TOWARDS A RESCUE CULTURE IN JERSEY?

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This article discusses the merits of incorporating a rescue culture, and an appropriate procedure enabling rescue, into Jersey law.

Introduction[1]

1 In this article, I look at six issues: (1) what do we mean by "rescue"? (2) what do the stakeholders actually want? (3) why change anything? (4) what changes are proposed? (5) what issues remain? and (6) quick fixes.

What do we mean by "rescue"?

2 The aims of most corporate insolvency regimes are to protect and balance the interests of competing creditors, deal with directors responsibly and promote rescue and recovery. "Rescue" in this context means the rehabilitation of viable companies (or viable businesses) in financial distress. In theory, such a rescue is good for the stakeholders involved. It is good for the debtor company if it is afforded a breathing space during which it is protected from creditor action so that it, or an insolvency officer-holder, has time to negotiate a solution that allows for the survival of the company (or the business). It is good for employees, who may keep their jobs. Importantly it is also good for creditors if they can receive higher recoveries in comparison with the immediate closure of the company (or business) and a "fire-sale" of its assets. It is also generally encouraged as an issue of social policy, because rescue may promote a more entrepreneurial culture and responsible risk-taking whilst seeking to protect employment.

3 Different approaches to rescue are taken in different countries.

- The USA has Chapter 11 of the Bankruptcy Code. The debtor company may file for Chapter 11 protection without the need to show that it is insolvent, and the debtor's management remains in place (as "debtor in possession"). The filing of the petition

[1] This article is based on a paper given at a conference on "The Enforcement of Creditors' Rights in the Channel Islands: Issues in Asset Security and Insolvency" organised by the Institute of Law, Jersey on 13 October 2014.

gives rise to an automatic stay of any actions against the debtor and its assets, and even prevents counterparties exercising contractual rights of termination on grounds of the debtor's insolvency. The debtor has an exclusive right to propose a plan of reorganisation during the first 120 days (which can be extended to up to 18 months), which can reschedule repayment terms or even eliminate debts. As the debtor retains full control and the debts are reduced or removed, there is a high company survival rate. US Chapter 11 is generally considered a "debtor friendly" regime.

- The UK's administration regime under the Insolvency Act 1986 was extensively reformed by the Enterprise Act 2002. The ability of a floating charge holder to appoint an administrative receiver, which was an obstacle to the more widespread use of administration, was virtually abolished (specific exceptions remain). For the first time, administrators could be appointed out of court. The debtor company may be either insolvent already, or likely to become insolvent. The filing of an application for administration gives rise to an interim moratorium (which is made permanent when administrators are appointed) against creditor action which extends to prevent secured creditors enforcing their security, stopping them from withdrawing essential assets of the business during the administration. The primary purpose of administration is the rescue of the company as a going concern. If this is not achievable, the administrator must either seek to achieve a better result for the company's creditors as a whole than would be likely if the company were wound up or, failing that, to realise property in order to make a distribution to one or more secured or preferential creditors. However, administration does not contain any form of a "cram down" regime to compromise creditors' substantive rights, which can only be achieved via a company voluntary arrangement ("CVA") or scheme of arrangement (albeit they can occur during the course of an administration), and so UK administration is generally considered a "creditor friendly" regime.[2] As a result the rescue of the *company* is rare, even if the

[2] That is not to say that secured creditors are without protection. For example, after issuing the petition and giving the secured creditor(s) notice, there is a 5-day period which allows them to appoint their own nominee as administrator. After the administrator has been appointed, the secured creditor still maintains control of its security. It has to release its security before a sale can be completed, the administrator also has to account to the secured creditor

assets can be sold in a pre-packaged sale (and therefore sometimes the whole or part of the *business* of the company can continue as a going concern). Pre-pack administrations have come in for criticism, principally due to a lack of transparency.[3]

- Most offshore jurisdictions do not have a rescue procedure at all, with Guernsey being a notable exception. Guernsey introduced administration for protected cell companies in 1997, and then extended it to all Guernsey companies in 2008. An application for an administration order may be made by any member of the company or any creditor, including any contingent or prospective creditor. The court may grant an order if it is satisfied that the company fails, or is likely to fail, the solvency test (if it is cash flow or balance sheet insolvent, or does not meet any regulatory solvency requirements), and if it considers that making an order will achieve either (a) the survival of the company *and* the whole or any part of its undertaking as a going concern, and/or (b) a more advantageous realisation of the company's assets than would be effected on a winding up. Like the UK regime, Guernsey administration contains no built-in provisions to allow for the rescheduling or "cramming down" of debts, and as a result business rescue or sale is more likely than a rescue of the company.[4] However, in contrast to the UK administration regime, the interim and permanent moratoria which arise do not prevent secured creditors from enforcing their security. This might be described as a "secured creditor friendly" regime.

