

An overview of Insolvency and Restructuring in Jersey

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The law is stated as at February 2017.

1 Legislation

What legislation is applicable to bankruptcies and reorganisations?

The principal statutes applicable to bankruptcies and reorganisations are:

- Bankruptcy (Désastre) (Jersey) Law 1990 (the **Bankruptcy Law**): this deals with *désastres*, a procedure for winding-up the affairs of companies and individuals unable to pay their debts as they fall due and which may be initiated either by a creditor or by the debtor. A *désastre* is administered by the Viscount, the executive officer of the Royal Court in Jersey;
- Companies (Jersey) Law 1991 (the **Companies Law**): this deals with the voluntary liquidation of companies, both solvent (a summary winding-up) and insolvent (a creditors' winding-up). It also deals with winding-up by the court on just and equitable grounds and winding-up companies of limited duration;
- Loi (1832) sur les Décrets: with the common law, this deals with *cession générale*, whereby a debtor may voluntarily renounce all its property for the benefit of its creditors;
- Loi (1839) sur les Remises de Biens (the **Remises Law**): under the *remise de biens* procedure, a debtor's assets are placed in the hands of the court for the purpose of sale and payment of creditors; and
- Loi (1880) sur la Propriété Foncière: this deals with *dégrévement* and *realisation*, for liquidating encumbered property for the benefit of certain creditors.

In addition, the insolvency of certain types of vehicles is dealt with in specific orders and regulations.

2 Excluded entities

What entities are excluded from bankruptcy proceedings and what legislation applies to them?

Désastre proceedings under the Bankruptcy Law do not apply to persons unless they have a connection with Jersey, as specified in the Bankruptcy Law. No application for a declaration of *désastre* can be made in respect of the property of a deceased person.

Certain categories of property are also treated as exempt from the effects of *désastre* proceedings.

The winding-up and liquidation provisions in the Companies Law apply only to companies incorporated under that law.

A trustee may become bankrupt but assets held by a trustee as trustee are not generally affected by the bankruptcy of the trustee. The Bankruptcy Law and the Trusts (Jersey) Law 1984 (the **Trusts Law**) apply to trusts.

3 Secured lending and credit (immoveables)

What are the principal types of security that are taken over immoveable property (ie real estate)?

Security over immoveable property in Jersey is taken by *hypothèque*. There are three principal types:

- an *hypothèque judiciaire*, which is now almost invariably used by lenders to secure charges over real estate, is created when an acknowledgement of debt (known as a *billet*) or other judgment or act of court is registered in the Public Registry;
- an *hypothèque conventionnelle simple* is created by a contract passed before the court in which the parties agree to grant and take security over the property; and
- an *hypothèque légale* is created by operation of law in certain special cases.

Leases can also be made the subject of an *hypothèque* if they are leases for over nine years' duration.

4 Secured lending and credit (moveables)

What are the principal types of security that are taken over moveable property (ie personal property)?

Security over intangible moveable property in Jersey is taken under the Security Interests (Jersey) Law 2012 (the **Security Law**). Security may be taken by:

- control of registered securities, bank accounts and securities accounts;

- possession of negotiable instruments or bearer securities; or
- registration in respect of any type of collateral.

A secured party can take control:

- of a registered security, by being registered as the holder of it or taking possession of the certificate of title to it;
- of a deposit account, by (a) the account being transferred into the name of the secured party, (b) the account bank agreeing in writing to act on the secured party's instructions, (c) the account being assigned to the secured party or (d) the secured party being the account bank; and
- of a securities account, by the same methods as a secured party can take control of a deposit account, except by assignment.

The Security Law:

- permits a security interest to be created in a grantor's present and after-acquired intangible property; and
- provides that a security interest in collateral is not affected if the grantor retains, in the absence of a contrary direction from the secured party, the right to deal with the collateral free from the security interest.

In relation to tangible moveable property, the usual form of security is a pledge. The party taking security must take actual possession of the pledged property and remove it from the control of the person providing security. Certain other interests, including liens, may also be recognised.

