Jersey Restructuring and Insolvency Guide (Mondaq)

Briefing Summary: This guide to Jersey restructuring and insolvency includes commentary on the legal framework, security, restructuring, insolvency, cross-border/groups, liability risk, the COVID-19 pandemic, other, trends and predictions, and tips and traps.

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Legal framework

What domestic legislation governs restructuring and insolvency matters in your jurisdiction?

The main legislation governing restructuring and insolvency matters in Jersey is:

- the Bankruptcy (*Désastre*) (Jersey) Law 1990 (the "**Bankruptcy Law**"); and
- the Companies (Jersey) Law 1991 (the "**Companies Law**").

This is supplemented by other legislation and principles of customary law.

What international / cross-border instruments relating to restructuring and insolvency have effect in your jurisdiction?

Jersey is not party to any international treaties relating to restructuring or insolvency. Jersey is also not part of the EU and so the European insolvency directives, such as the Recast European Insolvency Regulation, do not apply.

The Jersey courts will, however, have regard to the principles of private international law when ruling on restructuring or insolvency matters and may have regard to the UNCITRAL Model Law on Cross-Border Insolvency.

Do any special regimes apply in specific sectors?

There are no special regimes for specific sectors save that:

- the Bank (Recovery and Resolution) (Jersey) Law 2017 has specific provisions for dealing with distressed or failing banks in Jersey, based on the equivalent EU and UK legislation and applies to any person or entity registered to carry on deposit-taking business in Jersey under the Banking Business (Jersey) Law 1991; and
- entities carrying on certain regulated activities will be subject to the supervision of the Jersey Financial Services Commission which has additional powers to initiate insolvency proceedings.

Is the restructuring and insolvency regime in your jurisdiction perceived to be more creditor friendly or debtor friendly?

Jersey is generally perceived as a creditor-friendly jurisdiction. There are several creditor led insolvency processes and the principal security legislation, the Security Interests (Jersey) Law 2012 ("**SIL**") provides wide enforcement powers which can be exercised without court involvement.

How well established is the legal regime and infrastructure relevant to restructuring and insolvency in your jurisdiction (e.g. extent of recent legislative changes, availability of specialist judges / courts / advisers)?

As a popular jurisdiction for international investment structures, Jersey has a well-developed legal framework designed to assist UK and international investors and creditors. The judiciary are very experienced with the Judicial Committee of the Privy Council acting as the final court of appeal.

Although Jersey does not have the same volume of restructuring and insolvency legislation or case law as larger jurisdictions, such as the UK or the US, it has the advantage of being able to adapt quickly to recent developments when needed.

As a customary law jurisdiction, the judiciary are not as constrained by precedent as other jurisdictions and have been willing to develop areas of law in innovative ways to assist in restructuring and insolvency matters. Legislation is also reviewed regularly by various working groups and can be quickly updated where necessary.

Security

What principal forms of security interest are taken over assets in your jurisdiction?

The type of security taken depends on the nature of the assets.

The most common type of security is security over intangible movable property (such as shares, receivables, units in Jersey property unit trusts and bank accounts) which is created by the grant of a security interest under SIL. A Security Interests Register (the "**SIR**") is maintained for security interests granted under SIL. It is usual for a financing statement to be registered against the grantor in order to perfect security granted under SIL, but it is not always necessary.

Security over immovable property is taken by the creation of a hypothec under the ***Loi (1880) sur la propriété foncière***. Although a hypothec can arise by operation of law, it is generally created by registration of an act of court or judgment in the Public Registry in Jersey.

Security over ships and aircraft is created by a mortgage. There is as separate register of ship mortgages and the Jersey aircraft registry allows for the registration of private and corporate aircraft, aircraft engines and aircraft mortgages. It also permits registration of aircraft engine mortgages. The register does not cater for commercial air transport aircraft.

Security over tangible movable property (other than ships and aircraft) can only be taken by way of pledge, which requires physical delivery of the asset and such security is very unusual.

How can those security interests be enforced (and what factors could complicate or prevent this process)?

Security created under SIL may be enforced, without court involvement, by way of:

- appropriation;
- sale (including self-sale);
- taking ancillary actions such as: taking control or possession of the collateral; exercising rights arising from or in connection with the collateral; or instructing any person who has an obligation in respect of the collateral to carry out that obligation.

In addition, the security agreement may provide for additional enforcement remedies, to the extent not in conflict with SIL. Receivers are not part of Jersey law and enforcement must be carried out by the secured party.

The power of enforcement can be exercised once notice of the "event of default" (being the event which gives rise to the right to enforce under the security agreement) has been served on the grantor. Additionally, under SIL a secured party must give 14 days' written notice of an appropriation or sale of collateral to:

- the grantor (although this requirement is almost always waived in the security agreement); and
- any person who, at least 21 days before the appropriation or sale, has either (a) registered a financing statement on the SIR in respect of a security interest in the collateral or (b) given the secured party notice of a proprietary interest in the collateral.

