

# An Overview of The Jersey Corporate Insolvency Regime

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The Jersey insolvency legislative and common law framework provides an adaptable and commercially focussed regime for the supervision and handling of the liquidation and restructuring of Jersey entities. This note addresses the different mechanisms by which Jersey incorporated companies may be wound up.

## Winding up of a solvent company

A solvent, or "summary", winding up commences where the shareholders voluntarily pass, or are deemed to pass, and file, a special resolution to do so and the directors have confirmed either that the company:

- (a) Has no assets nor liabilities; or
- (b) Will be able to discharge all liabilities within six months of the commencement of the summary winding up;
- (c) Will be able to discharge any liabilities which will fall due more than six months after the commencement of the winding up in full as they fall due.

A liquidator is appointed by special resolution of the company's members. No qualifications are laid down for a liquidator in a summary winding up. However, in many cases, particularly in respect of trading companies, the company may seek to appoint an insolvency practitioner as liquidator to ensure that the liquidator's duties are being discharged properly.

On a summary winding up, the company's powers are limited to realisation of assets, discharge of liabilities and distribution of assets.

## Winding up of an insolvent company

### Insolvent voluntary liquidation ("creditors' winding up")

Previously, an insolvent, voluntary liquidation, called a "creditors' winding up", could only be commenced where the shareholders had passed, or had deemed to have passed, and filed, a special resolution to do so, or where a summary winding up (see above) became a creditors' winding up on the directors' conclusion that either the company would not be able to discharge its liabilities in full within six months of the commencement of the winding up, or, if there were liabilities arising more than six months after its commencement, that they would not be discharged as they fell due.

However, recent amendments to the [Companies \(Jersey\) Law 1991](#), which came into force in early 2022, have granted the power to creditors to apply to the Court for an order to commence a creditors' winding up. This gives creditors an alternative to *désastre*, which may not be an attractive option for creditors who would prefer the appointment of a professional insolvency practitioner as liquidator to manage the process as opposed to the Viscount.

Where a creditor's winding up is initiated by shareholder resolution:

- (a) At least fourteen days before the holding of the meeting to pass a special resolution to wind up a company, all creditors must be notified by post of a meeting of creditors which will typically immediately follow the meeting of members, for the purpose of appointing a liquidator. A statement outlining the financial affairs of the company must be prepared by the directors and laid before the meetings. Notice of the meetings and the passing of the special resolution require advertisement in the Jersey Gazette.
- (b) The company and the creditors may each nominate a liquidator, however, the creditors' choice will prevail unless the Royal Court determines otherwise. The liquidator must be an individual from one of a number of prescribed professional bodies. It is not possible to have a corporate liquidator. The liquidator can be resident outside of Jersey.

#### Where a creditors' winding up is initiated by a creditor:

- (a) The creditor must make an application to the Royal Court for an order commencing the winding up. The creditor must have a claim against the company for not less than £3,000, and either the consent of the company, or evidence that the company is unable to pay its debts or is insolvent.
- (b) The company will be deemed unable to pay its debts if a demand has been served by the creditor requiring payment and the company has, after 21 days after service of the demand, failed to pay the sum or otherwise dispute the debt to the creditor's satisfaction.
- (c) The Court may, at any time after an application for a creditor's winding up, appoint a provisional liquidator. The role of the provisional liquidator is to preserve the company's assets where there is a real concern that the company's affairs might not be properly conducted, or its assets dissipated, in the time between the application and the order effecting the winding up. Upon ordering the creditors' winding up, the Court may then appoint a person nominated by the applicant, or otherwise selected by the Court, as the liquidator.
- (d) Within 7 days of their appointment, the liquidator must give notice in writing to the creditors of the company of a meeting of the creditors to be held in Jersey 21 days following the date of the Court order. At least 10 days' notice of the meeting must also be given in the Jersey Gazette. The liquidator must, in advance of the meeting, provide the creditors with such information concerning the company's affairs as they may reasonably require, and a statement outlining the financial affairs of the company, verified by affidavit, must be prepared by the directors and laid before the meeting.
- (e) Where a liquidator has been appointed by the court, 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 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 Jersey Financial Services Commission, the Minister for External Relations and Financial Services or any other person.
- (f) A company can apply to the Court to terminate a creditors' winding up that has commenced following an order of the Court. In order to make such an order, the Court must be satisfied that the property of the company is sufficient to pay in full claims filed with the liquidator or claims which the liquidator has been advised will be filed within the prescribed timeframe.
- (g) The amendments provide protection to a company where an application is made by a creditor for an order for a creditors' winding up in respect of a company which is not in fact insolvent at the date of the application. In those circumstances the company has a right of action against the applicant creditor to recover damages arising out of the application, unless the creditor was acting reasonably and in good faith.