Where the property is situated outside Jersey, security granted under the law where the property is situated will generally be recognised.

5 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available? Do any special procedures apply to foreign creditors?

Unsecured creditors (as well as secured creditors) may seek judgment against the debtor. The time involved will depend on whether the debtor appears and has some arguable defence that prevents a summary judgment from being obtained. A default judgment can be obtained within one week. Summary judgment would probably take approximately two months to obtain.

Where court proceedings are brought in Jersey, the defendant may apply for security for the costs that it could be awarded at the end of the trial if it is successful.

A judgment may be registered against title to land as an *hypothèque judiciaire*. In this way an unsecured creditor may acquire security.

A judgment may be enforced by an *Acte Vicomte chargé d'écrire*, which calls upon the Viscount to seize and sell the debtor's assets.

The following procedures can be used to freeze assets in Jersey:

Mareva injunction – the court will grant injunctions freezing assets, even if no substantive cause of action is asserted in Jersey (for example in support of proceedings elsewhere);

- *Ordre Provisoire* – an *ordre provisoire* involves the seizure by the Viscount of the debtor's assets; and
- *caveat* – a *caveat* may be lodged with the court to prevent dealings in land.

6 Courts

What courts are involved in the bankruptcy process? Are there restrictions on the matters that the courts may deal with?

The Royal Court of Jersey has a general jurisdiction, including jurisdiction to deal with bankruptcy proceedings within the jurisdiction. There is an appeal to the Court of Appeal and, ultimately, to the Privy Council.

7 Voluntary liquidations

What are the requirements for a debtor commencing a voluntary liquidation and what are the effects?

Bankruptcy law

A debtor may make an application for its property to be declared *en désastre*. It must satisfy the court that it is insolvent but has realisable assets.

Upon a declaration of *désastre*, the debtor's assets vest in the Viscount, who is responsible for gathering in the assets, discharging the liabilities and, if there is a surplus, paying it to the debtor or, if it is a company, its shareholders.

Summary winding-up

The summary winding-up procedure under the Companies Law may be used by companies that are solvent. To initiate the procedure, the company must pass a special resolution and the directors are required to make a statement as to solvency.

The winding-up is commenced when the statement and the resolution are filed with the registrar of companies (the **registrar**). Once the winding-up process has begun the powers of the company are limited to the realisation of its assets, discharge of its liabilities, and distribution of its assets in accordance with the summary winding-up procedure. Upon completion of that process the directors must make a statement that the company has no assets and no liabilities. Upon registration of that statement with the registrar, it is dissolved. The company continues to exist until its dissolution.

Creditors' winding-up

The creditors' winding-up procedure is used for Jersey companies that are insolvent. It is commenced by the company passing a special resolution to commence a creditors' winding-up. The company must give 14 days' notice to the creditors of the day on which it intends hold the meeting to pass the resolution, calling for a meeting of the creditors to follow such meeting and nominating a liquidator. Notice must be published in the Jersey Gazette and the directors must prepare a statement of affairs of the company. The creditors may appoint a liquidator of their own choice in place of the nominated liquidator.

The winding-up commences at the time that the special resolution is passed. The company continues to exist until its dissolution, but must cease to carry on its business, except as may be required for its beneficial winding-up. Any transfer of shares without the sanction of the liquidator or alteration of the company's membership after this time will be void unless the transfer is made by a secured party pursuant to the Security Law.

Actions against the company (except under the Security Law) may not be continued without the court's leave and subject to any terms it imposes.

Just and equitable winding-up

A Jersey company can apply to the court to be wound-up on the grounds that it would be just and equitable to do so. Typically, an application for a just and equitable winding-up is made in circumstances where a deadlock is reached by participants in a quasi-partnership company. However, the courts are prepared to order a winding-up on just and equitable grounds in other circumstances including where delays inherent in a creditors' winding-up would result in a more disadvantageous realisation of the company's assets for creditors. A creditor cannot apply for a just and equitable winding-up.

