

Collas Crill guiding you through... Getting a foreign insolvency officeholder recognised in Jersey

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Jersey is a popular international finance centre because it is well regulated, creditor friendly and has modern and flexible legislation. It is home to a large number of asset holding vehicles and, according to a 2016 report by Capital Economics, is custodian of over £1.3 trillion of wealth.

As a result of Jersey's prominence as an offshore financial centre, it is an increasingly common occurrence for **foreign officeholders** to come to Jersey to gather information and evidence to help them carry out their duties.

This guide looks at the key things you need to know about getting a **foreign officeholder** recognised in Jersey.

Words in bold text are defined at the end of this guide.

Why take actions in Jersey?

Typically, a **foreign officeholder** will have been appointed in respect of:

- foreign assets of a Jersey person; or
- a foreign person which owns Jersey assets (like a Jersey bank or custody account or shares in a Jersey company).

The kind of actions a **foreign officeholder** may want to take in Jersey include to:

- investigate and gather evidence;
- interview witnesses;
- protect or take control of assets located in Jersey;
- start legal proceedings in Jersey; or
- wind up an insolvent Jersey company or dispose of its assets.

Why is recognition needed?

Problem

The capacity and power of a **foreign officeholder** will be derived from the laws of the jurisdiction of the **foreign officeholder's** appointment - a foreign statute, a foreign court order or a foreign law governed security document.

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A **foreign officeholder** has no standing or power under Jersey law to carry out the **foreign officeholder's** duties in Jersey, and consequently, has no power to compel a person in Jersey to cooperate with the **foreign officeholder**.

Invariably, a Jersey recipient of a request for information will require a **foreign officeholder** to produce a copy of an order of the **Jersey Court** recognising the **foreign officeholder's** appointment before cooperating.

Moreover, the **Jersey Court** has said that no foreign court should seek to exercise its powers in Jersey without the **Jersey Court's** consent.

Solution

To overcome the lack of power in Jersey, a **foreign officeholder** who wants to take any actions in Jersey must apply to the **Jersey Court** to:

- have the **foreign officeholder's** appointment recognised; and
- be given the authority to take the actions in Jersey the **foreign officeholder** wants to take.

The purpose of recognition is to enable the **foreign officeholder** to:

- avoid having to start parallel insolvency proceedings in Jersey; and
- give the **foreign officeholder** the authority to exercise in Jersey the powers that would be available if equivalent proceedings were taken in the jurisdiction of the **foreign officeholder's** appointment.

What do we mean by *recognition*?

The basis of an application for recognition by a **foreign officeholder** is a letter of request from the **Requesting Court** asking the **Jersey Court** for assistance.

So *recognition* does not simply mean the **Jersey Court** will acknowledge the **foreign officeholder's** appointment. It means that the **Jersey Court** will assist the **Requesting Court** by:

- recognising the **foreign officeholder's** appointment; and
- making the orders set out in the letter of request (subject to any conditions the **Jersey Court** considers appropriate) which authorise the **foreign officeholder** to exercise the powers given to the **foreign officeholder** under the jurisdiction of the **foreign officeholder's** appointment.

How does a foreign officeholder get recognised?

A **foreign officeholder** may apply to the **Jersey Court** to be recognised under:

- the **Bankruptcy Law** if the **foreign officeholder** was appointed under the laws of a **listed jurisdiction**; or

- customary law (under the principle of mutual cooperation) if the **foreign officeholder** was appointed under the laws of any other jurisdiction.

Statutory recognition

The **Bankruptcy Law** gives the **Jersey Court** the power to assist, to the extent it thinks fit, a **Requesting Court** from a **listed jurisdiction** in any matter relating to the insolvency of a person.

For the purposes of giving assistance to a **Requesting Court** from a **listed jurisdiction**, the **Jersey Court**:

- may have regard (to the extent it considers appropriate) to the UNCITRAL model law on cross border insolvency;
- may exercise any powers which the **Jersey Court** or the **Requesting Court** could exercise in the circumstances; and
- must have regard to the rules of private international law.

The following general principles regarding recognition under the **Bankruptcy Law** arise from the cases in this area.

