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RESTRUCTURING AND INSOLVENCY

Restructuring and Insolvency in Jersey: Overview

Peter German and Marcus Pallot, Carey Olsen

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FORMS OF SECURITY

1. What are the most common forms of security granted over immovable and movable property? What formalities must the security documents, the secured creditor or the debtor comply with? What is the effect of non-compliance with these formalities?

Immovable property

Common forms of security and formalities. The form of security granted over immovable property is a hypothec. This is a registered encumbrance which attaches to either a:

- Freehold property.
- Contract lease (that is, a lease of more than nine years registered with the Royal Court of Jersey (Court)).
- An undivided share of freehold property or a contract lease owned in common (as opposed to jointly).

A hypothec is attached to either specific property or all the debtor's real property assets at the time of registration.

There are two main types of hypothec:

- ***Hypotheque judiciaire* (HJ).** This is created by registering an obligation with the Public Registry (*see below*). The obligation can take the form of a:
  - promissory note;
  - bond; or
  - judgment debt, including a consensual judgment debt.

  The Public Registry (*Le Registre Public*) is a register open to public inspection of (among other things) almost all immovable property transactions in Jersey. It was established by Act of the States of Jersey (that is, the Jersey Parliament) in 1602. It is administered by the Judicial Greffe.
- ***Hypotheque conventionnelle simple* (HCS).** The creation of an HCS usually only occurs in two circumstances:
  - when a property is sold and part of the purchase price is not paid to the seller but remains outstanding as an encumbrance on the property, representing the debt owed to the seller by the purchaser;
  - when the terms of borrowing in a real property transaction, with provision for security, are otherwise sworn to before the Court. The terms of borrowing are therefore available for public inspection at the Public Registry, which can make an HCS unattractive for commercial or complex lending.

  The HCS is itself immovable property, but an HJ is not.

The formalities for creating a consensual HJ, and an HCS, are as follows:

- **HJ.** An HJ requires:
  - signature by or on behalf of the debtor or guarantor of a document which acknowledges the amount borrowed or the maximum obligation under a guarantee; and
  - registration at the Public Registry.

  By convention, the document is admitted to the Public Registry on a Friday, between 2.30 pm and 4.00 pm. Failure to register the document means that no HJ has been created. Subsequent registration will create the HJ, but priority will be lost if other hypothecs are created in the interim.
- **HCS.** This is created by:
  - swearing to a contract before the Court which contains the terms of the borrowing and provides for the security; and
  - registering the contract at the Public Registry. As for an HJ, registration is essential for the creation of an HCS and priority will be lost if another HCS is created before registration.

Effects of non-compliance. An HJ, or HCS, will not be created unless either the document (in the case of an intended HJ) or contract (in the case of an intended HCS) is registered with the Public Registry (*see above*).

Movable property

Common forms of security and formalities. These are as follows:

- **Tangible movable property.** A pledge is the only form of security that can be taken over tangible movable property.
- **Ships and aircraft.** Ships have a separate register of mortgages. The Jersey aircraft registry (JAR) 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.
- **Intangible movable property.** Security can be created over intangible movable property (such as shares, units in property unit trusts, and bank accounts) by creating a security interest.

There are two other forms of security/quasi-security over movable property:

- **Liens.** Contractual liens most commonly take the form of:
  - a banker's lien over property in a lender's possession; and
  - a lien of a company over its shares for amounts unpaid on that share, as set out in the company's articles of association (articles).

- **Set-off.** Set-off can be used to create quasi-security (*see Question 4, Set-off of obligations*).

A pledge must be created through physical delivery of the property by the debtor and retention of the property by the creditor. In the event of default by the debtor, the creditor can either retain or sell the asset.

A security interest is created pursuant to a security interest agreement, which must be in accordance with the Security Interests (Jersey) Law 2012 (Security Interests Law).

Under the Security Interests Law, security may be created over specified intangible movable assets (such as shares, bank accounts, securities accounts, other Jersey-situs contract rights), or alternatively, security may be granted over all present and after-acquired intangible movable property.

For a security interest to be valid, the security interest must attach to the collateral, and in order to be valid against third parties and not void against the Viscount or a liquidator and creditors in an insolvency, it must also be perfected.

A security interest attaches to collateral when the following three conditions are satisfied:

- Value must have been given in respect of the security agreement.
- The grantor of the security interest must have rights in the collateral or the power to grant such rights to the secured party.
- One or both of the following are satisfied:
  - the secured party has possession (in the case of negotiable instruments or negotiable investment securities) or control (in the case of bank accounts, securities and securities accounts) of the collateral; and/or
  - the security agreement is in writing, signed by the grantor and contains a description of the collateral sufficient to enable it to be identified.

A security interest is perfected by possession, control (the same step as above for attachment to occur) or registration of a financing statement in the on-line Jersey register (although there are exceptions as to automatic perfection and trustees that are not trustees of prescribed unit trusts are exempt from the registration provisions of the law). Possession only perfects a security interest in a documentary intangible. Control that perfects a security interest in securities (that is securities represented by a certificate and not bearer securities) means the secured party is either:

- Registered as the holder of the securities.
- In possession of the certificate.

Control that perfects a security interest in a bank account means any one of the following:

- The account is transferred into the name of the secured party with written agreement of the grantor and deposit bank.
- The grantor, secured party and the deposit bank agree in writing that the deposit bank will comply with instructions from the secured party as to disposition of funds.
- The account is assigned by way of security to the secured party by instrument in writing by the grantor and notice of the assignment is given in writing to the deposit bank.
- The secured party is also the deposit bank with which the account is held.