8 Involuntary liquidations

What are the requirements for creditors placing a debtor in involuntary liquidation and what are the effects?

The usual procedure used by creditors is *désastre* under the Bankruptcy Law.

The creditor must satisfy the court that it has a claim against the debtor for not less than £3,000. The claim is made by filing a *demande* and an affidavit.

On the making of the declaration of *désastre*, the debtor's property and powers, save for property held on trust by the debtor for some other person, are vested in the Viscount. Once a declaration of *désastre* has been made creditors with provable debts have no other remedy against the debtor and may not commence or, without consent, continue any action to recover the debt.

9 Voluntary reorganisations

What are the requirements for a debtor commencing a financial reorganisation and what are the effects?

Schemes of arrangement

Compromises and arrangements between a solvent company and its creditors can be arrived at by way of scheme of arrangement under Article 125 of the Companies Law. If a 3/4 majority in number representing 3/4 in value of the creditors or class of creditors agree to a compromise or arrangement, if sanctioned by the court, it is binding on all creditors or class of creditors. Sanction of the court is perfected by delivery of an Act of Court to the registrar. The registered Act should then be attached to the company's memorandum.

Under Article 167 of the Companies Law, an arrangement entered into between a company immediately preceding the commencement of, or in the course of, a creditors' winding up and its creditors is binding: (a) on the company, if sanctioned by a special resolution and (b) on creditors, if acceded to by 3/4 in number and value of them (subject to a right of appeal by a creditor or contributory within 3 weeks from completion of the arrangement).

Remise de biens

The *remise de biens* procedure implements a suspensory period to enable reconstruction of the debtor's affairs and its rehabilitation.

Upon application to it by the debtor, the Royal Court may grant a *remise* where:

- the debtor owns Jersey immoveable property or has the benefit of a lease of over nine years' duration of such property; and
- the debtor's property, both immoveable and moveable, exceeds the value of the claims of the secured creditors.

The debtor, in seeking the aid of the court under the *remise* procedure, agrees to act only in accordance with the advice of the *jurats* appointed to carry out the *remise*, known as the *autorisés*. The management of the debtor's property is transferred to the *autorisés* who are given the power to sell and deal with the property.

10 Involuntary reorganisations

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects?

A creditor or a class of creditors may apply under article 125 of the Companies Law to propose a scheme of arrangement (see question 9).

The *désastre* procedure, which may be commenced by creditors, effects a winding-up of the debtor's affairs and not a reorganisation.

The *remise de biens* procedure (see question 9) is not available to creditors.

The process of 'administration' does not exist in Jersey (although it is possible for a Jersey company in financial difficulty to be placed into administration under the UK Insolvency Act 1986 where its centre of main interest is in the UK or by the Jersey courts issuing a letter of request to the English courts).

11 Mandatory commencement of insolvency proceedings

Are companies required to commence insolvency proceedings in particular circumstances (to avoid personal liability to directors and officers or otherwise)? In what circumstances must companies do so? If proceedings are not commenced, what liabilities can result?

An insolvent company is not required, as a matter of law, to commence insolvency proceedings at any particular time. The company's directors may, however, risk personal liability if the company incurs liabilities under wrongful or fraudulent trading provisions (see question 33).

12 Doing business in reorganisations

Under what conditions can the debtor carry on business during a reorganisation? What conditions apply to the use of assets and to creditors who supply goods or services after the filing? What are the roles of the creditors and the court in supervising the debtor's business activities?

Scheme of arrangement

Pending a scheme of arrangement, on the assumption that there is a reasonable prospect that the company will avoid a creditors' winding-up or a declaration *en désastre*, the debtor can continue to carry on business. Creditors may keep a close watch on the management of the company and may impose conditions on its dealings with the company.

