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**Forum shopping and filing insolvency proceedings in a global
legal world**

Insolvency Commission

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1. Proper place for commencement of insolvency proceedings and centre of main interests.

- a. In your jurisdiction which is the proper place for commencement of insolvency proceedings? Is the applicable law determined separately than the venue?

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, giving 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.

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. 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.

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.

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.

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

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.

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). 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 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 the English Courts have jurisdiction to wind up foreign companies (including Jersey companies) if there is sufficient connection to England.

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

b. Is there in your country a notion or definition of the debtor's centre of main interests ("COMI")?

No, there is no notion or definition of the debtor's COMI in Jersey law.

In the first Jersey passporting case, *In re OT Computers* 2002 JLR N10 (heard in January 2002), the Jersey company's operations were situated mainly in the United Kingdom, and the Jersey Court issued a letter of request to the English Court for it to be placed into English administration. The Jersey Court recognized the principle of COMI as a persuasive element in the exercise of its discretion to issue the letter of request. This case came a few months before the EC Insolvency Regulation came into force in May 2002.

Since the EC Insolvency Regulation came into force in England:

- As a matter of English law, if a Jersey company has its COMI in England, it can be put into administration in England without reference to the Jersey Court - and therefore a passporting application is strictly unnecessary.
- A passporting application does not require the applicant to show that the company's COMI is in England - it merely requires the applicant to show that (amongst other things) there is sufficient connection with England. Indeed in many cases, the Jersey company or its directors may not want to assert that its COMI is in England for tax or other reasons. The creditor which is making the application may not be able to show where the COMI is, or the COMI may be in doubt. As far as the English Court is concerned, it is the letter of request from the Jersey Court itself which ensures that the English Court has jurisdiction to make an administration order in these circumstances.³

As noted above, the test for foreign companies being declared *en désastre* in Jersey does not involve a consideration of COMI.

c. Which are the factors relevant to the determination of centre of main interests?

Not applicable.

d. Is this essential in determining the jurisdiction?

Not applicable.

e. Are there international or supranational regulations regarding the proper place for commencement of insolvency proceedings and/or the determination of the centre of main interest applicable in your country?

Neither the EC Insolvency Regulation nor the Model Law applies in Jersey.

As noted above, however, on an application for recognition under Article 49 of the Désastre Law, the Jersey Court can "have regard to" the Model Law - which

³ See *Doltable v Lexi Holdings plc* [2006] 1 BCLC 384, at para 1.

may involve a consideration of the location of the COMI of the foreign company, and the definition of COMI found in the EC Insolvency Regulation.

So for example, if a US or German registered company is being wound up in England under the EC Insolvency Regulation on the basis that its COMI is in England, and those English liquidators seek recognition and assistance in Jersey under Article 49, the Jersey Court may have regard to the fact that the English liquidation is based on COMI grounds rather than being a liquidation in the place of incorporation.

- f. **Is the debtor's centre of main interests the place where an insolvency proceeding concerning the debtor is likely to commence? Why or why not?**

Not applicable as a matter of Jersey law.

- g. **Please discuss the issues of timing and procedure with respect to the determination of centre of main interests, including when or if a judicial determination on this issue is required or made?**

Not applicable in Jersey.

2. Movement of the place of registration (or habitual residence) of centre of main interest.

- a. **Is it possible for the debtor to move its place of registration (or habitual residence) prior or after the commencement of insolvency proceedings? Will such a move affect the decision as to centre of main interests and the determination about the commencement of the proceedings?**

As to place of incorporation and registration:

- It is possible for a foreign company to migrate to Jersey pursuant to Part 18C of the Companies Law. This process is called a "continuance". Once continuance has been achieved, it becomes a Jersey registered company under the Companies Law, as if it had been incorporated in Jersey.
- All Jersey companies must maintain a registered office in Jersey.
- As noted above, Jersey companies may be wound up under the Companies Law or declared *en désastre*. Once either of those proceedings have commenced, it would not then be possible for the company to move or "continue" elsewhere.
- In the case APIC Petroleum Corporation,⁴ a Canadian company wished to implement a solvent members' Jersey scheme of arrangement under Article 125 of the Companies Law. Such a scheme of arrangement is only available to Jersey registered companies. The scheme process involves three stages: (i) a court order convening a meeting of the members, (ii) the members'

⁴ 2013 (1) JLR Note 3; [2012] JRC 228

meeting itself and (iii) a court order sanctioning the scheme. The Jersey Court was prepared to make an order convening a meeting of members on the condition that the company would have successfully completed its continuance (and thus become a Jersey company) before the members' meeting took place.

