GUIDE

Demergers of Jersey companies

Last reviewed: February 2023

Introduction

The Companies (Demerger) (Jersey) Regulations 2018 (the Regulations) came into force on 1 September 2018. They provide a statutory framework for a Jersey company to demerge into two or more Jersey companies.

In essence, a demerger involves the approval of, and execution by, a Jersey company of a demerger instrument under which the assets and liabilities of the demerging company will be allocated between the companies which result from the demerger.

The demerging company may continue as one of the demerged companies (in which case the demerging company is a survivor company). Alternatively, the demerging company may cease to be incorporated as a consequence of the demerger. In such case, all of the demerged companies will be newly incorporated companies.

Why demerge?

There are a number of possible reasons why a company may wish to demerge such as:

- the company may wish to sell assets. The assets could be transferred to a new company so that the new company is sold instead of the assets themselves;
- the company may have diverse business lines. It may want to demerge so that business activities can be structured on a standalone basis or it may consider that it will have more success raising equity if the investors can invest directly in separate business lines; and
- a demerger may, subject to court sanction, be used to restructure an insolvent company.

Who can demerge?

Any Jersey company can demerge provided it is not a cell or a cell company and does not have unlimited shares or guarantor members. The Regulations also provide that certain Jersey regulated and/or Jersey tax paying companies are ineligible to demerge and Jersey non tax paying companies are ineligible if a Jersey resident owns (directly or indirectly) more than 2% of their ordinary share capital.

In addition, a company cannot demerge if it is under investigation in relation to an offence or if it has been charged with an offence and against which there is a criminal prosecution pending.

A demerging company must make a declaration to the Comptroller of Revenue that it is eligible to demerge.

Demerger instrument

A Jersey company that is proposing to demerge must execute a demerger instrument which sets out the terms and means of effecting the demerger.

The demerger instrument must contain certain information including:

- whether the demerging company will be a survivor company (i.e. whether it will continue after the demerger) and the names and addresses of the persons who are the directors of the demerging company;
- details of any arrangements necessary to complete the demerger;
- details of any payment proposed to be made to a shareholder or director of the demerging company;
- if the securities of the demerging company are to be converted into securities of a demerged company, the manner in which that conversion is to be undertaken;
- if the holders of securities in the demerging company are not to receive securities in a demerged company, the kind of payment that such holders are to receive and the manner and timing of such payment;
- in relation to any new company which will be the result of the demerger, the proposed memorandum and articles of association of the demerged company and the name and address of any person who will become a director of the demerged company;
- if a demerging company is to be a survivor company, whether any amendments to the memorandum and articles of the demerging company are proposed and whether it is proposed that any person will become, or cease to be, a director of the survivor company; and
- a demerger instrument must identify the undertaking, property, rights and liabilities of the demerging company and must state, in respect of each demerged company, which part of the undertaking, property, rights and liabilities of the demerging company is to become the undertaking, property, rights and liabilities of each demerged company. It should be noted, however, that a liability which is attached to property of a demerging company cannot be separated from that property.

Director resolutions and certificates

A demerger instrument has to be approved by the shareholders (see Special resolution below). Before notice is given of a shareholders' meeting to approve the demerger instrument, the directors of the demerging company must pass a resolution that, in the opinion of the directors voting for the resolution, the demerger is in the best interests of the demerging company.

As a protection for creditors, the Regulations envisage that the directors will either sign a solvency statement that the demerging company is and will remain able to pay its debts as they fall due or (if the directors are unable to sign a solvency statement) the directors must otherwise seek the permission of the court to the demerger.

The directors' resolution must state that the directors voting for the resolution are satisfied on reasonable grounds that they can properly make a solvency statement in respect of the demerging company or that they are satisfied on reasonable grounds that there is a reasonable prospect of obtaining the permission of the court for the demerger. In addition, the directors must sign a certificate containing a solvency statement or a court permission statement.

