

Jersey—restructuring and insolvency guide

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Main forms of corporate liquidations available in Jersey

The principal forms of corporate liquidations in Jersey are a creditors' winding up under the Companies (Jersey) Law 1991 (Companies Law); a declaration of *désastre* under the Bankruptcy (*Désastre*) (Jersey) Law 1990 (*Désastre* Law); a just and equitable winding up under Article 155 of the Companies Law and a summary winding up under Article 147 of the Companies Law. In outline:

- creditors' winding up—a creditors' winding up is a process of voluntary insolvent winding up available to Jersey-incorporated companies under Part 21, Chapter 4 of the Companies Law; it is not available to non-Jersey incorporated companies. Despite its name, a creditors' winding up is initiated by special resolution of the company itself, rather than creditors, but creditors are entitled (subject to control by the court) to choose the liquidator
- *désastre*—a *désastre* (strictly, a declaration that the property of the insolvent debtor is declared en *désastre*) is a court-ordered insolvent winding up, the application for which is made either by the company itself, a creditor or the Jersey Financial Services Commission in prescribed circumstances. It is thus a form of both voluntary and involuntary insolvent winding up, and it is available in the case of both corporate and individual debtors. The effect of a declaration of *désastre* is to vest all the debtor's assets (immovable as well as movable, and wherever situated) in the executive officer of the Royal Court, known as the Viscount. The Viscount administers the winding up, in effect, as official liquidator. Under *Désastre* Law, Art 4, a *désastre* is only available in respect of:
 - o Jersey-incorporated companies, Jersey-incorporated limited partnerships and Jersey-limited liability partnerships, and
 - o non-Jersey incorporated entities which at the time of application are carrying on business in Jersey or which, at any time during the immediately preceding three years, have carried on such business or which have Jersey immovable property capable of realisation at the time of the application.
- just and equitable winding up—the Royal Court may order a just and equitable winding up of an insolvent Jersey company under the Companies Law. The Royal Court has been heavily influenced by the English courts as to what constitutes just and equitable grounds. These include where:
 - o the company is being run as a quasi-partnership
 - o there is deadlock in management
 - o the company's substratum has gone
 - o it will produce a better result for creditors

An application for a just and equitable winding up may be made by the company, a director of the company or a member of the company. The Minister of Economic Development and the Jersey Financial Services Commission also have jurisdiction to apply in certain circumstances. Creditors do not have standing to make such an application.

- summary winding up—a summary winding up, which is a voluntary liquidation process, is commenced by special resolution of the shareholders. There are no qualification requirements for the liquidator. The winding up may be carried out by the directors, for example, as an alternative to a liquidator. A summary winding up bears similarities to a members' voluntary liquidation under English law

There is no direct equivalent in Jersey to an administration order under the English **Insolvency Act 1986 (IA 1986)**, as amended by the **Enterprise Act 2002**. A creditors' winding up, a *désastre* and a just and equitable winding up are all intended to effect an orderly winding up and dissolution and are not rescue procedures. However, the scope of the Royal Court's jurisdiction does permit some flexibility to, in certain cases, exercise its discretion to permit the business of the debtor to be continued in the interests of stakeholders and/or other related ancillary orders, designed to improve the ultimate returns for stakeholders (*In the Matter of Poundworld (Jersey) Limited*, [2009] JRC 042 and [2009] JLR N12 (not reported by LexisNexis UK)).

Moreover, in cases where English courts lack original jurisdiction to place a Jersey company in English administration, the Jersey court may, in appropriate cases, issue a letter of request to the English court asking it to place the company in English administration by way assistance under **IA 1986, s 426**. This is a route which has been utilised in a number of cases; its availability was confirmed by the English Court of Appeal in *HSBC Bank v Tambrook Jersey Ltd*. The issue of the request remains discretionary. The Jersey court will look at the respective interests of creditors and debtor, the connection (if any) to the jurisdiction to which it is asked to issue the request, any wider public interest, the merits of alternative Jersey procedures, and the likely approach of the recipient court: see for example *In the Matter of the Representation of Harbour Fund II LP and In the Matter of an Application to issue a letter of request to the High Court of England and Wales in respect of ORB a.r.l For the Appointment of an Administrator* [2016] JRC 171 (not reported by LexisNexis UK) for a case in which the Jersey court declined to issue a letter of request due to a lack of sufficient connection with England.

