ARTICLE 49 APPLICATIONS IN BANKRUPTCY

The purpose of this guide is to give practitioners and those who might be considering making such an application an appreciation of the practical issues to be addressed and also the benefit of topical decisions of the Court

Royal Court of Jersey
Viscount's Department
Jersey Court Service

PRACTITIONERS' GUIDE

ARTICLE 49 APPLICATIONS IN BANKRUPTCY
A PRACTITIONERS' GUIDE

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Introduction

The issue of applications made under Article 49 of the Bankruptcy (*Désastre*) Jersey Law 1990 ("the Bankruptcy Law") is addressed in the text book Jersey Insolvency and Asset Tracking[1]. These applications are now a regular occurrence and, as such, a number of useful precedents have been set. The purpose of this Guide is to give practitioners and those who might be considering making such an application an appreciation of the practical issues to be addressed and also the benefit of topical decisions of the Court[2].

Article 49 provides –

(1) The court may, to the extent it thinks fit, assist the courts of a relevant country or territory in all matters relating to the insolvency of a person, and when doing so may have regard to the extent it considers appropriate to the provisions for the time being of any model law on cross border insolvency prepared by the United Nations Commission on International Trade Law.

(2) For the purposes of paragraph (1), a request from a court of a relevant country or territory for assistance shall be sufficient authority for the court to exercise, in relation to the matters to which the request relates, any jurisdiction which it or the requesting court could exercise in relation to these matters if they otherwise fell within its jurisdiction.

(3) In exercising its discretion for the purposes of this Article the court shall have regard in particular to the rules of private international law.

(4) In this Article "relevant country or territory" means a country or territory prescribed by the Minister."

Prescribed country or territory

Perhaps the first point to note is that under Article 49, applications for assistance from foreign courts in relation to insolvency or bankruptcy matters can only be submitted to the Court by applicants from a "prescribed country or territory". Currently there are six such prescribed countries or territories, namely: the United Kingdom; the Isle of Man; Guernsey; Australia Finland and the Republic of Ireland, the last being the most recent to be granted prescribed status[3]. All other applications for assistance fall to be dealt with under the common law[4] and as matters of comity.

[1] By Michael Wilkins and Anthony Dessain, published by Key Haven Publications, Fifth Edition
[2] That is to say, the Royal Court of Jersey.
[3] Bankruptcy (*Désastre*) (Jersey) Order 2006, Order 6.
[4] The basis of Jersey law is in fact 'customary', but in this Guide the wider term 'common law' is used to refer to the source of a non-statutory remedy.

Two decisions of the Court dealing with applications for assistance noted that the statutory provisions of Article 49 were of no assistance where the country had not been so prescribed and that the matter of rendering assistance in such cases was accordingly "for the discretion of the court"[5] in its application of the common law. In reality there appears to be little difference in the approach of the Court based on the provisions of Article 49 or by reference to the common law. The distinction between an application under Article 49 and an application under the common law is that, under Article 49, the Court may apply Jersey law or may apply the law of the place from where the request emanated. In addition, the UNCITRAL Model Cross-Border Insolvency Law can be looked at as a matter of statute. In practice, on an application under the common law, private international law principles could be expected to be applied but it is less clear as to whether the UNCITRAL Cross-Border Insolvency Law would be applied in quite the same way, or with quite the same force. However, the distinction is a technicality that should be borne in mind, as applicants have contacted the Viscount's Department[6] referring to their wish to file "an Article 49 application", when the country in question has not been prescribed. It is recommended that an application should clearly state whether it is being made under the Article 49 procedure or otherwise. In addition, non-prescribed jurisdictions may wish to consider whether there are special benefits to be gained from seeking qualification under Article 49.

Applications to be notified to the Viscount's Department

A development arising from a Court direction in 2000[7] is that all applications for assistance in bankruptcy and insolvency matters should first be notified to the Viscount's Department for comment. In practice this direction extends to applications for assistance both under Article 49 and by way of comity under the common law. The result of this direction is that the Department's officers are able to advise on the suitability of the application and on the detailed information that should be provided before its presentation to the Court.

