

ALLEN & OVERY



Restructuring across borders

Jersey

Corporate restructuring and
insolvency procedures | June 2022

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Introduction

When a Jersey company faces financial difficulties, there are a variety of restructuring and insolvency options available. The principal restructuring and insolvency regimes for companies under Jersey law are:

- Creditors' winding up under the Companies (Jersey) Law 1991, as amended (**the Companies Law**);
- Désastre under the Bankruptcy (Désastre) (Jersey) Law 1990, as amended (**the Désastre Law**);
- Just and equitable winding up under the Companies Law;
- Summary winding up where a company is solvent (similar to a members' voluntary winding up); and
- Schemes of arrangement.

In addition to schemes of arrangement under the Companies Law, Jersey also has the option of out-of-court restructuring transactions. These restructuring transactions can involve, for example:

- Debt-for-equity swaps (with the agreement of all affected creditors);
- Group reorganisations; and/or
- Enforcement of security and set-off provisions.

There are also Jersey customary law insolvency and liquidation procedures, however, as these are primarily aimed at individuals rather than companies, it is unlikely that any of these procedures would be used for an insolvent company in preference to a désastre or a creditors' winding up.

There are no Jersey law corporate rescue procedures equivalent to English law administration or US Chapter 11 bankruptcy procedures. Insolvency proceedings in Jersey do not combine parent and subsidiary companies' assets into a single pool. The insolvency is on a company-by-company basis, barring a few exceptional cases where the court has ordered pooling of the insolvent estates of related companies.



Enforcement of Security

The main forms of security available under Jersey law are:

- security interests over Jersey intangible movable property pursuant to the Security Interests (Jersey) Law 2012 (the **SIJL**); and
- an encumbrance or charge over Jersey immovable property (a **hypothec**).

Jersey law recognises the concept of a trust.

The appropriate method of enforcement will depend on the type of security granted and the particular case in question.

Jersey intangible movable property

A secured party with a perfected security interest under the SIJL has the following wide range of enforcement powers available to them:

- a) appropriating the collateral
- b) selling the collateral
- c) taking any of the following actions:
 - i. taking control or possession of the collateral. This relates to perfecting the secured party's security interest in the collateral (rather than taking ownership of the collateral by appropriation). A

secured party may look to use this power if its security interest was not perfected by control or possession at the point of entering into the relevant security agreement (i.e. if it was perfected by registration only).

For further information on perfecting security by control or possession, please refer to our client briefing

The Security Interest (Jersey) Law 2012;

- ii. exercising the rights of the grantor in relation to the collateral;
- iii. instructing any person who has an obligation in respect of the collateral to carry out such obligation for the benefit of the secured party; and
- iv. applying any remedies provided for by the security agreement to the extent that such remedies do not conflict with the SIJL.

In practice, the most widely exercised enforcement powers under the SIJL are sale and appropriation. Jersey law does not have the concept of receivers enforcing security. Enforcement must be completed by the secured party (or its nominees/agents). An enforcement sale involves the secured party selling

the collateral to a third party, whereas appropriation involves the secured party taking full ownership of the collateral in return for reducing the secured obligations by the value appropriated.

Under Article 43 of the SIJL, these powers become exercisable upon (a) the occurrence of an event of default as provided for in the security agreement; and (b) the secured party serving written notice on the grantor specifying the event(s) of default. The powers can be exercised more than once after an event of default and in respect of all or part of the collateral.

Pre-enforcement steps

In addition, there are a variety of pre-enforcement steps available to a secured party (prior to serving written notice of default under Article 43 of the SIJL). These include:

- taking title to secured shares through instructing the corporate administrators to update the register of members (leaving beneficial ownership of such shares with the grantor);

- exercising voting rights in respect of secured shares, for example to change the board of directors of the company; and

- giving instructions to third parties in respect of the collateral, for example instructing the account bank to block the secured accounts.

Hypothecs

A hypothec is similar to a charge over immovable property as it is a subsidiary right available to protect a principal obligation. The principal obligation can exist independent of any hypothec, but a hypothec cannot exist independently of a principal obligation. If the principal obligation secured by the hypothec is repaid, the hypothec ceases to exist and there is a statutory procedure for enforcing the cancellation of hypothecs in such circumstances.