Control that perfects a security interest in an investment securities account means:

- The securities account is transferred into the name of the secured party with the written agreement of the grantor and the intermediary/broker with whom the account is held.
- The grantor, secured party and the intermediary agree in writing that the intermediary will comply with instructions from the secured party as to disposition of securities credited to the securities account.
- The secured party is also the intermediary with which the securities account is held.

Effects of non-compliance. For tangible movables: failure to comply with any of the above formalities for creation of a pledge renders the security void *ab initio* (in the sense that no security is created).

For intangible movables: Failure to comply with the requirements for attachment of a security interest means that no security interest is ever created. Failure to comply with any of the requirements for perfection (unless the above trustee exemption applies) means that the security will give rights only against the grantor, will not be enforceable against a third party and is void in insolvency against a creditor, liquidator or the Viscount (the insolvency officer of the Royal Court of Jersey).

CREDITOR AND CONTRIBUTORY RANKING

2. Where do creditors and contributories rank on a debtor's insolvency?

The two most frequently used processes are (*see Question 7*):

- *Désastre*, where the Viscount of the Royal Court of Jersey (Viscount) is appointed by the Court to administer the bankrupt's estate for the benefit of creditors.
- Creditors' winding-up, where the company's shareholders resolve to wind it up.

The process of *dégrèvement* (*see Question 7*) has its own set of rules in relation to the priority of creditors on enforcement. *Dégrèvement* is a process limited to the disencumberment of the immovable property of a bankrupt to enforce secure lending obligation or judgment debts whereas *désastre* is a more general insolvency process.

Order of priority

The order of priority is essentially the same as follows:

- Fees of the Viscount or the liquidator. This includes costs, charges and expenses (though the formal scope of the fees for a liquidator is slightly different from the fees of the Viscount in a *désastre*).
- Debtor's employees. This is for arrears of wages for up to six months before the declaration of *désastre*/commencement of the creditors' winding up. Employee holiday pay and bonuses are also included.
- Taxes, rent and rates. Payments include health insurance, social security, income tax, goods and services tax, rental arrears and parochial rates.
- All other debts proved in the *désastre*/creditors' winding up, which rank *pari passu*.

On a company's dissolution, the remaining monies, if any, are distributed among the shareholders. A shareholder can claim as a creditor in respect of a shareholder loan made by it.

Secured creditors

Creditors with security interests in immovable property are entitled to payment out of from the proceeds of sale of the property to which their security (*hypothec*) relates, minus the costs, fees and charges incurred in the sale (*see Question 1, Movable property*).

A creditor holding a pledge over tangible movable property can retain or sell the asset (*see Question 1, Immovable property*).

Secured creditors who have a security interest granted under the Security Interests Law in respect of the debtor's property are entitled to appropriate collateral or take the proceeds of sale of the collateral. The secured party can apply the proceeds of sale or value of appropriated collateral to discharging the secured obligations and can deduct its reasonable costs incurred in and incidental to (for example, conducting a valuation) the appropriation or incurred in or incidental to taking possession or control of, holding, valuing and preparing for sale and selling the collateral. The surplus, if any, is paid in the following order, to:

- Discharge any subordinate security interest that is perfected by registration.
- Any other person who gave the secured party notice that he claims an interest in the collateral and the secured party is satisfied that he has a legally enforceable interest.
- The grantor.

Rather than distributing any surplus, a secured party can elect instead to pay the surplus into court.

All secured creditors are treated in accordance with the three sets of rules outlined above. Their security assets are not available to general creditors, except to the extent of any surplus proceeds. The priority of repayment between secured creditors is determined by the date of the hypothec (date of registration) or the priority position attributable to the security interest agreement, subject to any contractual subordination. The priority rules are reversed under the *dégrèvement* process (*see Question 7*).

As to the priority position of security interests under the Security Interests Law, there are general rules of priority that provide that:

- Perfected security has priority over unperfected security.
- Priority among perfected security interests in the same collateral goes to the security interest that was perfected first.
- Priority among unperfected security interests in the same collateral is determined by order of attachment.

Special priority rules apply in the case of collateral comprising certificated securities, bank accounts and investment securities accounts. These include that:

- Security taken by a deposit bank in an account held with that deposit bank takes priority over any other security interest, unless that other security interest is created by having the account transferred into the name of the other secured party. The same rule applies in the case of a securities account and an intermediary.
- Subject to the above, security perfected by control or possession trumps security in the same collateral perfected only by registration, so for those asset types where control or possession can be obtained, it should be obtained.

For the application of set-off, see *Question 4, Set-off of obligations*. This gives priority to a creditor to the extent of the set-off that is mandatory or allowed.

Foreign security

Jersey law does not prescribe rules for prioritising holders of security created under foreign law over foreign situs assets on insolvency. Their entitlement is a matter of foreign law, but duly constituted foreign law security is recognised in a Jersey insolvency. UK real property is an example commonly met in Jersey of foreign situated assets.

In practice, the way in which the holder of foreign security, or a receiver appointed by them, proceeds in the event of a Jersey insolvency depends on the circumstances, including whether the secured party will want to claim in the Jersey insolvency for an unsecured amount. The Court will generally recognise UK administrators and on one occasion recognised a fixed charge receiver albeit in extraordinary circumstances.

In a *désastre*, all the assets of the debtor vest in the Viscount, subject to any security obligations. If the debtor has granted title security, so that the secured party holds title to the secured property, that property is no longer an asset of the debtor.