Similar powers of enforcement and requirements on enforcement exist when enforcing security over aircraft as those under SIL. In the case of security over ships, a registered mortgagee may sell the ship or the share in respect of which he is registered.

A hypothec over immovable property does not confer a power of enforcement. A hypothecary creditor must instead place the debtor into an insolvency process in order to realise value from the immovable property. In the case of a creditors' winding up or a ***désastre***, a hypothecary creditor will claim as a priority creditor in the distribution of assets. Alternatively, a hypothecary creditor can apply to have a debtor's property adjudicated renounced and then take the property as the "***tenant après dégrèvement***" in a ***dégrèvement*** (a Jersey law process designed to disencumber immovable property).

Restructuring

Are informal workouts available in your jurisdiction? If so, what forms do they typically take, and what are the benefits and drawbacks as compared to formal restructuring proceedings?

Informal workouts are available and are commonly used. There is no prescribed form of such workouts and no requirement to undertake consensual negotiations before the commencement of a formal process.

Due to the nature of Jersey as an offshore jurisdiction, workouts will generally be coordinated and negotiated in an onshore jurisdiction, where more stakeholders are based. As such, the form of the workout will tend to reflect the prevailing market trends in that onshore jurisdiction, most commonly the UK or the US.

An informal workout will tend to be less costly and may have less commercial risk than a formal procedure. Jersey law, however, does not provide for a rescue procedure or a standalone moratorium on creditor enforcement which can be invoked to provide breathing space while seeking a consensual, contractual restructuring. The court does, however, have wide discretion to make appropriate directions to ensure a formal scheme of arrangement is effectively implemented, which does include granting a stay or a moratorium against legal proceedings and has exercised this in, for example, cross-jurisdictional cases to assist overseas courts which the court considers to have principal jurisdiction.

What formal restructuring proceedings are available in your jurisdiction, and what are the benefits and drawbacks of each?

The principal restructuring procedure is a scheme of arrangement under the Companies Law, which is largely similar to a scheme of arrangement in the UK. There is no equivalent in Jersey to a UK administration or restructuring plan or a US chapter 11 bankruptcy.

A scheme of arrangement is a court-sanctioned compromise or arrangement between a company and its creditors and/or members (or any class of them), which is binding on all affected creditors and/or members if the required approval thresholds are met.

A scheme is not an insolvency process and so may not carry the same stigma as an insolvency process. It can be used for a variety of purposes, including debt for equity swaps or to compromise the claims of creditors or a specific group of creditors.

No automatic moratorium is imposed by a scheme and there is no ability to obtain a standalone moratorium in Jersey. A such, a creditor is not prevented from initiating insolvency procedures while a scheme is pursued (unless some form of standstill has been contractually agreed). The court does, however, have wide discretion to ensure a scheme is effectively implemented, which includes the ability to grant a stay or moratorium against legal proceedings.

There is also an older process known as a ***remise de biens***, which is a suspensory procedure aimed at rehabilitation of a debtor. A ***remise*** is only available to a debtor owning immovable property in Jersey, where the debtor's assets will be sufficient to repay its secured creditors in full and make a distribution to its unsecured creditors (however small). The ***remise*** procedure is only used exceptionally and outside the scope of this guide.

How, by whom and on what grounds are formal restructuring proceedings initiated? What are the main preconditions for success?

A scheme can be commenced by the company, by any creditor or a shareholder of the company or (where the company is being wound up) by a liquidator. A scheme will, however, require the company's support and so most schemes are company initiated.

A scheme must be approved by a majority in number representing 75% in value of each class of creditors or, in a members' scheme a majority in number representing 75% of the voting rights of each class of shareholders and in both cases sanctioned by the court.

The court has a discretion whether to sanction a scheme. It will need to be satisfied that, amongst other things:

- the statutory requirements set out in the Companies Law have been complied with;

- each relevant class of member was fairly represented by those who attended the meeting(s) ordered by the court the statutory majority are acting in good faith and are not coercing the minority in order to promote interests adverse to those whom they purport to represent; and
- the scheme is such that an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve.

What are the effects of the commencement of formal restructuring proceedings, both for the debtor and for creditors?

A scheme does not affect the powers of the company or its directors or impose any automatic moratorium.

Does a moratorium or stay apply and, if so, what is its scope? Are there exceptions?

No, there is no automatic moratorium during a scheme unless the company is already in liquidation.

What process do restructuring proceedings typically follow (including likely length of process and key milestones)?

There is no set timeframe for a scheme in the Companies Law and timing will be driven by the specific circumstances. As Jersey is a small jurisdiction the number of restructuring schemes pursued is limited and so it is difficult to make conclusions as to typical timings.

There are four main stages involved in undertaking a scheme which broadly mirror the process in the UK. These are:

- the first court hearing (known as the convening hearing) at which the applicant seeks an order to call a meeting of the affected creditors and/or members;
- notification of the scheme meeting (including the despatch of scheme documentation);
- the scheme meeting(s) at which affected creditors and/or members vote on the scheme itself; and
- the second court hearing (known as the sanctions hearing) where the court is asked to sanction the scheme.

