

The rise in debt for equity swaps structured through Jersey

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Partner Bruce MacNeil and managing associate James Lydeard at Ogier observe what makes the use of Jersey-incorporated acquisition and holding vehicles attractive for international restructuring transactions featuring debt for equity swaps, amid the emergence of a growing trend.

The use of Jersey as a jurisdiction of choice for restructurings involving debt for equity swaps has been growing – particularly for restructurings of UK and international corporate groups. While no doubt driven in part by the current economic environment, it marks a continuing trend, with a number of debt for equity restructuring transactions having taken place in the last 12 months involving a Jersey structure.

Ogier has advised on a variety of such restructurings incorporating debt for equity swaps, including [Pizza Express](#), [Travelex](#), Tunstall Healthcare and KCA Deutag. Casualwear retailer Fat Face and survival equipment manufacturer Survitec are also examples of recent high profile restructurings involving debt for equity swaps facilitated through a Jersey holding structure.

Benefits of Jersey companies

The benefits of using a Jersey company in terms of company law provisions and tax treatment are extremely wide, but generally include separate legal identity, limited liability for shareholders, corporate flexibility and tax neutrality.

The Companies (Jersey) Law 1991 enables capital to be denominated in any currency and share capital of either par value or no par value shares to be issued in various classes, including redeemable shares.

The structure and constitution of a Jersey company is similar to that of an English company and

therefore provides familiarity to debtors, creditors and their advisers looking for a suitable jurisdiction to facilitate restructurings involving debt for equity swaps.

Jersey does not form part of the United Kingdom and is a self-governing Crown Dependency and leading international finance centre. The Government of Jersey is committed to the highest standards of tax transparency and information exchange, including adoption of Foreign Account Tax Compliance Act (**FATCA**), Base Erosion and Profits Sharing (**BEPS**) and Common Reporting Standards (**CRS**) rules.

Debt for equity swaps

Debt for equity swaps provide creditors with an alternative option to recovering debt in, or in a manner that may lead to, a formal insolvency proceeding. They offer creditors an opportunity to take a longer term view on the equity value of a borrower group.

A creditor acquiring equity (which may also include stapled or non-stapled debt securities) will be concerned to structure the swap in a way that is tax efficient with respect to distributions or interest payments and transfer of the shares/securities.

Jersey's tax neutral environment, pursuant to which a creditor will, in general terms, not be subject to local tax on distributions or interest payments by the newly incorporated Jersey company, or stamp duty or other taxes upon transfer of the shares/securities, makes it appealing, although each party will need to consider its individual circumstances and seek professional advice where necessary.

The rise in debt for equity swaps where bondholders have used a new Jersey incorporated holding company is, as mentioned above, no doubt driven in part by the current economic climate.

The increasing trend of alternative lenders participating in finance and restructuring transactions where they may hold equity and debt interests in the same structure has also been a feature of this area. Alternative lenders often have the flexibility to participate in debt for equity swaps which may not appeal to more traditional lenders, which presents opportunities for overleveraged businesses to undertake a restructuring that may not otherwise have been possible. Whilst alternative lenders may have additional flexibility to participate, all creditors will have a collective objective of negotiating and implementing the swap in a manner that strikes a balance between ensuring the viability of the business as a going concern and recognising the enhanced credit risk of converting debt to equity.

Jersey structuring issues

The restructuring transactions which we have worked on recently have involved the incorporation of one or more Jersey holding companies at the top of the borrower's corporate

group. Creditors are issued shares in the new holding company at the top of the structure in exchange for a reduction in the existing debt obligations of the borrower group. This may be combined with amendments to existing finance documents, a bond exchange offer or other securities issue in favour of the creditors, and can be implemented as part of a consensual restructuring or pursuant to a court approved scheme of arrangement or UK restructuring plan.

From a local perspective, the key initial issues to consider in respect of the new holding company are as follows:

- Will the new holding company be a private company or a public company? A Jersey company with more than 30 shareholders will generally be treated as a public company. Any Jersey company with up to 30 shareholders will be a private company.
- Will the new holding company be tax resident in Jersey, the United Kingdom or another jurisdiction? Under the Income Tax (Jersey) Law 1961, a Jersey incorporated company shall be regarded as Jersey tax resident unless: (a) its business is centrally managed and controlled outside Jersey in another jurisdiction where the highest rate at which any company may be charged to tax on any part of its income is 10% or higher; and (b) the company is resident for tax purposes in that other jurisdiction. This will impact on the choice of directors for the new holding company and where board meetings are to be held, or corporate decisions are to be made. A Jersey incorporated company which is not tax resident in Jersey will not be subject to the island's economic substance legislation.
- How will the share capital be structured and do any special provisions need to be incorporated in the articles of association of the new holding company to reflect the commercial terms of any agreement between the creditors or shareholders (for example, class rights and reserved matters)?
- Will the new holding company be issuing any securities other than shares, and if so, depending on the number of securities holders and structure of the transaction, do any Jersey regulatory consents need to be obtained? Jersey benefits from a light-touch regulatory regime in this area and any necessary consents can generally be obtained quickly and with limited disclosure or filing requirements.
- Do any new securities need to be listed on The International Stock Exchange (TISE) or another exchange for withholding tax reasons, or due to the investor base? Jersey has close ties with TISE, which is a recognised exchange for UK HMRC purposes, as well as being recognised by the US SEC and various European regulators. TISE is well regarded as an offshore exchange of choice owing to its global standards of governance and regulation, pragmatic approach and market-focused outlook. Listings on TISE are not subject to the EU Market Abuse Regulation and the listing process can often be run alongside the restructuring transaction, or concluded relatively quickly before the first interest payment date for the new securities.

Continuing trend

Restructuring activity has increased significantly in the past 12 months. Although restructurings are taking place across a wide range of sectors, retail, food and beverage, transportation and oil and gas restructurings have been a consistent theme. There is likely to be increasing pressure on overleveraged borrower groups to enter into restructuring transactions this year, particularly as UK government support for various businesses gradually falls away.

We expect the trend of new Jersey holding companies being incorporated for debt for equity swap transactions to continue in 2021, as this structure becomes increasingly familiar to creditors and market standard for UK and international restructuring transactions.

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