- Although the outcome of every application turns on its facts, where an application has satisfied the requirements of the **Bankruptcy Law**, the **Jersey Court** has shown a general willingness to assist the courts of a **listed jurisdiction** unless there are good reasons not to do so.
- The **Jersey Court** may refuse an application if:
 - the request for assistance from the **Requesting Court** were *hopelessly bad* under the law of the jurisdiction of the **foreign officeholder's** appointment; or
 - there is a reason under Jersey public policy not to give the assistance sought.
- The **Jersey Court** will not generally give assistance if it has the effect of enforcing a penal, revenue or other public law of a foreign state.
- The **Jersey Court** will be concerned to ensure that the interests of any Jersey creditors are protected.
- The **Jersey Court** has been prepared to exercise the powers of the **Requesting Court** by authorising a **foreign officeholder** to manage Jersey real estate with a view to selling it even though a Jersey liquidator or holder of a security interest (judicial hypothec) over the real estate would not have the power to do so under Jersey law.

Customary law recognition

In the case of a **foreign officeholder** appointed under the laws of a jurisdiction that is not in a **listed jurisdiction**, the **Jersey Court** has inherent power to give assistance to a **Requesting Court** from that jurisdiction on the basis of mutual cooperation (or comity) and reciprocity.

The following general principles regarding customary law recognition arise from the cases in this area.

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- It must be shown that the **Requesting Court** would provide similar assistance to the **Jersey Court** on a reciprocal basis if were asked to do so.
- There must be a valid connection between the debtor and the law under which the insolvency occurred.
- Unlike statutory recognition, where the **Jersey Court** may apply Jersey law or the law of the **Requesting Court**, in the case of customary law recognition, the **Jersey Court** does not have the power to exercise any powers which the **Requesting Court** could exercise if those powers do not also exist under Jersey law.
- Customary law recognition:
 - is merely a power to assist the **Requesting Court**; and
 - cannot authorise a **foreign officeholder** to do something which the **foreign officeholder** does not have the power to do under the laws of the jurisdiction of the **foreign officeholder's** appointment.
- The **Jersey Court** has a discretion as to whether it should assist a **Requesting Court** and it should take into account all material factors. The fact that the **Requesting Court** has requested assistance is a weighty factor the **Jersey Court** should take into account.
- Although the **Jersey Court** may accept without further investigation the **Requesting Court's** views as to what is required for the proper conduct of an insolvency, a request is not conclusive as to the way in which the **Jersey Court's** should exercise its discretion.
- It is necessary to consider any matters that arise after the letter of request was signed by the **Requesting Court**.
- Any assistance to be given by the **Jersey Court** is subject to Jersey law and public policy. The **Jersey Court** can only act within the limits of its own statutory and customary law powers.

Role of the Viscount

The **Viscount** is responsible for insolvency matters in Jersey.

Before making an application, a **foreign officeholder** must first consult with the **Viscount**. The **Jersey Court** will seek the **Viscount's** view on an application, so it is important that any issues identified by the **Viscount** are addressed in a way that is acceptable to the **Viscount**.

There is a two step consultation process.

Consultation

The first step is for the **foreign officeholder** to discuss the application with the **Viscount**. The purpose of this step is to ensure that:

- the **Viscount** considers the application to be appropriate and does not object to it;
- it is possible under Jersey to give the assistance sought;
- the scope of the orders sought does not go beyond what is reasonably necessary in the circumstances; and

- any issues that may need to be addressed are identified and resolved at an early stage.

Submission of draft application documents

The next step is for the **foreign officeholder** to send a draft of the application documents to the **Viscount**. The purpose of this step is to ensure that:

- the orders sought are framed in terms that are appropriate under Jersey law;
- the application documents contain the information, and (where relevant) any undertaking to the **Jersey Court**, necessary to allow the **Jersey Court** to consider and approve the application and make the orders sought; and
- any issues identified by the **Viscount** in the first step will be appropriately addressed.

Jersey creditors

If there are any Jersey creditors or employees who will be affected by the orders sought, the **Viscount** will want to ensure that they will not be prejudiced.

Who may apply for recognition?

Any **foreign officeholder** may apply for recognition.

