Jersey corporate insolvency procedures

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The financial impact of the COVID-19 pandemic has put pressure on a wide range of structures and, as a result, lenders, borrowers and other counterparties are looking more closely at the impact of possible insolvency proceedings. As Jersey entities are often used in cross-border finance transactions, it is important to be aware of the differences between Jersey and English insolvency procedures for companies, trusts and limited partnerships.

What are the main Jersey insolvency procedures for a Jersey company?

These are:

1. a creditors' winding up under the Companies (Jersey) Law 1991 (the "Companies Law"). This is commenced by a special resolution of the shareholders. The procedure is broadly similar to a creditors' voluntary winding up under the UK Insolvency Act 1986; and
2. a désastre under the Bankruptcy (Désastre) (Jersey) Law 1990 (the "Désastre Law"). This may be commenced on application to the Royal Court by a creditor owed a liquidated sum of not less than £3,000, the company itself or, in some circumstances, the Jersey Financial Services Commission. If a creditors' winding up has already commenced when a declaration of désastre is made, the winding up terminates.

The Companies Law also contains provisions relating to just and equitable winding up, summary winding up where the company is solvent (similar to a members' voluntary winding up) and schemes of arrangement, which are broadly similar to the equivalent procedures under the UK Insolvency Act 1986 and the UK Companies Act 1985.

In recent years, there has been increased use of the just and equitable winding up procedure in Jersey. A Jersey company as the debtor may be wound up by the Royal Court if the debtor has not been declared en désastre and the Royal Court is of the opinion that it is just and equitable, or expedient in the public interest, to do so. This procedure is less common than the principal corporate insolvency procedures of a creditors' winding up or a désastre. The application to the Royal Court for such winding up may be made by the debtor, a director, a shareholder, the Minister or the JFSC on just and equitable grounds, or by the Minister or the JFSC on public interest grounds. If the Royal Court orders a debtor to be wound up, it may appoint a liquidator and direct the conduct of the winding up in the court order.

There are no Jersey law corporate rescue procedures equivalent to English law administration or US Chapter 11 bankruptcy procedures. Insolvency proceedings in Jersey do not combine parent and subsidiary companies' assets into a single pool; the insolvency is on a company by company basis.

What is the effect of commencement of Jersey insolvency procedures?

On a creditors' winding up, liquidators are appointed, usually by the creditors. The liquidators will stand in the shoes of the directors and administer the winding up, gather in assets, settle claims and distribute assets as appropriate. After the commencement of the winding up, no action can be taken or continued against the company except with the leave of court. This does not prevent secured creditors enforcing their pre-existing perfected security against the property of the company. The corporate state and capacity of the company continues until

the end of the winding up procedure, when the company is dissolved.

On a declaration of désastre, title and possession of the property of the debtor vest automatically in the Viscount, an official of the Royal Court. With effect from the date of declaration, a creditor has no other remedy against the property or person of the debtor, and may not commence or continue any legal proceedings to recover the debt. This does not prevent secured creditors enforcing their pre-existing perfected security against the property now vested in the Viscount, as the Viscount takes the property of the debtor subject to security.

Under the Security Interests (Jersey) Law 2012, if the grantor of a perfected security interest becomes bankrupt or the grantor or its property is subjected to Jersey or foreign insolvency proceedings, that shall not affect the power of the secured party to appropriate or sell collateral, or otherwise act in relation to collateral in connection with enforcement.

Shares of a company which is subject to a creditors' winding up or a désastre may not be transferred without the consent of the liquidators or the Viscount, as the case may be (although this does not prevent enforcement of security over such shares as noted above).

What are the powers of the liquidators or the Viscount?

The liquidators, on a creditors' winding up, may exercise all powers of the company as may be required for its beneficial winding up; they have express power to pay the company's debts.

The Viscount, on a désastre, has wide powers to sell all or part of the debtor's property, carry on the business of the debtor as far as is necessary for its beneficial disposal, pay debts, enter into compromises and arrangements with creditors, and exercise any authority and power in respect of the debtor's property which the debtor could otherwise have exercised.

The liquidators and the Viscount may apply to the Royal Court for an order that:

1. the directors are personally responsible for the debts and liabilities of the company on the grounds of wrongful trading. (There may also be claims personally against the directors for breach of their fiduciary duties to the company);
2. persons who were knowingly party to the company carrying on business with the intention to defraud creditors of the company, or for some other fraudulent purpose, are liable to contribute to the company's assets; and
3. where shares of the company have been redeemed or bought back in the 12 months before the commencement of the creditors' winding up or the declaration of désastre, the persons from whom such shares were redeemed or bought back and/or the directors may be required to contribute to any shortfall in the assets of the company.

What transactions can be set aside?

The liquidators, on a creditors' winding up, and the Viscount, on a désastre, may:

1. disclaim any onerous property (including unprofitable contracts, but excluding Jersey real property) by giving notice to interested persons;
2. apply to the Royal Court for an order setting aside any transactions at an undervalue or preferences entered into or given within a relevant period before the commencement of the creditors' winding up or the declaration of désastre; and
3. apply to the Royal Court for an order setting aside extortionate credit transactions entered into in the prior three years.

On a désastre, the Viscount may apply to the Royal Court for an order setting aside excessive approved pension arrangement contributions.

These statutory provisions are broadly similar to the equivalent UK statutory provisions.

How are assets distributed on a creditors' winding up or désastre?