It goes without saying that the majority of foreign practitioners are neither familiar with Jersey law (or Jersey legal terminology) nor the judicial process in the Island. The ability of the Department to advise on the content, format and ambit of applications is likely to reduce the time of both practitioners and the Court when dealing with them. In this regard, it would be beneficial if the letter of request and the prayer in the Representation making the application are in the same or substantially the same terms. In addition, as a matter of policy, the Court will ask for the Viscount's view when considering an application for assistance. Consequently, therefore, when the advice of the Department is sought, the Viscount will advise that the application should refer to the fact that the contents of the application have been discussed with the Department. If the Viscount is concerned as to any matter a letter detailing those concerns will be sent to the applicant.

This letter is copied to the Bailiff's[8] Judicial Secretary and the Deputy Judicial Greffier[9] prior to the hearing of the application. A representative of the Department may be present at the hearing of any application depending on the complexity of the matter.

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[5] *In the matter of the Bankruptcy of First International Bank of Grenada Ltd* (*F.I.B.G*) JU 2002/21. See also: *In the Matter of LeisureNet Limited* (*In Liquidation*) JU 2002/46.

[6] The Viscount is the Chief Executive Officer of the Island's courts. The Viscount's Department is, accordingly, a Department of the Judiciary established in 1930 through which the Viscount's functions are fulfilled.

[7] *In the application of Andrew David Dick, trustee in bankruptcy* JU 2000/215. See also Practice Circular 14 November 2000.

[8] The Bailiff is the Chief Justice and Civic Head of the Island

[9] The Judicial Greffier is the Clerk to the Island's courts

Applications usually "ex parte"

Applications for assistance are usually heard *ex parte* either during the public sitting of the *Samedi* Court on a Friday afternoon[10] or at a specially convened hearing which might be *in private*. The Island implemented the Human Rights (Jersey) Law 2000 in December 2006, which incorporates into domestic law the European Convention on Human Rights. In this regard, the Department has no jurisdiction to disclose to other parties the proposed making of an application unless authorised to do so by the applicant or by the Court. The Court would, however, have recourse to the convening of necessary parties where this is felt appropriate.

It is possible to submit a request for an Article 49 application to be heard *in private* if the content of the application is of extreme sensitivity. However, mindful of human rights considerations, the Court observed in the *LeisureNet* case that justice should generally be administered in public and gave careful consideration to the issues involved before allowing the application to proceed *in private*. It is suggested therefore that practitioners should be mindful of this when considering applying for an *in private* hearing[11].

Format of the application

Applications are generally presented in the form of a Representation supported by:

(i) the original Letter of Request[12] signed by a Judge with the original seal of the Court or other official indication as is customary in the jurisdiction from which the request emanates. If no seal is used, this should be stated in the accompanying affidavit. The Letter of Request will be issued by the Court which appointed the representor and will outline the assistance sought; and

(ii) an affidavit from the representor (*i.e.* the office holder applying for the order); and

(iii) a copy of the appointment document.

The accompanying affidavit should recite the history behind the appointment, what has happened since the appointment and the reasons for seeking assistance in the Island. In appropriate circumstances the Court would consider any application that the contents of such affidavit should not be disclosed on grounds of particular risk, confidentiality or sensitivity. However, the onus here would fall on the representor. It is suggested that affidavits that are to be considered in this way should be marked confidential[13].

The Representation should refer to the Letter of Request, the affidavit and the copy appointment document (duly exhibited) and, having outlined the facts, should then list the orders sought. The first Article 49 order to be made was in 1997[14].

[10] The *Samedi* Court now sits on a Friday which is the Island's traditional court day when all business of a general nature is transacted e.g. swearing in of public officials; conveyancing matters; minor criminal offences; first listings of civil actions, etc.

[11] See also *In the Matter of the application of Rosedale (JW) Investments Ltd* 1995 JLR 123; *G v A* 2000 JLR 56.

[12] *In the Representation of William Tacon in respect of Montrow International Limited and Likouala S.A.* [2007] JRC (request from the British Virgin Islands) the Court found that a Letter of Request is always required.

[13] See also in *re C Ltd* 1997 JLR N-8

[14] See also in *re C Ltd* 1997 JLR N-8

If the applicant is not from a prescribed country a willingness on the part of the applicant's jurisdiction to show reciprocity and comity to the Island for the purposes of any possible future request from the Island's courts, is also important and should be referred to in both the Letter of Request and the Representation[15]. The applicant country's profile and allegiance to the Rule of Law such as the appropriateness of its bankruptcy and associated legislation will also be of relevance when considering such an application.