The scheme will become effective once the act of court approving it is delivered to the Companies Registry for registration, usually within a few days of the sanctions hearing.

What are the roles, rights and responsibilities of the following stakeholders in restructuring proceedings?

(a) Debtor

The debtor will typically propose the scheme and its board of directors will need to approve it.

(b) Directors of the debtor

The directors will remain in control of the debtor company and will need to approve the scheme on its behalf (unless the company is in liquidation). The directors must act in the best interests of the company, meaning its members as a whole where the company is solvent and its creditors where the company is insolvent, with solvency being assessed on a cash flow basis.

(c) Shareholders of the debtor

The role of the shareholders will depend on the nature of the scheme proposed. In a members' scheme shareholders may be compromised. Shareholders owe no duties to the company or its creditors and may act in their own self interests.

(d) Secured creditors

Secured creditors may be compromised by a scheme, provided the required approval thresholds are met and the scheme is sanctioned by the court.

(e) Unsecured creditors

Unsecured creditors may be compromised by a scheme, provided the required approval thresholds are met and the scheme is sanctioned by the court.

(f) Employees

A scheme will not generally involve employees.

(g) Pension creditors

A scheme will not generally involve pension creditors.

(h) Insolvency officeholder (if any)

An insolvency official will not be appointed.

(i) Court

The court will need to approve the convening of the first meeting and sanction the scheme.

Can restructuring proceedings be used to "cram down" and bind dissentient creditors to a transaction supported by other creditors? Are creditors separated into classes for the purposes of voting in the proceedings? What are the relevant voting thresholds? Is "cross-class cramdown" available?

Stakeholders will be separated into classes. Classes will be constituted by those creditors/members whose rights which are not so dissimilar as to make it impossible for them to consult together with a view to their common interest. Class composition will be considered at the convening meeting.

If the required threshold for approval (noted at question 10 above) is met in all classes, all affected creditors and/or members will be bound. Cross-class cramdown is not available. All affected classes must approve the scheme.

Can restructuring proceedings be used to compromise secured debt?

Yes, provided the scheme is approved by all classes and sanctioned by the court.

Can contracts / leases be disclaimed or otherwise addressed through restructuring proceedings?

A scheme can, in principle, be used to amend the terms of a contract.

It is likely that the Jersey court would follow English law in finding that a scheme cannot be used to disclaim or surrender proprietary rights. A lease of more than 9 years, termed a "contract lease", constitutes "***héritage***" under Jersey law and requires an act of the Royal Court to take effect. It is likely that a contract lease could not be disclaimed or surrendered via a scheme. It may also not be possible to use a scheme to modify the terms of a contract lease given the formalities required for passing such a lease, although this has not been tested.

A lease of nine years or fewer does not constitute "***héritage*** " and so it may be possible to use a scheme to disclaim or surrender such a lease or to modify its terms, although this has not been tested before the Jersey courts.

Can liabilities of third parties (e.g. guarantors, professional advisers) be released through restructuring proceedings?

There is no local authority on the point, but we would expect the Jersey court to allow for guarantee liabilities to be released or amended if necessary for successful implementation of the scheme in line with English case law.

Is any protection and/or priority afforded to the providers of new money in the context of restructuring proceedings (i.e. is "DIP financing" available)?

There is no statutory regime for super priority rescue financing similar to DIP financing under the US Bankruptcy Code, but priority could be afforded to providers of new money as part of the terms of the scheme.

How do restructuring proceedings conclude?

The scheme will conclude upon delivery of the act of court sanctioning the scheme to the Companies Registry at which point it will take effect.

Insolvency

What types of insolvency proceeding are available in your jurisdiction, and what are the benefits and drawbacks of each?

The main insolvency procedures are:

- a declaration of ***désastre*** under the Bankruptcy Law; and
- in the case of a company, a creditors' winding up ("**CWU**") under the Companies Law.

A declaration of ***désastre*** under the Bankruptcy Law is granted by the court and is a formal declaration of bankruptcy. A ***désastre*** can be granted against individuals, companies, and incorporated and unincorporated partnerships and is carried out by the Viscount, the executive officer of the Royal Court in Jersey.

There are two types of CWU in Jersey:

- one initiated by a creditor (a "**Court Ordered CWU**); and
- one initiated (rather confusingly) by the shareholders (a "**Shareholder CWU**").

The principal advantage to a creditor of a CWU is that a liquidator is appointed to conduct the winding up rather than the Viscount and is usually selected by the creditors (see question 22 below).

In addition to increased control over the official appointed, a CWU also avoids incurring the fees of the Viscount, who is entitled to claim costs capped at 10% of the value of assets collected in plus 2.5% of assets paid out. In practice, however, the Viscount tends to charge sub-commercial lawyers rates on a time charge basis.

