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FOUNDATION CERTIFICATE IN INTERNATIONAL INSOLVENCY LAW

Module 5E Guidance Text

Jersey

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1. INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW IN JERSEY

Welcome to **Module 5E**, dealing with international insolvency law in **Jersey**. This Module is one of the elective module choices for the Foundation Certificate. The purpose of this guidance text is to provide:

- a general overview, including the background and history, of insolvency law in Jersey;
- a relatively detailed overview of Jersey's insolvency system, dealing with both corporate and consumer insolvency; and
- a relatively detailed overview of the rules relating to international insolvency and how they are dealt with in the context of Jersey.

This guidance text is all that is required to be consulted for the completion of the assessment for this module. You are not required to look beyond the guidance text for the answers to the assessment questions, although bonus marks will be awarded if you do refer to materials beyond this guidance text when submitting your assessment.

Please note that the formal assessment for this module must be submitted by **11 pm (23:00) BST (GMT +1) on 31 July 2024**. Please consult the Foundation Certificate in International Insolvency Law website for both the assessment and the instructions for submitting the assessment. Please note that no extensions for the submission of assessments beyond 31 July 2024 will be considered.

For general guidance on what is expected of you on the course generally, and more specifically in respect of each module, please consult the course handbook which you will find on the web pages for the Foundation Certificate in International Insolvency Law.

2. AIMS AND OUTCOMES OF THIS MODULE

After having completed this module you should have a good understanding of the following aspects of insolvency law in Jersey:

- the background and historical development of insolvency law in Jersey;
- the various pieces of primary and secondary legislation governing Jersey insolvency law;
- the operation of the primary legislation in regard to liquidation and corporate rescue;
- the operation of the primary and other legislation in regard to corporate debtors;
- the rules of international insolvency law as they apply in Jersey;
- the rules relating to the recognition of foreign judgments in Jersey.

After having completed this module you should be able to:

- answer direct and multiple-choice type questions relating to the content of this module;
- be able to write an essay on any aspect of Jersey insolvency law; and
- be able to answer questions based on a set of facts relating to Jersey insolvency law.

Throughout the guidance text you will find a number of self-assessment questions. These are designed to assist you in ensuring that you understand the work being covered as you progress through text. In order to assist you further, the suggested answers to the self-assessment questions are provided to you in **Appendix A**.

3. AN INTRODUCTION TO JERSEY

3.1 Historical background

Jersey (officially called the Bailiwick of Jersey) is the largest of the Channel Islands, with a population of approximately 100,000. It is located in the Bay of Mont St Michel off the northwest coast of France. The Bailiwick of Jersey and the Bailiwick of Guernsey (together the Channel Islands) form part of Britain, but they are not part of the United Kingdom (UK).

The Channel Islands represent the last remnants of the medieval Dukedom of Normandy that held sway in both France and England. The Channel Islands were the only British soil occupied by German troops in World War II.

3.2 Legal system

Modern Jersey law has developed from the customary law of Normandy and the common law of England.

3.3 Political / legislative system

Jersey is a British crown dependency but is not part of the UK or of the European Union (EU). It has constitutional rights of self-government and judicial independence and is governed by parliamentary democracy (Assembly of the States of Jersey). However, the UK government is constitutionally responsible for its defence and international representation, and in practice responsibility for Jersey's international representation rests largely with the UK government.

Jersey's relationship with the EU, in light of the UK's decision to leave the EU, is now enshrined in its membership of the UK-EU Trade and Cooperation Agreement, which means that Jersey goods bound for the EU are treated in the same manner as they would have been if they came from the UK.

3.4 Economy

In 2016, Jersey's gross domestic product (GDP) was USD 5.6 billion, representing a GDP per capita of USD 56,600. This compared favourably to the UK, which in 2016 had a GDP per capita of USD 43,800.

Jersey's economy is primarily based on international financial services, which in 2016 accounted for 41% of the island's output. Jersey has been a leading international finance centre for over 50 years for banking, investment funds, capital markets and private wealth. As at 2021, Jersey had the following:

- total value of banking deposits of JEP 133.5 billion;
- net asset value of regulated funds under administration of JEP 450.3 billion; and
- total funds under investment management of JEP 33.3 billion.

Low taxes / tax neutrality, economic stability, political independence and a sophisticated legal and regulatory infrastructure, have helped make Jersey a popular international finance centre.

4. LEGAL SYSTEM AND INSTITUTIONAL FRAMEWORK

4.1 Legal system

4.1.1 *History of legal system and insolvency laws*

Modern Jersey Law has developed from the customary law of Normandy and the common law of England. Jersey's legal system is separate from the UK and the other Channel Islands, including Guernsey. Sources of Jersey law are in the French and English languages, although since the 1950's the main working language of the legal system has been English.

Jersey's insolvency law is primarily contained in the Companies (Jersey) Law 1991, as amended (the Companies Law) and the Bankruptcy (*Désastre*) (Jersey) Law 1990 (the Bankruptcy Law). The Companies Law covers liquidation (or winding-up) of companies and the Bankruptcy Law covers personal insolvency, as well as corporate insolvency.

Jersey's insolvency law underwent significant changes in March 2022, which included amendments to the Companies Law to introduce a creditor led creditors' winding-up process.

4.2 Institutional framework

4.2.1 *Overview of the Jersey court system*

In relation to making claims, pursuing civil remedies and insolvency procedures, Jersey's court system is constituted of the Petty Debts Court (which deals primarily with debts of up to JEP 10,000), the Royal Court, the Court of Appeal and the Privy Council. The Royal Court of Jersey

is the court of first instance (the Jersey Court). An appeal lies to the Court of Appeal and onwards to the Privy Council.

The Viscount in Jersey is the Chief Executive Officer of the Island's courts and the States of Jersey. The Viscount's Department has many functions, including court enforcement functions, the duties of Coroner and insolvency functions in relation to administering *Désastre* procedures under the Bankruptcy Law.

4.2.2 Effectiveness of the Jersey court system

A survey amongst solicitors, barristers and other insolvency professionals with experience of conducting multi-jurisdictional insolvencies in leading offshore jurisdictions,¹ rated Jersey favourably in relation to its court infrastructure,² listing process³ and timeliness of enforcing judgments.⁴

However, the survey identified areas that require improvement and modernisation, in particular the range of insolvency and non-insolvency options available, the introduction of a commercial court judge, and improvements to the enforcement of security over immovable property. Other recommended changes included a creditor instigated winding-up process and rules permitting insolvency practitioners to be appointed instead of the Viscount on a *Désastre* application, and both of these changes were implemented in 2022.

4.2.3 Enforcement system for creditor rights

4.2.3.1 *Désastre*

Désastre is currently the most common way that a creditor can take enforcement action against a debtor in Jersey. The debtor can be a company⁵ or an individual (as discussed at paragraph 6.2). A creditor must have a valid claim of at least JEP 3,000 to be able to apply for the debtor's *Désastre*.⁶ The *Désastre* process is carried out by the Viscount and the debtor's worldwide assets are automatically declared *en Désastre*, meaning they vest in the Viscount. The Viscount will realise the assets for the benefit of the debtor's creditors and will conduct investigations to identify why insolvency occurred and whether any offences were committed. If the debtor is a company and the *Désastre* process has been completed, the Viscount will file the necessary forms with the Registrar of Companies to dissolve the company.

The debtor must be insolvent but have realisable assets and the creditor must confirm in its application that they believe this to be the case. The applicant creditor is also usually required

¹ S Akers and F Toube, *From Discord to Harmony: the Future of Cross-Border Insolvency* (2015), available at https://www.insol.org/emailer/July_2015_downloads/Document21.pdf.

² Jersey was ranked third of eight leading offshore jurisdictions, behind Ireland and the Isle of Man.

³ Jersey was ranked second of eight leading offshore jurisdictions, behind the Isle of Man.

⁴ Jersey was ranked third of eight leading offshore jurisdictions, behind the Isle of Man and Ireland.

⁵ Either a company registered in Jersey under the Companies Law or a company that has been dissolved pursuant to the Companies Law.

⁶ Application for *Désastre* can also be made by the debtor, or by the Jersey Financial Services Commission (JFSC) in respect of regulated business activities.

to indemnify the Viscount for costs and liabilities incurred in the *Désastre*. The Viscount may levy fees as they arise or take amounts equivalent to 12.5% of the amounts realised and distributed. Whilst secured creditors' rights are preserved, the Viscount's costs are paid in priority to other creditors from amounts liquidated.

4.2.3.2 Creditors' winding-up

Until recently, the only creditor-driven enforcement process available against a Jersey company was *Désastre*. However, in March 2022 the Companies Law was amended to include a creditor led creditors' winding-up process.⁷ This process allows a creditor of an insolvent company to apply to court for the company to be placed into a creditors' winding-up and for a liquidator to be appointed.