Frequently, the **foreign officeholder** is a court appointed liquidator or trustee in bankruptcy, however, the **Jersey Court** has also approved applications for recognition by:

- a provisional liquidator;
- an administrative receiver;
- a fixed charge receiver appointed under a security document; and
- a monitor.

For this purpose, it does not matter that Jersey law does not have an equivalent officeholder to the office held by the **foreign officeholder**.

Making an application

The application process is essentially the same irrespective of whether the **foreign officeholder** makes an application under the **Bankruptcy Law** or customary law.

The application comprises a representation (which is like a petition) and an affidavit from the **foreign officeholder** which confirms the details in the representation. The application must include:

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- an original letter of request from a **Requesting Court** in the jurisdiction in which the **foreign officeholder** was appointed which states the assistance sought from the **Jersey Court**;
- draft orders which follow the orders requested in the letter of request; and
- a copy of the document under which the **foreign officeholder** was appointed.

The representation and affidavit must:

- set out the background facts relating to the appointment of the **foreign officeholder**;
- outline the events that have taken place since the **foreign officeholder** was appointed;
- explain the reasons for seeking assistance from the **Jersey Court**;
- explain why it is not appropriate or possible to use a Jersey insolvency procedure in the circumstances (including taking into account things like cost and timing);
- state whether there are any Jersey creditors, and if so, explain the steps that will be taken to ensure that they will not be prejudiced by the orders sought; and
- if the jurisdiction in which the **foreign officeholder** was appointed is not a **listed jurisdiction**, confirm that the **Requesting Court** would provide similar assistance to the **Jersey Court** on a reciprocal basis if were asked to do so.

Hearing

If necessary, an application can normally be made on short notice (48 hours) by appointment, otherwise, the application would be heard in the **Jersey Court** on a Friday afternoon.

An application is typically made on an *ex parte* basis (without notice to other parties), however, the **Jersey Court** may require notice to be given to other relevant parties if the **Jersey Court** considers it appropriate to do so.

An application is normally heard in open court, but can be heard in private if the contents of the application are extremely sensitive. The **Jersey Court** has said, however, that justice should generally be done in public.

A representative of the **Viscount** will normally attend the hearing unless the application is straightforward.

Orders

Recognition is a discretionary remedy. If the **Jersey Court** is satisfied that it is appropriate in the circumstances to recognise a **foreign officeholder**, it will make the orders sought in the letter of request. To the extent that the **Jersey Court** considers it appropriate to do so, it may impose conditions on, or restrict the scope, of the orders sought.

The fact that a debtor is already subject to insolvency proceedings in Jersey is not necessarily a bar to the **Jersey Court** recognising a **foreign officeholder**.

Terms used

Bankruptcy Law means the Bankruptcy (Désastre) (Jersey) Law 1990.

foreign officeholder means any officeholder appointed in respect of a person, or any assets of a person (whether a natural or legal person), on account of insolvency or default under a security document, including any liquidator, trustee in bankruptcy, compulsory manager, administrator and receiver of any kind.

Jersey Court means the Royal Court of Jersey.

listed jurisdiction means Australia, Finland, Guernsey, Ireland, the Isle of Man or the United Kingdom.

Requesting Court means a court in the jurisdiction under which a **foreign officeholder** was appointed which issues a letter of request to the **Jersey Court** asking it to recognise, and give assistance to, the **foreign officeholder**.

Viscount means the head of the executive arm of the courts of Jersey.

About Collas Crill

We are a leading offshore law firm. We are easy to do business with and give practical advice to overcome tough challenges. Through our network of offices, we practise British Virgin Islands, Cayman Islands, Guernsey and Jersey law.

About this guide

This guide gives a general overview of this topic. It is not legal advice and you may not rely on it. If you would like legal advice on this topic, please get in touch with one of the authors or your usual Collas Crill contacts.

For more information please contact:



Matt Gilley

Partner^ (Advocate) | Jersey

t: +44 (0) 1534 601691 | **e:** matthew.gilley@collascrill.com



Jonathan Barham

Partner (Advocate) | Jersey

t: +44 (0) 1534 601641 | **e:** jonathan.barham@collascrill.com