Additional insolvency procedures such as a ***remise de biens***, an adjudication of renunciation and, in the case of a company, a just and equitable winding up may be available, but are uncommon and outside the scope of this note.

There are also additional types of insolvency procedures available for other types of Jersey entities, such as various types of partnership, which are also outside the scope of this note.

How, by whom and on what grounds are insolvency proceedings initiated? Can the instigating party (or any other parties) select the identity of the relevant insolvency officeholder?

Désastre

The debtor, a creditor with a liquidated claim of more than £3,000 or, in the case of foundations and certain regulated entities, the Jersey Financial Services Commission, can apply to the court for an order that a debtor's property be declared en ***désastre***.

The applicant must be able to show that the debtor is insolvent on a cash flow basis, that is, unable to pay its debts as they fall due and that the debtor has realisable assets. In practice, an unpaid debt following an informal demand process is generally treated as evidence of the debtor's insolvency. The application is typically made ***ex parte*** but the court can direct the application to be served on the debtor, often where the debt is uncertain. The court has discretion whether or not to grant a declaration.

If a declaration is made, the ***désastre*** is carried out by the Viscount, the court insolvency official. The Viscount controls the procedure and is responsible for the realisation and distribution of the debtor's assets.

Court Ordered CWU

A creditor with a liquidated claim of £3,000 or more may apply to the court for an order to commence a Court Ordered CWU of a Jersey company. Such application can only be made where:

- the company is unable to pay its debts;
- the creditor has evidence of the company's cash flow insolvency; or
- the creditor has the consent of the company.

A company is deemed to be unable to pay its debts if: (i) the creditor has served on the company a statutory demand in a prescribed form requiring it to pay the sum due; and (ii) the company has failed to pay the sum or dispute the debt due to the reasonable satisfaction of the creditor within 21 days of service of that demand.

Where the court makes an order to commence a Court Ordered CWU, it will also appoint a liquidator (or more than one liquidator), being either a person nominated by the creditor that made the application or a person selected by the court.

The court may appoint a provisional liquidator at any time after an application is made for a Court Ordered CWU which may provide comfort to creditors that company assets will not be dissipated in the intervening period between the initial application and the court order to commence the CWU.

Shareholder CWU

A Shareholder CWU is commenced by the shareholders of a company passing a special resolution resolving for the company to be wound up, where it is insolvent on a cash flow basis. The process is as follows:

- The directors give notice to the company's shareholders to call a general meeting for the purpose of:
    - passing a special resolution for a CWU; and
    - making a recommendation to the shareholders that the company should be wound up.
- The directors make a statement of the company's affairs which is verified by affidavit, and appoint a director to preside over the statutory creditors' meeting.

- At least 14 days before the general meeting, the company gives notice to all creditors of the intention to hold a creditors' meeting and to nominate a liquidator. The creditors' meeting takes place on the same day as, and is usually immediately, after the general meeting.
- At least ten days before the general meeting, the company gives notice in the ***Jersey Gazette*** to all creditors, informing them of the details of the creditors' meeting.
- At the shareholders' meeting there is a vote on a special resolution as to whether the company should enter a creditor's winding up process and if so, who should be proposed to the creditors as the liquidator.
- At the creditors' meeting the creditors receive a statement of affairs of the company and are entitled to vote on the liquidator proposed by the members or propose an alternative, and in default of agreement the matter is referred to the court.

What are the effects of the commencement of insolvency proceedings, both for the debtor and for creditors?

In the case of a ***désastre***, the assets of the debtor vest in the Viscount, subject to all security interests. If the debtor is a company, the directors and shareholders lose control of the company.

In a CWU, the company must cease to carry on its business except so far as necessary for its beneficial winding up. The directors and shareholders lose control of the company and are replaced by the liquidator, with all assets remaining vested in the company.

For creditors, see question below.

Does a moratorium or stay apply and, if so, what is its scope? Are there exceptions?

Yes, if a declaration of ***désastre*** is made or a CWU commenced, no action can be taken or proceeded with against the debtor except (i) in the case of an en ***désastre***, with the consent of the Viscount (in the case of a ***désastre***) or with leave of the court ((ii), in the case of an en ***désastre*** and a CWU)., with leave of the court.

A creditor may still enforce security created under SIL notwithstanding the commencement of insolvency procedures.

In addition, creditors may apply for the moratorium on claims to be lifted in facts specific circumstances and the court has a general discretion to allow claims to be commenced or pursued.

What process do insolvency proceedings typically follow (including likely length of process and key milestones)?

Désastre

After the declaration has been made, the Viscount will seek to realise and then distribute the debtor's assets.

The Viscount will call for claims to be filed within a period of not less than 40 and not more than 60 days after the declaration, subject to a discretion to allow late claims. On realising all of the debtor's property, the Viscount will:

- supply all of the creditors with a report;
- prepare a set of accounts relating to the ***désastre***, which will be made available to the court and the creditors;
- pay the final dividend due to the creditors;
- pay any surplus (if any) to the debtor, or where the debtor is a company, its shareholders.

