



Cross-Border Assistance in Insolvency

Paul Omar reports on how Jersey law can be extended to assist other courts in insolvency matters



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The modern law governing insolvency assistance in Jersey begins with the enactment of Article 49 of the Bankruptcy (*Désastre*) (Jersey) Law 1990, which enables assistance to be given by Jersey courts to other courts in insolvency matters. The drafting of the provision is inspired by section 426 of the Insolvency Act 1986 (United Kingdom) and it permits a Jersey court to assist, to the extent it thinks fit, the courts of a prescribed country or territory in all matters relating to the insolvency of any natural or legal person. In extending assistance, the court may have regard to the principles established by the UNCITRAL Model Law on Cross-Border Insolvency 1997. For the purposes of the law, a request from a court of a relevant country or territory for assistance is treated as sufficient authority for the Jersey court to exercise any jurisdiction which it or the requesting court could exercise in relation to the matters at issue. The subject matter of orders that are typically sought under this provision include for the recognition of office-holders, for disclosure of assets or information (especially documents), for the examination of witnesses, to prevent disclosure (“gagging” orders), for freezing assets (including bank accounts), restricting how information that is obtained may be used, delaying publication of the court order until further enquiries have been made as well as ancillary cost issues.¹

Co-operation under Article 49 is extended to certain prescribed countries and territories, including Australia, Finland, Guernsey, the Isle of Man and the United Kingdom.² In exercising its discretion for the purposes of



assistance, a Jersey court is to have particular regard to the rules of private international law, including whether foreign proceedings are final in nature, whether they comply with perceived notions of natural justice, whether jurisdiction has been exercised validly and whether recognition would offend public order rules. Difficulty has been evidenced in relation to claims on behalf of foreign revenue authorities, although the Jersey courts have stated that it would be unfair to refuse assistance merely because the tax authorities are the most substantial of a number of major creditors.³ Assistance would be refused, however, where the tax authorities are the only claimant or the only creditors to pursue proceedings. Where proceedings contain a penal element, including the possible disqualification of company directors, the Jersey

courts may subject requests for assistance to an undertaking in respect of disclosure where statutory duties to which office-holders are subject may have an impact.⁴

The brevity of Article 49 means that regard must be had for the case law in determining the scope of assistance. In *Re Royco*,⁵ the court accepted that the problems posed by the presence of fraud and the destruction of records made it impossible to determine accurately the inter-company indebtedness of the group and thus funds would be remitted to a pool set up by liquidators appointed in England for a single distribution to all entitled creditors. In *Warner*,⁶ the issue of concurrent proceedings was discussed with the court coming to the view that assistance under Article 49 could be forthcoming even if there were a

Jersey proceeding afoot. It could, however, refuse the request if it were hopelessly bad under the foreign law or if there were a reason of Jersey public policy not to grant the assistance sought. In relation to the format of requests for assistance, the Jersey authorities prefer that Article 49 requests are made following consultation with them to determine how the requests might be drafted in line with provisions of Jersey procedural and substantive law.⁷

Because Article 49 is necessarily limited to only those jurisdictions that have been prescribed, it is necessary to use principles of comity developed by the courts to give effect to requests for assistance emanating from other jurisdictions. In one case,⁸ although Switzerland was not a country qualifying for assistance in Jersey under Article 49, the Swiss court could still receive assistance as the Jersey court had an inherent jurisdiction enabling it to assist in

foreign insolvencies. The Jersey court was likely to recognise the appointment of a foreign insolvency office-holder who was administering a bankruptcy which had arisen in a foreign jurisdiction when there was a valid connection between the debtor and the law under which the insolvency occurred. Assistance would be especially forthcoming where there was evidence that assistance under a similar request made in the opposite direction would be reciprocated. In *Montrow*,⁹ the court held that the principles under which assistance is given to foreign bankruptcy courts by the courts in England and Wales apply by analogy to requests for assistance to Jersey courts under the customary law. Under these principles, the request for assistance is a weighty factor to be taken into account by the Jersey court but is not conclusive as to the manner in which the discretion of the court should be exercised; the

Jersey court may be expected to accept without further investigation the views of the requesting court as to what was required for the proper conduct of the bankruptcy or winding up and it would not normally be appropriate for the Jersey court to inquire into the basis for the views expressed by the requesting court.

“ The request for assistance is a weighty factor to be taken into account by the Jersey court ”

Footnotes

1. M. Cavey, Article 48 Applications in Bankruptcy – A Practitioner’s Guide (2002) 6(2) Jersey Law Review.
2. Article 6 of the Bankruptcy (*Désastre*) (Jersey) Order 2006.
3. *Re Bomford* 2002 JLR Note 34; *Re Williams* 2009 JLR Note 16.
4. *Re (AG) Manchester Limited* 2005 JLR Note 13.
5. *Re Royco Investment Company Limited (en désastre)* 1994 JLR 236.
6. *Warner v Equity Trust (Jersey) Limited and Another* 2008 JLR Note 1.
7. *Re Dick* 2000 JLR Note 4a.
8. *Re F & O. Finance AG* 2000 JLR Note 5a.
9. *Montrow International Limited v Tacon* 2007 JLR Note 49, applying *Hughes v Hanover* [1997] 1 BCLC 497.

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