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The International Comparative Legal Guide to:

Corporate Recovery & Insolvency 2015

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Country Question and Answer Chapters:

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1 Issues Arising When a Company is in Financial Difficulties

1.1 How does a creditor take security over assets in Jersey?

Jersey law distinguishes between two types of property – immovable (i.e. real property) and movable property (which can be both tangible and intangible).

Immovable property cannot be hypothecated (charged) unless it is hypothecated under one of two statutes, namely the *Loi (1880) sur la Propriété Foncière* or the *Loi (1996) sur l'hypothèque des Biens-fonds Incorporels* and by no other means, whatever the parties may have agreed.

It has historically been the position in Jersey that tangible movables cannot be hypothecated unless the movable is a ship, in which case it must be hypothecated in accordance with the Shipping (Jersey) Law 2002. It is possible to create security over tangible movable property by means of a pledge or lien and a landlord has a customary law right to seize all goods on premises for rent and reservation of title.

In early 2014 a new law, the Security Interests (Jersey) Law 2012, came fully into force and brought into effect new legislation governing security interests over intangible movable property. The previous legislation, the Security Interest (Jersey) Law 1983 was replaced.

The 2012 Law's transitional provisions provide that security interests created under the 1983 Law will continue to be valid and governed by the 1983 Law and will have priority over security interests created in the same collateral under the 2012 Law. If a security interest created under the 1983 Law is amended after the 2012 Law is in force by, for example, adding new collateral, the new Law will apply to the new collateral. There is, therefore, currently a "dual" security regime in Jersey – one governed under the 1983 Law and the other governed under the 2012 Law. The 2012 Law is a significant reform of the security laws of Jersey. It addresses many of the technical problems that existed under the 1983 Law and will greatly enhance the ability of a secured party to take security which will meet international standards and expectations.

The concept of a 'floating charge' over intangible immovables, where security is taken over a changing pool of assets, has only recently been introduced to Jersey by means of the 2012 Law. It is now possible to describe the collateral subject to a security interest as all the grantor's present and future intangible movable property in the style of a debenture. However, it is still not possible in Jersey to grant security over land (save as above) or over a pool of changing, tangible, movable property in the manner of an English-style floating charge.

The key features of the new Law are as follows:

- A simplified concept of what constitutes a security interest. It will be possible to create a "security interest" in the relevant collateral without having to specify any specific method of creation, for example, by possession of certificates of title, by control or by assignment.
- A clear set of priority rules. A secured party will enjoy more certainty as to how security will rank against competing interests.
- An online security interest registration system.
- The Law significantly extends the enforcement powers of security holders.

1.2 In what circumstances might transactions entered into whilst the company is in financial difficulties be vulnerable to attack and what remedies are available from the court?

A liquidator (or the Viscount in the case of a *désastre* – see below) has a wide range of powers, including undertaking investigations into the affairs of a company. If, after such investigation (which ordinarily has to be funded either from the company's assets or by creditor(s) directly), it appears to the liquidator that an offence has been committed, whether a transaction at undervalue, a preference payment, wrongful or fraudulent trading – all offences under the Companies (Jersey) Law 1991 ("Companies Law"), Articles 176 to 178 – the liquidator may apply to the court for various remedies against the relevant parties. These may involve the court ordering that the position be restored to the position had the preference not been given or transaction at undervalue not been made.

1.3 What are the liabilities of directors (in particular civil, criminal or disqualification) for continuing to trade whilst a company is in financial difficulties in Jersey?

A liquidator is obliged to make a report to the Attorney General (Jersey's state prosecutor) if it appears to him that the company or a director has committed a criminal offence or that a disqualification order should be sought as a result of his conduct.

