Insolvency practice in small jurisdictions: An example of innovation in Jersey

Paul Omar highlights Jersey as an example of a small jurisdiction that punches above its weight

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Small jurisdictions often suffer from deficiencies in appropriate laws, qualified professionals, supportive courts and policy-making infrastructure. The volume of economic activity is also a factor dictating the development of laws and legal infrastructure.

Jersey, though a small jurisdiction in size, punches above its weight when these factors are considered. It is an off-shore financial jurisdiction acting as a conduit for large-scale investment. It has well-qualified legal and accounting professionals and a very supportive judiciary, responsive to global developments, while respecting the mixed legal heritage of the island. The policy-makers are also active and keep an eye out on international measures of interest, particularly those that can support Jersey's ambition as a leading jurisdiction concerning financial services.

The present law of insolvency, though, does present some difficulties. There are three old procedures, two of which are rooted in the Middle Ages and derive from French law. *Cession de biens* is a foreclosure process enabling debtors to conduct a transfer of their goods to creditors. In return, the debtor gains a discharge (provided the debtor has acted diligently). There are then two exit processes for assets disposals: *dégrèvement* for real property, which contains a foreclosure element, and *réalisation* for moveables. Where the creditor has had to act to obtain judgment and enforcement, the involuntary cession (*adjudication de renonciation*), attracts the same exit procedures, but without the comfort of a discharge at the end.[1] *Remise de biens*, is a process by which a surrender of assets into the hands of the court occurs, resulting in asset disposal and a distribution of the proceeds to the secured and unsecured creditors. In fact, the prospect of a pay-out for unsecured creditors, however minimal, is a pre-requisite for the success of the application, and also leads to a discharge. However, the debtor is unable to dictate how the property is disposed of by the *jurats* appointed by the court.

The third procedure is *désastre*, created in the 18th century on the island, in order to marshal concurrent claims against the same debtors. *Désastre* was originally limited to moveables, but has been extended to immoveables by the passing of the Bankruptcy (*Désastre*) (Jersey) Law 1990 (*Désastre* Law). This law has also brought the procedure into the modern age, though it is not a codification by any means. Recourse to jurisprudence is necessary to fill in the *lacunae*. This is also the position in the case of the two older procedures, governed by the *Loi (1832) sur les décrets* and the *Loi (1839) sur les remises*.

More recently, the Companies (Jersey) Law 1991 (Companies Law), a text derived from the Companies Act 1985 (United Kingdom), was introduced. As a result, the Jersey Companies Law has both the scheme of arrangement and of winding up. However, there are differences between company law, as practised in Jersey, and elsewhere. For example, some procedural steps within winding up refer back to the *Désastre* Law and there is no right for a creditor to initiate the process. There is also a hierarchy of choice between the older procedures, as well as between the bankruptcy and company law procedures. Article 4 of the *Désastre* Law prohibits the opening of a procedure where a *cession* or *remise* is afoot, while Articles 154A and 185B of the Companies Law require winding up to cede ground to a *désastre* order.

> **JERSEY IS AN OFF-SHORE FINANCIAL JURISDICTION ACTING AS A CONDUIT FOR LARGE-SCALE INVESTMENT**

Innovation

In Jersey, however, what has distinguished the practice of insolvency law has been the innovation lying at the heart of developments. For example, the courts created, long before consideration of such insolvencies elsewhere, the "social *désastre*" procedure to enable the discharge of debtors with minimal estates.[2] This procedure was of such utility that it has only lately been supplemented by the Debt Remission Order under the Debt Remission (Individuals) (Jersey) Law 2016 for qualifying debts under £20,000. The homestead exemption in Article 12 of the *Désastre* Law has also been carefully crafted by the courts to postpone realisation of the creditor's interest in the property under certain conditions, thus safeguarding its use by vulnerable spouses and dependents.

In the corporate insolvency field, other advances have been made, many ingeniously impressive. For example, Jersey has extended its scheme practice to envelop entities near the