References:

HSBC Bank v Tambrook Jersey Ltd [2013] EWCA Civ 576

There is one older suspensory procedure, known as a *remise de biens*, which is specifically designed to facilitate the rescue and rehabilitation of an insolvent debtor. It is a remedy for debtors; it cannot be initiated by creditors. The primary requirement is that the debtor owns immovable property in Jersey (directly or through a holding company). For this reason *remise de biens* is of limited interest for many Jersey companies which, typically, hold assets or conduct business entirely elsewhere.

Dégrévement, which follows a voluntary cession or creditor-initiated involuntary cession, is a means of disencumbering Jersey immovable property. Where there are also movable assets, these are dealt with by a process of *réalisation*. Detailed consideration of *dégrévement* and *réalisation* is outside the scope of this Practice Note.

Main forms of personal insolvency available in Jersey

The principle form of personal insolvency in Jersey is a declaration en *désastre*, which is described above. A *désastre* may be applied for by either the debtor or a creditor. The debtor must be a person:

- who is, or who was within 12 months immediately preceding the application, ordinarily resident in Jersey
- who carries on, or who has carried on within three years immediately preceding the application, business in Jersey, or
- who has Jersey immovable property capable of realisation at the time of the application (*Désastre Law, Art 4*)

The procedures of *remise de biens*, cession and *dégrévement*, briefly noted above, are also available in the case of individual debtors.

A procedure for a moratorium benefitting personal debtors who have acted in good faith, who have low incomes (having less than £100 disposable income per month after tax, social security and normal household expenses) and whose relevant debts amount to less than £20,000 was introduced by the Debt Remission (Individuals) (Jersey) Law 2016. The moratorium is envisaged to last typically for six months. At the end of the moratorium, the balance owing under the debts covered by the Debt Remission Order are written off.

What are the steps for directors to commence a voluntary liquidation? What is the effect?

Creditors' winding up

A creditors' winding up is, as noted above, a form of voluntary insolvent winding up of a Jersey company, commenced by special resolution of the shareholders passed at a general meeting of the debtor company. In this context, the directors

should have given proper consideration to the financial position of the company, the advisability of its insolvent winding up and the identity of the proposed liquidators; and if thought fit, the directors will then convene an extraordinary general meeting of the shareholders for the purpose of considering the required special resolution. The ultimate decision rests with shareholders.

In order to appoint a liquidator, a creditors' meeting will be convened to take place immediately after the general meeting. The company and the creditors may each nominate a liquidator, however, the creditors' choice will prevail unless the Royal Court determines otherwise. The liquidator must be an individual from one of a number of prescribed professional bodies. It is not possible to have a corporate liquidator. The liquidator can be resident outside of Jersey.

The immediate effects of a creditors' winding up are set out in Companies Law, Art 159 and include:

- the corporate state and capacity of the company continue until the company is dissolved
- however, the company must, from the commencement of the creditors' winding up, cease to carry on its business, except so far as may be required for its beneficial winding up
- subject to limited exceptions, a transfer of shares, not being a transfer made to or with the sanction of the liquidator, and an alteration in the status of the company's members made after the commencement of a creditors' winding up, is void
- after the commencement of a creditors' winding up, no action may be taken or proceeded with against the company except by leave of the court and subject to such terms as the court may impose and the right to take any other proceedings in bankruptcy is barred, except for the right of a creditor or the company to apply for a declaration of *désastre*

Summary winding up

A solvent, or 'summary', winding up commences where the shareholders voluntarily pass, or are deemed to pass, and file, a special resolution to do so and the directors have confirmed, by way of a declaration of solvency, either that the company:

- has no assets nor liabilities, or
- has assets but no liabilities, or
- will be able to discharge all liabilities within six months of the commencement of the summary winding up

Upon commencement of a summary winding up the company retains its corporate state and capacity but its powers are limited to realisation of assets, discharge of liabilities and distribution of assets.