Examples of the subject matter of orders typically sought are –

(i) recognition of the office holder making the application by the Court;

(ii) disclosure of assets and/or documents;

(iii) examination of witnesses;

(iv) gagging orders;

(v) freezing orders;

(vi) use of information to be obtained;

(vii) time delays before publication of the existence of the order;

(viii) costs.

The Viscount's Department will advise generally on these issues but practitioners and applicants from overseas should note that it is advisable to obtain local legal advice and representation before the Court. However, recent hearings have provided further guidance as to how applications for assistance are likely to be received by the Court and key developments and comments are referred to in the paragraphs that follow.

Registration of the office holder by the Court

Recognition should be sought from the Court of the appointment of the office holder who is bringing the application[16], usually a trustee in bankruptcy or a liquidator. Applicants often believe that it is necessary merely to record the appointment of the office holder in the Rolls of the Court. However, where specific relief is sought, the procedure is more involved. What is recorded is the grant of the application, once agreed by the Court, in the form of an official Act of Court. This summarises the detail of the application and the extent of the relief granted. Accordingly, full details both of the applicant and of the relief sought must be made at the outset in order for the Court properly to consider the application.

[15] See *Jersey Insolvency and Asset Tracking* 5th Edition commencing at page 318. See also: the *LeisureNet* case

[16] Though it should not be overlooked that, strictly, Article 49 of the Bankruptcy Law empowers the Court to assist *the courts* of an applicant territory: hence, again, the need for a Letter of Request (cf. footnote 12).

Disclosure of assets/documents

The breadth of the application should always be carefully reviewed. The Court will often reduce the ambit of the relief sought if it is deemed to be too general. It is suggested that the correct approach is to include in the application the essential steps required for the applicant to begin to see whether the enquiries are appropriate. A specific request asking for the applicant to be granted "liberty to apply"[17] to extend the order at a later date should then be included. If, for example, initial investigations have proved the existence of a relevant bank account, but insufficient evidence can be provided about its contents without calling upon someone to give oral evidence, then the applicant can if necessary revert to the Court under the liberty to apply provision for a further order.

Examination of witnesses

The application should also be specific with regard to exactly who is to be involved in the provision of the information sought in the application. In the *LeisureNet* case an order seeking that "an officer of the relevant institutions" be summoned before the Viscount for examination was initially regarded as "too general"[18]. In circumstances where the detail and breadth of information to be disclosed is not at first known it is suggested that the applicant should return to Court at a later date with a further more detailed request for assistance again brought under a "liberty to apply provision".

It is recommended that a phrase such as "the proper officer" (*i.e.* of a company) should be used to indicate the person who, at a senior level, will be summoned to give evidence. It is suggested that if evidence is to be taken, then the application should seek an order from the Court that evidence should be given before an appropriate official, such as the Master of the Royal Court[19].

Gagging orders

On the issue of gagging orders, the Court is likely to consider whether a gagging order is in fact necessary or whether the desired protection can be achieved by other means. For example, if freezing orders are already in place (or could be applied for) on bank accounts the subject of an application for assistance then the Court is likely to take the view that there is no need for a gagging order to be placed on a respondent bank or its officers[20].

Freezing orders

If freezing orders are in place it is possible for the Court to make an order allowing for their extension on a subsequent application for assistance so as to allow the applicant time to consider, having gleaned some information, whether or not time is needed to prepare for the issue of substantive proceedings. If not already in place the Court may make a freezing order as part of the initial application for assistance[21].

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[17] See the *LeisureNet* case and cf *In re O.T. Computers Limited* JU 2002/29

[18] See the *LeisureNet* case and cf *In re O.T. Computers Limited* JU 2002/29

[19] For a wider discussion on the obtaining of evidence in Jersey see A Guide to the Obtaining of Evidence in Jersey by Michael Wilkins and Anthony Dessain published in Volume 3 page 280 of the (then) Jersey Law Review.

