

Developments to Jersey's insolvency regime

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Mourant Ozannes partner **Stephen Alexander** and associate **Chris Vincent** examine the recent “landmark” changes to Jersey’s Companies Law, which they say reinforce the jurisdiction’s position as a leader among offshore international finance centres.

The robustness of a jurisdiction's insolvency regime is of considerable importance to creditors. They want to ensure that there are appropriate mechanisms in place to protect and maximise the economic recovery on their investments. International finance centres such as Jersey strive to give effect to these concerns by ensuring that creditors are afforded with high levels of protections

and flexibility and, in doing so, make their jurisdictions even more attractive for international business.

In this vein, Jersey has recently developed its insolvency regime with two laws that provide a number of amendments to the Companies (Jersey) Law 1991. Two of the most important of these amendments are the granting of power to creditors to commence a creditors' winding up (a process that only a company can commence in Jersey at present) and the granting of power to the court to appoint a provisional liquidator.

The existing regime

A creditors' winding up is a form of voluntary insolvent winding up of a Jersey company. As the law stands at present, it can only be commenced by special resolution of the shareholders at a general meeting of the debtor company.

A creditors' meeting is convened to take place immediately following the conclusion of the company meeting at which the resolution for creditors' winding up is proposed. The company and creditors may both nominate a liquidator for the purposes of the creditors' winding up. However, the creditors' choice prevails, unless the Royal Court of Jersey determines otherwise.

The company must, from the commencement of the winding up, cease to carry on its business, except so far as may be required for its beneficial winding up. The corporate state and capacity of the company continues until the company is dissolved.

Additionally, transfers of shares not sanctioned by the liquidator will be voided, as will any alteration in the status of the company's members made after the commencement of the winding up.

After the commencement of the winding up, no action can be taken or proceeded with against the company except by leave of the court – and subject to such terms as the court may impose.

The winding up of a company bars the right to take any other proceedings in bankruptcy except the right of a creditor or the company to apply for a declaration under the Bankruptcy (Désastre) (Jersey) Law 1990.

The amendments

The amendments provide that, once in force (expected in the first quarter of 2022), a creditor will be able to apply to the court for an order to commence a creditors' winding up.

To do so, the creditor will need to have a claim against the company for not less than a prescribed minimum liquidated sum (currently stipulated in the amendments as £3,000 (US\$3980) together with the consent of the company, or with evidence that the company is unable to pay its debts or is insolvent.

A company will be deemed unable to pay its debts if a demand has been served by the creditor requiring payment in respect of a sum exceeding the prescribed minimum and the company has, for 21 days after service of the demand, failed to pay the sum or otherwise disputed the debt to the reasonable satisfaction of the creditor.

The amendments provide that the court may, at any time after an application for a creditors' winding up (in respect of a court ordered creditors' winding up), appoint a provisional liquidator.

The role of provisional liquidator is already in effect in many jurisdictions, both offshore and onshore. It usually functions as an emergency procedure where there is a real concern that, between the presentation of an application for a winding up and the order effecting that winding up, the company's affairs may not be properly conducted or its assets may be dissipated. The role of provisional liquidator therefore serves to preserve the company's assets.

This development puts the Jersey regime in line with similar jurisdictions and represents a valuable tool for creditors in ensuring their claims are properly protected.

The effects of a creditors' winding up commenced by special resolution, as referred to above, apply equally to a creditors' winding up commenced by court order.

The court has a wide discretion in considering an application for an order commencing a creditors' winding up.

It may make an order that the creditors' winding up commences in respect of the company from the date of the application or such other date as the court deems fit. The court can appoint a person nominated by the applicant or selected by the court as the liquidator, and is able to adjourn the hearing of the application for such time as the court thinks fit.

It is also under the court's discretion to require the applicant to furnish such further information as the court requires, to order other parties be convened to the application, and/or dismiss the application and make other orders as it thinks fit.