A creditor must have a valid claim of at least JEP 3,000 to be able to apply for a creditors' winding-up. In addition, the debtor company must be unable to pay its debts, or the creditor must show evidence of the company's insolvency, or the debtor company must consent to the application. The Companies Law amendments also included the introduction of a statutory demand process whereby the debtor company is deemed to be unable to pay its debts as they fall due if it has failed to (i) pay the debt due or (ii) adequately dispute the debt to the reasonable satisfaction of the creditor, within 21 days of being served a statutory demand. A creditor must provide the company with at least 48 hours' notice of the application (except in exceptional circumstances), and a creditor must not make an application if it has agreed not to do so and / or if the claim relates solely to the repossession of goods. If the application is successful, the court will order that the company be placed into creditors' winding-up from the date the application is made or such other date as the court deems fit, and will appoint a person nominated by the creditor or selected by the court to act as liquidator. The liquidator must within 14 days of appointment give notice of the appointment to the Jersey registry, the Viscount and the directors and creditors of the company, to the extent known. The liquidator must also advertise the appointment in the Jersey Gazette.

The court may at any time after the making of an application for creditors' winding-up appoint a liquidator provisionally. The reason for this appointment might be that there is concern that the company's affairs will not be managed properly between the application date and the making of the winding-up order, or that there is a risk of dissipation of assets. The court will determine the functions to be carried out by a provisional liquidator and may limit the powers available to the liquidator. Once a provisional liquidator has been appointed, no action must be taken or proceeded with against the company except by leave of the court and subject to such terms as the court may impose. The provisional liquidator must as soon as possible give notice of the appointment to the Jersey registry, the Viscount and the directors and creditors of the company, to the extent known.

⁷ The Companies Law already included a creditors' winding-up process, but perhaps somewhat misleadingly, this could only be instigated by the shareholders of the debtor company passing a special resolution, rather than by creditors.

4.2.4 Insolvency regulator

There is no insolvency regulator in Jersey. The Companies Law requires a liquidator to be an individual person, but until recently there was no register or specific licencing of insolvency practitioners in Jersey. However, in March 2022 a Ministerial Order came into effect⁸ creating a register of approved liquidators that can be appointed to public companies, or to companies that are being wound up in a creditors' winding-up (whether that be a creditors' winding-up via court application under the amended Companies Law, or a creditors' winding-up via shareholder resolution under the existing Companies Law). The register will be administered by the Viscount.

In order to be eligible for the register of approved liquidators, a person must:

- be ordinarily resident in Jersey;
- have the level of experience determined by the Viscount in writing, and be a UK licensed insolvency practitioner or a qualified accountant; and
- have in place a general bond of JEP 250,000 plus a specific bond of JEP 5,000 to JEP 5,000,000.

It is also possible for a non-Jersey resident person (who meets all other requirements) to be appointed jointly with a resident liquidator. They must apply to the separate register of non-Jersey approved liquidators which is also administered by the Viscount.

Furthermore, the Jersey Court in a just and equitable winding-up will expect to see a proposed liquidators' credentials and to be satisfied with them. There are no such requirements for a summary winding-up and directors will often conduct the summary winding-up themselves without the appointment of a liquidator.⁹

Self-Assessment Exercise 1

Question 1

Compare the *Désastre* process to the creditors' winding-up process. How would you rate them both as tools for enforcement?

Question 2

What are the benefits and potential pitfalls arising out of Jersey's register of approved liquidators?

⁸ The Companies (General Provisions) (Amendment No 6) (Jersey) Order 2022.

⁹ Discussed below at para 6.3.

For commentary and feedback on self-assessment exercise 1, please see APPENDIX A

5. SECURITY

5.1 Forms of real security

Jersey law distinguishes between “immovable property” (otherwise described as “real property”), being land, buildings and long-leases on land and buildings for longer than nine years; and “movable property”, being all other property.

5.1.1 Immovable property

It is possible to take security over immovable property by way of mortgage (or hypothec / *hypothèque* as it is traditionally referred to in Jersey). An obvious example is a domestic mortgage provided by a bank, which is secured over a house. The mortgage would be registered in the Jersey Court and the proceeds of the sale of the house must first be applied to repay the mortgage.

Jersey has three varieties of hypothec:

- A judicial hypothec (*hypothèque judiciaire*) occurs by judgment of the Jersey Court (by consent or otherwise) acknowledging debt of a defined sum, which is registered in the Jersey Public Registry. An example would be where a creditor asks the Jersey Court to register a judgment for debt obtained against a debtor, which effectively becomes a mortgage over immovable property owned by the debtor (that is, an unsecured creditor can become secured);
- A conventional hypothec (*hypothèque conventionnelle simple*) is created by agreement between two or more parties as to the granting and taking of security expressed in the form of a contract passed before the Jersey Court; and
- A legal hypothec (*hypothèque légale*) is relatively rare and arises by operation of law in certain special cases.

If there is more than one mortgage over the same property, the mortgagees have priority based upon the date of the mortgage, with earlier mortgages having greater priority.

5.1.2 Movable property

Security over intangible movable property can be created via a security interest under the Security Interests (Jersey) Law 2012 (the Security Law). Intangible movable property is defined in the Security Law as movable property other than goods, and includes cash (being cash that is not money) and licences and quotas having commercial value, whether or not they are transferrable. Examples of intangible movable property are shares, units in a property trust, bank

accounts, and negotiable instruments. A security interest under the Security Law means an interest that, under a security agreement, secures the performance of an obligation. A security interest includes the interest of a secured party under a transfer of title by way of security, under a mortgage pledge, or contractual lien, or under any other encumbrance that is by way of security.

Other than in relation to ships, the only method of creating security over tangible movables in Jersey is by way of pledge. Specific charges or chattel mortgages do not exist in Jersey. To pledge property there must be actual physical (as opposed to constructive) delivery of the tangible movable property pledged into the creditor's possession. As a matter of customary law (absent any Jersey judicial authority on this point) the creditor should have an implied right of sale when the grantor is in default and there is likely to be an express power of sale in the pledge document.

Where the property is situated outside Jersey, security granted under the law where the property is situated will generally be recognised.

5.2 Ranking of security upon *Désastre* or liquidation

Secured creditors rank ahead of all other creditors in a *Désastre* or Liquidation scenario.

The Security Law provides that where the grantor is subject to any insolvency order or proceedings consequent upon insolvency in Jersey or elsewhere, that fact shall not affect the enforcement powers of the secured party.

On the sale of immovable property by the Viscount during *Désastre* proceedings, all hypothecs secured against it are extinguished, but the holders of the hypothecs have preferential rights in relation to the sale proceeds.

5.3 How secured creditors may enforce outside of an insolvency process

The power of enforcement is exercisable once an event of default has occurred and written notice of this fact has been served on the grantor.

If on enforcement the secured party wants to appropriate or sell collateral, it must give the grantor 14 days prior written notice, but the grantor may agree in writing to waive its right to notice of appropriation or sale (or the notice period may be reduced). The obligation to give notice applies only where the secured party seeks to appropriate or sell collateral.

Secured creditors with security over Jersey immovable property may enforce their rights by applying to the Jersey Court for a *Désastre* or a *Dégrévement* (discussed below at paragraph 6.2). Secured creditors with security over movable property may apply to the Jersey Court to enforce their contractual rights. Property subject to a valid lien can be retained pending judgment against the debtor. A creditor can have direct recourse to movable property, which is subject to a pledge, or a landlord's right of distraint.

A security interest can still be challenged, however, under the “transaction at undervalue” and “preference” regimes of relevant statutes and a security interest that is not perfected before the grantor becomes bankrupt is void against the Viscount (or a liquidator) and the grantor’s creditors.

5.4 Security register

The Security Law introduced with it a searchable, on-line, public register of security interests.

Self-Assessment Exercise 2

Describe the forms of security available in Jersey in respect of immovable and movable property.

[For commentary and feedback on self-assessment exercise 2, please see APPENDIX A](#)

6. INSOLVENCY SYSTEM

6.1 General

6.1.1 *Unified or fragmented approach*

As discussed at paragraph 4.1, Jersey’s insolvency law is primarily contained in the Companies Law and the Bankruptcy Law. There are also a number of customary law procedures relating to personal insolvency, which are available in Jersey. On that basis, Jersey’s insolvency regime is considered fragmented.

Part 21 of the Companies Law covers the winding-up of corporate entities (see paragraph 6.3). Part 18A of the Companies Law covers compromises and arrangements with creditors (see paragraph 6.5). There is no rescue procedure available equivalent to administration under English law, or Chapter 11 under the law of the United States (US).

The Bankruptcy Law applies to both personal insolvency situations and also to companies and other incorporated bodies.

6.1.2 *Creditor- or debtor-friendly*

Until recently Jersey’s insolvency regime was categorised as debtor-friendly, with few enforcement options available for creditors. However, in March 2022 the insolvency regime was updated with creditor-friendly changes, including a creditor led creditors’ winding-up process and provisional liquidation process (as discussed at paragraph 4.2.3), and a register of approved liquidators (as discussed at paragraph 4.2.4).

6.1.3 Management of insolvency proceedings

A just and equitable winding-up is a court-driven process and the appointed liquidator would act as officer of the Jersey Court with specific powers granted by the Jersey Court and with certain reporting requirements. The proposed liquidator is nominated by the party making the representation. The Jersey Court may scrutinise this nominee, challenge the proposal or insist on a different appointee.

In a creditors' winding-up through the Court (as discussed at paragraph 4.2.3), the liquidator is nominated by the creditor making the application for liquidation, and the court will either appoint this person or select another liquidator. The appointed liquidator would act as officer of the court. Similarly, a provisional liquidator appointed by the court would also act as officer of the court (as discussed at paragraph 4.2.3).