4 Jersey does not have a rescue regime. Should it now introduce one? First we need to consider if there is demand for such a process from stakeholders. Already we have used the expressions "debtor friendly" and "creditor friendly" but what do debtors and creditors actually want? Creditors obviously want to be paid on time, in full. If that is not going to be possible, there is a divergence between the wishes of secured and unsecured creditors. And what about public policy?

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with the sale proceeds, and *in extremis* if the secured creditor does not consent, the Administrator needs a court order to force a sale.

[3] The new Statement of Insolvency Practice 16 which came into effect on 1 November 2013 seeks to increase transparency in pre-pack administration sales.

[4] The first Guernsey pre-pack was approved in *Re Esquire Realty Holdings Ltd*, Royal Court, 2014 GLR 77.

What do the stakeholders actually want?

What do debtors want?

5 First, debtors want to survive. If a debtor company is insolvent, or is likely to become insolvent, but wants to survive, it may need the following:

- Breathing space to talk to creditors. This requires some form of moratorium to prevent creditors racing to obtain judgment and enforcing over the debtor's assets before other creditors can do so (a "creditor scramble"). At the moment Jersey does not really have a suspensory procedure[5] other than *remise de biens* which is only available if the debtor company owns Jersey immovable property and can show it will be able to repay its secured creditors in full with a surplus, no matter how small, available for unsecured creditors. *Remise* is generally considered unsuitable for complex cases.
- To restructure or reduce its debts. At present in Jersey, this can be done by way of consensual deal with all creditors or alternatively a "cram down" can be achieved through a scheme of arrangement, although the process takes some time and there is no moratorium during the course of the process.
- To trade out of trouble. Directors will be (or should be) very wary of wrongful trading. An insolvent company can continue to trade within a *désastre* or a winding up on just and equitable grounds, but both procedures are essentially terminal.[6]

6 Accordingly, at present, survival of the company is likely to be very difficult—this is the principal gap in the statute book. If the survival of the company is not possible, it may still be possible to save the whole or part of the business as a going concern through the use of a "pre-pack" sale within a winding up on just and equitable grounds.[7]

7 Alternatively, debtor companies may want to call it a day, and commence an orderly winding up of their affairs. There are many options available. This can be achieved through a *désastre*, a

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[5] If a Jersey company is placed into English administration, the English administration moratorium will apply (in England at least).

[6] A *désastre* can be recalled if the company is balance-sheet solvent (art 7 of the Bankruptcy (*Désastre*) (Jersey) Law 1991). It is also possible to terminate a creditors' winding up under art 185A of the Companies (Jersey) Law 1990 (often applied to just and equitable liquidations) or art 186A, if the company is solvent.

[7] *In re Collections Group* 2013 (2) JLR *N* [2].

creditors' winding up, a winding up on just and equitable grounds, (rarely) *remise de biens* and (very rarely) a voluntary *cession de biens*.

8 Although this article relates principally to debtors which are companies, I note that for individual debtors, their wishes are likely to be rather more personal—staying out of jail. Those who wish to avoid debtor's prison will be pleased to note that since 1 August 2014 it has been statutorily affirmed that a debtor can no longer be sent to jail where he genuinely and in good faith cannot pay.[8] For debtors who also want a fresh start with a clean slate there are many existing options. They can apply for a voluntary *cession de biens*, *remise de biens*, *désastre* (from which they will be discharged after four years in the usual case) and, in the case of the "deserving poor" and to alleviate the issue of people being "too poor to be bankrupt" they may be able to apply for a "social *désastre*", soon to be supplemented by the introduction of the new proposed "Viscount's Remission Order".

What do secured creditors want?

9 First and foremost, secured creditors want to enforce their security—even if a collective insolvency process is started. Whether they are able to do so depends on the type of security and the process initiated.