In either case, the creditors may also appoint a liquidation committee consisting of up to five persons. The liquidation committee has a supervisory function in the conduct of the winding up, including powers to agree the liquidator's remuneration, sanction the continuance of any powers of the directors, and sanction the liquidator paying out a class of creditors in full or compromising any claim by or against the company.

Upon the appointment of a liquidator in a creditors' winding up, all the powers of the directors cease (save as otherwise provided by the creditors' liquidation committee or, if none, by the creditors). Unlike in *désastre*, the assets of the debtor company remain vested in the company – not in the liquidator.

After the payment of any secured and priority creditors, the liquidator must apply the liquidated proceeds of the company's realised property in satisfaction of the company's debts *pari passu* amongst unsecured

creditors and any balance to the members in accordance with their rights. Past and present members are not required to contribute to the assets of the company in the event that there is an insufficiency in assets to meet the liabilities and expenses of company, aside from in certain very exceptional circumstances.

When the affairs of the debtor have been fully wound up, the liquidator is required to present to members and creditors an account showing the manner in which the winding up has been conducted and the property realised. The company is thereafter deemed to be dissolved three months after filing a return with the Registrar.

The Court has power to terminate a creditors' winding up on the application of a liquidator. The Court can only grant such an application if it is satisfied that all liabilities can be discharged as they fall due and that the application would be in the interests of creditors. The termination does not affect the validity of any actions undertaken during the liquidation.

### **Compulsory winding up by order of the court ("*désastre*")**

Previously, if a creditor wished to initiate insolvency proceedings against a company, the principal means of doing so was to seek a compulsory or court ordered liquidation, known as a declaration of *désastre*, under the [Bankruptcy \(Désastre\) Jersey Law 1990](#).

The *désastre* process arose out of the common law of Jersey and is unique to the Island. Notwithstanding the different historical roots, *désastres* are, in substance, similar to compulsory liquidations in England and Wales and other commonwealth jurisdictions.

An application for *désastre* can be made by the debtor or a creditor. On an application by a creditor, the Royal Court must be satisfied that the applicant creditor has a claim for a liquidated sum (i.e. a debt to which there is no reasonably arguable defence) in excess of £3,000. If the debt claimed in the demand is disputed by the company in good faith and on substantial grounds then it cannot form the basis of a winding-up petition. If, however, the debt claimed is a judgment debt, the company cannot legitimately dispute it, unless execution of the judgment has been stayed by the court.

In a *désastre*, all property and rights and powers of the debtor over its affairs (along with the capacity to take proceedings for exercising such powers) vests in the Viscount, who is the Chief Executive Officer of the Royal Court of Jersey. In effect, the Viscount "steps into the shoes" of the debtor and takes over the powers of the directors of the debtor.

Upon a declaration of *désastre*, an automatic stay of proceedings is effected. This means that no creditor of the debtor has any remedy (other than a right to prove his claim) in respect of any debt that is provable in the *désastre* against the property of the debtor, nor may a creditor commence any legal action or proceeding to recover the amount of the provable debt nor, except with the consent of the Viscount or the Royal Court, can a creditor continue any action or proceedings to recover the debt.

The duties of the Viscount in *désastre* are principally to investigate, get in and, ultimately, liquidate the estate for the benefit of the creditors who prove their claims. *Désastre* proceedings will last as long as necessary to ensure that the Viscount's duties have been discharged. When the Viscount has realised all of the debtor's property he must pay whatever final dividend is due and supply all creditors with a report and accounts relating to the *désastre*.

A *désastre* can be stayed in certain circumstances upon application of interested persons such as the directors or shareholders of the debtor. A *désastre* can also be recalled in certain circumstances at the application of the debtor or creditors. However, the Royal Court may not grant such an order unless it is satisfied that the debtor's property is sufficient to discharge the claims filed in the *désastre* in full.

### **Just and equitable winding up**

An application for a just and equitable winding up may be made by the company, a director of the company, or a member of the company. The Minister for External Relations and Financial Services, the Minister for Treasury and Resources, and the Jersey Financial Services Commission also have jurisdiction to apply in certain circumstances.

The Jersey court has been heavily influenced by the English courts as to what constitutes just and equitable grounds. These include where a company's main objective has been achieved or is impossible of

achievement; where a full investigation is required or the company was formed for the purposes of fraud; or where there is a deadlock due to disagreements between shareholders.

An application for a just and equitable winding up can be commenced without notice. This has the advantage of enabling a liquidator to be appointed urgently in order to protect the interests of the investors.

In a just and equitable winding up the choice of liquidator is made by the Court and will be determined according to the expertise and experience of the proposed liquidator. If the company has assets overseas, it may be important to have an insolvency official, such as a Court appointed liquidator, easily recognised in the overseas jurisdiction.

## Contacts

A full list of contacts specialising in restructuring and insolvency can be found [here](#).