In a creditors' winding-up not through the court, the liquidator is nominated by the shareholders at the meeting to commence the winding-up, but creditors then have an opportunity to replace the shareholders nomination with a nomination of their own, by simple majority of those voting (by value of claim) at the subsequent creditors' meeting. In the event of a dispute over the proposed liquidator, a creditor can take the matter to the Jersey Court for a ruling. In either type of creditors' winding-up, the liquidator is required to provide the creditors and shareholders with annual and final accounts and to hold meetings with both.¹⁰

6.2 Personal bankruptcy

6.2.1 Personal insolvency options

Personal insolvency in Jersey should be considered in the context of the island. Jersey has a small population and its economy is based on international financial services. The focus for insolvency professionals is understandably towards corporate insolvency as opposed to personal insolvency.

Nevertheless, Jersey has a number of personal insolvency options, most notably *Désastre*, which is the Jersey law equivalent of bankruptcy. In addition, Jersey has *Dégrévement* and Realisation, the Debt Remission Order and *Remise de Biens*. An insolvency practitioner would not be appointed in any of these processes.

6.2.1.1 *Désastre*

Désastre, a process under the Bankruptcy Law, is a procedure for the winding-up of the affairs of a company or an individual,¹¹ including an incorporated Limited Partnership or Limited Liability Partnership. As explained at paragraph 4.2, it is a process that can be instigated by a

¹⁰ Companies Law, arts 168 and 169.

¹¹ An individual must have been ordinarily resident in Jersey at any time within the period of 12 months immediately preceding the date of the application for *Désastre*; or have carried on business in Jersey at any time within the period of three years preceding the date of the application; or have immovable property in Jersey at the time of the application.

creditor and is a useful enforcement tool for creditors. However, debtors may also apply for their own *Désastre* (that is, to declare themselves *en Désastre*).

The making of a *Désastre* order is discretionary and the Jersey Court will carefully consider each application and decide whether such a declaration should be made. It is usual for a personal *Désastre* to last for four years, but it is also possible to shorten or lengthen such a term.

On the making of a declaration, the Viscount is vested with the worldwide property of the debtor. The Viscount's role is to realise the assets of the debtor for the benefit of the creditors. The Viscount has wide ranging powers, including the power to bring, institute or defend action in respect of property vested in the Viscount; to compromise debts, claims and liabilities; to make compromise or other arrangements with creditors; to dispose of property; to carry on the business of the debtor as far as is necessary for the beneficial winding-up of the debtor; to borrow money; the power to pay creditors; power to disclaim onerous property and contract leases; and powers to pursue recovery in respect of antecedent transactions.¹²

6.2.1.2 *Dégrévement and Realisation*

Dégrévement and Realisation are old processes available in Jersey under the *Loi* (1904) (Amendement No 2) *sur la Propriété Foncière*. As explained at paragraph 5, where a person owns immovable property in Jersey, a judgment creditor can seek to enforce using the process of *Dégrévement*. The property will become "disencumbered", which means that charges and debts are removed so that there is a new owner with clear unencumbered title.

Attournes are appointed who will hold a hearing whereby firstly the unsecured creditors of the debtor are given the opportunity of taking the property, but if they do then they take it subject to all of the secured charges, which they must pay in full. If the unsecured creditors do not accept this offer (which in practice they never do), then the second option is for each charge holder to be made the same offer in reverse order of their seniority, so that the most recent, that is, inferior and last in line, charge holder has the first opportunity of taking the property. Again, if they take the property then they also do so subject to an obligation to pay off all senior charge holders. Whoever takes the property will get it unencumbered and if the value of the property exceeds the value of their charge (and any other they may be required to pay off) there is no obligation to account to the debtor. The lack of a requirement to account to the debtor may be considered overly severe.

Réalisation is a process that sits alongside *Dégrévement* and which applies to movable assets. When a debtor's property is adjudged renounced, the moveable assets of the debtor are realised typically at auction. This would usually be conducted by the *Attournes*.

In both *Dégrévement* and Realisation, the debtor is not necessarily discharged from all of their debts if they are not fully paid off. If a charge holder does not accept the immovable then its

¹² Specifically transactions at an undervalue; preferences; wrongful trading; fraudulent trading; extortionate credit transactions and excessive pension contributions.

claim will remain, but it has lost its security. In such circumstances, it is possible that they can retain an unsecured claim after the process has concluded.

6.2.1.3 Debt Remission Order (DRO)

The Debtor Remission (Individuals) (Jersey) Law 2016 (the DRO Law) is a recent addition to Jersey Law. A DRO is similar to an English Debt Relief Order and is a local small debt proceeding administered by the Citizens Advice Bureau and run by the Viscount. A DRO is available in restricted circumstances including where the applicant has:

- assets worth less than JEP 5,000;
- less than JEP 100 of disposable income on a monthly basis;
- debts of less than JEP 20,000; and
- acted in good faith whilst incurring the debts.

A DRO creates a moratorium for the debtor for 12 months, after which time all debts covered by the DRO will be written off. Jersey currently has no active DROs on its register.

6.2.1.4 Remise de Biens (Remise)

Remise is an old procedure available in Jersey under the *Loi (1839) sur les Remises de Biens* (the Remise Law). A *Remise* is a court process available to a debtor who owns immovable property. The debtor does not necessarily need to be insolvent but will be having difficulty satisfying his creditors. Security registered against the debtor's property must be in an amount that there will be a balance remaining once it is realised, sufficient to pay a dividend to unsecured creditors. The debtor surrenders his property to the Jersey Court for a period of time, which offers protection to the debtor, and the Jersey Court then realises the property to discharge the debts.¹³

Remise has benefits over *Dégrévement* in that any surplus of assets may be returned to the debtor. It also offers rehabilitation to a debtor.

6.2.2 Moratorium

A moratorium is available in respect of *Désastre*,¹⁴ DRO¹⁵ and *Remise*. A moratorium is not available in respect of *Dégrévement* or Realisation.

¹³ Practice Direction RC17/12 provides guidance regarding the application for a *Remise*.

¹⁴ Bankruptcy Law, art 10.

¹⁵ DRO Law, art 10.

6.2.3 Proof of creditor claims

The process for proving claims in a *Désastre* is set out in Part 7 of the Bankruptcy Law. All debts and liabilities, present, future, or contingent are provable in the *Désastre*. Interest is provable to the date of *Désastre*, if the debt bears interest, or to the date of payment if it is a secured debt.

A creditor must prove their debt at the time and in the manner prescribed by the Jersey Court and must bear the cost of proving their debt. Creditors are also entitled to examine other creditors' proofs at a time fixed by the Viscount.

The Viscount is to adjudicate claims and request further information as required. The Viscount is then to admit or reject (in whole or in part) creditor claims. If a claim is to be rejected (in whole or in part) then the Viscount must serve notice of rejection on the creditor. If dissatisfied, the creditor has the opportunity to request that the Viscount applies to the Jersey Court to review the decision.

6.2.4 Priority creditors

Priority is conferred upon certain classes of creditors in accordance with article 32 of the *Désastre* Law. Payments to "priority creditors" are made in the following order:

- (1) depositors, where the debtor is a bank under the Banking Business;¹⁶ and
- (2) employees in respect of arrears of salary during the six months immediately preceding the declaration and holiday pay and bonuses (subject to certain limits); sums payable to the Health Insurance Fund under the Health Insurance (Jersey) Law 1967 and to the Social Security Fund under the Social Security (Jersey) Law 1974; certain amounts due under the Income Tax (Jersey) Law 1961 and due under the Goods and Services Tax (Jersey) Law 2007; amounts due to a landlord for payment of rent to the extent it qualifies for preference under customary law; and parochial rates due to any parish in Jersey for a period not exceeding two years.

6.2.5 Process of rehabilitation

A debtor will cease to be liable for their debts provable in a *Désastre* once the Jersey Court has made an order for their discharge under article 41 of the Bankruptcy Law. The debtor will still remain liable for debts incurred by them during the *Désastre*.

DRO and *Remise* also allow for the rehabilitation of debtors.

¹⁶ Depositors Compensation (Jersey) Regulations 2009.

Self-Assessment Exercise 3

Consider the bankruptcy regime in your own jurisdiction, or a jurisdiction that you are familiar with. How does it compare to *Désastre*? What are the advantages and disadvantages of *Désastre* compared to your own bankruptcy regime? Would *Désastre* be effective in your own jurisdiction and, if not, what problems do you envisage?

[For commentary and feedback on self-assessment exercise 3, please see APPENDIX A](#)

6.3 Corporate liquidation

6.3.1 Debtor

Jersey has numerous types of entities, in addition to traditional companies. The Companies Law provisions on liquidation apply principally to companies registered in Jersey,¹⁷ but this also includes Protected Cell Companies (PCCs) (being companies that have separate cells with their own assets and liabilities separate from the assets and liabilities of other cells) and Incorporated Cell Companies (ICCs) (being similar to PCCs, but with each cell having its own individual incorporation). The insolvency of a cell of a PCC or ICC does not ordinarily lead to the insolvency of the cell company. There are special provisions in Part 18 of the Companies Law which deal with the winding-up of cell companies and how assets and liabilities are allocated and applied.