- Enforcement of security taken over intangible movable property under the Security Interests (Jersey) Law 1983 or, now, the Security Interests (Jersey) Law 2012 is largely unaffected by a declaration *en désastre* or creditors' winding up in respect of the debtor company, in that the secured creditor may still enforce and remit the net balance to the Viscount or liquidator.
- Security (in the form of a hypothec) held over Jersey immovable property can only be enforced by following a long-winded process of several stages: the creditor must obtain judgment, then an order *Vicomte chargé d'écrire*, then an adjudication of renunciation, following which there will be a *dégrèvement* hearing at which the immovable property will be taken by one creditor as *tenant après dégrèvement* (and whose ownership is then confirmed at a subsequent court hearing). The debts of unsecured creditors or lower ranking secured creditors who have

[8] Statute Law Revision (Miscellaneous Provisions) (Jersey) Law 2014. The statute confirms the position taken by the courts. See *Benest v Le Maistre* 1998 JLR 213 (CA: Lord Carlisle of Bucklow, Southwell and Clarke JJA).

not taken as *tenant* remain in place.[9] The creditor who takes as *tenant* must repay any higher ranking secured creditors in full. Up until the adjudication of renunciation, the debtor can apply for a declaration *en désastre*, which would have the effect of the secured property vesting in the Viscount, who will then sell the property, giving priority to secured creditors from the proceeds of sale.[10] Up until the point at which a creditor has accepted as *tenant après dégrèvement*, the debtor can also apply for *remise*. If the *remise* application is granted, the secured property will be sold by Jurats appointed for the purpose, again with secured creditors being given priority from the proceeds of sale. Interestingly, if the *remise* application is granted but the *remise* itself is later unsuccessful in repaying all secured creditors in full with a surplus (no matter how small) for unsecured creditors, a deemed voluntary *cession de biens* arises. A *dégrèvement* at which one creditor takes as *tenant* occurs as before, but this time at the end of the process the debtor obtains a full discharge from all of its debts.

- Valid security held over foreign property under foreign law will be capable to enforcement by the secured creditor in accordance with that foreign law. What happens if the debtor company is declared *en désastre* is surprisingly unclear. Although foreign property would fall within the definition of "all property" that vests in the Viscount pursuant to arts 1(1) and 8(1) of the Bankruptcy (*Désastre*) (Jersey) Law 1991, there is no mention of such foreign security giving priority to the security holder in the waterfall provisions of art 32. In practice, it is understood that if the Viscount is satisfied such foreign security is valid, he will permit the secured creditor to enforce and the net proceeds of sale (if any) to be remitted to him as representative of the debtor company. In the case of doubt regarding the validity of the security, the Viscount may need to obtain recognition in that foreign country to assert his rights to the asset. Equally, while it seems clear that a debtor company holding only foreign property would not satisfy the threshold requirement for *remise* (namely that the debtor holds Jersey immovable property),[11] if it held both Jersey and foreign property and *remise* were granted, precisely how the Jurats would go about realising such secured property, or react to a foreign creditor seeking to enforce, is unclear.

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[9] *Birbeck v Midland Bank Ltd* 1981 JJ 121 (CA).

[10] Articles 32(4) and (5) of the Bankruptcy (*Désastre*) (Jersey) Law 1991.

[11] *Re Control Centre General Partner Ltd* [2012] JRC 080, at para 16.

10 Secondly, secured creditors want the option to engage a collective process instead. Their only options at present are to apply for the debtor company to be declared *en désastre* (which is not ideal as they lose control over the sale, the Viscount can levy large fees and in the case of foreign property the law is uncertain) or seek a letter of request from the Jersey court to put the Jersey debtor company into, for example, English administration. This latter course may be desirable even if the secured creditor has already appointed (for example) fixed charge or LPA receivers over an English property because administrators may have more powers to deal with the properties and there may also be tax benefits. Alternatively, by following Isle of Man authority, it should be possible to obtain a letter of request from the Jersey court asking the English court to put a Jersey company put into an English CVA.[12] But what is striking here is that creditors of Jersey debtor companies are asking to use a foreign procedure in the first place, in the absence of a suitable local alternative. I note in Guernsey, where such local alternative does exist, the use of administration has been led (perhaps counter-intuitively) by applications from secured creditors.

11 Thirdly and finally, secured creditors want the option not to sell the secured asset immediately. In the case of enforcement under the Security Interests (Jersey) Law 2012 or a *dégrèvement*, the secured creditor may end up with ownership of the secured property, which it can sell at its leisure. In the case of a UK administration, the administrators may be able to hold onto the property and delay a sale until a suitable moment. While the Viscount in a *désastre* could wait to sell a Jersey immovable property, generally speaking it is expected that the Viscount would wish to proceed promptly to a sale, rather than speculate on the future prospects of the market.