Where the court orders the commencement of a creditors' winding up, the liquidator must call a creditors' meeting to take place 21 days after the date of the order (or the next working day). Notice of the meeting is published in the Jersey Gazette not less than 10 days before the day for which the meeting has been called. The creditors are furnished with such information concerning the company's affairs as they may reasonably require and which is in the possession of the liquidator. The directors of the company must also produce a statement as to the affairs of the company, verified by affidavit and lay that statement before the creditors' meeting.

Additional provisions of the amendments provide that where, as a result of an application made by a creditor, an order for a creditors' winding up is made and the company was not insolvent at the date that the application was made, the company will have a right of action against the applicant to recover damages (unless the applicant, in making the application, acted reasonably and in good faith).

They also provide that a company may, at any time during the course of the creditors' winding up that has been ordered by the court, apply to the court for an order terminating the creditors' winding up.

Where a liquidator has been appointed by the court, the amendments state that a creditor may, within seven days of the creditors' meeting, apply to the court for an order appointing some other person to be liquidator. The court may at any time remove a liquidator and may appoint another. The appointment or removal of a liquidator may be made on request by the company, a director of the company, a creditor, the Viscount (the executive officer of the Courts of Jersey), the Jersey Financial Services Commission, the Minister for External Relations and Financial Services or any other person.

The amendments will also establish a Register of Approved Liquidators, to be published by the Viscount and which will be made available online. A person is only eligible for appointment as a liquidator of a company (being a public company or a company subject to a creditors' winding up) if that person is registered as an approved liquidator on that register.

A person may be registered as an approved liquidator: if that person is a resident in Jersey; if they have in place a general bond of £250,000 plus a specific bond of between £5,000 and £5 million for each appointment; and if they have enough experience as determined by the Viscount given they are licenced to act as an insolvency practitioner in the UK or are members of certain accredited professional accounting bodies.

A person who is not resident in Jersey but otherwise satisfies the above requirements may be entered onto the register as a non-Jersey liquidator. A registered non-Jersey liquidator, together with a person registered as an approved liquidator, may be appointed as a liquidator of a company (being a public company or a company subject to a creditors' winding up).

The amendments further introduce provisions for the supervision of liquidators by the Viscount. In particular, where the Viscount receives

representations (including but not limited to, complaints) about the exercise of powers, or a failure to exercise powers, by a liquidator or it otherwise appears to the Viscount that there are circumstances justifying investigation, the Viscount may notify the liquidator and require it to provide such information, documentation and/or reports as the Viscount may require.

Following an investigation by the Viscount, and if considered necessary or appropriate to do so, the Viscount may apply to court requesting the exercise, in relation to a liquidator, of any of the court's powers under the Companies Law.

Impact

The amendments serve to reinforce the position of Jersey as a leader among the offshore international finance centres and should present as a reassurance to all parties involved in insolvency action or where such action is contemplated in this jurisdiction.

In terms of the expanded creditors' winding up regime, the benefits to creditors, in supplementing their toolkit of options available for the purposes of debt recovery, is readily apparent.

The provision for the appointment of a provisional liquidator should further provide comfort to creditors that a swift protective remedy will be available where the assets of an insolvent company may be at risk.

The amendments have been balanced against ensuring appropriate safeguards to the company (see, for example, the company's right of action where an order commencing a creditors' winding up has been obtained but the company is not, in fact, insolvent) and other interested third parties (provision being made for the convening of additional parties to the commencing application and appropriate notice provisions).

Further developments, including the production of a publicly accessible register for liquidators and supervisory functions over liquidators on the part of the Viscount, will also serve to add additional

levels of confidence and transparency in the insolvency process on the part of interested parties.

The amendments demonstrate a continuing intention on the part of the legislature to adapt and improve the existing framework. This, together with the content of the amendments themselves, will serve to ensure that Jersey continues to enjoy its reputation as a highly attractive and preferential jurisdiction for the purposes of international business.