Jersey is a leading offshore jurisdiction in respect of trusts and more recently foundations, as defined in the Foundations (Jersey) Law 2009. Trusts and foundations are not subject to the Companies Law liquidation provisions. As a matter of Jersey law, a trust cannot strictly become insolvent since the obligations owed by the trustee for the trust are limited to the assets of the trust. This is an increasingly contentious area of Jersey law and there are a number of cases that have addressed certain of the issues arising. There is no ability strictly to appoint a liquidator to a trust, nor any provisions of the Trusts (Jersey) Law 1984, which address this point. However, it is expected that circumstances could arise where the directions provided by the Jersey Court could include a *de facto* liquidator appointment, which is likely to be the appointment of either a lawyer or an accountant with insolvency expertise.

¹⁷ By comparison, as explained in para 4.2, *Désastre* can apply to a non-Jersey company that has conducted business in Jersey in the previous three years, or that has assets in Jersey.

6.3.2 Types of liquidation / winding-up

6.3.2.1 General

Part 21 of the Companies Law describes four types of winding-up processes as follows:

- winding-up of companies with limited duration;¹⁸
- summary winding-up;¹⁹
- just and equitable winding-up;²⁰ and
- creditors' winding-up (either a voluntary winding-up by shareholders, or a court winding-up).²¹

These processes are summarised in the following table:

	Limited duration	Summary winding-up	Just and equitable winding-up	Creditors' winding-up (voluntary winding-up)	Creditors' winding-up (court winding-up)
Companies Law Reference	Part 21, Chapter 1 (articles 144-144A)	Part 21, Chapter 2 (articles 145-154A)	Part 21, Chapter 3 (article 155)	Part 21, Chapter 4 (articles 156-186)	Part 21, Chapter 4 (articles 156-186)
Overview	Automatic winding-up of a company with a limited life	Voluntary winding-up by shareholders	Court winding-up	Voluntary winding-up by shareholders	Court winding-up
Solvent/ insolvent	Applies to both (see below)	Solvent	Applies to both	Typically insolvent or where directors not willing to sign statement of solvency	Insolvent
Grounds	Limited life company, where Memorandum or Articles of Association specify that the company is to be wound up upon	Company has no liabilities, or is able to settle liabilities in full within six months of commencement, or as they fall due if liabilities	Jersey Court of the opinion that it is just and equitable, or it is in the public interest to wind-up the company	Winding-up otherwise than under Chapters 1, 2 or 3 of Part 21 of the Companies Law	Company is unable to pay its debts, as demonstrated by an unsatisfied statutory demand or some other evidence; or

¹⁸ Part 21, Ch 1.

¹⁹ *Idem*, Ch 2.

²⁰ *Idem*, Ch 3.

²¹ *Idem*, Ch 4.

	Limited duration	Summary winding-up	Just and equitable winding-up	Creditors' winding-up (voluntary winding-up)	Creditors' winding-up (court winding-up)
	expiration of a fixed period or occurrence of an event	crystallise at a later date			otherwise the company agrees to the application
Appointment	Company deemed to have passed a special resolution if period expires or event occurs	(i) Directors each sign a statement of solvency; (ii) Shareholders pass a special resolution within 28 days of statement of solvency (iii) Shareholders may appoint a liquidator (but not required)	Application may be made by the company, a director, a shareholder or certain States of Jersey bodies (but not a creditor)	(i) Directors prepare statement of affairs verified by affidavit (ii) Shareholders meeting to pass special resolution and to nominate liquidator (iii) Creditors meeting held immediately afterwards (on 14 days' notice, plus Gazette advert), to approve or nominate a liquidator	Application to be made by a creditor owed at least JEP 3,000; court may appoint the liquidator proposed by the creditor, or another liquidator; winding-up may commence from the date of the application or such other date as the court sees fit Court may also appoint a provisional liquidator at any time after the application for creditors' winding-up is made
Notice to Registrar of Companies	File resolution within 21 days	File resolution within 21 days (together with statement of solvency)	File act of court within 14 days	File resolution within 14 days	File resolution within 14 days
Advertising of appointment	Only if creditors' winding-up (see below)	Not required under the Companies Law	As determined by court order	Within 14 days in local Gazette	Within 14 days in local Gazette

	Limited duration	Summary winding-up	Just and equitable winding-up	Creditors' winding-up (voluntary winding-up)	Creditors' winding-up (court winding-up)
Powers of Liquidator	Either per summary winding-up or creditors' winding-up	Powers only as required to realise assets, discharge liabilities and distribute assets	As determined by court order	Wide ranging powers including all powers of the company required for its beneficial winding-up; power to pay creditors; power to disclaim onerous property and contract leases; and powers to pursue recovery in respect of antecedent transactions	Wide ranging powers including all powers of the company required for its beneficial winding-up; power to pay creditors; power to disclaim onerous property and contract leases; and powers to pursue recovery in respect of antecedent transactions
Dissolution	Either per summary winding-up or creditors' winding-up	Occurs immediately if the statement of solvency states no assets and no liabilities; otherwise after completion of distribution of assets and the filing of a statement by the directors or liquidator (if one is appointed)	As determined by the Jersey Court following a final application	After completion of winding-up, liquidator prepares an account to be presented at a shareholder meeting and creditor meeting (on 21 days' notice); return is filed with Registrar of Companies within seven days, and dissolution occurs three months later	After completion of winding-up, liquidator prepares an account to be presented at a shareholder meeting and creditor meeting (on 21 days' notice); return is filed with Registrar of Companies within seven days, and dissolution occurs three months later
Other comments	Will be wound up as a summary winding-up if a statement of solvency is made and filed	If company found to be insolvent, steps must be taken to convert to creditors' winding-up;	Jersey Court discretion on whether to appoint a liquidator (it typically will), and to direct	Follows the Bankruptcy Law as regards creditor claims and order of priority	Follows the Bankruptcy Law as regards creditor claims and order of priority

	Limited duration	Summary winding-up	Just and equitable winding-up	Creditors' winding-up (voluntary winding-up)	Creditors' winding-up (court winding-up)
	with the Registrar of Companies within a prescribed timeframe; otherwise it will be wound up as a creditors' winding-up	Summary winding-up will terminate if a declaration is made in respect of the company under the <i>Désastre</i> Law	the manner of the winding-up		

6.3.2.2 Companies of limited duration

Limited duration companies will be automatically wound up upon the expiration of a fixed period or the occurrence of a certain event, as specified in their Memorandum or Articles of Association. They will follow either the summary winding-up or creditors' winding-up process, depending upon whether a statement of solvency is made and filed with the Registrar of Companies within the prescribed timeframe.

6.3.2.3 Summary winding-up

Where a company is solvent and has either no liabilities or can discharge its liabilities, then it can enter summary winding-up provided that its directors all sign a statement of solvency. The winding-up commences on the passing of a special resolution²² of shareholders. It is possible (but not a requirement) to appoint a liquidator to conduct the winding-up, if the shareholders also pass a separate special resolution to that effect, but it is also possible for it to be conducted by the directors. In the event of insolvency there is a requirement for the winding-up to be converted to a creditors' winding-up.

6.3.2.4 Just and equitable winding-up

A director or a shareholder, or in certain circumstances the Chief Minister or the JFSC, may apply to the Jersey Court for a company to be wound up on the grounds that it is just and equitable to do so. This is a broad criterion and can be used, for example, where there has been a fundamental shareholder dispute. The Jersey Court has used the ground of just and equitable to ensure effective control of companies needing to be wound up. It is also useful for directors where a company is insolvent but neither the creditors nor the shareholders will take action.

Just and equitable winding-up has been used to place companies into a winding-up where they are insolvent but have assets to sell in a *quasi*-pre-packaged sale of assets. Just and equitable winding-up has also been used to reinstate companies and so that a liquidator is appointed to

²² Special resolutions require a two-thirds majority in Jersey.

gather in the assets and make distributions. Note that a creditor may not apply for a just and equitable winding-up.

6.3.2.5 Creditors' winding-up

There are two types of creditors' winding-up processes in Jersey under the Companies Law: a voluntary winding-up by shareholders, and a court winding-up.

Voluntary creditors' winding-up

This is available for insolvent companies or companies that are solvent but where the directors are not willing to sign a statement of solvency. It is commenced by the shareholders passing a special resolution. The shareholders place the company in to creditors' winding-up and appoint a liquidator. The creditors then meet to either confirm the liquidator's appointment or nominate their own liquidator (disagreement in the choice of liquidator can be settled by application to the Jersey Court). Creditors can also appoint a liquidation committee of creditors, to assist or supervise the liquidator.

Court creditors' winding-up

As discussed at paragraph 4.5.3, since March 2022 a creditor of an insolvent company can apply to court for a company to be placed into creditors' winding-up and for a liquidator to be appointed. If the application is successful, the court will order that the company be placed into creditors' winding-up from the date the application is made or such other date as the court deems fit, and will appoint a person nominated by the creditor or selected by the court to act as liquidator.