The time taken for completion of the process is fact specific and there is no statutory limit to the time the process may take, although typically we would not expect it to take more than two years.

CWU

Once a liquidator has been appointed it will supervise and control the CWU, gathering in the company's assets. A liquidator will call for claims to be filed within the same time periods as a ***désastre***.

The duration of the CWU will depend on:

- the complexity of the company's operations;
- the nature of the company's assets and liabilities; and
- whether there are any investigations into the conduct of the company's officers.

A CWU can be completed quickly if all creditors are "on side" from the outset. There is no statutory time limit on the process.

After the affairs of the company are fully wound up, the liquidator will:

- make an account of how the creditors' winding up has been conducted;
- present the account at a general meeting and a meeting of the creditors (giving at least 21 days' notice); and
- within seven days of the meetings, make a return to the Company Registry providing the dates of the meetings. If the company is a public company, the return must be accompanied by a copy of the account.

The company will be deemed dissolved three months from the date of registration of the return by the Company Registry, although the three month period can be extended by order of the court.

What are the respective roles, rights and responsibilities of the following stakeholders during the insolvency proceedings?

(a) Debtor

A debtor is required to aid the Viscount in the realisation of the debtor's property and the distribution of the proceeds amongst the debtor's creditors the utmost of the debtor's power.

(b) Directors of the debtor

Directors' powers will generally cease in a ***désastre*** or a CWU. Directors have a duty to cooperate with the Viscount or liquidator.

(c) Shareholders of the debtor

The role of a shareholder is limited. In a Shareholder CWU, the shareholders will vote to commence the CWU and vote on who should be proposed as liquidator.

(d) Secured creditors

In a Shareholder CWU, the creditors (secured and unsecured) will be given the option to vote on the liquidator to be appointed. In a Court Ordered CWU, the creditor who made the CWU application will be able to nominate a liquidator.

Perfected security granted under SIL will remain valid and enforceable despite the commencement of the ***désastre*** or the CWU and a secured creditor may enforce security granted under SIL.

If a secured creditor does not enforce its security, it will be entitled to be paid out of the proceeds of sale of the secured assets, less the fees of the Viscount or the liquidator incurred in respect of that sale. A secured creditor may prove for any shortfall in the ***désastre*** or the CWU as an unsecured creditor.

(e) Unsecured creditors

Unsecured creditors will need to prove for their debt and will receive a distribution only once all secured and priority creditors have been paid in full.

(f) Administrator

There is no concept of administration in Jersey

(g) Employees

Employment contracts will terminate automatically on a CWU or ***désastre***, although they may be continued by agreement between the liquidator or the Viscount (as applicable) and the employee. Employees are priority creditors for up to six months of arrears of salary plus any outstanding holiday pay and bonuses.

(h) Pension creditors

It is likely that arrears of employer pension contributions will fall within an employee's claim for salary arrears and constitute a priority claim, limited to six months of unpaid contributions.

(i) Insolvency officeholder

In a ***désastre***, the Viscount controls the procedure and is responsible for the realisation and distribution of the debtor's assets. In a CWU, the liquidator will take over the management of the company and is responsible for the realisation and distribution of the debtor's assets.

A liquidator and the Viscount are under a duty to investigate the debtor's affairs and report any misconduct.

(j) Court

The court will consider applications from the Viscount or the liquidator in respect of antecedent transactions or for wrongful or fraudulent trading or for various other orders.

The court retains a general supervisory jurisdiction over the Viscount's conduct of a ***désastre*** and a liquidator's conduct of a CWU and has the power, on application, to appoint or remove a liquidator. Creditors may apply to the court for review of certain decisions of the Viscount or a liquidator.

What is the process for filing claims in the insolvency proceedings?

The process is the same for a ***désastre*** and a CWU.

Creditors must file a proof of debt. The Viscount or liquidator will call for claims to be filed within a period of not less than 40 and not more than 60 days after the declaration of ***désastre*** or the commencement of the CWU, subject to a discretion to allow late claims. No assets other than perishable assets can be sold by the Viscount or liquidator until the period for filing claims has expired. Creditors are entitled to see and examine the proofs of other creditors.

How are claims ranked in the insolvency proceedings? Do any claims have "super priority" and is there scope for subordination by operation of law (e.g. equitable subordination)?

Secured creditors are paid in full (to the extent possible) from the disposal of the secured assets less the costs of and associated with the sale of the assets.

The proceeds of the ***désastre***/CWU will be then applied:

- firstly, in payment of the Viscount or liquidator's fees properly incurred, including the costs of the application process where the court so orders;
- secondly, to the following priority claims which shall rank equally:
    - payment to employees of up to six months of arrears of salary of up to £4,800 per employee and any outstanding holiday pay and bonuses of up to £1,375 per employee;
    - payment of local taxes such as health insurance, social security, income tax, goods and services tax;
    - up to two months arrears of local rent; and
    - payment of local rates for a period not exceeding 2 years.
- thereafter, to all other debts proved in the ***désastre*** or CWU, ***pari passu***.

