The insolvency landscape in Jersey

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The COVID-19 pandemic has given us an indelible reminder of the fragility of the social and economic constructs that we had perhaps taken for granted. While governments take urgent steps to support businesses and individuals to weather the storm, it is inevitable that insolvency and restructuring regimes around the world are going to be increasingly stress tested.

Jersey is fortunate to benefit from sophisticated and robust legislation which can fairly balance the often competing interests of creditors who might want their money now and shareholders who might prefer to explore whether the business can continue and ultimately offer better returns to its stakeholders.

Corporate insolvency procedures in Jersey

The two key pieces of legislation in the jurisdiction are the Companies (Jersey) Law 1991 (CJL) and the Bankruptcy (*Désastre*) (Jersey) Law 1990 (BDJL). The former is principally based on the United Kingdom's Companies Act 1985, the latter is derived from Jersey's customary law.

Whether a Jersey company is deemed insolvent depends on whether it can pay its debts as they fall due. This is known as the 'cash flow' test. Unlike in other jurisdictions, for a company to be insolvent it is not necessary that the value of the company's liabilities exceed its assets or that the company has failed to pay a statutory demand.

At the time of writing, *Désastre* proceedings brought under the BDJL are the only Jersey insolvency procedure for an insolvent company that may be started by a creditor. So, where a creditor wants to liquidate a company to try and recover what is owed, it must apply to the Royal Court of Jersey (the Royal Court) for an order that the company's assets be declared *en désastre* (in disaster). In general terms, a successful application vests the assets of the company (wherever situated) in the hands of the Viscount of Jersey (the chief executive officer of the Royal Court), who will then facilitate the orderly and fair distribution of its assets. However, change might be on the horizon. Consideration continues to be given to enabling a creditor to apply for the winding up of a company under the CJL and the appointment of a liquidator.

In the meantime, there are two other Jersey procedures that may be used to liquidate an insolvent company; a creditors' winding up (which, despite its name, cannot be initiated by a creditor) and a winding up on just and equitable grounds. These procedures are governed by the CJL and result in the appointment of an insolvency practitioner to administer the winding up of the company and distribution of its assets to its creditors. The manner of this distribution is prescribed by the BDJL.

Secured creditors

The vast majority of companies carry on business outside Jersey. In a typical financing transaction, the company will create security over its Jersey intangible movable assets (e.g. shares, debt securities, bank accounts and contractual rights) as well as its assets located outside Jersey (e.g. shares in foreign subsidiaries or real estate).

Crucially, where a creditor holds a perfected security interest in any Jersey intangible movable assets under the Security Interests (Jersey) Law 2012, the secured creditor may enforce its security interest despite the company becoming insolvent or any of its assets becoming subject to insolvency proceedings.

Where a company owns assets that are or deemed to be located outside Jersey that are secured by a valid security interest, the rights of the secured party will be determined by the law which governs the security interest.

Set off and subordination

Where there are any mutual credits, mutual debts or other mutual dealings between a company and a creditor, both the BDJL and the CJL require the debts to be automatically set off on the date on which the insolvency procedure started. Under the Bankruptcy (Netting, Contractual Subordination and Non-Petition Provisions) (Jersey) Law 2005, a set off provision or a close out netting provision 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.

Corporate rescue

The Jersey insolvency regime does not yet include reconstructive procedures like an administration under the UK Insolvency Act 1986 or Chapter 11 proceedings under the US Bankruptcy Code.

Drawing deep on its Norman French roots, the only Jersey procedure with a suspensory measure specifically to permit or facilitate reconstruction or rehabilitation is a *remise de biens* (which is governed by the Loi (1839) sur les remises de biens). This, in essence, places the affairs and assets of the company in the hands of the Royal Court for a period of usually between six to 12 months. To apply for a *remise*, the company must own immovable property in Jersey and – as long as the secured creditors have been paid in full, with a payment (no matter how small) to unsecured creditors – the company can, in theory, be discharged from all other debts and start afresh.

The Royal Court retains full discretion on whether to order a *remise* and has commented that it is of less importance in light of the evolution of the *désastre* procedure. The overarching point is that a *remise* is not geared towards handling complex and cross-border corporate insolvencies.

Instead, the Royal Court has adopted a broad interpretation of when it is just and equitable to wind up a Jersey company when exercising this jurisdiction under the CJL. This procedure enables the Royal Court to issue a bespoke order which can draw on the provisions of both the BDJL and CJL and enable the company to realise a better return for its creditors by, for example, permitting it to trade for a further period or enter into a pre-pack sale of its assets. The effective use of the just and equitable procedure in Jersey is a shining example of the Royal Court's pragmatism and flexibility. However, the procedure is still technically a terminal one and therefore limited in application.

A further avenue available to a Jersey company or a creditor is to apply to the Royal Court for a letter of request for the Jersey company to be placed into a foreign statutory rescue process. Such cases typically involve placing a Jersey company into administration in the UK. However, the Royal Court's jurisdiction in this regard is not fettered.

Other options

Scheme of arrangement

Although not strictly speaking an insolvency procedure, the CJL enables a company to enter into a scheme of arrangement with its creditors or any class of them (a Scheme).

In order for the Royal Court to sanction a Scheme, it will need to be agreed to by a majority in number of the creditors or shareholders (or a class of either of them) representing:

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

Once sanctioned, the Scheme is binding on all the creditors (or class of creditors), the company itself and, where the company is in the course of being wound up, on the liquidator.

The CJL also includes provisions specifically dealing with Schemes for reconstruction or amalgamation and gives the Royal Court the power to make a wide array of orders when sanctioning them.

Creditor arrangements

As an alternative to a Scheme, the CJL has a mechanism under which an arrangement entered into between a company and its creditors immediately before or during a creditors' winding up of the company will be binding on the:

- company if it is approved by a special resolution; and
- creditors if it is approved by three-quarters in number and value of them.

The main benefit of a creditor arrangement is that it does not require the approval of the Royal Court and although an objecting creditor cannot prevent an arrangement, it can cause the terms of the arrangement to be varied by the Royal Court.

Informal reorganisation

Companies and creditors can often be quick to pull the trigger on a formal insolvency procedure. Before this happens, careful consideration should be given to an out of court restructuring (or informal reorganisation). Once a statutory insolvency regime is called upon, the steps that can and must be taken are (necessarily) prescribed. No statutory regime can cover all eventualities and all scenarios of financial distress. In contrast, an informal reorganisation permits the company and its stakeholders to agree upon 'tailor-made' arrangements so as to be as mutually advantageous as possible. Informal reorganisations can also take place in relative silence when compared to a public insolvency procedure before a court and can result in significant cost savings.

However, with flexibility comes uncertainty. Consequently, a principal advantage of informal restructuring can be a significant disadvantage, particularly where stakeholders adopt unreasonable positions or fail to agree (because they can outside of the context of a prescribed statutory insolvency regime). The success of an informal restructuring therefore rests on the reasonableness of all of those participating (which is never certain).

To the extent that an out of court restructuring is not viable, Jersey's sophisticated statutory insolvency regime combined with the Royal Court's pragmatic and flexible approach should be seen as a safe harbour for both creditors and shareholders alike.

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