

Practice and trends in Jersey restructuring and insolvency law

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Jersey has a familiar range of legal processes and remedies for the restructuring and insolvency of corporations. The principal provisions are contained in the Companies (Jersey) Law 1991 (**CJL**) and the Bankruptcy (Désastre) (Jersey) Law 1990 (**BDJL**). These have been consistently applied and developed by the Jersey Court. Whilst certain reforms are often discussed, Jersey seeks to position itself as a jurisdiction with a system in which creditors can have confidence. From a broader perspective, the Jersey Court has shown itself to be willing to engage in cross border insolvencies whether by granting recognition to overseas office holders or seeking assistance from other jurisdictions.

Of the various restructuring options under the CJL (including merger and takeover provisions) is schemes of arrangement that have seen the most activity in recent years. A court approved scheme enables a binding compromise to be reached among creditors or shareholders with a 75% majority (in voting rights for shareholders and value for creditors). Most schemes that have been presented to the Jersey Court have been shareholder schemes, typically to restructure holding companies or to achieve a takeover. Cells of Jersey protected cell companies can be subject to a scheme.

For insolvent companies, the CJL provides for a creditors' winding up. This is commenced by a shareholders' special resolution followed by a creditors meeting to appoint a liquidator. Once in office a liquidator's primary duties are to wind up the company's affairs, to collect and its assets and then assess creditor claims and distribute the liquidation estate. The alternative to creditors' winding up, and a process that can be creditor (rather than shareholder) driven, is an application to Court for the company to be declared en désastre under the BDJL. If granted, the assets of the insolvent company will be vested in the Viscount (the executive officer of the Jersey Court).

Secured creditors' rights remain in placed notwithstanding the commencement of a creditors' winding up or a declaration en désastre; there is no moratorium on the enforcement of security,

although proceedings by or against a company that is in liquidation will require court sanction. For un-secured creditors, there is a *pari passu* distribution after the payment of the liquidation costs (which in the case of a *désastre* includes a statutory levy of up to 12.5% of the value of assets realised/distributed by the Viscount) and preferred claims (including those of employees, tax and rates and limited landlord claims). Wide powers are granted by statute to enable liquidators (or the Viscount) to obtain information and documentation, to disclaim certain kinds of onerous property and to apply for orders setting aside transactions at an undervalue or which may be considered to have been preferences. Claims in wrongful and fraudulent trading can also be brought by a Jersey liquidator or the Viscount.

Over recent years the Court's discretionary jurisdiction of just and equitable winding up of Jersey companies has been developing. Historically, this jurisdiction (which cannot be invoked by creditors) has been the preserve of solvent companies that have a deadlock shareholder base or whose life/purpose has come to an end (a loss of substratum). However, there is an ever-growing body of examples in Jersey where just and equitable winding up has been used to achieve a variety of ends including: allowing an insolvent company to trade out contracts or sell stock; to enable investigations into potential fraud to be carried out or to protect investors; and to enable the pre-packed sale of a distressed company's business. The process requires a court application and if granted the court has a very wide discretion as to the orders it can make. It will typically grant the liquidators the broad powers contained in the CJL and/or BDJL.

Jersey as a jurisdiction is at the heart of cross-border structuring. Inevitably, situations arise where insolvent companies' assets or possibly important evidence are located overseas or an overseas liquidation regime would be best for creditors. Conversely there will be situations where a foreign insolvency process will require steps to be taken in Jersey. The BDJL contains an assistance provision which gives the Jersey court discretion to provide assistance to the courts of prescribed jurisdictions (currently British Isles jurisdictions, Western Australia and Finland). Also, as a matter of comity the Jersey Court is willing where appropriate to assist overseas liquidators or other appointed officers by recognising those office holders in Jersey. A letter of request from the court of the home jurisdiction is needed for any application for assistance (whether statutory or under customary law) and for non-prescribed countries confirmation that similar assistance would be granted if the Jersey Court required it. Examples of recognised office holders have included liquidators, administrators and receivers from a variety of jurisdictions. Applications have also successfully been made to the Jersey Court for the grant of letters of request to the English Court to place a Jersey company in administration where creditors' interests would be best served thereby "passporting" the insolvency of the Jersey company to England. Also of note in January 2017, for the first time in 40 years the Viscount successfully obtained an order that a letter of request be issued to the English Court to seek her recognition in England to enable her to pursue the collection of assets in England a significant *désastre*.

As to reform, the lack of administration or other rescue procedure has been seen by some to be

an area for change in Jersey. That has been under discussion for some time but is not seen by all as necessary or beneficial, particularly those in structured finance where bankruptcy remoteness for secured parties is an attraction that Jersey offers. Currently, the lack of a creditor driven process other than *désastre* is perhaps the biggest gap in the CJL and it is anticipated that legislative changes will be made to address that and to ensure that Jersey's legal landscape in the area of restructuring and insolvency remains one that is attractive to those who are looking to do business using Jersey based structures.

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