Remise de biens

At the outset, on receipt of the schedule of all of the debtor's immoveable and moveable property, the *autorisés* will consult the debtor's creditors. During a *remise de biens* the property of the debtor is under the management of the *autorisés* and, as such, they have the power to sell the debtor's property at their discretion. The *autorisés* normally transact and contract with third parties on the debtor's behalf.

13 Rejection and disclaimer of contracts in liquidations

Can a debtor in a liquidation reject or disclaim an unfavourable contract? Are there contracts that may not be rejected? What procedure is followed to reject a contract and what is the effect of rejection on the other party?

The liquidator (in the course of the insolvent winding-up of a Jersey company) or the Viscount (in the course of a *désastre*) may, within six months of the commencement of the relevant procedure, disclaim any onerous property of such Jersey company or such person. Onerous property is:

- any unprofitable contract; and
- any of the following 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: any moveable property; any contract lease; and any other immoveable property if it is situated outside Jersey.

The counterparty to any such disclaimed contract or any person sustaining loss or damage in consequence of the operation of a disclaimer would have the right to prove in the winding-up or *désastre* for the amount of its losses incurred as a result thereof.

14 Sale of assets

In reorganisations and liquidations, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business of the debtor? Does the purchaser acquire the assets 'free and clear' of claims or do some liabilities pass with the assets?

In the course of a summary winding-up, the company's powers are limited so as not to be exercised except so far as may be required:

- to realise assets;
- to discharge liabilities; and
- to distribute assets to the persons entitled.

Specific limitations are not otherwise imposed on the sale of assets but a director or liquidator effecting the winding-up would be subject to the usual duties of the role to exercise care, diligence and skill of a reasonably prudent person in comparable circumstances.

With the sanction of the court or the liquidation committee, the liquidator in a creditors' winding-up may pay a class of creditors in full or compromise any claim by or against the company. Where court sanction is sought, creditors should ordinarily be given the opportunity to be heard. A liquidator may exercise any other power of the company as may be required for its beneficial winding-up without any sanction.

In *désastre* proceedings the Viscount has wide powers to deal with the assets of the company, including a power to carry on the debtor's business for beneficial disposal and to sell the whole or any part of the property of the debtor.

Property which is subject to a *dégrévement* is freed from charges thereon.

In relation to *remise* proceedings, see question 9.

15 Stays of proceedings and moratoria

What prohibitions against the continuation of legal proceedings or the enforcement of claims by secured and unsecured creditors are imposed by legislation or court order in liquidations and reorganisations? In what circumstances may secured or unsecured creditors obtain relief from such prohibitions?

Désastre

Legal proceedings against a debtor started before a *désastre* may only be continued with leave of the court or the Viscount. The court also has power to grant a stay or partial stay of *désastre* proceedings.

Winding-up

Once a creditors' winding-up has commenced, any actions taken against, or by, the company will only be permitted with leave of the court.

Schemes of arrangement

The court has the express power to make provision for the continuation by or against the transferee company of legal proceedings pending by or against a transferor company.

A *remise de biens* will work as a suspensory procedure allowing the orderly realisation of the property of a solvent debtor.

16 Arbitration processes in bankruptcy

How frequently are arbitration procedures used in insolvency proceedings? What limitations are there on the availability of arbitration procedures in insolvency cases? In insolvency proceedings, will the court allow arbitration proceedings to continue after an insolvency case is opened?

After the commencement of a *désastre* or a winding-up no action may be taken or proceeded with against the company except by leave of the court (or the Viscount in a *désastre*) and subject to such terms as the court may impose. This is likely to include arbitration procedures. Where action is taken, the Arbitration (Jersey) Law 1998 contains provisions for giving effect to arbitration agreements where a debtor is bankrupt.

17 Set-off and netting

To what extent are creditors able to exercise rights of set-off or netting in a liquidation or in a reorganisation? Can creditors be deprived of the right of set-off either temporarily or permanently?

In a *désastre* or winding-up, set-off is mandatory where there have been mutual credits, mutual debts or other mutual dealings between the debtor and creditor. The sum due from one party is set off against any sum due from the other party, and the balance of the account, and no more, may be claimed or paid on either side respectively.