In a creditors' winding up, the liquidator sits in the shoes of the insolvent company's directors. The assets do not vest in the liquidator, but only the liquidator can deal with the property of the company. The existence and terms of any security interests are unaffected.

For more information on the *désastre* and creditors' winding-up procedures, see *Question 7*.

By the Powers of Attorney (Jersey) Law 1995, powers of attorney granted in support of security, under foreign law as well as under a Jersey security interest agreement, survive insolvency.

UNPAID DEBTS AND RECOVERY

3. Can trade creditors use any mechanisms to secure unpaid debts? Are there any legal or practical limits on the operation of these mechanisms?

In a contract for the sale of specific goods, the seller can attempt to secure unpaid debts by using a retention of title clause. The seller can expressly retain a right of disposal until the buyer meets certain conditions (*Article 44, Supply of Goods and Services (Jersey) Law 2009 (SOGAS)*). In the following cases the seller may retain possession of goods which are the subject of a contract for sale until the buyer has paid in full:

- The goods have been sold without any stipulation as to credit.
- The goods have been sold on credit but the term of credit has expired.
- The buyer becomes insolvent (*Article 70, SOGAS*). In this situation the unpaid seller has a right to stop the goods in transit and resume possession, and retain them until payment (*Article 73, SOGAS*).

However, if the seller does not have actual possession of the goods, or the goods cannot easily be ascertained, the seller should proceed with caution when relying on such a clause. An unpaid seller of goods loses his right of retention if:

- He or she delivers the goods to a carrier or depositee for transmission to the buyer and does not reserve a right of disposal.
- The buyer or his or her agent lawfully obtains possession of the goods.
- He or she waives the right of retention

(*Article 72, SOGAS.*)

Articles 74 and 75 of SOGAS provide detailed rules on the duration of transit and how stoppage in transit is effected. An unpaid seller's right of retention or stoppage in transit is not affected by a buyer selling or otherwise disposing of the goods, unless the seller has consented to the sale or disposal (*Article 76, SOGAS*). An unpaid seller's rights can, however, be defeated or overridden where a document of title has been lawfully transferred to a buyer or owner, and that person transfers it to a person who takes it in good faith.

4. Can creditors invoke any procedures (other than the formal rescue or insolvency procedures described in *Question 6* and *Question 7*) to recover their debt? Is there a mandatory set-off of mutual debts on insolvency?

Compromise agreements

A company can enter into a compromise agreement with its creditors and shareholders, subject to specified majority votes (*Article 125, Companies Law, with a similar provision at Article 167*). The Court can approve a compromise agreement and, if so, a copy of the Act of Court (that is, court order) must be filed with the Jersey Companies' Registry (Registry).

A private law contractual compromise agreement can also be binding outside of the Companies Law framework. However, in the absence of 100% creditor consent, these agreements may be liable to be set aside on a bankruptcy as being preferences (*see Question 10*).

Basic debt recovery

For basic debt recovery and enforcement, a creditor can obtain judgment from either the:

- Petty Debts Court, for claims excluding costs and interest of GBP30,000 or less (and for any proceedings as to cancellation of a contract of lease of immovable property if the annual rent does not exceed GBP45,000).
- Royal Court, for claims excluding costs and interest of more than GBP30,000.

A creditor can enforce the judgment by lodging it with the Viscount. The powers available to the Viscount by way of execution include:

- Arranging seizure of the debtor's wages directly from the employer. This can only be implemented if the debtor is an employee. It is not possible to seize the debtor's earnings if the debtor is self-employed.
- The seizure of any valuable assets from the debtor and arranging for those assets to be sold at a public auction. The proceeds are used to pay off the judgment debt, less the Viscount's costs.

A judgment creditor is entitled as of right and without further process to have a judgment for a liquidated sum registered against the title to Jersey immovable property owned by the debtor which can be enforced as a *Hypotheque Judiciaire* (*see Question 1*).

Set-off of obligations

Article 34 of the Bankruptcy (*Désastre*) (Jersey) Law 1990 (*Désastre* Law) provides for the mandatory set-off of sums due from one party to another at the date of the declaration of *désastre* (*see Question 7, Désastre*). The equivalent set-off of sums due on the commencement of the creditors' winding up is provided in Article 166 of the Companies Law. A set-off creditor has priority to the extent of the mandatory set-off.

A creditor may also exercise contractual set-off rights. To the extent the terms of the relevant agreement fall within the scope of the statute, these rights are given a privileged status by the Bankruptcy (Netting, Contractual Subordination and Non-Petition Provisions) (Jersey) Law 2005 (Netting Law).

Foreign element

For details of the position of foreign creditors and international rules, see *Question 2* and *Question 13*.

STATE SUPPORT

5. Is state support for distressed businesses available?

There is no general scheme of financial support for distressed businesses. However, organisations such as the Citizens Advice Bureau offer free and confidential advice on the options available to businesses in distress.

Furthermore, the States of Jersey have introduced certain specific and targeted support schemes for employers and businesses, charities, sole-traders and partners in the wake of the COVID-19 pandemic. It established a business disruption loan guarantee scheme which is part guaranteed by the government. In addition, certain deferrals of social security and goods and services tax payments have also been made available to local businesses.

RESCUE AND INSOLVENCY PROCEDURES

6. What are the main rescue/reorganisation procedures in your jurisdiction?

There is no codified statutory or customary corporate rescue process in common use.