The wrongful acts which a director is likely to commit when a company is in financial difficulties are those of wrongful trading (where a director knew there was no reasonable prospect or, on the facts, was reckless as to whether the company would avoid a winding up or declaration of *désastre*) and fraudulent trading

(where a director intends to defraud creditors). In relation to wrongful trading a director may be made liable for any or all of the company's debts arising from the time of such knowledge unless he took reasonable steps to minimise the potential loss to creditors. Concerning fraudulent trading the court can order that parties who were knowingly involved be liable to contribute to the company's assets to the extent it sees fit.

2 Formal Procedures

2.1 What are the main types of formal procedures available for companies in financial difficulties in Jersey and can any of these procedures be used in a restructuring?

Jersey has two principal forms of insolvency procedure – creditors' windings up under the Companies Law and *désastre* under the Bankruptcy (*Désastre*) (Jersey) Law 1990. Jersey's legislation is designed to provide the same outcome whichever procedure is followed. In recent years, there has also been a growing trend for the use of court windings up, also under the Companies Law, principally where the court is satisfied that it is just and equitable to do so (a different test of public interest may also be available). The 'just and equitable' route has, in recent times, been used in the context of so-called 'pre-packaged' arrangements where, immediately following their appointment, the liquidators enter into an agreement for the sale of much of the business and assets of the companies to a Newco, in which former management has an interest. Broadly speaking, as long as this is in the interests of creditors, this route can be used as a form of restructuring.

Other forms of insolvency do exist (based on Norman customary law, given Jersey's constitutional, legal and cultural background) but these procedures are invoked comparatively rarely.

2.2 What are the tests for insolvency in Jersey?

The test for insolvency is a cashflow test, i.e. the company is unable to pay its debts as they fall due.

2.3 On what grounds can the company be placed into each procedure?

Concerning creditors' windings up and *désastres*, the ground is simply that the company is insolvent based on the cashflow test. Rather confusingly, a creditor is not entitled to initiate a creditors' winding up; it is for the directors of a company to do so on the basis of insolvency. An application for a *désastre* may be made to the court by a creditor of the company having a liquidated claim exceeding £3,000. This limit does not apply to creditors' windings up. A company can apply to the court to be declared, through its directors, *en désastre*.

In relation to just and equitable windings up, the court has adopted a flexible approach. Recent cases have included, but are not limited to, the following grounds: where the substratum of the company has gone; where an investigation is required; where there might be competing interests between creditors and clients (particularly where financial services businesses are concerned); or where speed and choice of liquidator are important. A just and equitable winding up can be initiated by the company, a director, a shareholder, or the local financial services regulator.

2.4 Please describe briefly how the company is placed into each procedure.

In a *désastre* it is normally necessary to give the Viscount (the principal executive officer of the Jersey courts) at least 48 hours' notice of an intention to make an application. The application is accompanied by a supporting affidavit which confirms, insofar as the applicant is aware, that the company is insolvent, has assets, and that the applicant has a liquidated claim (if presented by a creditor).

In respect of a creditors' winding up, the directors resolve to call a shareholders' meeting to pass a special resolution to place it into liquidation. A creditors' meeting usually takes place immediately after this meeting, but 14 days' written notice must be given to creditors directly in advance of this meeting. A notice in the local newspaper advertising the meeting must also be placed at least 10 days in advance of the meeting. Creditors are entitled to receive information concerning the company's affairs and a statement of affairs verified on affidavit by some, or all, of the directors. At the creditors' meeting a liquidator is appointed as well as a liquidation committee.

An application for a just and equitable winding up is also commenced by a representation and affidavit, but given the complexities that are usually associated with such applications, more court time is required for such hearings. The Viscount's views on the appropriateness of such applications are always sought by the court.

