

# Recognition of Foreign Insolvency Office Holders

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## The Statutory Position

The provisions governing the recognition of a foreign (including a UK) insolvency office holder under Jersey law are found in Article 49 of the Bankruptcy (Désastre) (Jersey) Law 1990 (the **Law**) and Article 6 of the Bankruptcy (Désastre) (Jersey) Order 2006 (the **Order**).

Article 49 states that the Royal Court may, to the extent it thinks fit, assist the courts of a 'relevant country' in all matters relating to the insolvency of a person, and that a request from the court of a 'relevant country' would be regarded as sufficient authority for the Royal Court to exercise its jurisdiction. A list of the relevant countries prescribed to date are found in Article 6 of the Order, which includes the United Kingdom, Australia, Republic of Ireland, Finland, Guernsey and the Isle of Man.

## Procedure and Considerations

In re Dick [2000] JLR N4, it was decided that the foreign application for assistance must first go to the Viscount's Department (the court's enforcement division), in order that they may ensure its compliance with Jersey legislation, and advise as to its format and content. The Royal Court will also request the Viscount's opinion when considering any such application. The Viscount's department will usually inform the applicant by letter of any concerns it may have in relation to the application, with a copy of the letter being sent to the Royal Court to keep it informed of the discussions between the applicant and the Viscount's Department. A representative of the Viscount's Department is usually present at the hearing of any applications of this nature.

An application for assistance is usually made by way of a Representation (a form of originating process), and submitted with the following supporting documentation:

- (a) an affidavit from the office holder in question detailing the history behind the appointment, events since the appointment and the reasons behind the request for assistance;

(b) a Letter of Request issued by the court of the jurisdiction of the office holder outlining the assistance that is sought; and

(c) a copy of the appointment document.

The applications are usually either heard *ex parte*, at a specially convened hearing, or at the weekly public sitting of the Royal Court at the “Samedi Court” sitting on Friday afternoons. The application may be heard *in camera* if its content is very sensitive.

Article 49(3) of the Law stipulates that in exercising its discretion, the Royal Court shall have regard to the rules of private international law. The Royal Court will apply those rules in deciding any issues relating to jurisdiction, title to property, third party interests and public policy.

One important aspect of private international law which often impacts on this area is the rule that assistance will not be granted by one jurisdiction to another if the applicant is a revenue authority seeking recovery of foreign revenue (see Dicey, Morris & Collins, rule 3). The key Jersey case concerning this issue is *Re Tucker* 1987-88 JLR 473, where an English trustee in bankruptcy had made a request for assistance pursuant to Section 122 of the Bankruptcy Act 1914, and the only creditor of the insolvent company in question as a foreign revenue authority. The Royal Court was unable to grant assistance in this case. However, the Royal Court has granted assistance where the revenue authority is the majority creditor, and in the recent case of *re: Collet* [2009] JRC 054, assistance was granted where non-revenue claims only amounted to 0.2% of the creditors.

This line of authority may however be developed by the Jersey judiciary following Jersey's adherence of the OECD multilateral convention on Mutual Assistance in Tax matters which places obligations on member states' government bodies (not tax payers directly) to assist the authorities in the collection and recovery of foreign taxes.

At present Jersey's adherence to the convention presents a minor issue as it has not been translated into local legislation.

## **Customary Law**

In *Re: First International Bank of Granada Limited* (Jersey Unreported) 23rd January 2002, the court concluded it had a discretion to grant assistance to a liquidator or receiver from a non prescribed country or territory (i.e. one not named under the Order), and in doing so, the court should exercise its discretion taking into account the principles of comity and private international law, granting assistance where there is evidence of reciprocity from the courts of the foreign state.

## **Relief Available**

The Royal Court has discretion in deciding the nature of the assistance it will grant. Examples of those

orders include:

- (a) recognition of the office holder making the application by the Court and allowing that office holder to conduct the affairs of office in Jersey, according to Jersey law or to the foreign law of the office holder's domestic jurisdiction;
- (b) disclosure of assets and/or documents;
- (c) examination of witnesses;
- (d) gagging orders;
- (e) freezing orders;
- (f) use of information to be obtained;
- (g) time delays before publication of the existence of the order; and
- (h) costs.

Recent decisions have examined the nature of the Royal Court's discretion in granting orders for assistance. The Royal Court will consider giving recognition to positions which are not known to Jersey Law as was demonstrated in the case of *Montrow International Limited and Likouala SA* [2007] JRC 107, where the Royal Court recognised a provisional liquidator under BVI law even though the concept of a provisional liquidator does not exist under Jersey law.

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