Holders of registered hypothecs can enforce their security by calling for the insolvency of the debtor in the event of a default as defined in the underlying bond or other document creating the debt.

Enforcement of Security

(Cont.)

Insolvency and enforcement

The SIJL provides that the grantor of a security interest becoming bankrupt (as defined in Article 8 of the Interpretation (Jersey) Law 1954), or the grantor or its property becoming subject, whether in Jersey or elsewhere, to any other insolvency proceedings, will not affect the power of a secured party to appropriate or sell, or otherwise act in relation to, collateral under the SIJL.

However, the SIJL provides that, in the case of the bankruptcy of the grantor of a security interest, the security interest is void as against the Viscount (a court officer who conducts the *désastre*) or liquidator (as applicable) and the grantor's creditors unless the security interest is perfected before the grantor becomes bankrupt. A perfected security interest could still potentially be challenged by the Viscount or a liquidator (as applicable) as a transaction at an undervalue or preference under insolvency legislation.

If an owner of Jersey immovable property is declared '*en désastre*' title to the property will vest in the Viscount who will be responsible for realising the asset. The holder of a registered hypothec will be treated in the

same way as any other secured creditor(s) and entitled to be repaid from the proceeds of any sale.

Setting aside transactions

Under the Companies Law and the *Désastre* Law, the liquidator (in a creditors' winding-up) or the Viscount (in a *désastre*) have the power to apply to court to challenge transactions entered into by the company during the relevant challenge periods, such as transactions at an undervalue and preferences.

If a company enters into a transaction at an undervalue (that is, a gift or sale of assets for significantly less than market value) within five years before the start of insolvency proceedings, on application of the liquidator or the Viscount, the court may order that the transaction be unwound, if the company was cashflow insolvent at the time or became cashflow insolvent as a result of the transaction. However, the court will not make any order in respect of a transaction at an undervalue provided that it is satisfied that the company entered into the transaction with reasonable grounds and in good faith for the purpose of carrying on its business.

If a company gives a preference to any person within 12 months before the commencement of insolvency proceedings, on application of the liquidator or the Viscount, the court may order that the transaction be unwound, if the company was cashflow insolvent at the time or became cashflow insolvent as a result of the transaction. A preference is any act by a company which has the effect of putting one of the company's creditors into a better position than it otherwise would have occupied in the event of the company's insolvency (such as providing new security or repaying one creditor in advance of other creditors). However, the court will not make any order in respect of a preference unless it is satisfied that the company, when giving the preference, was influenced by a desire to put the beneficiary into a better position than it otherwise would have occupied in the event of the company's insolvency.



Désastre

An insolvent Jersey company may be liquidated by the Jersey Royal Court following a désastre application. An application to declare the property of a company en désastre can be made by:

- The debtor;
- A creditor (although note that the creditor must have a liquidated claim against the debtor of at least GBP3,000 that is not subject to any reasonable defence, set-off or counterclaim); or
- The Jersey Financial Services Commission (the JFSC). The JFSC can make an application, in the case of certain regulated entities, on just and equitable grounds.

The application cannot be made unless the application has given the Viscount at least 48 hours' notice of the intention to make the application.

The court has discretion to commence the désastre if the company has realisable assets but is unable to discharge its liabilities as they fall due (that is, it is cashflow insolvent). External funding may be required for the désastre and the court may require a creditor applying for a declaration to indemnify the Viscount against the costs of the désastre.

On and from the commencement of the désastre:

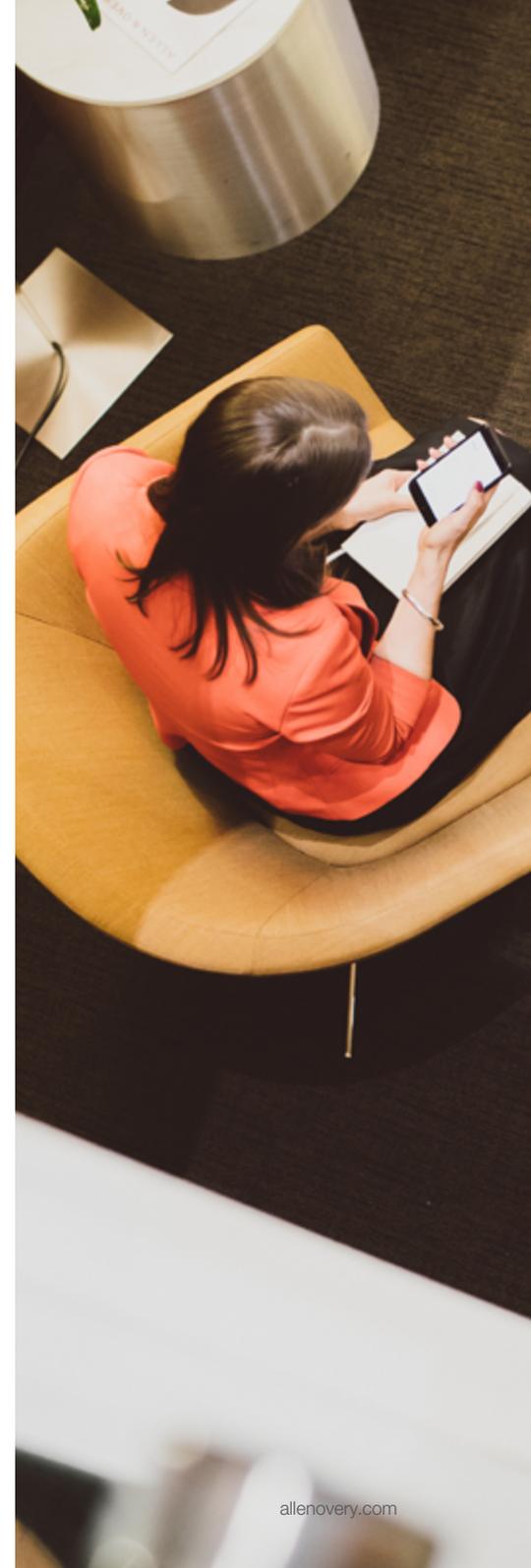
- All of the property and powers of the debtor, save those held on trust by the debtor for another person, immediately vest in the Viscount; and
- The company's shares cannot be transferred (and the company's shareholders cannot change) without the permission of the Viscount.

A creditor who has a debt provable in the désastre does not have any other remedy against the debtor or its property in respect of the debt, and cannot commence or continue any action or legal proceedings to recover the debt, except with the consent of the Viscount or the court.

The Viscount has wide powers under the Désastre Law. The Viscount realises the company's assets, discharges its liabilities and distributes realisations to the creditors. All costs and expenses properly incurred or payable by the Viscount in a désastre, including commissions levied by the Viscount against the value of assets realised and distributed, are payable out of the liquidated value of the company's assets in priority to all other claims.

When all of the debtor's property has been realised, the Viscount (i) provides the creditors with a report and accounts relating to the désastre, and (ii) pays a final dividend. After the Viscount has filed a notice of the date of payment of the final dividend with the Jersey Companies Registry, the company is normally immediately dissolved.

At any time during the course of the désastre, the debtor may make an application to the court for an order recalling the declaration, on the basis that the debtor has realisable assets vested in the Viscount which are sufficient to fully pay all claims in the désastre. If the application is granted by the court (having regard to the interests of the debtor and creditors), the debtor's property which vested in the Viscount will immediately re-vest in the debtor. Where a declaration of désastre has been made in respect of a debtor that is not insolvent at the date of the désastre, the debtor may have a right of action against the creditor that applied for the declaration in respect of any loss caused, unless the creditor acted reasonably and in good faith in applying for the declaration.



Winding Up

Creditors' Winding Up

The purpose of a creditors' winding up is to facilitate an orderly and fair distribution of the assets of an insolvent Jersey company by treating the claims of all unsecured creditors equally and rateably. However, it cannot be used where the company has been (or is subsequently) declared by the court *en désastre*.

Prior to 1 March 2022, the creditors' winding up procedure could only be commenced by the shareholders of the company passing a special resolution.

However, Amendment No.8 of the Companies Law has created another option. For the first time under Jersey law, a creditor with a debt of over GBP3,000 can apply to the court for an insolvent company to be placed into a winding up and for a liquidator to be appointed. However, such application can only be made where:

- The company is unable to pay its debts as they fall due;
- The creditor has evidence of the company's insolvency; or
- The creditor has the consent of the company.

The company will be deemed to be unable to pay its debts for these purposes if the creditor has served on the company a statutory demand (in the prescribed form) requiring it to pay the sum so due, and the company has, for 21 days after service of that demand, (i) failed to pay the sum, or (ii) dispute the debt due to the reasonable satisfaction of the creditor.