There is no equitable subordination in Jersey.

What is the effect of insolvency proceedings on existing contracts? Is the counterparty free to terminate? Can they be disclaimed? Will retention of title and set-off provisions in these contracts remain enforceable?

Existing contracts will remain enforceable and a counterparty's termination rights will depend on the specific terms of the contract.

A liquidator or the Viscount may disclaim onerous property within six months of the commencement of the winding up or declaration of ***désastre***. Onerous property is movable property, a contract lease or immoveable property situated outside Jersey that is unsaleable or not readily saleable or is such that it may give rise to a liability to pay money or perform any other onerous act.

In an insolvency, an unpaid seller of goods has a right of retention where the seller remains in possession of those goods and a right of stoppage in transit. A retention of title clause will in principle remain enforceable, but there is a risk it may be re-characterised as the purported grant of security, which is void as security over tangibles can only be created by pledge. This will depend on the specific circumstances.

In addition, under Jersey law a landlord has security rights for unpaid rent over all goods located on rented premises, no matter to whom they belong and including goods subject to a reservation of title, if the tenant's own property is insufficient to discharge its unpaid rent.

There is mandatory set off of mutual debits, credits and other mutual dealings in insolvency. A set-off provision that satisfies the definition in the Bankruptcy (Netting, Contractual Subordination and Non-Petition Provisions) (Jersey) Law 2005 will remain enforceable despite insolvency.

Can transactions entered into by the debtor prior to the insolvency be challenged and set aside? What are the relevant grounds/look-back periods / defences?

The principal grounds for challenging pre-insolvency transactions are in respect of preferences and transactions at an undervalue.

A debtor gives a preference if it does anything or suffers anything to be done that has the effect of putting a creditor or surety of the debtor into a better position in a ***désastre*** or CWU than it would otherwise have been in.

The debtor must have been insolvent at the time the preference was given or become insolvent as result and, in deciding to give the preference, influenced by a desire to put the person into a better position than it would otherwise have been in. Where the preference was given to an associate of or a person connected with the debtor there is a rebuttable presumption that the company was so insolvent and was so influenced.

The look back period for a preference is 12 months from the declaration of ***désastre*** or the commencement of the CWU.

A debtor enters into a transaction at an undervalue with a person if it makes a gift to that person or enters into a transaction with that person on terms for which there is no ***cause*** (similar to consideration), or for a ***cause*** the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the cause provided by the debtor.

A transaction can only be set aside as a transaction at an undervalue if the debtor was insolvent at the time it entered into the transaction or became insolvent as a result of the transaction. If the transaction was entered into with to an associate of or a person connected with the debtor there is a rebuttable presumption that the debtor was so insolvent.

It is a defence to show that the transaction was entered into in good faith for the purpose of carrying on the company's business and at the time it entered into the transaction, there were reasonable grounds for believing that the transaction would be of benefit to the debtor.

The look back period for a transaction at an undervalue is 5 years from the declaration of ***désastre*** or the commencement of the CWU.

Other transactions which may be impugned on the application of the Viscount or a liquidator include where a debtor has entered into extortionate credit transaction or an individual has made excessive pension contributions.

A creditor may also be able to bring an action under customary law, called a Pauline action, to seek to reverse a transfer of property made by a debtor where:

- the debtor was insolvent at the time of the transfer or became insolvent as a consequence of the transfer; and
- the transfer was made with the intention of prejudicing creditors and prejudice has been caused by the transfer.

If the transfer of assets was made for value, then the creditor must also show that the recipient was aware that the real purpose of the transaction was to prejudice creditors.

How do the insolvency proceedings conclude? Can any liabilities survive the insolvency proceedings?

As noted above, in a CWU the company will be deemed dissolved at the end of three months after the registration of the return of the final meetings.

In a ***désastre***, where the debtor is a company it will be dissolved once the Company Registry has been notified of payment of the final dividend.

Where a debtor is an individual, it will remain liable for any debts that are provable in the ***désastre*** until an order of discharge is granted (usually 4 years after the declaration). A debtor will then be released from all debts provable in the ***désastre*** except for any debt or liability:

- incurred by means of fraud or fraudulent breach of trust;
- whereof the debtor has obtained forbearance by any fraud; or
- under a matrimonial maintenance order.

A debtor will remain liable for any liabilities arising as a result of obligations incurred after the declaration of ***désastre*** was granted.

Cross-border / Groups

Can foreign debtors avail of the restructuring and insolvency regime in your jurisdiction?

A scheme and a CWU (both processes under the Companies Law) are only available to Jersey companies.

A foreign debtor's property may be subject to a ***désastre*** if that person:

- has carried on business in Jersey in the three years preceding the application for a ***désastre***; or
- owns immovable property situate in Jersey.