Under the Bankruptcy (Netting, Contractual Subordination and Non-Petition Provisions) (Jersey) Law 2005 (the **Netting Law**), the effectiveness of contractual close-out netting provisions and set-off provisions (as such terms are defined in the Netting Law) is protected before and after bankruptcy of any relevant person.

18 Intellectual property assets in insolvencies

May the licensor or owner of the IP terminate the debtor's right to use it when an insolvency case is opened? To what extent may an insolvency administrator continue to use IP rights granted under an agreement with the debtor? May an insolvency representative terminate a debtor's agreement with an IP licensor or owner to continue to use the IP for the benefit of the estate?

There are no statutory provisions in Jersey dealing with the treatment of intellectual property on bankruptcy in Jersey. The right of any licensor or owner of intellectual property rights to terminate the debtor's right to make use of such property will, in the first instance, be governed by the licence agreement's provisions. (Also see question 13.)

19 Post-filing credit

Can a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is given to such loans or credit?

A debtor subject to a *désastre* commits an offence if it obtains credit in excess of £250 without disclosing the fact of the declaration of *désastre*. (In relation to priority see question 28.)

20 Successful reorganisations

What features are mandatory in a reorganisation plan? How are creditors classified for purposes of a plan and how is the plan approved? Can a reorganisation plan release non-debtor parties (officers, directors, advisers, etc) from liability, and, if so, in what circumstances?

See question 9.

21 Expedited reorganisations

Do procedures exist for expedited reorganisations?

See question 9.

22 Unsuccessful reorganisations

How is a proposed reorganisation defeated and what is the effect of the plan not being approved? What happens if there is default by the debtor in performing an approved plan?

See question 9.

23 Bankruptcy processes

During a bankruptcy case, what notices are given to creditors? What meetings are held? What committees are or can be formed? What powers or responsibilities do these committees have? May creditors initiate proceedings to pursue remedies against third parties?

Désastre

Following a declaration of *désastre* the Viscount must publish a notice in the Jersey Gazette and otherwise as he or she thinks fit.

This notice will require claims to be filed by a date within 40 to 60 days from the declaration.

The Viscount also reports periodically on the progress of the *désastre* to the creditors. As a matter of practice, he or she will hold meetings with creditors in order to ascertain their views. The Viscount is also required to supply a written report and the accounts relating to the *désastre* to the creditors.

Winding-up (summary)

If during a summary winding-up, the liquidator forms the view that the company will not be able to discharge its liabilities within six months of the commencement of the winding-up or if they fall due after that date, as they fall due, he or she will give each creditor of the company notice by post and in the Jersey Gazette of a meeting of the creditors. As of the date of that meeting, the winding-up becomes a creditors' winding-up. Ten days' notice must be given of the meeting by advertisement in the Jersey Gazette.

Winding-up (creditors)

Notice of the creditors' meeting is given to all creditors and, in addition, notice is placed in the Jersey Gazette. At the creditors' meeting (which immediately follows the general meeting convened to consider a resolution to wind up the company) a liquidation committee may be appointed. This comprises not more than five people and its membership may be overruled by the creditors. The committee has a veto power

over the liquidator's powers to pay a class of creditors and compromise any claim by or against the company (unless the court sanctions the compromise or claim).

If the winding-up takes longer than 12 months, a further meeting must be called within 15 months of commencement of the winding-up.

At the conclusion of the winding-up, the liquidator convenes a general meeting and a meeting of the creditors. The purpose of this is to approve the liquidator's report and accounts. The approval is then notified to the registrar and the company is dissolved automatically three months after the registration.

24 Insolvency of corporate groups

In insolvency proceedings involving a corporate group, are the proceedings by the parent and its subsidiaries combined for administrative purposes? May the assets and liabilities of the companies be combined into one pool for distribution purposes?

There are no statutory provisions for the combination of parent and subsidiary companies' assets into one pool for insolvency purposes.