6.3.3 **Obligation to liquidate**

There is no obligation to liquidate a company. However, a director of an insolvent company should avoid the risk of personal liability that they may face in permitting a company to trade whilst insolvent.²³

The Companies Law²⁴ defines "insolvent" as "unable to pay debts as they fall due". Similarly, the Bankruptcy Law²⁵ defines "insolvency" as "the inability of a debtor to pay his or her debts as they fall due". This is commonly referred to as the "cash-flow test" of insolvency and it is also used in other jurisdictions including England and Guernsey. Other common tests of insolvency which are not found in Jersey, include the "balance-sheet test", that is, where the liabilities exceed the assets (as used in England and Guernsey); and the "legal action test", for example an unsatisfied statutory demand or other judgment (as used in England).

²³ That is, wrongful trading under the Companies Law, art 177.

²⁴ *Idem*, art 1(1)).

²⁵ *Ibid*.

6.3.4 *Moratorium*

Article 193 of the Companies Law states that the winding-up of a company under the Companies Law bars the right to take any other proceedings in bankruptcy, except the right of a creditor of the company to apply for a declaration under the Bankruptcy Law.

Furthermore, article 159 of the Companies Law explains that after the commencement of a creditors' winding-up, no action may be taken or proceeded against the company without leave of the Jersey Court.

Désastre does not prevent secured creditors enforcing pre-existing rights against property now vested in the Viscount, as the Viscount takes the property subject to existing security.

6.3.5 *Alternatives to formal liquidation*

There is no modern rehabilitation procedure equivalent to administration under English company law, or Chapter 11 under the US Bankruptcy Code. However, the Companies Law includes provisions in relation to Schemes of Arrangement (discussed further in paragraph 6.5). As discussed at paragraph 6.2, there is also the process of *Désastre*, plus various other customary law processes.

6.3.6 *Role of liquidators, powers and duties*

The general role of a liquidator is to realise assets to enable a *pari passu* distribution amongst creditors according to their status, with any surplus (after payment of creditors in full with interest) to be distributed to shareholders.

Article 149 of the Companies Law explains that directors' powers cease upon appointment of a liquidator in a summary winding-up and that a liquidator may instead exercise those powers. In a creditors' winding-up, a liquidator's powers are more wide-ranging to include payment of creditors under article 170, disclaiming of onerous property under article 171, and the pursuit of antecedent transactions under articles 176 to article 179.

In a just and equitable winding-up, the liquidator's powers will be determined by court order and are likely to be similar to either a summary winding-up or a creditors' winding-up, depending upon whether the company is solvent or insolvent. In a provisional liquidation, the provisional liquidator must carry out such functions that the court may confer on him and the powers of the provisional liquidator may be limited by the order of the court.

A number of general duties are set out in the Companies Law, which include an obligation to report possible criminal offences relating to the company and, in a creditors' winding-up, to investigate the assets of the company.

6.3.7 *Creditor claims*

Article 166 of the Companies Law, which relates to a creditors' winding-up, explains that the same rules prevail with regard to the respective rights of secured and unsecured creditors, to debts provable, to the time and manner of proving debts, to the admission and rejection of proofs of debts and to the order of payment of debts, as are in force under the Bankruptcy Law (described at paragraph 6.2).

There is no statutory time period for notices to be published for potential claims in a winding-up. It is generally agreed that a period of 21 days' notice is adequate for a summary winding-up (if a notice is published at all), and 60 days for a creditors' winding-up. There is no statutory provision for publishing a notice for potential claims outside of Jersey. However, a liquidator should consider the circumstances of the liquidation in determining whether this would be prudent in order to avoid challenge from a claimant subsequently coming forward.

6.3.8 *Antecedent and voidable transactions*

A liquidator in a creditors' winding-up can pursue recovery action in respect of various antecedent and voidable transactions, as detailed in the Companies Law.²⁶ These powers are not available to the liquidator of a summary winding-up (on the basis that the company is solvent, or will otherwise convert to a creditors' winding-up if it is found to be insolvent). These powers will be subject to the specific court order in a just and equitable winding-up.

Recovery action can be pursued in respect of the following:

- Transactions at an undervalue;²⁷
- Preferences;²⁸
- Wrongful trading;²⁹
- Fraudulent trading;³⁰
- Extortionate credit transactions.³¹

There has been very little insolvency litigation in Jersey. Consequently, there remains a dearth of authority on antecedent transactions and breach of fiduciary duties of directors resulting in losses for which a liquidator can pursue a claim for recovery. In the event such matters come before the Jersey Court, reference would be made to the jurisprudence in other jurisdictions, notably Guernsey and the UK.

²⁶ As can the Viscount in a *Désastre*.

²⁷ Companies Law, art 176.

²⁸ *Idem*, art 176A.

²⁹ *Idem*, art 177.

³⁰ *Idem*, art 178.

³¹ *Idem*, art 179.

6.3.9 Dissolution

Dissolution occurs by striking a company off the Register of Companies after a winding-up or a *Désastre* has completed.

6.3.10 Simplified procedures

There is no simplified liquidation process under Jersey law.

Self-Assessment Exercise 4

Question 1

Consider the types of powers that might be granted by the Jersey Court to a Liquidator in a just and equitable winding-up. How would you expect these to differ if the just and equitable winding-up was solvent or insolvent?

Question 2

Why might directors in Jersey choose to conduct their own summary winding-up without appointing a professional liquidator? What are the potential risks?

[For commentary and feedback on self-assessment exercise 4, please see APPENDIX A](#)

6.4 Receivership

There is no receivership procedure in Jersey.

6.5 Corporate rescue

6.5.1 Generally

There is no statutory or customary corporate rescue procedure equivalent to administration under English company law, or Chapter 11 under the US Bankruptcy Code. Upon the commencement of a liquidation, the liquidator's ability to continue to trade the company is restricted to winding-up its affairs (unless the power to allow the liquidator to trade the company in order to sell it is specifically granted by the Jersey Court in a creditors' winding-up or a just and equitable winding-up).

To understand the reasoning for this lack of rescue culture, it is important to recognise that Jersey is an offshore jurisdiction and international finance centre, which is a different business landscape to a typical onshore jurisdiction. Jersey has 33,000 live companies registered (which is equivalent to approximately one company for every three people in Jersey) and, by

comparison, the UK has one company for every 17 people. A reason for the relatively large number of companies in Jersey is that they are often used for financial structuring and other finance-related purposes, for example banking, private wealth and funds. Jersey companies are therefore often special purpose vehicles, holding companies or other group companies, as opposed to more traditional “trading businesses” found onshore. With this many companies, the numbers of managed solvent liquidations is high, whereas conversely the requirement for rescue and turnaround processes, which are more typically associated with traditional trading businesses, is low.

The Jersey Court has however shown a willingness to fashion creative and flexible solutions where necessary. As noted at paragraph 6.3, the just and equitable winding-up process has been used to effect a *quasi*-pre-packaged sale of assets, which you would typically associate with an administration process.

6.5.2 **Compromises or arrangements**

The usual means of effecting a voluntary reorganisation in Jersey is by way of a compromise or arrangement between the company and any class of its creditors or shareholders. The relevant provisions are contained within Part 18A of the Companies Law. A company may pursue a Compromise or Arrangement as a pre-insolvency procedure, in order to avoid a *Désastre*, creditors’ winding-up or a just and equitable winding-up.

A compromise or arrangement can be proposed by way of an application to the Jersey Court by the company, a creditor, a shareholder or the liquidator. The Jersey Court may order a meeting of the creditors or class of creditors, or a meeting of the shareholders in such manner as it sees fit. If a majority in number representing 75 per cent in value of the creditors (or class of creditors), or 75 per cent of the voting rights of the shareholders (or class of shareholders agree) present and voting either in person or by proxy at the meeting, agree to a compromise or arrangement, providing that it is sanctioned by the Jersey Court, it is binding on all creditors (or class of creditors), or all shareholders (or class of shareholders). Accordingly, it creates a moratorium against creditor action in respect of debts that are bound by the compromise or arrangement.

This process will require legal advice to the company and may also require insolvency practitioner involvement at certain stages, although no formal winding-up necessarily results.

A private law contractual compromise agreement can also be binding outside of the Companies Law framework. However, in the absence of 100% creditor consent, these arrangements may be liable to be set aside on a bankruptcy as being preferences (see paragraph 6.3).

7. CROSS-BORDER INSOLVENCY LAW

7.1 General background

7.1.1 Legal environment

Jersey is an international finance centre and therefore many Jersey cases involve an international element and the Jersey Court is experienced in dealing with cross-border jurisdictional issues and considering foreign laws. A Jersey-appointed insolvency officeholder will not have automatic standing in other jurisdictions and likewise a foreign insolvency officeholder will not have automatic authority to act in Jersey.

A survey amongst solicitors, barristers and other insolvency professionals with experience of conducting multi-jurisdictional insolvencies in leading offshore jurisdictions³² found that Jersey was rated favourably in relation to its court infrastructure,³³ listing process³⁴ and timeliness of enforcing judgments.³⁵ The effectiveness of Jersey's insolvency laws was also ranked reasonably high.³⁶ However, the survey identified other aspects of Jersey's cross-border insolvency regime that require improvement and modernisation, in particular the range of insolvency and non-insolvency options available, the introduction of a commercial court judge and improvements to the enforcement of security over immovable property. Other recommendations include a creditor-instigated winding-up process and rules permitting insolvency practitioners to be appointed instead of the Viscount on a *Désastre* application, plus the introduction of an administration-like procedure and / or a rescue regime that preserves secured-creditor priority.

