

Jersey Corporate Cross Border Insolvent Reconstruction and Moratorium Procedures

Bedell Cristin Jersey Briefing

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The liquidity crisis has increased the need for creative procedures to avoid sudden death bankruptcy in order to salvage existing value.

A Jersey company or a company incorporated elsewhere but administered in Jersey may become involved in insolvency procedures under Jersey law or the law of a jurisdiction outside Jersey.

Both a *désastre* and a creditors' winding up result in the closure of the business and realisation of all assets, by the Viscount in the case of a *désastre*, or a liquidator in the case of a winding up. A *désastre* can be sought by the company as debtor or by a creditor. A creditors' winding up can be initiated by two-thirds or more of a Jersey company's shareholders (but not by creditors or by the board) or by the court.

Where court orders are needed by a creditor or a company, it is important to seek advice and to follow the proper procedures and practices to ensure that the most efficient and cost effective action is taken. Insolvency practitioners appointed under Jersey law will need to be appointed pursuant to Jersey statute or by the Royal Court. Insolvency practitioners appointed under foreign law do not by virtue of such an appointment necessarily have any status or power to act in Jersey. Their appointment will usually need to be recognised by a Jersey court order and their powers confirmed by the Jersey court, subject to any limitations which the court may impose. In particular and importantly, the EU Regulation on insolvency proceedings does not apply in Jersey. In certain circumstances, the Jersey court may have regard to the UNCITRAL Model Law on Insolvency when considering requests for recognition and assistance.

The starting point for a *désastre* is to check whether all the requirements for a *désastre* can be met. Even if the requirements can be met, the Viscount may use his good offices to assist parties to avoid the *désastre* procedure. A *désastre* requires an exercise by the court of a discretion to grant it and the court generally discourages *ex parte* applications, to enable argument if appropriate. If granted *ex parte*, a re-hearing or an application to recall the *désastre* may be possible. If the requirements cannot be met, another procedure may be available.

Directors may, at personal risk, have a duty to apply for a *désastre* or to recommend a creditors' winding up. Alternatively, they may consider seeking an order for a court winding up on just and equitable grounds on such terms as the court thinks fit. This latter process may enable a business to continue on a limited basis, or generally provide time for an orderly trade out. Nevertheless, whilst all or part of the business may be sold for value, it will still end in the dissolution of the company itself at some stage.

There may be many good reasons for avoiding the terminal result of a *désastre* or winding up. It may be in the interests of the creditors, employees, suppliers, customers, lenders and shareholders for there to be a planned re-organisation. Accordingly, the following should be considered:

- Where there is a small number of creditors, it may be possible to seek a stay of hostile actions or otherwise seek a mutually agreed rescheduling with all creditors.
- If agreement cannot be reached with all creditors, it may be possible for the court to approve a compromise or a scheme of arrangement for the rescheduling, whereby a majority in number representing at least 75% in value of each class of creditors votes in favour and so effectively causes a cram down of the minority.

- It may be appropriate to seek an order for assistance from courts in other jurisdictions. For instance, provided certain conditions are satisfied, it may be preferable for the company's business to be subject to a UK administration or CVA (company voluntary arrangement).

Bedell Cristin has had recent experience in all these areas and been involved in most of the recent Jersey cases touching insolvency.

For further details, please see Dessain and Wilkins "Jersey Insolvency & Asset Tracking" 3rd Edition and the 2009 Supplement.

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