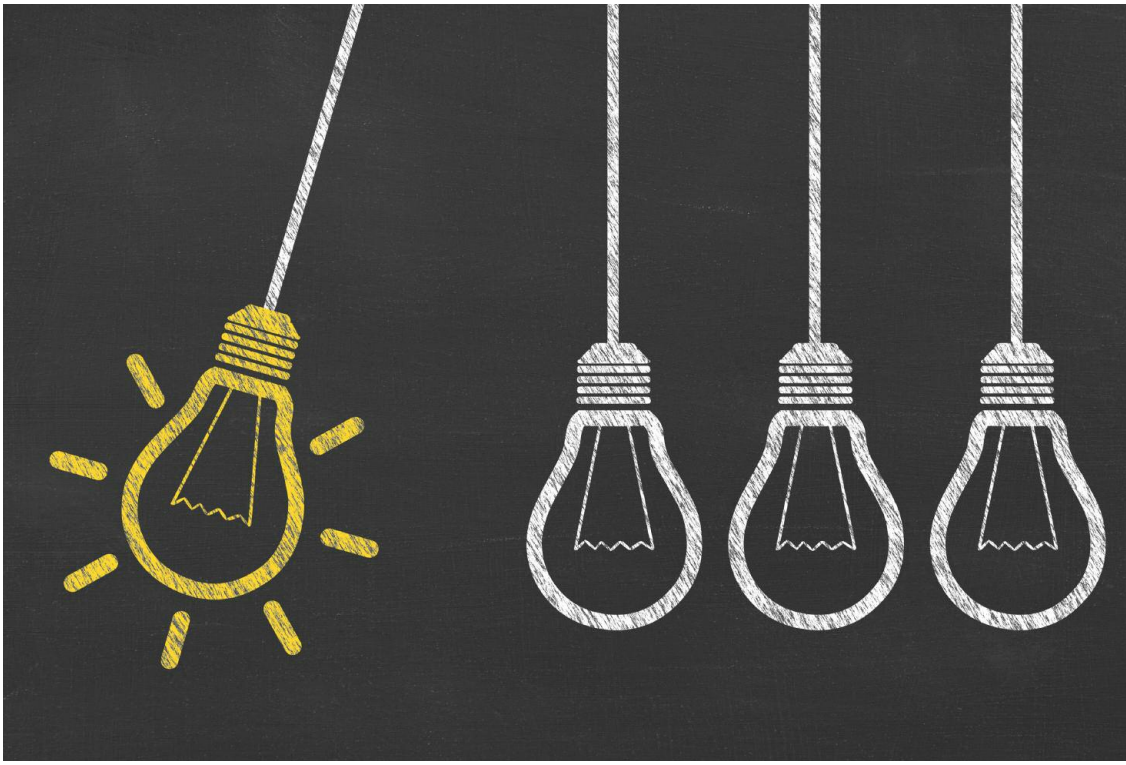
insolvency threshold.[3] The case-law has also seen authority for a scheme, in conjunction with the continuance procedure in Part 18C of the Companies Law allowing a Canadian company to domicile itself in Jersey, so as to avoid the territorial bar limiting the application of the statute to Jersey companies.[4] The jurisprudence has also developed to embrace new techniques for ascertaining the will of classes, including in special purpose vehicles with multiple beneficiaries.[5] As such, scheme practice is seen as a strong adjunct to restructuring initiatives for island entities used as investment vehicles for projects elsewhere, assisted by the courts' ability to use the local cooperation provision in cross-border cases.[6]

In winding up, even without a creditor right to initiate procedures, the case-law has taken into account their interest. The courts have evolved jurisprudence focusing on the just and equitable winding up provision in Article 155 of the Companies Law.[7] Under this provision, cases have developed a workout style process, avoiding the cessation of activity in winding up and enabling the sale of the business as a going concern.[8] The workout model has also been used successfully in the case of entities carrying out regulated business, an area of some concern for the financial sector.[9] Taking the model further has been its more recent use to facilitate a Jersey equivalent of the pre-pack procedure.[10]

Elephant in the room

The "elephant in the room" is of course the fact that these manoeuvres might not be necessary if Jersey had a dedicated rescue-type procedure. There is already a "passporting" process, by which a Letter of Request sent to the High Court in London, properly motivated and comforted by Counsel's opinion on the suitability of invoking the procedure, will lead to UK administration being made available for Jersey entities under the authority of section 426 of the Insolvency Act 1986 (United Kingdom). This procedure has been so often used that it represents a well-trodden path for Jersey Advocates and courts,[11] although a more recent application for a Letter of Request was turned down, where the court was concerned about proper supervision being available to monitor the office-holder's activities on the island, preferring instead the opening of local proceedings placing the Viscount in charge.[12] While the option for rescue in the UK exists, there does not seem to be any urgency for any home-grown initiative to take its place or any transplanting of the administration procedure, as has occurred in Guernsey in the Companies (Guernsey) Law 2008. However, for financial institutions, a special provision has been made recently by means of the Bank (Recovery and Resolution) (Jersey) Law 2017 to introduce recovery and resolution procedures as options.

Overall, the experience in Jersey illustrates that, even without a wide tool-kit of procedures to use, practitioners and the courts appear more than able to repurpose existing procedures and laws in order to achieve successful outcomes. Although a consideration of reforms may still prove necessary, such an innovation can have a palliative effect. In the last analysis, change may only come if policy-makers are sufficiently convinced that reforms will prove useful.[13] ■



> THESE MANOEUVRES MIGHT NOT BE NECESSARY IF JERSEY HAD A DEDICATED RESCUE-TYPE PROCEDURE

Footnotes:

1 *Birbeck v Midland Bank Ltd* (1981) JJ 121.
2 *Re Russell* (5 May 1994) (unreported).
3 *Re Drax Holdings Ltd; Re Inpower Ltd* [2004] 1 BCLC 10 (a UK-Jersey scheme).
4 *Re APIC Petroleum Corporation and APIC (Petroleum) Jersey Limited* [2012] JRC 228; [2013] JRC 034.
5 *Re Investkredit Funding Ltd* [2012] JRC 121.
6 Article 49, Bankruptcy Law.
7 *Re Belgravia* [2008] JRC 161; *Bisson v Bish* 2008 JLR Note 46.
8 *Re Poundworld (Jersey) Limited* 2009 JLR Note 12.
9 *Re Centurion Management Services* [2009] JRC 227.
10 *Re Collections Group* [2013] JRC 039.
11 A recent example is *Siena SARL v Glengall Bridge Holdings Limited and Others* [2015] JRC 260.
12 *Re Orb arl (or Representation of Harbour Fund II LLP)* [2016] JRC 171.
13 The author is aware of reforms currently being mooted, proposing a petition right for creditors in winding up, removing recourse to *dégrèvement*, as well as possibly introducing a new restructuring procedure.