What do unsecured creditors want?

12 If the company or business is viable, they may ultimately receive more through a rescheduling of the debt. This may be done through a consensual deal or a scheme of arrangement.[13] If the company or business is not viable, they will want to shut it down quickly to prevent further debts being incurred. This can be achieved through an

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[12] *In re Television Trade Rentals Ltd* [2002] BCC 807, [2002] EWHC 211 (Ch).

[13] A $5 billion consensual restructuring of the debts of a Jersey company, United Company Rusal Plc, was achieved in August 2014 following the initiation of parallel English and Jersey schemes of arrangements in July 2014.

application for a declaration *en désastre*. There will generally be no desire to leave the management in place. Unsecured creditors who have not been paid will often have lost trust in the management and will be wary of "throwing good money after bad".

13 In either case, unsecured creditors will want to avoid a "creditor scramble". Both a *désastre* and a creditors winding up contain moratoria on actions being continued or commenced against the company without leave of the court. *Désastre* also prevents the enforcement of security over Jersey immovable property by the secured creditors, although it will be realised by the Viscount as described above. As to the possibility of a limited continuation of trading to maximise returns, it is possible for the Viscount to continue to trade during a *désastre*, but this option is usually achieved by the company being placed into a just and equitable winding up and the liquidators either carrying out such limited trading or arranging a pre-pack sale. However, it is not presently possible for a creditor to apply for a just and equitable winding up or a creditors' winding up: its only option is *désastre*.

What do the authorities want?

14 The Jersey Financial Services Commission will wish to protect the public and the reputation of Jersey. There is an interesting conflict between office holders (i) spending time and money ensuring that investors (who will often be unit holders or shareholders) can be placed into a "lifeboat", and (ii) maximising returns for creditors. The Government of Jersey and the parishes will want taxes to be paid in priority to other unsecured creditors,[14] and indeed, in the case of a *dégrèvement*, certain taxes must be paid by the *tenant après dégrèvement* instead.[15]

15 What about the public interest? In the case of *In re REO (Powerstation) Ltd*,[16] a letter of request was sought to put a Jersey company into English administration. The Royal Court said that the public interest includes (a) having a satisfactory methodology for dealing with the interests of creditors and debtors, and (b) considering the reputation of Jersey. So the court can have regard, at the edges of its discretion, to the fact that a major insolvency of a Jersey company,

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[14] In the Enterprise Act 2002, the UK abolished the Crown preference in respect of certain PAYE income tax, national insurance and VAT liabilities.
[15] Article 21(1) of the Rates (Jersey) Law 2005, art 45(1) of the Income Tax (Jersey) Law 1961 and art 41 of the Social Security (Jersey) Law 1974.
[16] 2013 (1) JLR 145.

causing extensive damage to the creditors and the debtor, is not in the best interests of the Island.

16 Finally, there is the important question of public policy. Jersey as a jurisdiction wishes to encourage the continued growth of the finance industry, both as regards international finance and lending. So any proposed changes to the insolvency regime in Jersey must find favour amongst the lending community or else they may put that growth at risk. This "creditor is king" approach can be readily seen in the changes introduced by the Security Interests (Jersey) 2012.

Why change anything?

17 There are gaps in our current armoury. Jersey is missing a process whereby a debtor can get breathing space and restructure its debts and possibly survive. As a consequence, creditors may be missing out on greater returns than are currently available. There is a clear demand. This is shown by the use of English administration (a foreign procedure) for Jersey companies, and also the recent extension of just and equitable liquidation far beyond its historical use.

18 There are also problems with what we currently have:

- *Dégrèvement* is creaking. There are legal uncertainties. There is the potential for unfairness to the debtor (in particular where a secured creditor takes the property and keeps any surplus equity) but also to lower-ranking secured and unsecured creditors who get nothing. It is a dinosaur when compared with the new Security Interests (Jersey) Law 2012 and the remedies contained therein. I note that, in the case *In re Estate and General Developments Ltd*,[17] English receivers had their appointment recognised in Jersey and were allowed to conduct the sale of a Jersey immovable property (in part to avoid the disadvantages of *dégrèvement* and *désastre*), something that cannot otherwise be done in Jersey under our own domestic law.
- *Désastre* is perceived to be expensive. The Viscount can levy a fee consisting of 10% of the value of all assets realised and 2.5% of the value of all assets distributed. In complex cases, the Viscount may also instruct accountants to assist her whose fees will also be paid from the estate. On occasion, the Viscount can agree to charge fees on a time cost basis where the *ad valorem* fees would be disproportionate to the work involved, but (not unreasonably) she is unable to agree to do so prior to her appointment.