Désastre

Désastre is initiated by way of a court application, called a *demandé*. Subject to the leave of the court, the company must give the Viscount at least 48 hours' notice of its intention to make the application. The application must be supported by a statutory statement setting out, among other things, the estimated value of the company's assets and liabilities. It must also be supported by an affidavit verifying the contents of the statement, stating that the company is insolvent on a cash flow basis but has realisable assets, and providing details of the notice given to the Viscount.

The immediate effects of a declaration of *désastre* are set out in *Désastre Law*, Arts 8 and 10. In contrast to a creditors' winding up, where the company's property does not vest in the liquidator, in a *désastre* all the property and powers of the debtor, wherever situated, vest in the Viscount. This includes the capacity to exercise and to take proceedings but does not include property held by the debtor in trust for another person. Subject to the terms of Article 9, the Viscount has power to claim after-acquired property of the debtor.

In other respects, the position is similar to a creditors' winding up. There is a bar on creditors commencing or (except with the consent of the Viscount or a court order) continuing proceedings for recovery of the debt or other remedies. Similarly, a transfer of shares in the debtor (unless it is a transfer to or with the sanction of the Viscount) and an alteration in the status of the company's members made after the declaration are both void.

Just and equitable winding up

Companies Law, Art 155 which concerns just and equitable windings up, was modelled on the equivalent provisions in the English **Companies Act 1985** and, as noted above, the Jersey court has been heavily influenced by English decisions as to what constitutes just and equitable grounds. Some of these are described above. A just and equitable winding up commences upon order of the Jersey court. It will usually follow the hearing of a Representation, which is a form of originating process whereby the applicant will seek orders placing the company into a just and equitable winding up.

Upon ordering the just and equitable winding up, the court will appoint a liquidator and issue directions as to the manner in which the winding-up is to be conducted and it will make such orders as it sees fit to ensure that the winding up is conducted in an orderly manner.

How can creditors commence involuntary liquidation? What is the effect? (e.g. moratoriums etc?)

If a creditor wishes to initiate insolvency proceedings against a company, then he must apply for a declaration of *désastre*, in respect of the company under the *Désastre Law*. A creditor cannot initiate a solvent or insolvent winding up under the Companies Law and cannot apply for a just and equitable winding up. The application process is described above.

The effect of a creditor-initiated *désastre* is the same as when the declaration of *désastre* was sought by the insolvent company itself, as described above.

Must directors commence liquidation within a set time period of insolvency?

There is no legal obligation on directors to apply for a declaration of *désastre* or recommend to the shareholders that the company be wound up in a creditors' winding up.

However, under the wrongful trading rules in both the *Désastre Law* and the Companies Law directors may be personally responsible without limitation of liability for all debts and liabilities of the company from the time when a director knew there was no reasonable prospect that a company would avoid a creditors' winding up or a *désastre* or on the facts known was reckless as to whether the company would avoid such a winding up or *désastre*. Liability is avoided if the court is satisfied that the director took reasonable steps with a view to minimising the potential loss to the company's creditors. In appropriate circumstances this can mean causing the company to cease trading and taking steps to have the company wound up.

Summary of creditors' committees and how they are formed

Under the *Désastre Law*, there is no requirement for the formation of a creditors' committee or for the Viscount to convene a meeting of creditors. The Viscount can be expected to convene a meeting of creditors should the need arise.

Under the Companies Law, a creditors' meeting may appoint a liquidation committee consisting of not more than five persons to exercise various functions conferred on it by the Law. The company may also appoint up to five persons as members of the committee. These functions comprise the fixing the liquidator's remuneration; agreeing to the existence of any vestigial powers of the directors; sanctioning the payment of a class of creditors in full; and sanctioning the compromise any claim by or against the company.

How do claims rank on insolvency (e.g. secured, unsecured, preferential claims etc)?

Creditors rank in order of secured creditors, priority creditors and unsecured creditors. The order of payment as between priority creditors and unsecured creditors is set out in *Désastre Law*, Art 32. The effect Companies Law, Art 166 is to assimilate those rules to a creditors' winding up.