It has been possible to use the "just and equitable winding-up" (J&E) jurisdiction under the Companies Law in certain limited circumstances. However, this is a continually evolving area of law without consistent jurisdiction.

There is also an older process under the *Loi (1839) Sur Les Remises des Biens* and named *remise de biens* that may be afforded by the Court to temporarily embarrassed debtors.

Objective. J&E: the objective is to wind up the company with the possibility of the appointed liquidators selling parts of the business and assets as a going concern.

Remise: the objective is to repay in full the creditors holding security interests in the debtor's Jersey *situs immoveable* (real) property (including lease interests held which are for a term in excess of nine years), with any surplus then distributed to the unsecured.

Initiation. J&E can be initiated by application from the company, a shareholder of the company or one of its directors.

Remise is initiated upon application by the debtor.

Substantive tests. J&E: there is no specific statutory test, although the court must be satisfied that it is just and equitable in all the circumstances.

Remise: the debtor must have an interest in Jersey situs immoveable property and there must be a real prospect that at least the secured creditors will be paid in full.

Consents and approvals. J&E and *remise*: both are discretionary remedies only available on application to the Court.

Supervision and control. With a J&E, the court can elect to appoint a liquidator of its choosing, direct the manner in which the winding-up is to be conducted, or make such orders as it sees fit to ensure that the winding-up is conducted in an orderly manner.

As the *remise* is a discretionary remedy, it is conducted with the Court's supervision. However, the Court will typically appoint two *Autorises* from among its *jurats* (finders of fact) to assess the appropriateness of the *remise*, who will conduct their examination and, if endorsed by the Court, ultimately sell, lease and/or dispose of the debtor's property. The debtor's property does not, however, vest in the *Autorises*.

Protection from creditors. J&E: The terms of the appointment are not prescribed but it is common for orders to be made prohibiting collateral creditor actions without the leave of the Court.

Remise: Enforcement is prevented in practice as the debtor's assets are placed into the hands of the Court as a quasi-trustee.

Length of procedure. J&E: there is no set timetable.

Remise: the process generally takes six months can be customarily extended to 12 months if required.

Conclusion. J&E: the process is typically concluded by a further Court order, but as may otherwise be set by the Court.

Remise: the process is concluded upon satisfaction of the secured creditors' claims and payment of any dividend to the unsecured, but if this is completed within 12 months the process automatically converts to a voluntary cession (foreclosure of the debtor's estate for the benefit of creditors without the prospect of any surplus being paid to the debtor).

7. What are the main insolvency procedures in your jurisdiction?

Désastre

Objective. A declaration of *désastre* (strictly, a declaration that a person's property is *en désastre*) under the Désastre 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. The purpose of the declaration is to collect in and liquidate the debtor's assets for the benefit of its creditors as appropriate, including settling claims.

Initiation. If the debtor has realisable assets, a debtor or a creditor with a liquidated claim of more than GBP3,000, can apply ex parte to the Court having given 48 hours' notice to the Viscount.

There are no specific consents and approvals required, except for the requirement that the declaration be made by the Court, which has discretion whether or not to make the declaration.

Substantive tests. The Court has discretion whether or not to grant a declaration in respect of the debtor (*Désastre Law*). A declaration will only be granted if the Court considers it just and equitable to do so when the application is made by Jersey Financial Services Commission. The applicant must be able to show that the debtor is insolvent on a cash flow basis, that is, being unable to pay its debts as they fall due.

A declaration of *désastre* under the Désastre Law does not require a balance sheet test, however a debtor may apply to recall the declaration if it can pay the claims in full, such as where, for example, the debtor is cash flow but not balance sheet insolvent.

Consent and approvals. A *désastre* can only be granted by the Court.

Supervision and control. The Viscount controls the procedure and is responsible for the realisation and distribution of the debtor's assets. The Court retains a general supervisory jurisdiction over the Viscount's conduct of a *désastre* which is actionable on application by debtors and creditors.

Protection from creditors. A creditor with a claim that is provable in the *désastre* cannot:

- Seek any other remedy against the debtor.
- Commence or, without the consent of the Viscount or leave of the Court, continue any other actions for recovery against the debtor (*Article 10, Désastre Law*), provided that nothing in Article 10 prevents a secured party enforcing a security interest agreement under the Security Interests Law without the consent of the Viscount.

Length of procedure. The debtor will be discharged from the *désastre* after four years, although that may be varied on application by the Viscount, the debtor or the creditor. The désastre continues until the assets are distributed, which cannot commence less than three months after the order for a matrimonial home or 40 days for movable property (unless they are perishable) or other immovable property.

Conclusion. On realising all of the debtor's property, the Viscount must:

- 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 Viscount must apply for the order of discharge typically after four years although this may be varied on application. Undistributed property remains vested in the Viscount after discharge. Upon discharge an individual debtor ceases to be liable for any debts provable in the désastre other than debts incurred by fraud, fraudulent breach of trust or under matrimonial finance obligations.

If the debtor is a company, the Viscount must notify the Registrar of Companies (Registrar) of the date the final dividend is paid. On receipt of that notice, the Registrar files a notice of dissolution in respect of the company.

Creditors' winding-up

Objective. The purpose of this procedure is to wind up the company by collecting and realising the company's assets for the benefit of creditors as appropriate, including settling claims, but not at the instigation of creditors.

Part 21, Chapter 4 of the Companies Law sets out the procedure for a creditors' winding-up.

Initiation. A creditors' winding-up is commenced when the shareholders pass a special resolution resolving to enter that process. If a declaration of *désastre* has been granted and has not been recalled, a creditors' winding up can only be commenced with leave of the Court.

