



INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

**THE QUEST FOR COORDINATION OF PROCEEDINGS IN CROSS
BORDER INSOLVENCY CASES**

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Edward Drummond, Partner

Bedell Cristin

26 New Street

St Helier, Jersey JE2 3RA

+44 (0) 1534 814 814

edward.drummond@bedellgroup.com

General Reporters

Giuseppe Scotti

Studio Macchi di Cellere Gangemi

Milano, Italy

g.scotti@macchi-gangemi.com

Héctor Sbert

Lawants

Barcelona, Spain

hector.sbert@lawants.com

1. Do you have the notion in your legal system of main insolvency proceedings? Is this notion procedural or substantial? Is this notion purely international or also domestic?

No, Jersey does not have the notion of "main insolvency proceedings".

By way of background, Jersey is a self-governing dependency of the British Crown but does not form part of the United Kingdom. Jersey has its own legal system and laws. Accordingly, neither the UK Insolvency Act 1986 nor the Cross-Border Insolvency Regulations 2006, which gave effect to the UNCITRAL Model Law ("Model Law"), apply in Jersey.

Jersey is also neither a member nor an associate member of the EU. Jersey's relationship with the EU is governed by Protocol 3 to the UK's Act of Accession to the Treaty of Rome. Put simply, Jersey is considered part of the Customs Union and is, to all intents and purposes, part of the Single Market for the purposes of freedom of trade in goods. However, in all other respects, EU provisions have neither direct nor indirect effect. Accordingly, the European Council Regulation on Insolvency Proceedings (1346/2000/EC) ("EC Insolvency Regulation") does not apply to Jersey.

So Jersey follows the traditional English conflict of laws principles as regards the proper place for commencement of insolvency proceedings. The starting point is that a company should be wound up in its place of incorporation in one unitary proceeding.

There are however circumstances in which a foreign company may be declared *en désastre* in Jersey, or conversely (under applicable overseas law) where a Jersey company may be placed into liquidation (or into another process such as administration) abroad.

(1) Winding up Jersey companies in Jersey

There are two principal insolvency regimes which apply to Jersey registered companies. They may be subject to winding up under the Companies (Jersey) Law 1991 ("Companies Law") or a declaration *en désastre* pursuant to the Bankruptcy (Désastre) (Jersey) Law 1990 ("Désastre Law"). In the case of a *désastre* the property of the company vests in the Viscount of Jersey who administers the *désastre* process.

Such proceedings will take place in Jersey under Jersey law.

(2) Recognising foreign companies wound up in their place of incorporation

Where a foreign company is being wound up in its jurisdiction of incorporation, the liquidators (or other office-holders) may seek recognition of their appointment in Jersey by way of letter of request from the foreign court addressed to the Royal Court of Jersey ("Jersey Court") as follows:

- For certain prescribed countries (United Kingdom, Guernsey, Isle of Man, Australia and Finland), the application for recognition is made under Article 49 of the Désastre Law. The Jersey Court may assist the liquidators by

exercising any jurisdiction which it or the requesting court could exercise (i.e. under Jersey law or the relevant foreign law). The Jersey Court may also "have regard to" the Model Law and the rules of private international law.

- For any other countries, an application for recognition is made at common law, and dealt with by the Jersey Court as part of its inherent jurisdiction on the basis of comity and reciprocity. It is likely that the Jersey Court will only grant assistance that is available under Jersey law.

On any application for recognition, the Jersey Court will seek to co-operate - subject to local law and public policy. As a matter of public policy, the Jersey Court will consider whether the foreign proceedings comply with natural justice, whether jurisdiction has been exercised validly, and whether recognition would offend public order rules. So for example, recognition will not be given if to do so would indirectly amount to enforcement of a foreign revenue claim (it is however different if there are other, non-revenue, creditors).¹

(3) Désastre of foreign companies in Jersey

Whilst a foreign company cannot be wound up in Jersey under the Companies Law, Article 4 of the Bankruptcy (Désastre) Law 1990 provides that foreign companies which (i) are carrying on, or have carried on at any time in the preceding 3 years, business in Jersey, or (ii) have realisable immovable property in Jersey, may be subject to a declaration *en désastre* in Jersey. Such a *désastre* will be dealt with under Jersey law.