In addition, in a solvent demerger, each person who will become a director of a demerged company must also sign a solvency statement to the effect that the demerged company is in a position to carry on business and discharge its liabilities as they fall due for the 12 months immediately following the demerger along with the grounds for their opinion. If none of such persons are directors of the demerging company, then the solvency statement must also be signed by a director of the demerging company who voted in favour of the demerger.

Special resolution

The directors of the demerging company must submit the demerger instrument for approval by a special resolution of the shareholders of that demerging company and, where there is more than one class of shareholders, for approval by a special resolution of a separate meeting of each class.

The notice convening each meeting must be accompanied by certain documents and information including:

- a copy or summary of the demerger instrument;
- a copy or summary of the proposed memorandum and articles of the demerged company;

- a copy of the signed certificate containing either the solvency statement or court permission statement;
- a statement of the material interests of the directors of the demerging and demerged companies; and
- sufficient information to alert shareholders to their right to apply to court to object to the demerger.

A demerger is approved when all the special resolutions that are required have been passed.

Objection by a shareholder

A shareholder of a demerging company may object to the demerger on the basis that the demerger is unfairly prejudicial to the interests of the shareholder. Such a shareholder may:

- within 21 days after the date on which the demerger is approved, serve notice on the demerging company of the shareholder's objection to the demerger; and
- within 21 days after the date on which the shareholder of the demerging company served such notice of objection, apply to the court for an order on the ground that the demerger would unfairly prejudice the interests of the shareholder.

If the court is satisfied that an application is well founded, it may make such order as it thinks fit for giving relief. The court order may, for example, provide for the purchase of the shareholder's shares by other shareholders or by the demerging company.

Notice to creditors

The demerging company must send written notice to each of its creditors known to the directors to have a claim against the demerging company exceeding £5,000.

The notice has to be given within the period beginning with the date on which the meeting of the shareholders is called to pass the special resolution to approve the demerger and ending 21 days after all the special resolutions required to approve the demerger have been passed.

The notice must contain information prescribed by the Regulations. In particular, if the directors are not providing a solvency statement, the notice must state (amongst other things) that the directors of the demerging company have applied or will apply to court for permission to demerge.

In contrast, if the directors are providing a solvency statement, the notice must state (amongst other things) that any creditor may (a) object to the demerger and apply to court for an order restraining the demerger or modifying the demerger instrument or (b) require the demerging company to notify the creditor if any other creditor makes such an application to court.

The demerging company must also publish the contents of the notice once in a newspaper circulating in Jersey or in any other approved manner permitted by the Regulations.

Court application in insolvency

If the directors of the demerging company are unable to provide a solvency statement in accordance with the Regulations, then the demerger cannot be completed unless an order of the court has been obtained permitting the demerger on the ground that the demerger would not be unfairly prejudicial to the interests of any creditor or shareholder of the demerging company.

Therefore, where the demerging company is insolvent, the court protects the interests of both creditors and shareholders.

Objections by creditor in solvent demergers

A creditor of a demerging company who has a claim against the demerging company exceeding £5,000 and who objects to the demerger may:

- within 21 days after the date of the publication of the general notice to creditors, serve notice of the creditor's objection to the demerging company; and
- within 21 days after the date on which the notice of the creditor's objection was given to the demerging company, if the creditor's claim against the demerging company has not been discharged, apply to court for an order restraining the demerger or modifying the demerger instrument and serve a copy of the application on the demerging company.

If the court is satisfied that the demerger would unfairly prejudice the interests of the applicant, or of any other creditor of the demerging company, the court may make such order as it thinks fit in relation to the demerger, including an order:

- restraining the demerger; or
- modifying the demerger instrument in such manner as may be specified in the order.

If the effect of the modification will be unacceptable to the shareholders of the demerging company, the demerger instrument may be revoked by the demerging company.