Article 49 of the Bankruptcy Law serves as a co-operation provision in cross-border insolvency cases and sets out the requirements for the Jersey Court to provide assistance to foreign courts. Article 49 may typically cover recognition of officeholders; disclosure of assets or information; examination of witnesses; prevention of disclosure; freezing of assets; and restricting how information obtained may be used. If the Jersey Court receives a Letter of Request from the court of a "relevant" country or territory, being those that have offered reciprocal treatment,³⁷ then there is "...sufficient authority for the court to exercise, in relation to the matters to which the request relates, any jurisdiction which it or the requesting court could exercise in relation to these matters if they otherwise fell within its jurisdiction".

Article 49 also suggests that the Jersey Court have regard to the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency 1997 (the Model Law) and also to consider the rules of private international law. If a request is received from the

³² S Akers and F Toube, *From Discord to Harmony: the Future of Cross-Border Insolvency* (2015), available at https://www.insol.org/emailer/July_2015_downloads/Document21.pdf.

³³ Jersey was ranked third of eight leading offshore jurisdictions, behind Ireland and the Isle of Man.

³⁴ Jersey was ranked second of eight leading offshore jurisdictions, behind the Isle of Man.

³⁵ Jersey was ranked third of eight leading offshore jurisdictions, behind the Isle of Man and Ireland.

³⁶ Jersey was ranked seventh of 14 offshore jurisdictions, behind Singapore, Cayman Islands, Ireland, British Virgin Islands, Hong Kong, and Bermuda.

³⁷ Which currently extends to Australia, Finland, Guernsey, the Isle of Man and the UK.

court of a non- “relevant” country, it will likely provide assistance based upon common law principles of private international law and / or comity and co-operation (discussed below).

7.1.2 Common law / private international law principles

Private international law is often used to help the Jersey Court to resolve questions of jurisdiction, title to property, choice of law and public policy.

7.1.3 Territorial or universal approach

The principle of universality applies to the *Désastre* proceeding, that is, it applies to “...all the property and powers of the debtor...”³⁸ worldwide. A claimants’ status in one jurisdiction should be recognised in the absence of a compelling argument otherwise. Notwithstanding the general view toward universalism and co-operation, the Jersey Court will continue to exercise its powers and discretion to control matters appropriately within its own jurisdiction, in keeping with article 49 of the Bankruptcy Law.

7.2 Absence of the UNCITRAL Model Law on Cross-Border Insolvency

7.2.1 Adoption of UNCITRAL Model Law on Cross-Border Insolvency

Jersey is not a signatory to the UNCITRAL Model Law on Cross-Border Insolvency, nor is it a member of the EU and, as such, the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) (the Recast EIR) is not applicable. However, the Jersey Court has a long history of providing assistance to overseas insolvency officeholders in appropriate circumstances, both under article 49 of the Bankruptcy Law and on the basis of the common law principles and on the grounds of comity.

7.2.2 Comity

For jurisdictions that are not “relevant” under article 49, the Jersey Court may agree to assist under pre-existing customary law and its inherent jurisdiction to extend assistance under principles of comity, on a case-by-case basis. This has been demonstrated on numerous occasions including in *Re Royco Investment Company Limited (en Désastre) (1989)*³⁹ (discussed below), which gave particular regard to the principles of comity.

7.2.3 Inward-bound requests by foreign representatives

Foreign representatives, being those appointed as officeholders by a foreign court (such as a foreign insolvency proceeding over a Jersey company), require recognition by the Jersey Court before they have any standing to act in Jersey. This is sought via application to the Jersey Court by the foreign court in the form of a Letter of Request, which will be presented by Jersey counsel.

³⁸ Bankruptcy Law, art 8.

³⁹ *Re Royco Investment Company Limited* [1994 JLR 236].

In practice, before the application is submitted, the officeholder and their Jersey counsel will engage with the Viscount regarding the proposed strategy.

Jersey will typically co-operate in foreign insolvency proceedings where there is a sufficient connection between the debtor (be that an individual debtor or a company) and the law under which the foreign representative is appointed. Although the Jersey Court still retains discretion under the customary law, where there is a sufficient connection, it will typically grant the relief sought.

7.2.4 Discretion of Jersey Court and effect of recognition

The extent of assistance offered by the Jersey Court under article 49 of the Bankruptcy Law is discretionary. Assistance will typically be offered to “relevant” countries and article 49 of the Bankruptcy Law requires the Jersey Court to have regard to the Model Law and rules of private international law.

The Jersey Court also has discretion whether to apply Jersey law or the foreign law of the requesting country when granting assistance and in this regard it has flexibility. Indeed, the Jersey Court has demonstrated flexibility and has, for example, recognised the office of provisional liquidator and administrator, even though it does not have these processes locally.

The Jersey Court is likely to consider whether the principles of equality of treatment of creditors as per the Bankruptcy Law will be upheld. For example, it is unlikely to assist a territorial jurisdiction, that is, one that ring-fences local assets for local creditors. A transfer of assets to a foreign office holder will typically require interests of Jersey creditors to be protected by an undertaking or court order. Furthermore, the Jersey Court will wish to ensure that any request from a foreign court is not inconsistent with Jersey law and public policy.

The Jersey Court will exercise any jurisdiction it, or the requesting court, could exercise domestically including:

- endorsing and registering the appointment of the foreign officeholder;
- appointing the Viscount to render appropriate assistance to the foreign officeholder;
- making information available by discovery of documents or the examination of witnesses.

Practice Direction RC05/17 provides guidance in respect of applications for an order in aid to fulfil a Letter of Request. It states that the applicant must consult with the Viscount’s Department “...with a view to ensuring that the order actually sought in the representation, while seeking to achieve the objects of the Letter of Request, is drawn in terms which are suited to the Island’s domestic law”.

7.2.5 *Outward-bound requests*

Jersey officeholders can seek assistance from UK courts under Section 426 of the Insolvency Act 1986, as it applies in England and Wales.

A Jersey liquidator appointed by the Jersey Court in a just and equitable winding-up may have a stronger ability to seek recognition of his status in a foreign jurisdiction than a liquidator appointed under a summary winding-up or creditors' winding-up procedure. In any event, a Jersey liquidator will need to seek legal advice in the foreign jurisdiction where he wishes to be recognised, followed by an application to the foreign court for recognition.

Once recognised in a foreign jurisdiction, a Jersey liquidator will need a further court order to enforce his Jersey powers if required locally. An application to the foreign court will be necessary to achieve this, supported by local legal advice.

7.2.6 *Commencement of local proceedings by foreign insolvency practitioners*

There is no requirement for an officeholder to be a Jersey resident in order to take a Jersey appointment. Furthermore, as discussed at paragraph 4.2 there is no register or specific licencing of insolvency practitioners in Jersey. Accordingly, it is possible for practitioners to be appointed liquidators who are not resident in Jersey.

7.3 **Bilateral or multilateral treaties or conventions**

Jersey has not entered into any treaties or conventions with other countries in respect of cross-border insolvency. Where cross-border issues have arisen in Jersey cases, the courts have treated them as matters for judicial assistance, rather than requiring a comprehensive protocol.

Jersey does, however, contribute to the development of international initiatives to achieve harmonisation and recognition of insolvency law and procedures internationally. Jersey was a founding member of the International Association of Insolvency Regulators, which promotes liaison and discussion amongst insolvency regulators. Jersey, through the Association of Restructuring and Insolvency Experts (ARIES), is also a member of INSOL International, INSOL Europe, the Insolvency Practitioners Association and the Association of Business Restructuring Professionals, amongst others.

The EC Regulation on Insolvency Proceedings does not apply in Jersey, however it can influence decisions in Jersey.⁴⁰ The Guidelines on Court-to-Court Communications in Cross-Border Cases (the CoCo Guidelines), which were drawn up by the American Law Institute, do not have direct application in Jersey but can be expected to assist in harmonising the approach to cross-border insolvency issues.

⁴⁰ See *Re OT Computers (2002)*, discussed below, in respect of the centre of main interest (COMI).

7.4 Important cross-border cases

7.4.1 *Hamel v Hawkes and Gardner Limited*⁴¹

The Jersey Court accepted the effect of foreign insolvency extended to movable property of the debtor in Jersey.

7.4.2 *Re F & O Finance AG*⁴²

The Swiss court was able to receive assistance from the Jersey Court, despite not being a “relevant” country under article 49 of the Bankruptcy Law, as the Jersey Court deemed itself to have inherent jurisdiction enabling it to assist in foreign insolvencies.

7.4.3 *Re Royco Investment Company Limited (en Désastre)*⁴³

This relates to an English provisional liquidator of a Jersey company, which had assets in New York. The provisional liquidator wanted recognition in New York. The New York court required bankruptcy in the country of incorporation, being Jersey, and confirmation that the US claim would be treated sympathetically. This was provided.

7.4.4 *Re Tucker*⁴⁴

An English trustee in bankruptcy requested via the English court to the Jersey Court an order for assistance. The UK revenue (HMRC) was the only creditor. The Jersey Court was unable to provide assistance as it was felt there was no jurisdiction. The outcome would have been different if there was a non-revenue creditor.