The order of payment is as follows: (1) the Viscount's or liquidator's proper fees and expenses; (2) where the debtor is a bank in default, payments under the Banking Business (Depositors Compensation) (Jersey) Regulations 2009; (3) six months' arrears of employee wages and holiday pay and bonuses subject to prescribed amounts; (4) Jersey tax and social security payments, certain preferential claims of landlords and parochial rates; (5) all other provable debts on an equal footing (*pari passu*).

Does the UNCITRAL Model law on Insolvency apply? Does the Recast Regulation 2015/848 apply?

While the UNCITRAL Model Law does not apply in Jersey, the Royal Court may have regard to the Model Law when providing assistance to a foreign court under Désastre Law, Art 49(1). This is discussed further below.

Jersey is not a member of the EU and has not opted for the EC Regulations to have effect in Jersey.

Does your country's system provide for recognition of foreign insolvency proceedings and for cooperation between domestic and foreign courts and domestic and foreign insolvency administrators in cross-border insolvencies and restructurings?

The Jersey courts are used to dealing with cross-border insolvencies and judicial assistance is frequently given to foreign courts. The court may, at the request of the foreign court, grant assistance to officers of foreign courts, as well as those appointed by shareholders or administrative receivers, where they wish to take steps in Jersey in relation to insolvency matters (for example, because assets are held in the Island).

The Jersey court derives its jurisdiction to assist foreign courts from statute, customary or common law pursuant to its inherent jurisdiction and general principles of comity.

The relevant statutory jurisdiction is Désastre Law, Art 49 which allows the Jersey courts to have regard to the UNCITRAL Model Law when giving assistance to foreign courts. Where the application is made pursuant to this statutory provision, a request from a court of a relevant country or territory for assistance will be sufficient authority for the Jersey court to exercise its jurisdiction. Currently, the UK, the Isle of Man, Guernsey, Australia, and Finland are prescribed territories under the Bankruptcy (Désastre) Jersey Order 2006 (the 2006 Order). These countries will extend reciprocal treatment to Jersey, for example by way of English **IA 1986, s 426** (as amended). For those countries not listed in the 2006 Order, an application for assistance from the Jersey courts will be determined under the customary/common law of Jersey. In considering the foreign court's request for assistance, the Jersey court will have regard to whether the foreign country subscribes to the principles of comity and universality and whether the request is consistent with domestic law and policy.

If the court grants assistance, it might typically do so by sanctioning and registering the appointment of a foreign office holder or empowering the Viscount to render appropriate assistance to the foreign office holder.

What test is used in your jurisdiction to determine the COMI of a debtor company or group of companies? Is there a test for, or any experience with, determining the COMI of a corporate group of companies in your jurisdiction?

There is no statutory centre of main interests (COMI) test in Jersey relevant to Jersey insolvency proceedings.

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?

Each of the Désastre Law and the Companies Law provides for mandatory set off, on the date on which the property of the company is declared en désastre or a creditors' winding up of the company commences, in respect of mutual credits, mutual debts or other mutual dealings between the company and a creditor. This is similar to the Insolvency Rules 2016, **SI 2016/1024, r 14.25** (formerly The Insolvency Rules 1986, **SI 1986/1925, r 4.90**).

Under the Bankruptcy (Netting, Contractual Subordination and Non-Petition Provisions) (Jersey) Law 2005 (the 2005 Law) a set-off provision or a close-out netting provision (as those terms are defined in the 2005 Law) contained in an agreement will be enforceable in accordance with its terms despite the insolvency of any party to the agreement or any other person or any lack of mutuality of obligations. The 2005 Law also provides that non-petition provisions (meaning agreements that a party to the agreement does not take any action to have a person declared bankrupt or limits the circumstances in which such action may be taken) are enforceable in accordance with their terms.

Can IPs disclaim onerous property?

Under Désastre Law, Arts 15–16 (and rule 8 of the Désastre Rules) and Companies Law, Arts 171–173, the Viscount or liquidator has the power to disclaim any onerous moveable property (wherever situated) and any onerous immovable property (situated outside Jersey) as well as a contract lease of Jersey immovable property. The power allows the Viscount or liquidator to determine all rights, interest and liabilities in respect of the disclaimed property.

