. Guernsey also has an administration process, which allows for the appointment of an administrator to manage a company's business and affairs. Once an order is made, the company will have the benefit of a moratorium against claims from unsecured creditors, allowing it time to achieve either the survival of its business or more advantageous realisations of its assets than on a winding up. Administration orders may also be used to effect a "pre-packaged" sales of a company's business.

In Jersey, there is no administration regime or other formal rescue mechanism, however, a company may restructure as part of either a just and equitable winding up process, or a *désastre* process. The just and equitable winding up grounds broadly correspond to the equivalent power of the English Court. It has led to the Royal Court sanctioning 'pre-packaged sales' and permitting the continued trading and restructuring of a business, where



it has been in the interests of creditors to do so. A *désastre* is a court supervised winding up process, which operates in a way similar to a court supervised winding up in other common law jurisdictions. The key distinction, however, is that *désastres* are administered by the Viscount of the Royal Court, who is the Court's Executive Officer and performs a role similar to that of the UK Official Receiver.

Final observations

The courts in the CDOTs have demonstrated they have robust continuity plans, ensuring as little disruption as possible to the timely disposal of cases in these unprecedented times.

Given the likelihood of social distancing measures continuing for the foreseeable future in order to mitigate the spread of COVID-19, the above-mentioned measures taken by the courts within the CDOTs may remain in place for some time. However, this should not deter anyone from seeking to engage with the CDOT's courts, especially if (readily available) restructuring or insolvency relief is required. ■

Footnotes:

- ¹ This will become a restructuring officer, when the anticipated legislation is brought into force.
- ² *In the Matter of Constellation Overseas* [BVIHC (COM) 2018/0206, 0207, 0208, 0210, 0212]



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