7.4.5 *Re Williams (as Trustee in Bankruptcy of Collett)*⁴⁵

This was similar to *Re Tucker*, however 0.2% of creditor claims were from a non-revenue creditor. The Jersey Court therefore recognised the appointment of the trustee in bankruptcy.

7.4.6 *Re Walkers Advertising Associates Limited*⁴⁶

This was a Jersey *Désastre* followed subsequently by English proceedings. The Jersey Court ordered a stay of the *Désastre*. This was subsequently permitted to continue on terms agreed between the Viscount and the English liquidator, primarily being that the Viscount would realise the Jersey assets and settle priority creditors before remitting the balance to England. Furthermore, Jersey unsecured creditors would be properly and equitably dealt with.

⁴¹ (1900) 220 Ex 122.

⁴² (2000) JLR Note 5a.

⁴³ *Re Royco Investment Company Limited* [1994 JLR 236].

⁴⁴ (1987-1988) JLR 473.

⁴⁵ (2009) JRC 054, 2009 JLR.

⁴⁶ (1992) Unreported.

7.4.7 *Re OT Computers Limited*⁴⁷

The company applied for an English administration under section 426 of the UK Insolvency Act, 1986. The Jersey Court exercised its inherent jurisdiction regarding a letter of request.

Self-Assessment Exercise 5

Question 1

Describe how a foreign officeholder can obtain recognition in Jersey.

Question 2

Provide three examples of circumstances in which the Jersey Court may decline to grant assistance to a foreign court.

[For commentary and feedback on self-assessment exercise 5, please see APPENDIX A](#)

8. RECOGNITION OF FOREIGN JUDGMENTS

8.1 Whether foreign judgments can be recognised under statute or common law

Foreign judgments cannot be directly enforced in Jersey. There is however an exception under the Judgments (Reciprocal Enforcement) (Jersey) Law 1960 (the 1960 Law) where judgments (excluding those relating to taxes, fines or penalties) given in superior courts of certain foreign jurisdictions will be given effect as if they were given in Jersey and can be enforced as such. The jurisdictions in question are the UK, Northern Ireland, Isle of Man and Guernsey.

A judgment of a court other than a court qualifying under the 1960 Law is not directly enforceable in Jersey. However, the Jersey Court still has a discretion to assist under Jersey customary law, which can permit recognition and enforcement of a foreign judgment. The foreign court that granted the judgment must have been of a competent jurisdiction. The Jersey Court will apply conflict of law rules in determining whether or not this was so.

Under customary law, a foreign judgment is regarded as a debt. Accordingly a judgment creditor must sue on the debt and then apply for summary judgment, without re-litigation of the substantive issues in the case. There are limited grounds upon which it is likely to be ignored by the Jersey Court, being:

- the foreign court had no jurisdiction;

⁴⁷ (2002) JU 29, 2002 JLR N10.

- the party obtaining the judgment committed fraud;
- enforcement of the judgment would be contrary to public policy; or
- the proceedings in which the judgment was obtained were contrary to natural justice.

It should be noted that there is no distinction between local and foreign creditors in a *Désastre* or liquidation.

8.2 Requirements for recognition of foreign judgments by the Jersey Court

Under the 1960 Law, judgments must be:

- that of a superior court of a specified foreign country;
- registered, that is, final and conclusive (whether or not an appeal is pending);
- in respect of a money sum (not a tax, fine or penalty) and for a sum not wholly satisfied; and
- able to be enforced by execution.

The judgment creditor must apply to the Jersey Court on an *ex parte* basis within six years of the date of the judgment, seeking leave for the judgment to be registered.

8.3 Legislation or case law impacting the recognition of foreign judgments

8.3.1 *Re Hardwick*⁴⁸

The judgment must be a superior court judgment, not simply transferred for the purpose of enforcement for the 1960 Law.

8.3.2 *Solvalub Limited v Match Investments Limited*⁴⁹

The Jersey Court applied principles of comity in aid of proceedings in the foreign court.

Self-Assessment Exercise 6

Assuming you were Jersey counsel, how would you advise a foreign creditor with a judgment in respect of a Jersey company? What background details would you need to establish from your client, and how would this impact your advice?

⁴⁸ (1995) JLR 245.

⁴⁹ (1996) JLR 361 (CA).

For commentary and feedback on self-assessment exercise 6, please see APPENDIX A

9. INSOLVENCY LAW REFORM

Jersey's insolvency law underwent significant changes in March 2022, which included amendments to the Companies Law to introduce a creditor led creditors' winding-up process (as discussed at paragraph 4.2.3) and the introduction of a register of approved liquidators (as discussed at paragraph 4.2.4).

There are long term proposals to extend the provisions of the Securities (Jersey) Law 2012 to tangible movable properties, but there is no ascertained timeframe for that legislation.

In March 2021, the Association of Restructuring and Insolvency Experts (ARIES), which is the Channel Islands' member association of INSOL International, issued Jersey Statements of Insolvency Practice (JSIP) to assist its members with best practice procedures. The JSIPs are a voluntary industry initiative which are based on English Statements of Insolvency Practice, and follow the introduction of Guernsey Insolvency Practice Statements by ARIES in May 2017. JSIPs issued to date cover the conduct of restructuring procedures and assignments, and fees and disbursements in formal restructuring work.

10. USEFUL INFORMATION

10.1 ARIES

ARIES is the predominate source of information for individuals specialising in restructuring and insolvency work in Jersey. See www.aries-ci.org.

10.2 JSCCA

To the extent that insolvency practitioners are also qualified accountants, the Jersey Society of Chartered and Certified Accountants (JSCCA) is a source of information for accountants located in Jersey. See www.jscca.org.

10.3 References

- Akers S and Toube F (2015); *From Discord to Harmony: the Future of Cross-Border Insolvency*;
- Central Intelligence Agency (2022); *The World Factbook* <https://www.cia.gov/library/publications/the-world-factbook/>;
- Dann J (2019); *Getting the Deal Through: Restructuring and Insolvency 2019*;

- Dessain A and Wilkins M (2012); *INSOL International Cross-Border Insolvency II: a Guide to Recognition and Enforcement*;
- Dessain A and Wilkins M (2012); *Jersey Insolvency and Asset Tracking (4th edition)*;
- German, P, Pallot, M and Garrood, J (2018); *Restructuring and Insolvency in Jersey: Overview*;
- Gov.uk Official Statistics of Incorporated Companies in the UK July to September 2018;
- JFSC (2018); *Financial Services Industry Quarterly Report; September 2018*;
- Omar P J (2013); *A Jersey Perspective on Cross-Border Insolvency: Article 49 and Receivers*;
- Roberts A and Pallot M (2017); *INSOL International Small Practice Issues - Jersey*;
- Royal Viscount of Jersey Viscount's Department (2018); *A Guide to the Bankruptcy Law*;

APPENDIX A: COMMENTARY AND FEEDBACK ON SELF-ASSESSMENT EXERCISES
Self-Assessment Exercise 1
Question 1

Compare the *Désastre* process to the creditors' winding-up process. How would you rate them both as tools for enforcement?

Question 2

What are the benefits and potential pitfalls arising out of Jersey's register of approved liquidators?

Commentary and Feedback on Self-Assessment Exercise 1
Question 1

Points to include in your answer:

- Both processes are used by creditors to enforce debts. *Désastre* applies to both companies and individuals in Jersey. Creditors' winding-up applies only to companies.
- Creditors must be owed JEP3,000 to be able to apply for a debtor's *Désastre* or a creditors' winding-up.
- In *Désastre*, there is a risk for the creditor as they must confirm their belief that the debtor has realisable assets. This may be difficult to ascertain, depending upon the relationship between the debtor and creditor. There is no such requirement for a creditors' winding-up.
- In *Désastre*, there is a risk for the creditor in meeting the costs and indemnifying the Viscount for costs and liabilities incurred. In a creditors' winding-up, the creditor will likely be required to meet the legal fees and court costs of presenting the application, which might also be costly and potentially not recoverable.
- The process for *Désastre* and creditors' winding-up have similarities in that the appointee will seek to realise the assets for the benefit of creditors and will conduct investigations in relation to directors' conduct and to pursue claims where appropriate.
- In *Désastre*, the process is carried out by the Viscount, which is a States of Jersey office. In a creditors' winding-up, the liquidator will be proposed by the creditor and will be required to be on the register of approved liquidators. An approved liquidator will be very experienced in insolvency and asset recovery matters, and may be better resourced to successfully pursue recoveries.

Question 2

Points to include in your answer:

- The purpose of the register of approved liquidators is to ensure that liquidators meet certain standards, including qualification, experience and insurance. In addition, the applications are vetted by the Viscount. This will bring Jersey in line with other jurisdictions and provide creditors and other stakeholders with comfort that liquidators are of high standard.
- In the absence of a register, liquidators might not be members of a Recognised Professional Body (RPB) to which they are accountable.
- In the absence of a register, a liquidator may not have adequate insurance (if any) if they are not a professional liquidator.
- There remains a risk that liquidators of solvent non-public companies undertaking a summary winding-up need not be members of an RPB and they may even be the director of the company with no relevant liquidation experience. The risk is that they may not have the skill or experience required to properly liquidate the company, and to deal with all assets and all liabilities. Furthermore, they may not follow "best practice" protocols that a professional liquidator will typically follow. If a liquidation has not been completed correctly, for example if assets have not been fully realised or creditors not met in full, then the company will need to be reinstated to the Jersey Registry which can be costly and time consuming.