(4) Liquidation (or administration) of Jersey companies abroad

The Jersey Court has acknowledged that, in some circumstances, it is appropriate for Jersey companies to be put into liquidation or administration abroad.

Indeed, the Jersey Court has on many occasions, at the request of a creditor, exercised its inherent jurisdiction to issue a letter of request to the English High Court, requesting that a Jersey company be placed into English administration - without any insolvency process being conducted in Jersey (a so-called "passporting" application). Typically the letter of request requires creditors who would have priority status under Jersey law to have that status respected in the English administration.

Before seeking the assistance of the English court, the Jersey Court will need to be satisfied that the Jersey company is insolvent, it is in the interests of creditors, there is a sufficient connection with England and that (if the request is made) the English court is likely to make an administration order. The English Court of Appeal decision in Tambrook has confirmed that the English Court may receive and give effect to such letters of request.² If the letter of

¹ Re Tucker 1987-12988 JLR 473; In re Williams 2009 JLR Note 16

² HSBC Bank plc v Tambrook Jersey Limited [2013] EWCA Civ 576

request is issued, it will be a question of English law whether an administration order will be made by the English Court.

We are also aware that e.g. the English Courts have jurisdiction to wind up foreign companies (including Jersey companies) if there is sufficient connection to England.

2. Do you know the notion of secondary insolvency proceedings? Is this notion purely international or also domestic?

No, Jersey does not have the notion of "secondary insolvency proceedings".

3. Are the material effects of the main proceedings halted when secondary proceedings elsewhere are opened? Please specify, if this is not the case, whether or not the law of the State in which main proceedings are opened shall affect certain rights of third parties or have effect in certain contractual relations, e.g. labour contracts.

Jersey legislation does not mention "main" or "secondary" proceedings.

However, as the Désastre Law expressly permits foreign companies to be declared *en désastre* it is implicit that situations may arise where a foreign company is *en desastre* in Jersey and also being wound up elsewhere.

But in contrast to applications for recognition of foreign office-holders in Jersey, or passporting applications from Jersey to England, which are common, applications to commence parallel or ancillary proceedings in Jersey are very rare.

We are aware of four examples:

1. In re Woodham Builders Ltd (1961) 253 Ex 190 related to an English company in liquidation in England. The court authorized the acting Viscount to realise the company's Jersey assets, deduct an amount sufficient to pay his costs and the preferential creditors in Jersey and then to remit the balance to the company's liquidator in England. The arrangement was that the moneys recovered in Jersey and in England would ultimately be pooled and distributed *pari passu* amongst the ordinary creditors both English and Jersey.
2. In re Royco Investment Company Limited 1991 JLR Note 6a, 1994 JLR 236 related to a Jersey company. It was one of a group of companies with English directors and which conducted its business from London. A fraud was discovered. The English High Court appointed a provisional liquidator over the company. Some of the company's money was held in New York. The provisional liquidator needed to have his status recognized in New York to get hold of the money, but the New York courts first required a bankruptcy in the place of incorporation (i.e. Jersey) and confirmation that Jersey would treat the US claim sympathetically on the basis of comity. The English provisional liquidator therefore sought an order declaring the Jersey company *en desastre*. The Jersey Court was satisfied that, although registered in Jersey, the company conducted its affairs outside Jersey, and was wholly controlled from outside

Jersey, and that in the interests of comity, it would recognize his standing to apply for a *désastre* and made a declaration *en désastre* accordingly.

Accordingly, the Jersey company became subject to parallel insolvency proceedings - provisional liquidation (and later liquidation) in England and *désastre* in Jersey. This enabled the assets in New York and elsewhere to be realized. The Viscount collected in assets and held these jointly with the liquidator.