Application to registrar to complete a demerger

Unless all shareholders and creditors with claims exceeding £5,000 otherwise agree, an application to the Jersey registrar of companies to complete the demerger can only be made once any applicable court involvement has been resolved or (as applicable) any period for the making of objections has expired. The application has to be accompanied by certain documentation including a further directors' certificate signed by those directors who provided the original demerger certificate stating that (i) the director and the demerging company have complied with the Regulations in respect of the demerger and (ii) (if the original demerger certificate contained a solvency statement) in the director's opinion there has been no material change to the position stated in the solvency statement.

If the registrar is satisfied with the application, the registrar will then register notices as to the demerger and the completion date of the demerger. The relevant notices are as follows:

- if the demerging company is not to be a survivor company, a notice stating that the company has ceased to be incorporated;
- if the demerging company is to be a survivor company, a notice which states that the company has demerged and has been continued as a survivor company; and
- if a demerged company is a new company, a notice which states that the new company is the result of a completed demerger (and the registrar shall also register the company as a newly incorporated company).

Effect of a demerger

Under the Regulations, on the completion date of a demerger:

- if the demerging company is a survivor company, it continues as a demerged company together with any demerged companies that are new companies; or
- if the demerging company is not a survivor company, it ceases to be incorporated as a separate company and continues as two or more demerged companies that are new companies.

The Regulations further provide that when a demerger is completed:

- all property and rights to which the demerging company was entitled immediately before the demerger was completed become the property and rights of the demerged companies in the parts stated in the demerger instrument or otherwise jointly in common in equal parts;
- subject to an order of the court, the demerged companies become jointly and severally subject to all financial penalties (such as criminal liabilities) which the demerging company was subject to immediately before the demerger was completed;
- the demerged companies become subject to all civil liabilities and all contracts, debts and other obligations which the demerging company was subject to immediately before the demerger was completed in the parts stated in the demerger instrument or otherwise jointly and severally; and
- subject to an order of the court, all actions and other proceedings which, immediately before the demerger was completed, were pending by or against the demerging company may be continued by or against all or any of the demerged companies.

It should be noted, however, that a licence held by a demerging company will not be transferred to a demerged company on completion of the demerger unless the permission of the authority that granted the licence has been obtained. If a demerging company carries out a regulated business activity, it will be necessary to obtain the permission of the issuing authority for the licence to be transferred to a demerged company or a new licence will need to be applied for.

Employees and retirement schemes

While the Regulations contain provisions relating to employees and retirement schemes, the Regulations do not presently permit a company with Jersey employees to demerge.

It is understood that that the intention is for the ambit of the Regulations to be extended in due course and so these provisions will be of greater relevance in the future.

Alternatives to demergers

A re-arrangement of a company's affairs can already be achieved under Jersey law.

It would be possible, for example, to establish a newly incorporated company and to arrange for the transfer of assets and liabilities to the newly incorporated company. The potential disadvantage of this method is a need to have a novation agreement in place with all relevant creditors to transfer the relevant liabilities. The consent of each relevant creditor would be needed in this situation.

It would also be possible to undertake a scheme of arrangement under the Companies (Jersey) Law 1991 (the Companies Law). Such a scheme is sanctioned by the court. One aspect which may frustrate the implementation of a scheme is the need to have meetings of shareholders and creditors approving the scheme. There is a relatively high consent threshold under the Companies Law. A majority in number representing 3/4ths in value of the creditors (or a class of creditors) or (as applicable) 3/4ths of the voting rights of the shareholders (or class of shareholders) present and voting (either in person or by proxy) at the relevant meeting is needed to approve the scheme.

In contrast, the Regulations provide a simplified and more certain framework for the demerger of Jersey companies.

Conclusion

The Regulations make the process of demerging companies simpler and avoid the need for more complex and expensive reorganisations or schemes of arrangement. The Regulations enhance Jersey's already flexible and straightforward company law regime.

Contact(s):

A full list of contacts specialising in 'Demergers of Jersey companies' can be found here.