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[17] 2012 (1) JLR *N* [13], [2011] JRC 232A.

- English administration has limited application. It can be used (without reference to the Jersey court) if a Jersey debtor company has its "centre of main interests" in England. However for tax and other reasons, the Jersey debtor company is unlikely to do so. A letter of request from the Jersey court is therefore required. Obviously, 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 clarified the law in this area.[18] Whilst this remedy can be used for Jersey companies with assets in other parts of the UK (such as Scotland) it cannot realistically be used where those assets are held solely outside the UK. It is also an oddity that a mature jurisdiction such as Jersey needs to send its insolvent companies to be put into administration in a foreign country for lack of a domestic process.

- The use of just and equitable liquidation is being pushed to the limit. The Royal Court of Jersey has shown that it is quick, flexible and will look after the interests of creditors. This route can also be used pre-insolvency, as there is no requirement to show insolvency. This has helped allow local trading companies to stave off creditor action, letting the business be sold on. But for legal purists, winding up on just and equitable grounds has gone beyond its proper remit. It is now being used merely because it is cheaper than a *désastre* and quicker than a creditors' winding up. Furthermore, there are sometimes problems initiating a creditors' winding up because of a difficulty in obtaining a shareholders' resolution or finding people to act as directors to facilitate the relevant meetings. A just and equitable winding up rarely allows the company to survive as debts are not rescheduled. There also continue to be legal uncertainties, and none of the applications for just and equitable winding up has been fully contested. The precise requirements remain woolly and there is little guidance on what should or must be included in the act of court sought from the Royal Court.

[18] *HSBC Bank plc v Tambrook Jersey Ltd* [2013] EWCA Civ 576.

What changes are proposed?

19 The suggestion of Jersey introducing a "suspensory procedure" has been around a long time.[19] In January 2014, the Chief Minister's Department (Financial Services Unit) ("CMD") produced a "discussion paper" entitled "The Reform of Jersey's Law of Corporate Insolvency". It seeks to put flesh on the bones and suggests details of a bespoke process that could be introduced in Jersey. It is not a formal consultation paper, but is designed to thrash out what could be achieved and what stumbling blocks there may be. Key suggestions in the CMD paper and comments thereon are set out below:

- The new process would require a court order and would not therefore be available to creditors out of court. It might perhaps be appropriate, in due course when the new regime (if adopted) has bedded in, to introduce an out of court process, perhaps for small companies, to avoid the costs of a court application.
- The debtor, directors of the debtor and creditors can apply for the new process. It is submitted that the regulator should also have the opportunity to apply, as it currently does in respect of a winding up on just and equitable grounds and a *désastre*.
- A three stage test is proposed:
  (a) There must be actual or threatened insolvency. Insolvency is measured on a cash-flow or a balance-sheet basis. In the case of a creditor, it can show cash-flow insolvency where there is a due and unpaid and undisputed debt, or a statutory demand has not been meet. It is submitted that the introduction of a statutory demand procedure would be sensible. The threshold should match that of a *désastre* (currently £3,000). "Threatened insolvency" should be useful in cases where the debtor company (or its directors) applies and there is difficulty showing actual insolvency, as it allows the process to be engaged earlier. Perhaps the test for threatened insolvency could follow the test in wrongful trading (*i.e.* that there is no reasonable prospect of avoiding a creditors' winding up or a *désastre*).

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[19] This follows from the *Edwards Report* in 1998 and JFSC proposals in 1999. The issue was also debated at a seminar presented by ARIES and the Institute of Law in November 2013 entitled "Time for administration in Jersey?"

(b) There must be a "likely benefit" to creditors, either (a) the survival of the company *or* the whole or part of its undertaking as a going concern or (b) a better realisation then is available on a winding up. This is similar to the position in Guernsey.

(c) The Royal Court must be persuaded to exercise its discretion to make the order.