After the commencement of the creditors' winding up:

- The company ceases to carry on its business, except in so far as may be required for the winding up of the company;
- The corporate state and capacity of the company continues until it is dissolved;
- The company's shares cannot be transferred (and the company's shareholders cannot change) without the permission of the liquidator; and
- No action can be taken or proceeded with against the company, except with the permission of the court, and subject to such terms as the court may impose. However, this does not prevent the enforcement of pre-existing security interests or contractual set-off provisions (see above).

Once a liquidator has been appointed, all the powers of the directors cease, except in so far as allowed by the creditors. Subject to this, the liquidator has all the powers that the directors had in relation to the company, although such powers must be exercised for the benefit of the winding up.

The liquidator realises the company's assets, discharges its liabilities and distributes realisations to the creditors. The liquidator can seek funds from creditors for the purposes of funding the liquidation once agreed between the liquidator and the liquidation committee or (if no liquidation committee has been appointed) the creditors, or failing such agreement, as is approved by the court. All costs and expenses properly incurred in a creditors' winding up, including the liquidator's remuneration, are payable out of the company's assets in priority to all other claims.

Once the affairs of the company have been fully wound up, the liquidator prepares an account of the creditors' winding up to be laid before meetings of the shareholders and the creditors.

After a return is made by the liquidator to the Jersey Companies Registry confirming the holding of these meetings, the company will be dissolved within three months unless the court, on the application of the liquidator or of another person who appears to the court to be interested, makes an order deferring the date at which the dissolution of the company is to take effect (and for such time as the court thinks fit).

Summary winding up

Where a Jersey company is able to discharge its liabilities as they fall due (i.e. it is cashflow solvent), it can be wound up using the summary winding up procedure.

A summary winding up is commenced by:

- each director signing a statement of solvency using the prescribed wording (with different options), which confirms the company's cashflow solvency; and
- a special resolution for the summary winding up being passed by the shareholders within 28 days of the statement of solvency being signed, with a copy of the special resolution being filed with the Jersey Companies Registry.

The summary winding up can be conducted by the directors, although a liquidator may be appointed by special resolution to conduct the liquidation instead. The directors or liquidator can only take actions that are necessary to realise the company's assets, discharge its liabilities and distribute realisations to the shareholders.

A summary winding up is completed on the filing with the Jersey Companies Registry of a further statement of solvency signed by the directors or the liquidator (if appointed) stating that the company has no assets and no liabilities, after which the company is dissolved.

Court Orders

Just and equitable winding up

A company may be wound up by the court if (i) the company has not been declared *en désastre* and (ii) the court is of the opinion that it is just and equitable, or expedient in the public interest, to do so.

The application to the court for such winding up may be made (i) by the company, a director, a shareholder, a Minister or the JFSC on just and equitable grounds, or (ii) by a Minister or the JFSC on public interest grounds. The test to be applied by the court in considering the application is whether it holds the above opinion, as opposed to a test of solvency. If the court orders a company to be wound up, it may appoint a liquidator and direct the conduct of the winding up.

There have been various cases in which the Royal Court of Jersey has ordered the just and equitable winding up of Jersey companies, which were summarised in the case of *Representation of Maltese Holdings and Zollinger Investments* [2012] JRC 239 (the **Maltese and Zollinger Case**). In the Maltese and Zollinger Case, it was held that just and equitable winding up remains a discretionary remedy and the words 'just and equitable' should be given a flexible interpretation. Although there is no exhaustive list of situations that may fall within the scope of such words, there is a wide jurisdiction for the court to order a just and equitable winding up.

Schemes of arrangement

Under Article 125 of the Companies Law, the court may sanction a compromise or arrangement (a Scheme) between a company and its creditors (or a class of them) or shareholders (or a class of them). The court may, on application of the company (or its creditor, shareholder, or

liquidator if it is being wound up), call a meeting at which the Scheme will need to be agreed to by a majority in number of the creditors or shareholders (or a class of either of them) representing:

- (a) 75% in value of the creditors (or class of creditors); or
- (b) 75% of the voting rights of the shareholders (or class of shareholders).