The following steps are required in the following order:

- The directors must give notice to the company's shareholders to call a general meeting for the purpose of:
  - passing a special resolution for a creditors' winding-up; and
  - making a recommendation to the shareholders that the company should be wound up.
- The directors must make a statement of the company's affairs which must be verified by affidavit, and appoint a director to preside over the statutory creditors' meeting.
- At least 14 days before the general meeting, the company must give postal 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 must give notice in the *Jersey Gazette* to all creditors, informing them of the details of the creditors' meeting.
- At the members' 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.
- If the special resolution is passed, a notice must be published in the *Jersey Gazette* within 14 days of the general meeting, stating that the special resolution has been passed and the identified liquidator appointed.
- Within 14 days of his appointment, the liquidator must notify the following of his appointment:
  - the Registrar;
  - the company's creditors.

Substantive tests. A creditors' winding-up is available if both:

- The shareholders resolve that it is appropriate for the company to be wound up.
- The directors cannot sign a statement of solvency in the form prescribed by the Companies Law for a summary (solvent) winding up.

Consent and approvals. The process can only be commenced by the members of the company voting by special resolution (two-thirds majority) or as otherwise provided for in the articles of association.

Supervision and control. The effect is a declaration of bankruptcy under Jersey law. The company must cease to carry on its business except so far as necessary for its beneficial winding up. The directors and shareholders lose their powers to direct the company and are replaced by the liquidator (unless and to the extent that any liquidation committee, or if none, the creditors, authorise the directors to continue exercising their powers). The liquidator or liquidation committee supervises and controls the winding up. The liquidator can make an application to the Court for directions.

Protection from creditors. No action can be taken or proceeded with against the company once a creditors' winding up has commenced, unless leave is obtained from the Court (*Article 159(4), Companies Law*).

Length of procedure. The time of commencement and timing of the subsequent steps in the process are set out in the Companies Law. The duration of the post appointment procedure depends on:

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

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

Conclusion. After the affairs of the company are fully wound up, the liquidator must:

- 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).

Within seven days of the meetings, the liquidator must make a return to the Registrar, in a non-prescribed form document providing the dates of the meetings. If the company is a public company, the return must be accompanied by a copy of the account.

On receipt, the Registrar will register the return (and account where appropriate).

The company is deemed dissolved three months from the date of registration by the Registrar. The three month period can be extended by order of the Court.

Just and equitable winding-up

Objective. The Companies Law provides at Article 155 that the Court can wind up a company, whether solvent or insolvent, if it is just and equitable to do so, or on application by the Minister/Regulator if it is in the public interest (*Part 21, Chapter 3, Companies Law*) (*see below, Substantive tests*).

Initiation. A just and equitable winding-up can be commenced by:

- The company.
- Any director of the company.
- Any company shareholder.
- The Minister for Economic Development (Minister).
- The Jersey Financial Services Commission (JFSC).

If the winding up is commenced by the company, the Court is likely to require that it does so following a resolution of its members. However, an individual director or shareholder does not need any special consent to make the application.

Once the Court has ordered a just and equitable winding up, the Act of Court must be registered with the Registrar within 14 days.

Substantive tests. The Court will only make an order for a company to be wound up where no declaration under the Désastre Law has been granted and it is satisfied that it is either:

- Just and equitable to do so.
- Expedient in the public interest to do so (only the Minister or the JFSC can make an application on these grounds).

(*Article 155, Companies Law.*)

Consent and approvals. The process can only be approved by the Court.

Supervision and control. A just and equitable winding-up is supervised by the Court. Under Article 155 of the Companies Law, the Court has the power to:

- Direct the manner in which the winding up is conducted.
- Make such orders as it sees fit to ensure the orderly winding up of the company.
- Appoint a liquidator.

The directors or liquidator can only act in a way that has been specified directly by the Court. If it is beneficial to the company and its creditors, the Court may permit the company to continue trading, even if the company is unable to pay its debts as they fall due.

Protection from creditors. The Court has discretion to make any orders it sees fit including orders equivalent to what Article 159(4) of the Companies Law provides (*see above, Creditors' winding-up: Protection from creditors*). There is no guarantee it will do this, but there are strong public policy reasons why a moratorium would be imposed.

Length of procedure. As with a creditors' winding-up, a just and equitable winding up can be completed quickly. However, each case must be considered on its own merits.

Conclusion. The Court will require the directors or any liquidator to ensure that the affairs of the company are wound up appropriately and that the company is dissolved. The Court will typically ensure that the commencement order contains a provision for dissolution.

Dégrèvement/réalisation

Objective. *Dégrèvement* is a process for enforcement of secured lending or execution of judgment debts by removing all encumbrances from immovable property at the request of a petitioning or enforcing creditor. *Réalisation* is the process which runs parallel to *dégrèvement* and applies to the debtor's movable property.

Initiation. A *dégrèvement* or *réalisation* can be initiated by either:

- A judgment creditor.
- The debtor making voluntary *cession* (that is, voluntarily giving up all of its property with the leave of the Court).

If the *dégrèvement* or *réalisation* is initiated by a judgment creditor and the debt remains unpaid for more than one month after the judgment is obtained, the judgment creditor can apply for an *Acte Vicomte chargé d'ecrire* (AVC). The AVC is an order from the Court. The order authorises the Viscount to inform the debtor that unless the debt is repaid within a further two months, its property will be adjudged renounced by the Court and the immovable property will be the subject of a *dégrèvement*. An adjudication of renunciation is a declaration of bankruptcy under Jersey law.