Certain schemes which have the effect of consolidating the assets of a group have been approved by the court in Jersey but the circumstances have been particular and the determining requirement has been the interests of the creditors in the context of the insolvency of the Jersey company.

25 Modifying creditors' rights

May the court change the rank (priority) of a creditor's claim? If so, what are the grounds for doing so and how frequently does this occur?

The court does not have any general jurisdiction either in a *désastre* or a winding-up to alter the priority of the creditors' claims.

The effect of contractual subordination provisions before and after bankruptcy is protected by the Netting Law.

26 Enforcement of estate's rights

If the insolvency administrator is without assets to pursue a claim that is available to the estate, are there procedures by which the creditors can pursue the estate's remedies? If so, to whom do the fruits of the remedies belong?

The Viscount in a *désastre* might seek funding from the principal creditors to pursue a claim or might seek an indemnity from a creditor who wishes to pursue a claim.

Any funding would be classed as an expense of the *désastre* and, consequently, would be repaid as an expense of the *désastre* in priority to other creditors.

A liquidator similarly might seek funds from creditors in order to fund the liquidation.

No action may be taken outside the *désastre* or liquidation proceedings.

27 Claims and appeals

How is a creditor's claim submitted and what are the applicable time limits? How are claims disallowed and how does a creditor appeal a disallowance? Are there any provisions that deal with the purchase, sale or transfer of claims against the debtor?

Désastre

Upon a declaration of *désastre*, the Viscount is obliged to place a notice in the Jersey Gazette requiring every creditor to file a statement containing full particulars of its claim.

The notice will specify the date (between 40 and 60 days after the date of the declaration) by which all claims must be filed. Failure to submit a claim results in the creditor forfeiting its right to participate in the distribution of the assets.

The Viscount examines every proof and any opposing statements. If the Viscount rejects a claim he or she must serve a reasoned notice of rejection informing the creditor of its right to apply to the court for a reversal or variation.

A creditor may challenge the rejection within 21 days by notifying the Viscount. The Viscount is required to apply to the court to fix a date for the hearing.

Winding-up

The Companies Law applies the *désastre* rules in relation to the proving of debts.

There are no provisions dealing with the transfer of claims.

28 Priority claims

What are the major governmental and non-governmental privileged and priority claims in liquidations and reorganisations? Which priority and privileged claims have priority over secured creditors?

The fees and expenses of the Viscount take priority over secured creditors. The following rank after secured creditors but before unsecured creditors:

- if the bankrupt is a bank, amounts payable to the Jersey Bank Depositors Compensation Board;
- wages and salary for the six months before the declaration of *désastre* and holiday and bonuses (subject to maxima);
- health insurance, social security, income tax and goods and services tax;
- six months' arrears of rent; and
- two years' arrears of parish rates.

29 Liabilities that survive insolvency proceedings

Do any liabilities of a debtor survive an insolvency or a reorganisation?

Scheme of arrangement

The terms of any scheme of arrangement will determine the extent to which the debtor's liabilities are compromised.

Désastre and winding-up

There are no specific provisions preserving claims against corporate debtors. Following the *désastre* or winding-up, the debtor will be dissolved. In relation to individuals there are specific provisions in the *Désastre* Law preserving claims in relation to fraud.

A company that has been dissolved may be reinstated to the register at any time within 10 years of the date of dissolution by order of the court upon application by a liquidator or any other person (including a creditor) appearing to the court to be interested. Once reinstated, proceedings may be taken against the company as if it had not been dissolved.

Past and present members of a company that is wound up may be liable to contribute to its assets to an amount sufficient for payment of its liabilities, the expenses of the winding-up and the adjustment of the rights of the contributories among themselves. However, in the case of limited shares, the amount of the contribution will not exceed the amount unpaid on the shares. Other limitations also apply in the case of other types of shares.

In certain other circumstances, shareholders may also become liable for the debts of a company that has been wound up.