A foreign debtor who owns immovable property in Jersey could, in theory, be subject to older (and less common) insolvency procedures such as a renunciation and a subsequent dégrèvement.

Has the UNCITRAL Model Law on Cross Border Insolvency or the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments been adopted or is it under consideration in your country?

No, but the Jersey courts may have regard to the UNCITRAL Model Law on Cross-Border Insolvency when ruling on restructuring or insolvency matters.

Under what conditions will the courts in your jurisdiction recognise and/or give effect to foreign insolvency or restructuring proceedings or otherwise grant assistance in the context of such proceedings?

There is no automatic recognition of foreign insolvency or restructuring proceedings. Applications for recognition can be made:

- under Article 49 of the Bankruptcy Law in the case of certain prescribed countries being the UK, Guernsey, the Isle of Man, Australia and Finland; or
- under the court's inherent jurisdiction in the case of non-prescribed countries.

Article 49 of the Bankruptcy Law provides the court with a statutory power to provide assistance to the courts of a prescribed country in all matters relating to insolvency, including the ability to apply the insolvency law of the foreign jurisdiction.

For non-prescribed jurisdictions, the court can provide assistance under its inherent jurisdiction and applications will be considered on a case-by-case basis, with regard to the principles of comity.

In practice, there is little difference between the approach of the court on applications made under Article 49 or under its inherent jurisdiction. Applications for the recognition of foreign insolvency officials are predicated on the issue of a letter of request from the court in the foreign jurisdiction. Although the recognition is a discretionary matter, the court is typically willing to assist foreign insolvency officials.

To what extent will the courts cooperate with their counterparts in other jurisdictions in the case of cross-border insolvency or restructuring proceedings?

As noted above, the court has a statutory and inherent jurisdiction to provide assistance to courts in foreign jurisdictions and will generally seek to cooperate.

Applications for assistance are commonplace with orders typically seeking recognition of foreign office holders, disclosure of assets and/or documents, examination of witnesses, gagging orders or freezing orders.

In particular, it is relatively common for insolvent Jersey companies with their COMI in the UK to be placed into a UK administration and for the administrator to then seek recognition under Article 49 of the Bankruptcy Law. Conversely, the Jersey court has also issued letters of request to the English Court to place a Jersey company which does not have its COMI in the UK into an administration where creditors' interests would be better served by an administration than a Jersey process.

Cooperation is at the discretion of the court. The willingness on the part of the foreign jurisdiction to show reciprocity and comity to Jersey and the appropriateness of that jurisdiction's bankruptcy and associated legislation will be of relevance when considering whether to grant assistance, as will the effect on local creditors.

How are corporate groups treated in the context of restructuring and insolvency proceedings? If there is no concept of a group proceeding (or consolidation), is there any regime through which insolvency officeholders must / may cooperate?

There are no specific provisions in Jersey law for the restructuring and insolvency of group companies. Under Jersey law, each company is considered a separate legal entity and its directors (or its insolvency official) must consider the interests of the creditors of that specific company.

However, the Jersey court has previously ordered a pooling of assets and liabilities of connected companies in both a ***désastre*** and a CWU where it was shown to be in the best interests of creditors and just and equitable to do so (such as where there has been an inextricable intermingling of funds).

Is your country considering adoption of the UNCITRAL Model Law on Enterprise Group Insolvency?

Not currently.

How is the debtor's centre of main interests determined in your jurisdiction?

Jersey is not a party to the EU Insolvency Regulation and there is no concept of "centre of main interests" under Jersey law./the Bankruptcy Law or the Companies Law.

How are foreign creditors treated in restructuring and insolvency proceedings in your jurisdiction?

Foreign creditors have the same rights in proceedings as local creditors. However, foreign tax claims and foreign claims of a penal nature are not enforceable.

Liability risk

What duties do the directors of the debtor have when the company is in the "zone of insolvency" (or actually insolvent)? Do they have an obligation to commence insolvency proceedings at any particular time?

Directors owe a duty to act honestly and in good faith with a view to the best interests of the company and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances act. Where a company is solvent the best interests of the company means the interest of its members as a whole.

Following the recent UK Supreme Court decision in ***Sequana*** (which would be persuasive in Jersey), where a company is insolvent or bordering on insolvency, or an insolvent winding up is probable, the directors' duty to act in good faith in the interests of the company should be understood as including the interests of its creditors as a whole.

The greater the company's financial difficulties, the more the directors should prioritise creditors' interests and where an insolvent winding up is inevitable, creditors' interests become paramount as the members cease to retain any valuable interest in the company.

There is no obligation to commence insolvency proceedings at any particular time, but directors must consider their duty to the company's creditors and will also be wary of potential liability for wrongful trading (see answer to question 41 below).

Are there circumstances in which the directors could incur personal liability in the context of a debtor's insolvency?