- The CMD suggests that the new process would include a moratorium against (*inter alia*) the pursuit of legal proceedings, the enforcement of judgments against the debtor's property, the passing of a resolution for a creditors' winding up of the debtor company, and any steps to create or perfect a security interest in the debtor's property. This is not contentious.

- However, controversially, the CMD paper also proposes that the moratorium extend to prevent the enforcement of security by secured creditors, possibly subject to industry-specific "carve outs". This would mark a significant departure from what currently exists in Jersey, and indeed Guernsey's administration regime. This is an issue dealt with below.

- A "dual model" is proposed. The Royal Court must decide whether the new process is run by:

  (a) the existing management with a third party "supervisor" who would be an insolvency practitioner (or possibly the Viscount); or

  (b) an independent insolvency practitioner.

  It may be doubted how feasible it is for the management of the failing debtor company to devise a plan for its survival, nor would the appearance of a "debtor in possession" remedy sit easily with the "creditor is king" approach hitherto taken in Jersey. It would seem more transparent and efficient for an insolvency practitioner to do so, using the knowledge of the existing management as necessary. That insolvency practitioner would also fulfil a function in boosting confidence, reducing court involvement and mediating between the company and creditors as necessary.

- There is a proposal that any such insolvency practitioner should have had no prior involvement with the debtor. In a perfect world this seems sensible, but in practice this is likely merely to add costs. Insolvency practitioners are often brought in close to the end of the debtor company's life to see if it is possible to save the company or its business. They may do that work at a reduced fee, or indeed no fee at all, on the basis that if the

company, for example, goes into liquidation they will be retained as liquidators. If there is no possibility of them being retained as the office-holder in this new process, they may not be willing to do this work and so the opportunity to save the business outside a formal process may be lost. It certainly adds an extra layer of costs when the company can least afford it.

- It is proposed that a plan should be formulated and put to creditors within a timeframe specified by the court. Perhaps it would be more sensible to say that such a plan should be put forward within 28 days, giving the Royal Court the power to vary that timeframe.
- Importantly, it is proposed that the plan can include a "cram down",[20] with the compromise process built into the legislation itself. The plan could be approved by a two thirds vote by all creditors by value (or if there are classes of creditors, such a proportion of each class), with the votes of "connected creditors" being ignored. If passed, there is no need to go to court for confirmation prior to implementing the plan, but there is a proposed 28-day period for unhappy creditors to challenge the plan on the grounds of procedural irregularity or unfair prejudice. It is submitted that the proposed cram-down procedure would remedy a major weakness in the UK administration regime and indeed the Guernsey model, and give greater scope for the rescue of the debtor company. It is noted that a two thirds vote is a lower threshold than a scheme of arrangement, and thus easier to achieve; the process is also more straightforward. This all seems sensible. It may be asked, however, whether the process should provide for the involvement of the shareholders (as they are in English CVA) and the regulator (particularly in circumstances were they may have initiated the process and the debtor may be a regulated business).
- If the plan is **not approved by creditors, the debtor company** will be immediately placed into a creditors' winding up, save that the CMD proposes a "second bite" (which appear to derive from the US Chapter 11 regime) whereby the Royal Court can confirm the plan on the grounds it is fair, just and reasonable, notwithstanding that certain classes of creditor have voted against it. This would have the effect that dissenting classes

[20] In simple terms, a "cram down" is a mechanism whereby, with the consent of a prescribed proportion of creditors, the debts of a company can be rescheduled or reduced, including debts to creditors who dissent—they are involuntarily "crammed down".

would be crammed down anyway. It is suggested this power should only be exercisable if the Royal Court is satisfied that (i) the dissenting classes would be no worse off under the plan than in a liquidation, and (ii) the provisions of the plan respect the order of priority in insolvency, *i.e.* classes of creditor ranking lower than the dissenting classes do not receive anything. Precisely how this "second bite" would work in practice is not clear. It is suggested that, just like a scheme of arrangement, if the vote of the creditors cannot be carried, the matter should end there—the proposed "second bite" seems to be an invitation for more litigation.

- It is proposed that if the plan is passed but later fails to meet its objectives, the person implementing the plan (whether the directors under supervision or the insolvency practitioner) must apply to court for directions. The court would either convert the process into a creditors' winding up, or it could give directions for a formulation of a new plan. As to the latter option, whilst this gives a further chance for the company to be rescued, it again adds a further layer of complication and potential delay. There is also the risk that an overly ambitious plan is proposed on the first occasion, in the expectation that a more realistic plan can always be attempted later.