30 Distributions

How and when are distributions made to creditors in liquidations and reorganisations?

The manner and timing of distributions in reorganisations will depend upon the circumstances and terms of the reorganisation.

The Viscount must distribute assets realised among the creditors entitled to receive them as soon as practicable. He or she may make interim distributions. The order of payment of debts is set out in the Bankruptcy Law. See question 28.

The timing and manner of distributions in liquidations will be determined by the liquidator acting in accordance with his or her duties in the winding-up. After paying priority creditors in accordance with legislation, the liquidator must apply the proceeds of the company's realised property in satisfaction of the company's debts *pari passu*. Any balance is paid to members in accordance with their rights.

31 Transactions that may be annulled

What types of transactions can be annulled or set aside in bankruptcies and what are the grounds? What is the result of a transaction being annulled?

The principal types of transactions that can be set aside in bankruptcies are: transactions at an undervalue; preferences; extortionate credit transactions; excessive contributions to an exempt pension; onerous property; and invalid trusts or invalid transfers to trusts.

A security interest granted under the Security Law is void against the Viscount (or liquidator) and the grantor's creditors in a bankruptcy of the grantor unless the security interest is perfected before the grantor becomes bankrupt.

32 Proceedings to annul transactions

Is there a 'suspect period' in determining whether a transaction by an insolvent debtor can be annulled? May voidable transactions be attacked by secured creditors or by unsecured creditors or only by a liquidator or trustee? May they be attacked in a reorganisation or suspension of payments or only in a liquidation?

Transactions at an undervalue

A transaction at an undervalue may in certain circumstances be set aside if entered into up to five years before the declaration of *désastre* or commencement of the winding-up.

Preferences

A preference may be set aside if given within 12 months before the declaration of *désastre* or commencement of the winding-up.

Extortionate credit transactions

A transaction providing credit to the debtor may be set aside if it is extortionate and was made within three years before the declaration *en désastre* or commencement of the winding-up.

Excessive contributions to an exempt pension

There is no specific time period for excessive contributions to an exempt pension (although the time might be relevant to the exercise of the court's discretion to set them aside).

Voidable transactions can be set aside only on the application of the Viscount (in respect of a *désastre*) or the liquidator (in respect of a winding-up).

33 Directors and officers

Are corporate officers and directors liable for their corporation's obligations (eg, amounts owed to government authorities)? Are they liable for pre-bankruptcy actions by their companies? Can they be subject to sanctions for other reasons?

Corporate officers and directors will not generally be liable for obligations owed by their corporations (including amounts owed to government authorities, such as taxes or fees). Directors and officers may, however, be personally liable for fraudulent or wrongful trading and for criminal or tortious acts if procured by or participated in or by a director. A director may also incur a personal liability if he or she suspects that property acquired by his or her company has been wrongfully acquired.

Wrongful trading occurs when the company incurs liabilities while the director knew there was no reasonable prospect of the company avoiding a declaration *en désastre* or winding-up or, on the facts known to him or her, the director was reckless whether it would.

Fraudulent trading occurs where it appears that the business of the company was carried on with the intent to defraud creditors or for a fraudulent purpose.

Directors of a company may be liable to its shareholders for breach of fiduciary duty.

A person may be disqualified by the court from holding office as a director or being concerned with the management of a company.

34 Creditors' enforcement

Are there processes by which some or all of the assets of a business may be seized outside of court proceedings? How are these processes carried out?

Under the Security Law, intangible moveable assets secured under the provisions of that Law may become subject to a power of enforcement exercisable by the creditor where there is an event of default.

A landlord has certain rights pursuant to the *droit de gage* to distrain on goods on the demised premises for rent that is due and unpaid and as security for rent payable during the notice period to terminate the tenancy.

35 Corporate procedures

Are there corporate procedures for the liquidation or dissolution of a corporation? How do such processes contrast with bankruptcy proceedings?