2.5 What notifications, meetings and publications are required after the company has been placed into each procedure?

Under a *désastre*, the Viscount is required to publish a notice in the gazette section of the local newspaper to the effect that a company has been declared *en désastre* and invite claims to be filed in a 40- to 60-day window after the declaration. Thereafter, the Viscount must allow claims to be inspected by interested parties, notification of which is made again via the local paper (although, in practice, known creditors outside Jersey are contacted directly). A formal process follows whereby objections are considered and further information can be requested. Finally, formal adjudication of filed claims then takes place and creditors and any objectors are notified of the Viscount's decision. An appeal mechanism is also available. When the Viscount has realised all of the debtor's property the Viscount must supply all the creditors of the debtor with a report and accounts and pay a final dividend. The company is then struck from the register of companies following notification by the Viscount to the Registrar of Companies.

There are no formal requirements to hold meetings under a *désastre*. The Viscount may contact creditors on issues relating to funding or conduct of the proceedings on an *ad hoc* basis and seek directions from the court.

The creditors' winding up provisions in terms of claims handling are broadly similar. However, if a creditors' winding up continues for more than 12 months, a general meeting of members and creditors must be held. In the case of the first meeting, this must be held within three months after the end of the first 12 months, at which the liquidator must lay an account of his or her acts. Once the liquidator has notified the Registrar of Companies confirming that the final members' and creditors' meetings have been held, the company is dissolved at the end of three months after the registration of the return from the liquidator.

In just and equitable proceedings, the court can direct the manner in which the winding up is to be conducted and make such orders

as it sees fit to ensure that the winding up is conducted in an orderly manner. Such orders are usually similar to the provisions of creditors' windings up, but modified to accommodate any fact-specific requirements.

2.6 Are "pre-packaged" sales possible?

Jersey does not have any statutory regime which formally acknowledges "pre-packaged" sales. However, interpretation by the Jersey courts of the just and equitable provisions as referred to earlier has allowed the concept of both administration and pre-packaged sales as recognised in England and Wales to safeguard the interests of both clients of financial services businesses and creditors respectively.

3 Creditors

3.1 Are unsecured creditors free to enforce their rights in each procedure?

Yes, they are.

3.2 Can secured creditors enforce their security in each procedure?

Yes, they can.

3.3 Can creditors set off sums owed by them to the company against amounts owed by the company to them in each procedure?

Yes, but only where there have been mutual credits, mutual debts or other mutual dealings between the company and a creditor.

4 Continuing the Business

4.1 Who controls the company in each procedure? In particular, please describe briefly the effect of the procedures on directors and shareholders.

In the case of a *désastre*, all the property and powers of the company vest in the Viscount. This includes the capacity to exercise and to take proceedings for exercising all such powers in, or over, or in respect of any property. It is important to note that, unlike in a creditors' winding up, the Viscount (as, effectively, the liquidator) is not an agent of company – the assets and liabilities of the company and the powers of the directors legally vest in him.

In a creditors' winding up, the liquidator, once appointed, controls the company. The corporate state and capacity of the company continue until the company is dissolved but the powers of the liquidator in exercising any power of the company are limited to those as may be required for its beneficial winding up. On the appointment of a liquidator in a creditors' winding up, all the powers of the directors cease, except so far as the liquidation committee (or, if there is no committee, the creditors) sanction their continuance.

4.2 How does the company finance these procedures?

Whether in a *désastre* or creditors' winding up, a company should ordinarily fund the steps required to place the company *en désastre* or liquidation from its own resources. The existence of realisable assets in order to pay for a liquidator's or the Viscount's costs (and to pay a dividend to creditors) is fundamental when considering whether to use either procedure. Where there are insufficient funds and a creditor seeks to place a company *en désastre*, the Viscount will usually seek an indemnity for his costs and expenses from the declaring creditor or seek to put in place funding arrangements with creditors. The ongoing costs of the Viscount or liquidator are then met in priority to all other claims, save where a creditor has security.

4.3 What is the effect of each procedure on employees?

Whilst there is no formal legal effect on contracts of employment in a *désastre* or a creditors' winding up, given that the company must cease to carry on its business, except so far as may be required for its beneficial winding up, the practical effect is that employees are dismissed and they should file claims in the proceedings. In relation to court windings up, any order may have the effect of automatically dismissing the employees. However, although it would be unusual, it is possible to continue employment with the company by agreement between a liquidator and an employee. Where agreement is reached to this effect, employment continues until such point as it is terminated thereafter.