20 In conclusion, it is submitted that the CMD's discussion paper advances the debate substantially and provides, for the first time, real detail as to how the process could work in practice. Overall it presents a streamlined process, incorporating the all-important cram-down mechanism. If it were implemented it would reduce the need for the winding up of companies on just and equitable grounds and applications for Jersey companies to be placed into English administration. There are still, however, issues of both policy and detail which remain obstacles to the introduction of such a new process.

What issues remain?

21 The main issue is the proposed secured creditor moratorium. It appears to be inconsistent with the policy behind the new Security Interests (Jersey) Law 2012, which very much preserves the ability of secured creditors to enforce their security even if the debtor goes into an insolvency process. There are also multiple commercial concerns. International financial institutions setting up synthetic structures need certainty that they can enforce. Any proposed moratorium puts that certainty in doubt. This business is highly mobile and may go elsewhere. It has even been said that it may lead lenders to charge more by way of interest because of the risk they will be unable to

enforce, and that it could also lead to ratings downgrades of Jersey structures.

22 In response to those points, it could be noted that *désastre* already imposes a moratorium in respect of the enforcement of security over immovable property (which has effect at least insofar as Jersey immovable property is concerned), and that non-petition and limited recourse provisions will still be effective. Moreover, the CMD discussion papers suggests that such commercial concerns might be ameliorated by introducing an "opt out", or modifying the process for example to ensure that senior lenders in capital market arrangements have control, or even a veto.

23 As to an opt out, it is not clear whether what is proposed is for certain debtor companies to opt out of the whole process, or just the secured creditor moratorium. It might perhaps only be available for debtor companies which are "international companies", but this then raises questions about how such companies are defined (noting that the definitions for the exceptions to the prohibition on appointing administrative receivers introduced in the Enterprise Act 2002 are not easy to use in practice). It is further not clear when the opt out is made. If it is a general opt out for companies of a particular type, presumably it would subsist from incorporation. If it is a question of individual secured creditors opting out, this would be presumably need to be clear when they take the security, even if it is only tested when someone applies for the new process to be initiated. Perhaps, rather than an opt out, it would operate as an exception such that either the new process as a whole does not apply to certain companies, or that certain transactions are outside the scope of the moratorium. It is possible to anticipate from all these uncertainties that it would be difficult for corporate lawyers to give "clean" legal opinions on enforceability, and may generally be bad for perception reasons. It may be asking too much of busy practitioners in the City of London to work their way through opt outs or exceptions to a Jersey regime which has a secured creditor moratorium, rather than simply divert their business to a jurisdiction which has no such moratorium in any circumstances.

24 An alternative could be to have an "opt in" to the new process, perhaps for "local trading companies". This suffers from the same issues of definition raised above. Whilst it might be "cleaner" for those contemplating international structured finance transactions, it may deter lenders who may be caught up in the process from lending to local Jersey trading companies (or increase the costs for the borrowers).

25 It is submitted that the solution is to keep it as simple as possible. Complications lead to mistakes and confusion. If such a process is to

be introduced, the Guernsey model, which has no secured creditor moratorium at all, should be followed:

- The secured creditors should have a choice, either to enforce outside the scope of the regime or, if the regime offers advantages to them, to be able to apply for its initiation.
- Those secured creditors not in favour can continue to enforce outside the process.
- All are able to argue their case in court.

26 This would seem to solve all the problems without any complications or perception issues.

27 A further issue is the name of the new process. The name is important. This is a bespoke process for Jersey. Whilst the benefits of using a name which is familiar to those working onshore are obvious, this process is not the same as, for example, English administration. If it were called "administration", there is a risk of lawyers and clients, particular onshore, wrongly assuming that a secured creditor moratorium arises as it does in England, a risk which has arisen in practice when discussing Guernsey "administration". Although there is scope for debate about what the process should be called, and whether the name should be in French or English, the author would favour the title "remediation". This does not prevent reference to persuasive English case-law and textbooks in relation to the parts of the process which are analogous to English processes.