[20] See the *LeisureNet* case and cf *In re O.T. Computers Limited* JU 2002/29

[21] See the *LeisureNet* case and cf *In re O.T. Computers Limited* JU 2002/29

Representors might also consider giving undertakings as to the extent to which assets should be frozen. Obviously, the sum which the applicant is potentially seeking to trace or claim will be of significance here. The Court has also required an insolvency practitioner to provide security for damages. It was agreed that such security would be limited to the value of the net assets recovered by the insolvency practitioner[22].

Application of information obtained

In addition, the Court has, on more than one occasion, used its discretion when granting an application for assistance, to place special restrictions on how the information to be disclosed under the order is to be used and to whom it can be given[23]. For example, if a trustee in bankruptcy wishes to use any documentation or information obtained as a result of a court order, then such use might be prohibited without the prior leave of the Royal Court and, if appropriate, the court from which the Letter of Request derived. The Royal Court has taken the view that where documents are ordered to be produced and are to be used for the purposes of the liquidation, this does not extend without further authority to making such documents available to the then English Department of Trade and Industry even though under English Law, a liquidator is required by statute to do so[24].

Deceased estate

In the matter of Anthony John Warner (as Trustee in Bankruptcy of the Estate of the late Rene Walter Rivkin) v Equity Trust (Jersey) Limited and Royal Bank of Scotland International Limited [2008] JRC 003 and having regard to Article 19(1) of the Probate (Jersey) Law 1998, as amended, it was found that no domestic grant of probate would be required in Jersey to enable a trustee in bankruptcy to deal with the Jersey-situate movable property of a bankrupt deceased estate; the property of the deceased insolvent fell to be dealt with by the applicant under (in that case) Australian Law.

Time delay

Orders can also be given by the Court restraining the date of publication of any decision of the Court in relation to the application until such time as the initial enquiries have been carried out, or for any other relevant reason[25].

Costs Orders

When seeking an order for recognition, applicants should be prepared to offer undertakings to the Court to pay the reasonable costs of the Viscount and any third parties affected by the Order. However the issue of costs is again one to be decided upon by the Court and in the *LeisureNet* case the order stated that the applicants should pay the compliance costs of those assisting.

[22] See *Equity Trust (Jersey) Limited (known as the Accident Group Limited) Employees Benefit Trust and other v A G (Manchester) Limited* 2006 JRC 047

[23] See the *LeisureNet* case and cf *In re O.T. Computers Limited* JU 2002/29 and *Re C Ltd* 1997JLR N-8

[24] See in Re: *A G (Manchester) Limited* 2005 JLR Note 13

[25] See the *Leisurenet* case and cf *In re O.T. Computers Limited* JU 2002/29

Private International Law

The Bankruptcy Law was introduced to assist in the efficient administration of bankruptcy proceedings. The pre-existing principles in accordance with which a *désastre* (see footnote 28) was previously administered are still recognised as a support to the Bankruptcy Law in areas where the Law is silent. Similarly, the rules of private international law are applied by the Court when considering any application for assistance made under either Article 49 or the common law. Further, the Court may have regard to the provisions of the UNCITRAL Cross-Border Insolvency Law when considering the granting of such assistance.

One aspect of private international law that frequently causes problems to potential applicants for assistance is the general rule that assistance is not granted by one jurisdiction to another if the applicant is a revenue authority seeking the recovery of foreign revenue. The case of *Re Tucker*[26] was decided on this point prior to the introduction of the Bankruptcy Law. In *Re Tucker* the UK Inland Revenue was the only creditor in the bankruptcy and for this reason the application for assistance by the trustee in bankruptcy failed. Even if an application is brought under Article 49 the existence of a revenue element will still be a material consideration.

If there are additional claimants other than the foreign revenue authority it will be a matter for the Court to decide whether the revenue authority's interest should affect the granting of the application. This was a matter that arose for consideration in the cases of *Re Hoare* and in *Re the Representation of Carman*[27]. Accordingly, it is suggested that practitioners seeking assistance with bankruptcy matters should consider the extent to which a foreign revenue authority is a claimant in the bankruptcy[28] and make appropriate disclosure.