- As regards a foreign company declared *en désastre* in Jersey under Article 4 of the Désastre Law, this is not dependent on place of incorporation, registration or residence.

As noted above, COMI is not a concept that applies under Jersey law.

b. Is it possible to move a debtor's centre of main interests prior to commencement of insolvency proceedings?

Not applicable.

c. Is it possible to move a debtor's centre of main interests between the time of the application for commencement and the actual commencement of those proceedings?

Not applicable.

d. If there is evidence of such a move in close proximity to the commencement of the commencement, in determining whether to recognize those proceedings, will the court scrutinize more closely such a move?

Not applicable.

e. Is forum shopping allowed under domestic or supranational law which applies in your jurisdiction?

There is nothing in the Jersey legislation to prevent forum shopping. Each case will be judged on its merits.

f. What are factors in your country that may influence a debtor to choose one forum over another, e.g. judges, favorable laws, case law precedent, etc.?

Jersey has a stable legal and political system, with good judges and experienced lawyers and insolvency professionals. It is geographically close to the UK. In the absence of local precedent, in many areas the Jersey Court will follow English common law principles. The ultimate court of appeal is the Privy Council in London.

g. Is it possible for a creditor or other party to force or cause a debtor's insolvency proceedings to be moved (rather than dismissed), as a result of a challenge to the debtor's definition of its centre of main interests?

No, as COMI is not a relevant factor in Jersey.

3. Recognition of foreign proceedings, main and secondary proceedings

- a. **Is the recognition of foreign proceedings allowed in your country? What are the requirements? Is this recognition affected by the notion of centre of main interests?**

Yes. See the answer to 1a above. Recognition of insolvency proceedings from prescribed countries can occur under Article 49 of the Désastre Law. For other countries, recognition can occur at common law.

On an application for recognition under Article 49, the Jersey Court may "have regard to" the Model Law, which can include considerations of COMI.

- b. **Does your relevant domestic or supranational legislation have the notions of main and secondary proceedings or otherwise distinguish between the concepts?**

No.

- c. **Does your legislation permits secondary proceedings to be opened to run in parallel with the main proceedings? Are the effects of secondary proceedings limited to the assets located in that State where secondary proceedings are opened?**

Jersey legislation does not mention 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.

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.

One example relates to a Jersey company called Royco Investment Company Limited. 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 orderly 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.⁵

- d. Does your jurisdiction allow a challenge to proceedings being designated as secondary? If so, please explain in greater detail.**

Not applicable.

4. Abuse of process

- a. In your jurisdiction, is a court able to take account of abuse of its processes as a ground to decline recognition?**

Yes.

The Jersey Court has discretion, on receiving a letter of request from a foreign court seeking assistance in a foreign bankruptcy, whether or not to provide assistance. It will take into account all material factors. The fact of the request for assistance is a weighty factor to be taken into account.

As noted in 1a above, the Jersey Court will generally 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. Any alleged abuse of process in the foreign court may be taken into account.

The Jersey Court can also have regard to any alleged abuse of its own processes. So, for example, on an *ex parte* application for recognition, the applicant is required to give full and frank disclosure. If it is later shown that such disclosure was not given, the Jersey Court can amend or revoke its order granting recognition.

- b. What happens if the applicant falsely claims the centre of main interests to be in a particular State?**

COMI is not directly relevant in Jersey. But if the underlying basis of the appointment of the office-holders turns out to be based on false COMI grounds, the Jersey Court may amend or revoke its order granting recognition.

⁵ In re Royco Investment Company Limited 1991 JLR Note 6a, 1994 JLR 236

c. Are those issues governed by international or supranational regulations or only by domestic law?

These are issues determined by the Jersey Court under Jersey law, but clearly if the alleged abuse is, for example, a false claim that the company's COMI is in England by which English liquidators have been appointed who are seeking recognition in Jersey, the Jersey Court may have to consider how COMI ought properly to be determined under English law. The Jersey Court could receive expert evidence of foreign law for that purpose.

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