The liquidators or, as the case may be, the Viscount will apply the realised assets of the company as follows:

1. payment of the fees and expenses of the liquidators or the Viscount. The fees of the Viscount can be material, consisting of 10% of the value of all assets realised and 2.5% of the value of all assets distributed;
2. payment of up to six months' salary and holiday pay and bonuses of any employee (subject to statutory limits);
3. certain amounts due in respect of health insurance, social security, income tax, rent and parish rates; and
4. payment of all proved debts.

Where property is subject to security under the Security Interests (Jersey) Law 2012, the proceeds of sale or appropriation are to be applied in accordance with the provisions of that law. Any surplus after deduction of the enforcing security party's reasonable costs and the monetary value of the secured obligations will be used to pay:

1. any person with a subordinate security interest;
2. any other person (other than the grantor) who has given the secured party notice of a proprietary interest in the collateral; and
3. finally the grantor (or, in the case of the grantor's insolvency, the relevant official).

Article 34 of the Désastre Law provides for mandatory set off of mutual credits, mutual debts and other mutual dealing between a debtor and a creditor. (This is similar to rule 4.90 of the UK Insolvency Rules 1986). Article 34 is also applicable, by extension, to a creditors' winding up. By virtue of the Bankruptcy (Netting, Contractual Subordination and Non-Petition Provisions) (Jersey) Law 2005, contractual set-off provisions may survive the bankruptcy of any party or other person and will be enforceable in accordance with their terms, regardless of any lack of mutuality.

Insolvency and Jersey trusts

A Jersey company may act as trustee of a Jersey law trust, such as a Jersey property unit trust (or JPUT). The Trusts (Jersey) Law 1984 provides that where a trustee is a party to any transaction affecting the trust, if the other party knows that the trustee is acting as trustee, any claim by the other party shall be against the trustee as trustee and shall extend only to the trust property.

As a matter of Jersey law, a trust is not a separate legal person but acts through its trustee. The insolvency procedures in the Companies Law and the Désastre Law relate to the insolvency of a legal person, and do not apply to a trust. If a trust became insolvent (on the basis that the trustee was unable to discharge its liabilities as they fell due), as no statutory insolvency procedure would apply, it is likely that the trustee would apply to the Royal Court for directions as to how the trust assets should be distributed.

Jersey case law indicates that receivers may, in certain circumstances, be appointed in respect of an insolvent trust. This is an exceptional remedy which depends on the Royal Court's

exercise of power under its inherent jurisdiction and may be appropriate, for example, where there is a pending application for the appointment of a new trustee amidst claims of breach of trust or where the trustee has insufficient funding and expertise (as compared to receivers) to pursue litigation for the realisation of trust assets.

An insolvent company trustee could potentially become subject to a creditors' winding up or désastre proceedings. If the company acting as a trustee becomes insolvent, its personal creditors have no right or claim against the trust assets (except to the extent that the trustee itself has a claim against the trust). If a company which is a trustee is subject to a declaration of désastre, it must resign as trustee forthwith.

Insolvency and Jersey limited partnerships

A limited partnership established under the Limited Partnerships (Jersey) Law 1994 (the "Limited Partnerships Law") is not a separate legal person nor a body corporate, but acts through its general partner (which is typically a Jersey company). Therefore all actions and proceedings against the limited partnership must be commenced against the general partner in its capacity as general partner of the limited partnership, and not against any limited partner or against the limited partnership itself (without reference to the general partner).

For the purposes of the Limited Partnerships Law, a limited partnership is "insolvent" when the general partner is unable to discharge the debts and obligations of the limited partnership (excluding liabilities to partners in respect of their partnership interests) as they fall due out of the assets of the limited partnership. As a limited partnership is not a separate legal person, its insolvency will not lead to the commencement of désastre or creditors' winding up proceedings in respect of the limited partnership. However, assuming the general partner is the sole general partner of the limited partnership, given the unlimited liability of the general partner for limited partnership obligations, the insolvency of the general partner will usually follow the insolvency of the limited partnership.

A limited partnership shall be dissolved upon the dissolution, bankruptcy or withdrawal from the limited partnership of the sole or last general partner (but not, subject to the provisions of the limited partnership agreement, a limited partner). In such circumstances, the limited partnership shall be wound up in accordance with the terms of the limited partnership agreement or on the application of a limited partner or a creditor of the limited partnership in accordance with the directions of the Royal Court. Upon the dissolution of a limited partnership, its affairs shall be wound up by the general partner unless the activities of the limited partnership are taken over and continued by a new general partner or the Royal Court has given directions as to how the limited partnership should be wound up.

Cross-border insolvency

Article 49 of the Désastre Law provides that the Royal Court shall assist the courts of prescribed countries and territories (currently the UK, Guernsey, the Isle of Man, Finland and Australia) in all matters relating to the insolvency of any person to the extent it thinks fit. However, this does not exclude the pre-existing customary law right of the Royal Court to exercise its inherent jurisdiction to assist non-prescribed countries or to have regard to the rules of private international law.

Although the EU Regulation on Insolvency Proceedings does not apply in Jersey, the Royal Court may still have regard to where the debtor's centre of main interests is in considering applications to commence insolvency proceedings. It may be possible to put a Jersey company into administration under English law, by making an application for a letter of request from

the Royal Court to the English court. This is a non-statutory discretionary remedy that requires the approval of both courts. It would be necessary to show in the application that English administration would be likely to achieve the best possible outcome for the debtor and creditors (as opposed to local alternatives, such as a creditors' winding up or a désastre).

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