The voluntary liquidation of companies is governed by the Companies Law, both solvent (a summary winding-up) and insolvent (a creditors' winding-up). These procedures are commenced by the company itself and cannot be commenced by creditors. Liquidations are conducted either by the directors of the company or a liquidator in a solvent liquidation or a liquidator must be appointed in an insolvent liquidation. Until dissolution the company remains in existence but the powers of the directors may be used only for the purposes of liquidation. If a liquidator is appointed the powers of the directors cease and the liquidator controls the company to the purposes of the winding-up.

Désastre proceedings may be commenced by creditors as well as the insolvent person. The proceedings are conducted by the Viscount and all property and powers of the insolvent at the date of the *désastre* declaration vest in him or her (along with after acquired property).

Limited life companies and companies of limited duration will be wound up and dissolved in accordance with their constitutions.

36 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

In a *désastre*, the Viscount will pay a final dividend and make a final report to creditors. He or she will then notify the registrar of the date of the final dividend and on receipt of the notice the company is dissolved.

A creditors' winding-up is concluded by the presentation to the company and the creditors of a final account and filing of a return with the registrar. Dissolution follows three months later.

A summary winding-up is concluded upon the filing with the registrar of a statement that the company has no assets and no liabilities.

A scheme of arrangement is concluded when the Act of Court sanctioning the scheme is delivered to the registrar for registration.

37 International cases

What recognition or relief is available concerning an insolvency proceeding in another country? How are foreign creditors dealt with in liquidations and reorganisations? Are foreign judgments or orders recognised and in what circumstances? Is Jersey a signatory to a treaty on international

insolvency or on the recognition of foreign judgments? Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

There is no distinction between local and foreign creditors in a *désastre* or winding-up.

Qualifying foreign judgments may be enforced in Jersey under the Judgments (Reciprocal Enforcement) (Jersey) Law 1960 (applicable to judgments from England, Wales, Scotland, Northern Ireland, the Isle of Man and Guernsey (a Qualifying Jurisdiction) or by an action on the judgment.

A judgment of a court other than a court in a Qualifying Jurisdiction is not directly enforceable in Jersey. Whilst there is no conclusive authority in Jersey law, it is thought that the Jersey courts will recognise as valid a final judgment for a liquidated sum of money, which is not in respect of taxes, fines, penalties or other similar fiscal or revenue liabilities, rendered against a Jersey judgment debtor by any competent superior court of a jurisdiction which is not a Qualifying Jurisdiction, provided that:

- such judgment is not for exemplary, multiple or punitive damages and is obtained without fraud, in accordance with the principles of natural justice and is not contrary to public policy, and
- the proceedings in the such court were duly served.

The Jersey courts' inherent jurisdiction to recognise and enforce foreign judgments is not restricted to judgments for a debt or a definite sum of money. The Jersey courts have also held that they have a discretion, to be exercised cautiously, not only to recognise but also to enforce foreign *in personam* non-monetary judgments given by courts of competent jurisdiction without reconsidering the merits provided that the defendant had every opportunity to raise all relevant defences at the hearing giving rise to the foreign judgment. Although there is some doubt whether this proposition is correct, even so, a foreign non-monetary judgment may be enforceable in Jersey by way of summary judgment on a fresh claim brought on the original cause of action.

The Bankruptcy Law provides that the Royal Court may assist courts of a relevant country or territory in matters relating to insolvency and may have regard to the provisions of any model law on cross-border insolvency prepared by UNCITRAL. The Royal Court may also assist in insolvency proceedings in jurisdictions that are not designated as relevant countries in accordance with general principles of comity.

38 Cross-border insolvency protocols and joint court hearings

In cross-border cases, have the courts in Jersey entered into cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries? Have courts in Jersey communicated or held joint hearings with courts in other countries in cross-border cases? If so, with which other countries?

Where cross-border issues have arisen in Jersey cases, the courts have treated them as matters for judicial assistance, rather than requiring a comprehensive protocol. In cases where a protocol is appropriate it is thought likely that the Royal Court, following principles of comity, would give effect to it.

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