Self-Assessment Exercise 2

Describe the forms of security available in Jersey in respect of immovable and movable property.

Commentary and Feedback on Self-Assessment Exercise 2

See study notes in respect of:

- Immovable property: legal hypothec; conventional hypothec; and, judicial hypothec.
- Movable property: pledge.

Self-Assessment Exercise 3

Consider the bankruptcy regime in your own jurisdiction, or a jurisdiction that you are familiar with. How does it compare to *Désastre*? What are the advantages and disadvantages of *Désastre* compared to your own bankruptcy regime? Would *Désastre* be effective in your own jurisdiction and, if not, what problems do you envisage?

Commentary and Feedback on Self-Assessment Exercise 3

Answer should be specific to your jurisdiction (a comparison to England is included below). Points to include in your answer:

1. Jersey has a number of personal insolvency options: *Désastre*; *Dégrévement* and Realisation; the Debt Remission Order; and *Remise de Biens*.
2. ***Désastre***:
 - Similar to an English bankruptcy;
 - *Désastre* can apply to individual debtors and to companies (English Bankruptcy only applies to individuals);
 - Can be instigated by a debtor, or a creditor who is owed JEP 3,000 (creditor must be owed JEP 5,000 to apply for a debtors' Bankruptcy in England);
 - Jersey Court discretion whether or not to declare the debtor *en Désastre*;
 - Personal *Désastre* typically lasts four years (English Bankruptcy typically lasts one year) but it is possible to lengthen or shorten this term;
 - Process is carried out by the Viscount (similar to the Official Receiver which manages Bankruptcy in England; albeit an insolvency practitioner can subsequently be appointed Trustee in Bankruptcy); and,
 - Debtor's estate vests in the Viscount (same as in England where the debtor's estate vests in the Official Receiver or subsequently appointed Trustee in Bankruptcy).
3. ***Dégrévement***:
 - Creditor enforcement process in respect of a debtors immovable property;
 - Property becomes "discumbered", meaning charges and debts are removed so that there is a new owner with clear unencumbered title;
 - Creditor in reverse order of priority are given opportunity to take the property, but all senior creditors must be paid in full;
 - There is no obligation to account to the debtor for the balance;
 - Debtor is not necessarily discharged from their debts.
4. ***Realisation***:
 - Applies to movable assets when a debtor's property is adjudged renounced;
 - Movable assets are realised at auction; and,
 - Debtor is not necessarily discharged from their debts.

5. The Debt Remission Order:

- Local small debt proceeding administered by the Citizens Advice Bureau, which is similar to an English Debt Relief Order;
- Debtor has assets worth less than JEP 5,000 (GBP 1,000 in England);
- Debtor has less than JEP 100 of disposable income per month (GBP 50 per month in England);
- Debtor has debts of less than JEP 20,000 (same restriction in England);
- Debtor has acted in good faith whilst incurring the debts (similar in England); and,
- Provides a moratorium for 12 months after which all debts covered by the DRO will be written off (same in England).

6. Remise de Biens:

- Jersey Court process available to a debtor with immovable property;
- Secured creditors should be capable of being paid from the value of the assets;
- Debtor surrenders the property for a period of time and the Jersey Court then realises this to discharge the debts, with any surplus being returned to the debtor; and,
- Provides rehabilitation to the debtor.

Self-Assessment Exercise 4
Question 1

Consider the types of powers that might be granted by the Jersey Court to a Liquidator in a just and equitable winding-up. How would you expect these to differ if the just and equitable winding-up was solvent or insolvent?

Question 2

Why might directors in Jersey choose to conduct their own summary winding-up without appointing a professional liquidator? What are the potential risks?

Commentary and Feedback on Self-Assessment Exercise 4
Question 1

Points to include in your answer:

- Will broadly follow powers available to a Liquidator in a summary winding-up or creditors' winding-up, depending upon whether solvent or insolvent;
- Summary winding-up powers will be only those required to realise assets, discharge liabilities and distribute assets; and

- Creditors' winding-up powers will be wide ranging including all powers of the company required for its beneficial winding-up; the power to pay creditors; the power to disclaim onerous property and contract leases; and powers to pursue recovery in respect of antecedent transactions.

Question 2

Points to include in your answer:

1. There is no requirement to appoint a professional liquidator in a summary winding-up;
2. Directors may choose not to appoint a Liquidator for the following reasons:
 - To reduce costs (although a professional director of a Corporate Service Provider firm, as is typically the case in Jersey, is likely to charge a fee of their own to wind-down the company);
 - To maintain control throughout the process; and,
 - To avoid review by an independent Liquidator (this is a cynical view, but nonetheless, some directors may wish to avoid having a Liquidator involved who could review their actions).
3. There are risks involved if a director does not appoint a professional Liquidator:
 - Directors may lack the experience to ensure that the Liquidation is properly undertaken, with all assets realised and all liabilities (including contingent, prospective and unliquidated liabilities); and,
 - Directors retain responsibility for the company throughout the summary winding-up, rather than transferring responsibility to a professional Liquidator. A director may therefore become liable for offences under Schedule 1 of the Companies Law that would otherwise fall upon a professional Liquidator.

Self-Assessment Exercise 5

Question 1

Describe how a foreign officeholder can obtain recognition in Jersey.

Question 2

Provide three examples of circumstances in which the Jersey Court may decline to grant assistance to a foreign court.

Commentary and Feedback on Self-Assessment Exercise 5

Question 1

Points to include in your answer:

- Foreign office holder will usually apply to the Jersey Court via their own court, for recognition of his or her appointment, in the form of a letter of request;
- Article 49 of the Bankruptcy Law sets out the requirements for the Jersey Court to provide assistance to foreign courts. The Jersey Court maintains discretion as to what assistance is provided, but article 49 refers to 'relevant' countries or territories, where assistance can be expected to be given (which extends to Australia, Finland, Guernsey, Isle of Man and the UK);
- If the office holder is not from a relevant country or territory then they may still be afforded recognition upon common law principles of private international law and/or comity and cooperation. Indeed the Jersey Court has a long history of providing assistance to overseas insolvency office-holders in appropriate circumstances; and,
- Alternatively, an office holder may seek an entirely new appointment over a Jersey company, that is, a new local appointment. There is no requirement for an office holder to be Jersey resident in order to take a Jersey appointment and there is no specific licencing of Insolvency Practitioners in Jersey. However this would require the support of directors and/or the company if a just and equitable winding-up or creditors' winding-up.

Question 2

Points to include in your answer:

The Jersey Court has discretion whether or not to provide assistance to foreign courts. It may decline for the following reasons:

- Insufficient connection: The Jersey Court may consider that there is insufficient connection between the office-holder appointed in the jurisdiction where the company is incorporated or the individual is domiciled, and the company or individual has submitted to the jurisdiction of the court by which the appointment was made;
- Treatment of Jersey creditors: The Jersey Court is unlikely to assist a territorial jurisdiction, i.e. one that ring-fences local assets for local creditors. A transfer of assets to a foreign office holder will typically require interests of Jersey creditors to be protected by an undertaking or Court Order;
- Consistency with Jersey law: The Jersey Court will wish to ensure that any request from a foreign court is not inconsistent with Jersey law; and,
- Tax creditor: The Jersey Court is unlikely to provide assistance if the only creditor is a foreign tax authority (see *Re Tucker* (1987-1988)).

Self-Assessment Exercise 6

Assuming you were Jersey counsel, how would you advise a foreign creditor with a judgment in respect of a Jersey company? What background details would you need to establish from your client, and how would this impact your advice?

Commentary and Feedback on Self-Assessment Exercise 6

Points to include in your answer:

1. Is the judgment covered under the 1960 Law? If so, the foreign judgment should be capable of being enforced directly in Jersey, as though the judgment was given in Jersey. Specifically, the 1960 Law applies to:
 - Judgments granted in a superior court of a specified jurisdiction (being the UK, Northern Ireland, Isle of Man or Guernsey);
 - Judgments that are registered, that is, final and conclusive (whether or not an appeal is pending);
 - Judgments in respect of a money sum (other than taxes, fines or penalties) and for a sum not wholly satisfied;
 - Able to be enforced by execution; and,
 - Judgment obtained not more than six years ago.
2. If the judgment is not covered under the 1960 Law, then was the judgment granted in a relevant country as specified in article 49 of the Bankruptcy Law (being Australia, Finland, Guernsey, the Isle of Man and the UK)? If so, the Jersey Court is likely to assist the courts of a relevant country, and permit enforcement of the judgment.
3. Failing the above, customary law may apply to permit recognition and enforcement of a foreign judgment. The foreign court that granted the judgment must have been of a competent jurisdiction and the Jersey Court will apply conflict of law rules in determining whether this was so.
4. If the foreign court had no jurisdiction; if the party obtaining the judgment committed fraud; if enforcement of the judgment would be contrary to public policy; or if the proceedings in which the judgment was obtained were contrary to natural justice, then the Jersey Court is unlikely to grant assistance.



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