In order to disclaim onerous property, notice (in the prescribed form) must be given within six months of the declaration of désastre or the commencement of the creditors' winding up to any person having an interest or liability in respect of the property include the case of a hypothecary creditor.

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

Pre-insolvency transactions may be challenged by the liquidator or Viscount under the various anti-avoidance provisions contained in the relevant laws. These include:

- transactions at an undervalue—where a company in a creditors' winding up or in a désastre (or individual in a désastre) has entered into a transaction with a person at an undervalue, the Royal Court has the power to make such order as it thinks fit, including an order restoring the position to what it had been if the company had not entered into the transaction. These provisions are adapted from English **IA 1986, s 238**. A debtor enters into a transaction at an undervalue if he, she or it makes a gift or enters into a transaction for which there is no 'cause' or the value of the 'cause' obtained by the debtor is significantly less than the value of the 'cause' provided by the debtor. The term 'cause' in this context can be understood as meaning substantially the same as consideration. If the court is satisfied that the transaction in question was entered into in good faith for the purpose of carrying on its business and that there were reasonable grounds for believing that the transaction would be of benefit to the company at the time the transaction was entered into, the court will not make the order. A transaction at an undervalue may be impugned if it was entered into during the five years immediately preceding the date of commencement of the winding up but only if the company was insolvent when it entered into the transaction or become insolvent as a result of the transaction. Where the transaction has been entered into with a person connected with the company the burden of proof is reversed and the person must prove that the company was not insolvent when it entered into the transaction or that it did not become insolvent as a result of the transaction
- preferences—where a party has given a preference the Royal Court has the power to make such order as it thinks fit, including an order restoring the position to what it had been if the company had not entered into the preference. A debtor gives a preference to a person if that person is one of the debtor's creditors, surety or guarantor for any of his, her or its debts or other liabilities and the debtor does anything or suffers anything to be done which has the effect of putting that person in a better position in the event of a declaration or winding up being made than would have been if the thing had not been done. However, before the Royal Court can make any such order, it must be satisfied that the debtor was influenced by a desire to produce the above result. The giving of a preference may be impugned if it was entered into during the prior of 12 months immediately preceding the date of commencement of the winding up, but only if the company giving the preference was or became insolvent as a result of preference. As with transactions at an undervalue, if the transaction is entered into with a connected person the evidential burden is reversed. In respect of both transactions at an undervalue and preferences, the Royal Court is given discretion to consider the circumstances of the case including the position of bona fide third parties and purchasers for value
- extortionate credit transactions—transactions entered into within three years of the commencement of a désastre or a creditors' winding up, which require grossly exorbitant payments to be made in respect of credit or the credit transaction grossly contravenes ordinary principles of fair dealing may be impugned. In a désastre the Viscount may also reject in whole or part any claim for interest on a debt if the Viscount considers the rate of interest to be extortionate, subject to appeal to the court
- share redemptions and purchases—under the Companies Law, where a company has within 12 months of a creditors' winding up made a payment in respect of the redemption or purchase of its own shares and the payment was not lawfully made (for the purpose of redemption or purchased) and the aggregate realisable

value of the company's assets and the amount paid by way of contribution to its assets is not sufficient for the payment of its liabilities and the expenses of the liquidation, the liquidator may apply to court for an order that the person from whom the shares were purchased or redeemed, or a director of the company make a contribution to company's assets to enable the insufficiency to be met

Other grounds for impugning transactions—such a breach of directors' duties where the other party is on notice of the breach, an unlawful distribution by a company or the setting aside, in a customary law Pauline action, of transactions designed to defeat the interests of creditors—do not depend on the company being en désastre or in a creditors' winding up, but they will also be available to the Viscount or liquidator.

Summarise any recent reforms

As noted above, the Debt Remission (Individuals) (Jersey) Law 2016 created a moratorium procedure for individual debtors with low disposable income and debts of less than £20,000.

Summarise any upcoming reforms

It is anticipated that an amendment to the Companies Law will be introduced enabling creditors to commence a creditors' winding up of a company under the Companies Law, thus giving them an additional means of initiating a liquidation.

If you would like to contribute to Lexis®PSL Restructuring and Insolvency please contact:

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