No specific consent or approval is required.

Substantive tests. If the process (*see below, Supervision and control*) is complied with, the debtor has no legal remedy to prevent either the AVC or the adjudication of renunciation.

Supervision and control. *Attournées* are appointed to administer the process after the Court has made an order for *dégrèvement* or *réalisation*. The *attournées* are usually two qualified Jersey lawyers who act as agents for the creditor that initiated the process.

Once appointed, the *attournées* must:

- Apply to the Judicial Greffier (that is, a judicial officer of the court holding limited powers to conduct hearings) for a *dégrèvement* hearing date. The hearing must be between four and six weeks from the date of the adjudication of renunciation and relates only to the *dégrèvement*.
- Publish a notice advertising the *dégrèvement* and the hearing date in the *Jersey Gazette* on two consecutive Saturdays.
- Issue a summons to all secured and unsecured creditors known to them to attend the *dégrèvement* hearing before the Judicial Greffier.

At the hearing, the Judicial Greffier must call the creditors in the following order:

- **Unsecured creditors.** These are called as a collective and asked whether they would like to take the property, subject to any hypothecs on the property. It is usual for the unsecured creditors not to attend, or to refuse.
- **Secured creditors.** These are ordered by date of registration. If the creditor holding the most recent security takes the property, it does so subject to paying off the earlier ranking secured creditors in full. This is not attractive if there are a large number of secured creditors and very little (or no) equity in the property. If a secured creditor refuses to take the property, it loses its security in respect of that property for its claim against the debtor. However, the creditor will retain an unsecured claim against the debtor.

In the case of a *réalisation*, the Viscount is responsible for selling the debtor's movable property at public auction. The proceeds of the sale are lodged with the Treasurer of the States of Jersey and the *attournées* are responsible for distribution to the creditors.

Protection from creditors. Protection from creditors is limited. Creditors who are not repaid from the *dégrèvement* or *réalisation* process retain their claims on an unsecured basis.

Length of procedure. This is a short procedure with a strict timetable prescribed by law, which must be complied with (*see above, Supervision and control*).

Conclusion. The effect of the *dégrèvement* is to remove all hypothecs from the immovable property which post-date that of the creditor who takes the property (Tenant). Any hypothecs which predate those of the Tenant will remain. In practice, the Tenant will be required to repay any secured creditor with such a higher-ranking security in full. There is no obligation to account to the debtor for any equity in the property.

At the conclusion of the formal *dégrèvement* process, the property is legally transferred to the Tenant. When the Tenant has discharged the debts secured by the hypothecs which predate those of the Tenant, the property will become unencumbered. Other creditors retain unsecured claims against the debtor.

Debt remission order

Objective. A debt remission order (DRO) is a statutory out-of-court summary bankruptcy process for individuals with debts of less than GBP20,000.

Initiation. A DRO process is initiated by a debtor who can apply to the Viscount of Jersey in prescribed form including a list of creditors.

Substantive tests. The DRO is available to individuals over 18 years old and resident in Jersey with assets not exceeding GBP5,000. The debtor must act in "good faith" and the statute provides a non-exclusive list of conduct which is not considered as evidencing good faith.

Supervision and control. The DRO is supervised by the Viscount.

Protection from creditors. Once the DRO has been granted the creditors identified in the order are notified and are given the option to protest the making of the DRO or the inclusion of their debt or its particulars. On receipt of a protest the Viscount must adjudicate and may confirm or vary the DRO. There is a moratorium on actions by creditors listed in the DRO for the duration of the process.

Length of procedure. The DRO is discharged after 12 months but can be varied on application.

Conclusion. If the listed debts are not all satisfied after 12 months the debtor is discharged from liability for all listed debts.

STAKEHOLDERS' ROLES

8. Which stakeholders have the most significant role in the outcome of a restructuring or insolvency procedure? Can stakeholders or commercial/policy issues influence the outcome of the procedure?

Stakeholders

Creditors have the most significant role. Since administration or any other rescue or restructuring procedure is unavailable under Jersey law, the procedures generally focus on the creditors' interests.

Influence on outcome of procedure

Jersey processes are predominantly creditor driven. Where discretionary remedies are available, the Royal Court will have creditors' interests at the forefront of its considerations. The court will therefore be interested at each stage as to whether an application brought by a debtor is supported by its creditors and will be concerned with establishing the nature and extent of its debtors and the security over assets held by creditors.

No specific protections are afforded to the government or local businesses in Jersey.

LIABILITY

9. Can a director, partner, parent entity (domestic or foreign) or other party be held liable for an insolvent debtor's debts?

Director

In the absence of any agency, guarantee or contractual obligation under which such a party could be liable (jointly and severally or otherwise), the possibilities are limited.

However, the director of a company may be liable (though not directly to creditors) in the following circumstances:

- **Breach of fiduciary duty.** Directors must act honestly and in good faith with a view to the best interests of the company. To paraphrase, reasonable care and skill must be used when performing their duties (*Article 74, Companies Law*). The prescription period for a claim alleging breach of directors' statutory or fiduciary duties is ten years.
- **Wrongful trading.** The director of a company may be liable, without limitation, for the debts or other liabilities of the company if (*Article 177, Companies Law; Article 44, Désastre Law*):
  - liabilities are incurred before the commencement of a creditors' winding-up or a declaration of *désastre*; and
  - the director then knew that there was no reasonable prospect that, or was reckless as to whether, the company would avoid a creditors' winding up or a declaration of *désastre*.
- **Fraudulent trading.** The directors responsible will be liable for an amount the Court thinks proper if it is found, during the course of a *désastre* or creditors' winding up, that the company has been carrying on business with the intent to defraud (*Article 178, Companies Law, and Article 45, Désastre Law*):
  - its creditors;
  - the creditors of another person; or
  - for a fraudulent purpose.