Ultimately the Courts in England and Jersey approved an agreed mechanism by which the assets of the group were pooled and distributed to the creditors of the group, with the Viscount transferring the assets he held (net of his costs and expenses) to the English liquidator for that purpose.³

3. In re Walkers Advertising Associates (21 December 1992, unreported) related to a Jersey company that was liquidated in England but was also subject to a Jersey *désastre*. In other words, there were parallel proceedings. The Jersey Court initially stayed the Jersey *désastre* but later approved an order agreed between the Viscount and the English liquidator whereby, effectively, the English liquidation was treated as the main proceedings:
 - The Viscount would realise the debtor's assets in Jersey, discharge the Jersey priority creditors and remit the balance of the funds held by him to the English liquidator, subject to:
 - The remaining claims in the *désastre* being lodged in the English winding up; and
 - The Viscount being satisfied that such claimants would be properly and equitably dealt with in the English winding up.
4. In re Woolworths plc (2 March 2009, unreported) related to an English company with a Jersey branch, which was placed into administration in England. The administrators had, without seeking recognition, closed the Jersey branch of the company. They subsequently sought recognition in Jersey under Article 49 of the *Désastre* Law and authority to realise and sell unsecured Jersey situated immovable property. The proceeds were to be remitted to England for the benefit of secured creditors of the company, and there would have been nothing left for unsecured creditors of the Jersey branch.

Although the Jersey Court permitted the administrators to realise the assets, it then ordered them to remit the net proceeds to the Viscount, who was directed to advertise for and adjudicate upon claims of creditors of the Jersey branch business on similar terms to the *désastre* procedure and to hold the proceeds pending further order. This "quasi-*désastre*" has the appearance of "secondary proceedings" in Jersey, although the precise legal basis for the order is not clear (whether as a matter of Jersey public policy or on some other ground).

³ In re Royco Investment Company Limited 1991 JLR Note 6a, 1994 JLR 236

Eventually in September 2010 agreement was reached between the administrators and the Viscount, and approved by the Jersey Court, which provided for the payment of an acceptable dividend to the unsecured creditors of the Jersey business (wherever those creditors were situate).

4. Shall the creditors have the right to lodge claims in any of the insolvency proceedings (main and secondary)?

As we do not have any statutory provisions this will have to be determined by the Jersey Court on the facts.

As noted in the cases described above, we would expect those creditors seeking to assert a priority or preferential claim under the Désastre Law to lodge their claims in the Jersey proceedings.

5. Are the dividends in all proceedings pooled? In other words, are dividends obtained in proceeding X deducted from dividends to be obtained in other proceedings?

As we do not have any statutory provisions this will have to be determined by the Jersey Court on the facts.

Subject to meeting the costs of the Jersey process and any priority claims, and notwithstanding the decision in Woolworths, we would expect the assets of all proceedings to be pooled and distributions to ordinary creditors to be made from the main proceedings.

6. If by liquidation of assets in any secondary proceedings it is possible to meet all claims, shall the liquidator transfer any remaining assets to the liquidator in the main proceedings?

We would expect this to be the case, but as we do not have any statutory provisions this will have to be determined by the Jersey Court on the facts.

7. Does the so-called “dominance” of the main proceedings create a leading role for the liquidator, appointed in the main proceedings, to coordinate all insolvency proceedings pending against the same debtor?

We would expect this to be the case, but as we do not have any statutory provisions this will have to be determined by the Jersey Court on the facts.

Aside from the rare cases noted above, typically the liquidator in e.g. England will merely seek recognition in Jersey rather than seeking to commence secondary proceedings here.

8. How do you think the above mentioned issues have been tackled by the new EU Regulation on Transnational Insolvency? If yes, in which way defective or useful?

We cannot comment - Jersey is not subject to the EU Regulation on Transnational Insolvency.

9. How do you think the above mentioned issues have been tackled by the UNCITRAL Model Law on Cross-Border Insolvency? If yes, in which way defective or useful?

We cannot comment - the Model Law does not apply in Jersey, save that, on an application for recognition under Article 49 of the Désastre Law, the Jersey Court can "have regard to" the Model Law.

10. Are there other salient aspects of the EU Regulation on Transnational Insolvency or the UNCITRAL Model Law on Cross-Border Insolvency that are key to answer the need and quest for coordination in cross borders insolvency proceedings?

We cannot comment - neither applies in Jersey.

11. Are there other devices that the EU Regulation on Transnational Insolvency or the UNCITRAL Model Law on Cross-Border Insolvency should have regulated or adopted to enhance further coordination in cross borders insolvency proceedings?

We cannot comment - neither applies in Jersey.

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