4.4 What effect does the commencement of any procedure have on contracts with the company and can the company terminate contracts during each procedure?

Whilst a *désastre* or creditors' winding up does not automatically terminate contracts with the company (although it may be a ground for termination under the terms of certain contracts), the liquidator has the power unilaterally to terminate onerous contracts in order to facilitate the winding up: the right to disclaim onerous property. While there is no formal termination of contracts, where they will not be performed, a claim will crystallise against the debtor company. The only remedy available to the creditor is to file a claim in respect of the unperformed portion of the contract.

5 Claims

5.1 Broadly, how do creditors claim amounts owed to them in each procedure?

Jersey does not have specific proofs of debt forms unlike England. Creditors should, in accordance with the communications or notices published by the liquidator or the Viscount, file claims in writing together with sufficient supporting documentation so as to support the claim.

5.2 What is the ranking of claims in each procedure? In particular, do any specific types of claim have preferential status?

The statutes which relate to creditors' windings up and *désastre* provide for identical ranking of claims. The liquidator/Viscount's costs and expenses are paid in priority to all other distributions (save where a creditor has a secured charge). Employees' wages (£4,350), holiday pay and bonuses (£1,250) are next, with limits shown in brackets, followed by social security, certain state and parochial taxes and rent payable to landlords under Jersey customary law.

5.3 Are tax liabilities incurred during each procedure?

Given the introduction of the zero/ten regime, many trading companies are taxed at zero per cent, and therefore there is no tax to pay on the outcome of any insolvency proceedings. However, Jersey operates a Goods and Services Tax (GST), for which businesses have to register to account to the government if they reach certain revenue thresholds. Generally speaking, the business of the individual/company will cease to trade as at the date of the *désastre*. If this is the case, where such a business was subject to GST, the obligation under GST will cease. However, where assets are disposed of for the benefit of an insolvency where the individual or company is GST registered, GST will be charged. Where debts are collected where the individual/company was registered for GST prior to the *désastre*, the Viscount is obliged to collect and retain separately that amount which relates to GST.

6 Ending the Formal Procedure

6.1 What happens at the end of each procedure?

Once the liquidator has notified the Registrar of Companies confirming that the final members' and creditors' meetings have been held, the company is dissolved at the end of three months after the registration of the return from the liquidator, although the court can defer such dissolution.

When the Viscount has realised all the debtor company's property, the Viscount must supply all the creditors with a report and accounts and pay a final dividend. The company is then struck from the Register of Companies following notification by the Viscount to the Registrar of Companies.

7 Restructuring

7.1 Is a formal statutory procedure available to achieve a restructuring of the company's debts in Jersey and, if so, to what extent is it supervised by the court?

Jersey does not have any administration procedure similar to that in England and Wales which would allow a reorganisation (although in certain circumstances a formal administration subject to English provisions can be conducted in relation to the affairs of a Jersey company).

Once a creditors' winding up, *désastre*, or court winding up has commenced, the outcome is always, ultimately dissolution (although a pre-packaged sale of a company's assets to a new entity can sometimes be achieved). However, under the Companies Law schemes of arrangement are available which can involve almost any kind of corporate reorganisation, merger, acquisition or restructuring so long as the appropriate approvals and court sanction are obtained. This generally involves 75 per cent of either creditors or shareholders approving such a scheme and is binding on them and the company (and a liquidator if the company is being wound up). Such schemes are closely supervised and sanctioned by the Royal Court.

7.2 If such a procedure is available, is a debt for equity swap possible and how are existing shareholders dealt with?

Yes – see above. The effect on existing shareholders will depend on the terms of the restructuring but they will always have a voice in such proceedings.