Other possibilities for making a claim against a director, shareholder, parent company or other party include:

- Establishing that the company was such a person's nominee.
- Establishing that such a person has committed fraud using the company, enabling piercing of the corporate veil.

Partner

Partners are likely to be jointly and severely liable for each other's debts incurred in the course of the partnership business. There are separate rules for incorporated and unincorporated limited partnerships that are beyond the scope of this work.

Parent entity (domestic or foreign)

Domestic or foreign parents who receive distributions from subsidiaries may have a statutory liability to account for a distribution if by reason of that distribution the subsidiary may reasonably be expected to be insolvent within 12 months. Otherwise, the limited but well-trodden avenues of tracing or Pauline actions may be available to creditors.

Other party

The Royal Court has jurisdiction to make third party costs orders where an insolvent litigant has caused an ultimately successful party to engage in litigation and where an adverse costs order has been made.

SETTING ASIDE TRANSACTIONS

10. Can an insolvent debtor's pre-insolvency transactions be set aside? If so, who can challenge these transactions, when and in what circumstances? Are third parties' rights affected?

A company in a creditors' winding-up, or that has had its property declared *en désastre*, can have its pre-insolvency transactions set aside in the following circumstances:

- **Transactions at an undervalue.** The liquidator or the Viscount can bring an action to challenge any transaction the company has made during the five years preceding the date of the commencement of the creditors' winding up or the date of the declaration of *désastre*, if the transaction was:
  - a gift from the company or was for consideration worth significantly less than the value of the consideration provided by the company; and
  - the company was insolvent (on a cash flow test) when it entered into the transaction, or became so insolvent.

  The burden of proof is reversed (that is, where it is presumed to have been entered into at a time when the company was or became insolvent as a consequence) if the transaction was entered into with:
  - a person connected with the company; or
  - an associate of the company.
- **Preferences.** The liquidator or the Viscount can bring an action against the company to challenge any action of the company, if it is believed the company has done anything (or allowed anything to be done) that has the effect of putting a particular creditor, surety or guarantor into a better position than if the company had not done that thing or allowed that thing to be done.

  The action can only be brought if:
  - the action occurred during the 12 months preceding the date of the commencement of either the creditors' winding up or declaration of *désastre*; and
  - the company was insolvent (on a cash flow test) when the preference was given, or became so insolvent.

  The burden of proof is again reversed if the preference was given to:
  - a person connected with the company; or
  - an associate of the company.

The Court can order a preference or transaction at an undervalue to be undone. This is to restore the position to what it would have been had the debtor not entered into the transaction or given the preference.

There are certain defences and protections available, including protections for third party persons other than those who dealt directly with the company, who acted in good faith.

There are also provisions dealing with extortionate credit bargains, excessive pension contributions and matrimonial homes, which may be relevant to individual bankrupts.

Rules in respect of transactions at an undervalue and preferences are in the Companies Law at Articles 176, 176A and 176B and the Désastre Law at Articles 17, 17A and 17B.

CARRYING ON BUSINESS DURING INSOLVENCY

11. In what circumstances can a debtor continue to carry on business during rescue or insolvency proceedings? In particular, who has the authority to supervise or carry on the debtor's business during the process and what restrictions apply?

There is no administration process or other rescue procedure to provide the mechanics for a company to carry on its business during insolvency. It is therefore unusual for a company to continue to carry on its business in these circumstances.

Under Jersey law, a company is either:

- Solvent and legitimately trading.
- Insolvent and should not be trading (unless there are exceptional circumstances).

Once a company has commenced a creditors' winding up, it must cease to carry on its business, except so far as may be required for its beneficial winding up (*Article 159, Companies Law*).

If it is beneficial to the company and its creditors to continue trading when the business is insolvent, it is likely that the company will either:

- Seek agreements from its creditors which enable the directors to conclude that its debts can be paid from available resources.
- Seek a court order to approve such actions. This is most likely to be given in the context of a just and equitable winding up (*see Question 7, Just and equitable winding-up*).

The authority to supervise or carry on the company's business depends on the type of insolvency procedure:

- ***Désastre.*** In a *désastre*, the Viscount has a limited statutory power to carry on the debtor's business. This power enables the Viscount to carry on the business as far as is necessary or expedient for its beneficial disposal (*Article 26(h), Désastre Law*).
- **Creditors' winding-up.** The liquidator (or directors, to the extent that their powers continue) has power to carry on the company's business for its beneficial winding up.
- **Just and equitable winding-up.** Any arrangements for carrying on the company's business are directed by the Court, which will decide:
  - the overall manner of conducting the winding-up;
  - whether and how the company's business is to be carried on;
  - if to be carried on, whether the business is to be carried on by the directors or a liquidator.

ADDITIONAL FINANCE

12. Can a debtor that is subject to insolvency proceedings obtain additional finance both as a legal and as a practical matter (for example, debtor-in-possession financing or equivalent)? Is special priority given to the repayment of this finance?

There are no express provisions for additional finance in either the:

- Companies Law.
- *Désastre* Law.