Quick fixes

28 Whilst the debate about the introduction of a new process continues, there are some rather more pressing amendments to existing procedures which could be introduced. For example:

- *Dégrèvement* needs reform. There are some fundamental uncertainties about the rights of the parties involved. For example, whilst the position of secured creditors who do *not* take as *tenant après dégrèvement* following an adjudication of renunciation has been settled,[21] the effect on the debt for the creditor who *does* take is still unclear. Some changes are occurring:

  (a) A new practice direction RC15/03 came into effect on 5 January 2015 which requires a judgment creditor to give notice to a judgment debtor of his intention to apply for

[21] *Birbeck v Midland Bank Ltd* 1981 JJ 121 (CA).

an adjudication of renunciation. It includes a prescribed form, highlighting the debtor's ability to apply for a declaration *en désastre* or a *remise de biens*. The notice must be provided to the debtor at least four working days before the hearing of the renunciation application with a copy of the supporting evidence. Similar notice has to be given to the Viscount. One can see that this has been introduced for reasons of fairness. However, this stage is only reached when a debtor (i) has not paid its debts, (ii) has been sued and judgment obtained, and (iii) has already been given notice by the Viscount that if it fails to pay within a further two months (for Royal Court judgments), its property may be renounced. From the point of view of the lending community, having to send a fourth form of notice to a recalcitrant debtor seems an additional expense for little or no benefit, and will add further costs and delay.

(b) The Royal Court has confirmed that it is possible to have a *dégrèvement* of an undivided share of property owned in common.[22] However, value is only realised by the *tenant après dégrèvement* selling that share (if practically possible) or forcing a *licitation* (sale of the whole).

(c) The Legislation Advisory Panel has also consulted the Law Society in relation to changing the law to permit the *dégrèvement* of an undivided share of jointly owned property. The proposal is that a creditor of only one of the joint owners could seek to enforce over such property (which is not presently possible)[23] at which time the joint ownership would convert to an ownership in common in equal shares (much as it does on bankruptcy), and a *dégrèvement* of the relevant part would occur. The motivation for such changes is unclear. Secured lenders know to obtain security from all joint owners to permit a *dégrèvement* of the whole property. Change is certainly not in the interest of debtors, whose jointly owned property is currently protected from attack from creditors of only one of them, save in a *désastre*. There are also no protections (as there are on bankruptcy) in relation to the matrimonial home. The outcome of this consultation has not yet been published.

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[22] *De La Haye v Walton* [2015] JRC 003.

[23] *Re dégrèvement Bonn* 1971 JJ 1771.

- Alternatively, instead of reforming *dégrèvement*, it could be abolished and a power of sale and/or receivership introduced. Possession of the property could be given to the Jurats (as in a *remise*) or an insolvency practitioner who organises a sale of the property and/or manages it prior to such sale. The inherent unfairness in the *dégrèvement* process (whereby one secured creditor "scoops the pool" and keeps any surplus over and above the debt owed) could be removed by applying the normal, common sense waterfall (as applies in a *désastre*) such that after the costs of sale, the senior secured creditor is paid first, any balance is paid to the second secured creditor, and so on, with any balance returned to the debtor.
- Alternatively, following the new Security Interests (Jersey) Law 2012, secured creditors could be given a power of sale or appropriation in respect of Jersey immovable property, either by court order or out of court, with similar waterfall provisions put in place.
- The Companies (Jersey) Law 1991 could be amended to allow creditors to initiate a creditors winding up and/or the Bankruptcy (*Désastre*) (Jersey) Law 1990 could be amended to allow for appointment of insolvency practitioners (rather than the Viscount) on a *désastre*.
- The Bankruptcy (*Désastre*) (Jersey) Law 1990 could be further amended:

  (a) To allow secured creditors to enforce over secured Jersey immovable property and remit any surplus to the Viscount, rather than for such property to vest in the Viscount and for the Viscount to arrange such a sale.

  (b) To tidy up art 32, which provides for the order of payment of debts in a *désastre*. In particular, to clarify the position of creditors with security over foreign property governed by foreign law.
- Article 155 of the Company (Jersey) Law 1991 could usefully be extended to make it clear that whenever a debtor company is wound up on just and equitable grounds (or perhaps only when the debtor company is insolvent or of doubtful solvency), the provisions which relate to a creditors' winding up (for example in relation to voidable transactions, directors disqualification and termination) will always apply.

Conclusion

29 There is much in the existing Jersey regime for dealing with corporate insolvency that works well. Where there are gaps, the Royal Court, with the assistance of practitioners in this area, has proved flexible in meeting the needs of the interested stakeholders. But the desire for clarity and modernisation of the Jersey insolvency regime will continue to drive reform in this area.

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