An amendment to Section 386 of the UK Insolvency Act 1986 by Section 4 of the Enterprise Act 2002 has repealed the preferential status of revenue and customs debts due in an insolvency there. The consequence of this decision is that such claims now rank equally with all other unsecured creditors. This is of help to a trustee in bankruptcy, or other office-holder in insolvency, seeking assistance under Article 49. An example is provided by *In the case of the Representation of Steven John Williams as trustee in bankruptcy of Michael Stephen Collett* [2009] JRC 54. In this case, the Royal Court recognised a UK trustee in bankruptcy even though 99.8% of the admitted claims were from Her Majesty's Revenue and Customs. The Royal Court found that fairness dictates that exclusion of such a claim should not apply where there is at least another unsecured creditor who will stand to benefit from assistance being given.

[26] *Re Tucker 1987-8* JLR 473

[27] *Re Hoare, a bankrupt* – Act of the Court dated 7 November 2001 and in *Re the Representation of Carman* – Act of the Court dated 3 April 2002.

[28] See further: *Re Walmsley* 1883 JJ 35; *Le Marquand and Backhurst v Chitmead Estates Limited* 1987-88 JLR 86.

The correct approach?

Applicants sometimes seek to use other procedures to bypass an Article 49 application where in fact, such an application is the appropriate means of obtaining assistance. In *Re Hoare* the Court declined to grant the assistance sought, which had initially been presented by way of an Order of Justice (Writ), but ordered the freezing of a bank account so as to enable the applicant to prepare and present the appropriate Article 49 application for, *inter alia*, documentary disclosure[29].

Requests by the Royal Court to Foreign Courts

Jersey is a relevant country or territory under the UK Insolvency Act 1986, enabling the English High Court jurisdiction to make such an order at the Royal Court's request, if the English High Court is minded to do so.

The Royal Court recognised – *In the matter of O.T. Computers Limited* [2004] JRC 613; 2004 JLR N4 - the principle of "Centre of Main Interest" as a persuasive element when requesting the English High Court to authorise the company to go into a Creditors' Voluntary Winding Up and that it should be governed by English Law. Other cases where the Court made requests to the English High Court are *In the matters of First Orion Amber Limited and First Orion Amber Nominees Limited* [2009] JRC126.

This case also extended the directions in relation to such applications to include directions to give priority creditors under Article 32(1)(b) and (c) of the Bankruptcy Law the same status as priority creditors under English Law. See also *In the matter of the Representation of Anglo Irish Asset Finance [2010]* JRC087.

Format of the application

Once again, application is generally presented in the form of a Representation, supported by a draft Letter of Request and will need to provide:

(i) a comprehensive background to the case

(ii) reasons for the application

(iii) drafts of the orders being sought which should follow the format of the Letter of Request

The affidavit must:

(i) be sworn by a director, representative of any security trustee or a senior creditor

(ii) include the nature and location of the company's activities

(iii) provide details of any financial/security arrangements which may exist

(iv) advise on the location of the creditors

[29] See further, now, *In the Matter of SAAD Investments Limited* – Act of the Court dated 23 July 2010.

(v) set out the reasons for the application and the expected outcome of the proposed (e.g.) administration

(vi) provide an explanation as to why (eg) the administration route would be preferable to a creditors' winding up or a *désastre*.

For example:

- providing an opportunity to maximise the return for creditors
- securing jobs, by selling as a going concern
- to avoid two separate insolvencies running concurrently
- to enable flexibility by opening the gateway of co-operation with other jurisdictions

(vii) exhibit any UK counsel's opinion, valuation reports, etc., to assist in supporting the application

The Viscount's Department will advise generally on these issues but practitioners and applicants from overseas should note that it is advisable to obtain Jersey legal advice and representation before Court.

CONCLUSION

This Guide has sought to provide only a brief overview of what, to date, appear to have been the key issues for consideration in Article 49 applications under the Bankruptcy Law and also applications made in accordance with the common law. It is anticipated that the number of such applications for assistance will increase as insolvencies with cross-border implications rise due to the global nature of modern business and the ongoing economic tensions. As indicated, information and general advice on applications can be offered by the officers of the Insolvency Team[30] of the Viscount's Department on +44 1534 441410. In addition, the Jersey Legal Information Board website at www.jerseylaw.je provides access to a list of local law firms as well as offering a wealth of additional information which includes a database of Jersey legislation.

[30] The Insolvency Team is an operational section of the Viscount's Department specialising in matters of insolvency administration, the concept of '*désastre*' (literally signifying financial disaster) having been created by the Court during the 18th Century.