If the Scheme is so agreed and sanctioned by the court, it is binding on all the creditors (or class of creditors) and/or shareholders (or class of shareholders) subject to the Scheme, as well as on the company itself. Where the company is in the course of being wound up, the Scheme is also binding on the liquidator and all contributories. A Scheme is concluded when the court order sanctioning the Scheme is filed with the Companies Registry.

Article 167 of the Companies Law provides that a Scheme between a company and its creditors entered into immediately preceding the commencement of, or in the course of, a creditors' winding up is binding:

- (a) on the company, if sanctioned by special resolution of the shareholders; and
- (b) on the creditors, if acceded to by 75% in number and value of them.

However, a creditor or contributory may appeal to the court against the Scheme within 3 weeks from its completion, and the court may then amend, vary or confirm the Scheme in any way it thinks just.

The advantages of Schemes are that if the appropriate approvals and court sanction are obtained, they are binding on all of the creditors (or class of creditors),

including secured and preferential creditors, or on all the shareholders (or class of shareholders) (irrespective of whether they are included in the Scheme). A Scheme can involve almost any kind of company reorganisation, merger or restructuring as long as the appropriate approvals and court sanction are obtained.

On the other hand, Schemes can be expensive and involve a formal court procedure, which may be time consuming. There is no direct Jersey equivalent of administration under English law, meaning a Scheme could not be used in conjunction with Jersey administration to obtain a moratorium protecting the company from its creditors enforcing their security or other rights. There is no automatic stay on proceedings in connection with a Scheme.

Although we do not advise on English law, we understand that the above provisions relating to Schemes are broadly similar to the provisions of Part 26 of the UK Companies Act 2006).

An out of court restructuring procedure may be used as an alternative to, or in combination with, a Scheme. A Jersey company that is not subject to any formal insolvency proceedings will generally have the ability to participate in a restructuring. However, without the benefit of any stay on proceedings, it will be necessary for the company to negotiate with all creditors (particularly secured creditors) to bind themselves by entering into standstill agreements and a restructuring agreement.

Cross-border issues

Article 49 of the Désastre Law provides that the court shall assist the courts of such countries and territories as may be prescribed in all matters relating to the insolvency of any person to the extent it thinks fit. Currently, the prescribed countries are the United Kingdom, Guernsey, the Isle of Man, Finland and Australia.

However, Article 49 does not exclude the pre-existing customary or common law right of the court to exercise its inherent jurisdiction to assist non-prescribed countries or to have regard to principles of comity. Such right would extend to the discretion to apply either Jersey law or the law of the requesting court. In our view, the court is likely to recognise the appointment of a foreign officeholder administering insolvency proceedings under the laws of a foreign jurisdiction, where there is a valid connection between the debtor and the laws of the jurisdiction of the insolvency proceedings.

As Jersey is not in the United Kingdom or a member of the EU, the EU Regulation on Insolvency Proceedings does not apply in Jersey. However, the Jersey court may still have regard to where the debtor's centre of main interest is in considering applications to commence insolvency proceedings. The court may have regard to the UNCITRAL Model Cross-Border Insolvency Law and is required to have regard to the rules of private international law.

It may be possible to put a Jersey company into administration under English law, by making an application for a letter of request from the Jersey court to the English court. This is a non-statutory discretionary remedy which will require the approval of both courts. It will generally only be available where the Jersey company regularly conducts the administration of its business in England rather than in Jersey. It would be necessary to show in the application why English administration may achieve the best possible outcome for the debtor and creditors, and why local alternatives such as a creditors' winding up or désastre would not be as beneficial to the debtor and creditors.

Foreign judgments from England and Wales, Scotland, Northern Ireland, Guernsey and the Isle of Man may be enforced in Jersey under the Judgments (Reciprocal Enforcement) (Jersey) Law 1960.



Key contacts

If you require advice on any of the matters raised in this document, please contact any of our partners or your usual contact at Allen & Overy, or email rab@allenoverly.com

This factsheet has been prepared with the assistance of Ogier (Jersey) LLP's Insolvency and Restructuring Team. Any queries under Jersey law may be addressed to the key contacts listed below from Ogier.

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Further information

Developed by Allen & Overy's market-leading Restructuring group, "**Restructuring Across Borders**" is an easy-to-use website that provides information and guidance on all key practical aspects of restructuring and insolvency in Europe, Asia, the Middle East and the U.S.

To access this resource, please [click here](#).

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