In the event of an insolvency, a director may incur personal liability:

- for wrongful trading. A director of a company may be liable, without limitation, for the debts or other liabilities of the company incurred after the director then knew that there was no reasonable prospect that, or was reckless as to whether, the company would avoid a CWU or a declaration of ***désastre***. It is a defence, however, for a director to show that he took reasonable steps with a view to minimising the potential loss to the company's creditors;
- for fraudulent trading. If any business of the company was carried on with intent to defraud its creditors or creditors of another person, or for a fraudulent purpose, a director (or any other person) who was knowingly party to the carrying on of the business in that manner could be liable to make such contributions to the company's assets as the court thinks proper;
- for a breach of duty which caused loss to the company; and
- in respect of a purchase or redemption of shares made unlawfully within the 12 months preceding the declaration/ commencement of the CWU.

In addition, a director may be disqualified from acting as a director if it is found that his conduct makes him unfit to be concerned in the management of a body corporate and can incur criminal liability in certain circumstances.

There are also various offences relating to insolvency in respect of which a director may be guilty, but which are outside the scope of this note.

Is there any scope for any other party to incur liability in the context of a debtor's insolvency (e.g. lender or shareholder liability)?

A director is defined in the Companies Law as "a person occupying the position of director, by whatever name called" and a person acting as a ***de facto*** director will be subject to the potential liabilities of a director.

Shareholders may be liable to contribute to a company's assets up to the amount unpaid on their shares (or the amount of their guarantee in a guarantee company). A shareholder may also be liable to repay any distributions received by it if they knew or had reasonable grounds for believing it was made unlawfully. A shareholder who received a payment for an unlawful share redemption or share buy back in the 12 months preceding the declaration of ***désastre*** or commencement of the CWU may be liable, in certain circumstances, to contribute to the assets of the company an amount not exceeding the amount of the unlawful payment received by that shareholder.

A lender may be required to repay amounts received from a company where the payment is found to have constituted a preference or the transaction found to have been an extortionate credit transaction (see answer to question 30 above for more details).

The COVID-19 Pandemic

Did your country make any changes to its restructuring or insolvency laws in response to the COVID-19 pandemic? If so, what changes were made, what is their effect and are they temporary or permanent?

No. The government introduced various initiatives to combat the pandemic such as the Coronavirus Government Co-funded Payroll Scheme, the Business Disruption Loan Guarantee Scheme and the Jersey COVID-19 Special Situations Fund, but there were no noted changes to the restructuring or insolvency laws.

Other

Is it possible to effect a "pre-pack" sale of assets, and is it possible to sell the assets free and clear of security, in restructuring and insolvency proceedings in your jurisdiction?

There is no equivalent to a UK administration in Jersey and so it is not possible to pre-arrange a sale with an administrator as it would be in the UK.

The Jersey court has, however, allowed the just and equitable winding up procedure to be used to effect a pre-pack sale of a company's business as a going concern. Although this is an evolving area of law, it shows the willingness of the Jersey use its powers innovatively to find pragmatic solutions in insolvency matters.

Is "credit bidding" permitted?

There is no concept of credit bidding under Jersey law, but it is not prevented.

In the case of assets secured under SIL, a secured party may appropriate those assets or sell them to a nominee or connected party, but it will need to take all commercially reasonable steps to determine the fair market value of the assets and apply that amount against the outstanding debt. The secured party will therefore need to demonstrate a thorough valuation procedure has been followed.

Trends and predictions

How would you describe the current restructuring and insolvency landscape and prevailing trends in your jurisdiction? Are any new developments anticipated in the next 12 months, including any proposed legislative reforms?

Jersey companies have remained a popular choice for holding entities and bidcos in debt for equity swaps due to the flexible companies law and lack of stamp taxes on the transfer of shares. We have also noticed an increased use of Jersey vehicles as holding entities or warehousing vehicles in enforcements and other financial restructurings.

The Court Ordered CWU regime was introduced on 1 March 2022 to allow a creditor to initiate a winding up. Previously, the only creditor initiated insolvency process in common use was a ***désastre***. Changes were also introduced to the eligibility criteria for appointment as a liquidator to allow, amongst other things, non-Jersey residents to be appointed as liquidator jointly with a Jersey resident liquidator, provided they meet certain qualification requirements. This will enable creditors and the court to draw on resources and expertise that may not otherwise be available in Jersey.

The Jersey courts have shown a willingness to adapt the just and equitable winding up regime to assist in insolvency and restructuring matters, including cross border restructurings. Given the current economic climate, it seems likely that this area of law may be further developed as the number of distressed companies increases.

Tips and traps

What are your top tips for a smooth restructuring and what potential sticking points would you highlight?

Early engagement with stakeholders is key. Given that Jersey law does not provide for a rescue procedure akin to administration or a stand-alone moratorium, cooperation from stakeholders is vital to facilitate a restructuring.

Seeking professional advice at an early point is generally advisable. Although this may incur unwanted costs, it is likely to lead to efficiency savings in the long run.

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