7.3 Is a moratorium available as part of the restructuring process?

There is no direct equivalent in Jersey of the English administration procedure, meaning a scheme of arrangement cannot be used in conjunction with administration to obtain a moratorium protecting the company from its creditors enforcing their security or other rights (unless an English administration is sought for this purpose). There is no automatic stay on proceedings in connection with such a scheme.

7.4 Can dissenting creditors be crammed down?

See question 7.1 above.

7.5 Is consent needed from other stakeholders for a restructuring?

Restructuring requires the consent of either creditors or shareholders, depending on the terms.

8 International

8.1 What would be the approach in Jersey to recognising a procedure started in another jurisdiction?

Jersey has both statutory and common law provisions relating to the provision of assistance to foreign courts in insolvency proceedings. The key determinant as to which route is chosen is based on whether a country is a "relevant country or territory" as defined in statute. There are currently five such countries, being Australia, Finland, Guernsey, the Isle of Man and the UK. Other countries are dealt with under the court's inherent jurisdiction. However, whichever route is taken, the court adopts a similar approach. The Jersey court is generally receptive to such requests for assistance, granting recognition and further powers (e.g. for disclosure) when warranted.

The application starts by way of a representation supported by a letter of request from the court which appointed the foreign office holder, an affidavit and a copy of the appointment documents. These are provided to the Viscount who vets them for appropriateness and content before they are passed to the court.

The burden on a representative not from a "relevant country or territory" is greater. The application will need to be decided on the basis of comity which would require, for example, the applicant to show that the requesting jurisdiction shows reciprocity to Jersey for the purposes of any possible future request from the Jersey court.

There are numerous examples of Jersey both granting requests for assistance and seeking assistance from foreign courts where Jersey companies are involved.

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William is a Jersey Advocate and English Barrister with extensive experience of litigation and a focus on advocacy. He practised at the English Bar for 13 years before moving to work in Jersey in 2008.

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William has appeared in many notable recent civil decisions in Jersey. He appeared for the successful plaintiff in a recent case in which a judgment debtor denied for two years the plaintiff's claim that he was beneficially interested in assets held in a structure headed by a Jersey foundation, such that the judgment could be enforced against those assets.

He has also frequently advised and assisted financial services businesses and regulators in Jersey on a variety of regulatory matters, including AML laws and procedures, sanctions and tax information exchange. He has conducted regulatory investigations on behalf of both regulated businesses and the regulator.

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Having qualified as a Chartered Accountant in 1998 with Arthur Andersen, Ed has been involved in a variety of litigation support, proceeds of crime and regulatory investigations and enforcement actions.

Ed leads the Regulatory team at Baker & Partners. He has been appointed liquidator of two fiduciary services providers – one under just and equitable provisions and the other under solvent winding up procedures.

He has also produced reports and provided support for financial services businesses which have assisted them in meeting their obligations under the law, as a result of which he has delivered practical and realistic advice as to strategic options and operational matters.

Ed has also delivered training courses on topics of corporate governance and risk management, speaks at conferences on topics relating to offshore financial centres and writes regularly on associated topics.

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Baker & Partners is a Jersey law firm specialising in civil & commercial litigation, contentious trusts, financial services regulation, crime, fraud, asset tracing & recovery.

Our Insolvency team have acted under a wide variety of Jersey insolvency and winding down processes, including liquidations under the Companies (Jersey) Law 1991 in both solvent and insolvent scenarios, *remises de biens* under the Loi (1839) Sur Les Remises de Biens, both corporate and personal bankruptcies under the Bankruptcy (Désastre) (Jersey) Law 1990, *degrevements*, and Directions issued by the Jersey Financial Services Commission to regulated financial services businesses to wind down operations.

Our team has also been instructed by a range of parties who have been involved in insolvency processes including financial and commercial institutions, individuals subject to insolvency, directors acting on behalf of potentially insolvent funds and companies, the Jersey Financial Services Commission, the Viscount of the Royal Court of Jersey and Jurats.

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