In addition, there is no Jersey equivalent of the US Chapter 11 procedure and its provisions for debtor-in-possession financing.

The debtor is prohibited from obtaining any additional credit during the course of a *désastre* beyond the current maximum threshold of GBP250, unless the bankruptcy is disclosed to the creditor (*Article 25, Désastre Law*).

MULTINATIONAL CASES WHERE THERE ARE NO APPLICABLE EU OR INTERNATIONAL FRAMEWORKS?

13. What are the rules that govern a local court's recognition of concurrent foreign restructuring or insolvency procedures for a local debtor? Are there any international treaties or EU legislation governing this situation? What is the process for applying for local recognition where there are no applicable EU or international frameworks? What are the procedures for foreign creditors to submit claims in a local restructuring or insolvency process?

Recognition

Article 49 of the Désastre Law provides statutory provisions in relation to the assistance to and co-operation with foreign courts. However, such assistance is limited to the territories set out in the Bankruptcy (Désastre) (Jersey) Order 2006. These territories are:

- The UK (comprising England, Scotland, Wales and Northern Ireland).
- Guernsey.
- The Isle of Man.
- Australia.
- Finland.

In all other matters, applications must be considered on a case-by-case basis, with regard to the principles of comity.

If the appointment of a UK administrator for a Jersey company is sought, the procedure is to apply to the Jersey Court for a letter of request to be issued to a UK court by way of the appointment of a UK administrator.

Money judgments

A final judgment made by or registered for execution in a Superior Court in the UK, Isle of Man or Guernsey is enforceable by registration, subject to compliance with the Judgments (Reciprocal Enforcement) (Jersey) Law 1960. Judgments from other jurisdictions may be enforced by way of a fresh action on the judgment without re-litigation of the substantive issues in the case.

However, this is not the case if the sum is payable in relation to:

- Taxes.
- Charges that are similar to taxes.
- Fines or penalties.

Concurrent proceedings

Jersey courts will consider existing proceedings in other jurisdictions and generally operate on the basis that concurrent proceedings are undesirable. However, each case is treated on its own merits.

International treaties

The *Désastre* Law and the Companies Law expressly provide that Jersey courts must have regard to the UNCITRAL Model Law on Cross-Border Insolvency 1997. Jersey is not part of the EU, save to a very restricted extent in respect of trade in goods. Therefore, Regulation (EC) 1346/2000 on insolvency proceedings (Insolvency Regulation) does not apply to Jersey.

Procedures for foreign creditors

There are no special procedures for foreign creditors. Each application must be made and treated in accordance with the underlying claim and the rules that apply to all creditors.

Brexit should not cause any new issues for those seeking recognition of UK judgments or insolvency or rescue procedures because Jersey has always been outside of the EU and is a Crown dependency. Neither of those facts has changed as a consequence of Brexit.

REFORM

14. Are there any proposals for new legislation or other reform in the context of restructuring and insolvency processes?

There are long term proposals to extend the provisions of the Securities (Jersey) Law 2012 to tangible movable property but there is no ascertained time frame for that legislation.

At present a creditors' winding-up can only be instigated by the shareholders of a Jersey company. However, it is anticipated that an amendment to the Companies (Jersey) Law 1991 will be introduced in 2021 to enable creditors to commence a creditors' winding-up via a court-supervised process, which would provide creditors with an additional means of instigating insolvency proceedings against a Jersey company.

The government is also considering replacing the *dégrèvement* process with a mortgagee's power of sale as a process for enforcing secured lending obligations.

Practical Law Contributor profiles

Peter German

Carey Olsen Jersey LLP

T +44 1534 822 372
F +44 1534 887 744
E peter.german@careyolsen.com
W www.careyolsen.com

Professional qualifications. New Zealand, 1994; England and Wales, 2007; Jersey Advocate, 2009

Areas of practice. Banking and finance; corporate and commercial; restructuring and insolvency.

Recent transactions

- Acting for Goldman Sachs on its Project Ribbon and Project Silver corporate finance restructurings involving multiple Jersey entities in 2020.
- Acting for Morgan Stanley in its GBP60 million financing of Blackstone's acquisition of 1 America Square, London.
- Acted for Oxford Properties in its GBP1.15 billion disposal of the Leadenhall Building, London.
- Acted for GE Capital Real Estate in its GBP72 million financing of Ares Real Estate Group's GBP115 million acquisition of 10 Fleet Place, London.
- **Professional associations/memberships.** Member of INSOL; member of the banking lawyers group that worked with government on the introduction of the Security Interests (Jersey) Law 2012.

Marcus Pallot

Carey Olsen Jersey LLP

T +44 1534 822 427
F +44 1534 887 744
E marcus.pallot@careyolsen.com
W www.careyolsen.com

Professional qualifications. England and Wales, 1997; Jersey Advocate, 2004; British Virgin Islands, Barrister, 2015

Areas of practice. Banking and finance; corporate and commercial; restructuring and insolvency.

Recent transactions

- Novel application leading to an extension of the law of just and equitable winding up of a trading company permitted to carry on trading during process.
- Sale of business and assets of insolvent trading company. Value was realised for the business and recovery for all creditors, which was not foreseeable in a bankruptcy.
- A series of reciprocal recognition matters including acting for BOS and NAMA in commencing the process of administration in England for the Jersey incorporated Battersea Power Station borrowing companies.
- Jersey's first quasi pre-pack application under the just and equitable jurisdiction leading to successful sale of business and assets out of liquidation.

Professional associations/memberships. Member of INSOL, Chancery Bar Association.