GUIDE

Liquidating an insolvent Jersey company

Last reviewed: February 2023

Contents

The two primary procedures that are used to liquidate an insolvent Jersey company are *désastre* proceedings under the Bankruptcy (*Désastre*) (Jersey) Law 1990 (the **Bankruptcy Law**) and a creditors' winding up under the Companies (Jersey) Law 1991 (the **Companies Law**). This guide examines the key aspects of each procedure and related matters.

The Limited Liability Companies (Jersey) Law 2018 and the Limited Liability Companies (Winding Up and Dissolution) (Jersey) Regulations 2022 deal with the liquidation of insolvent limited liability companies (**LLCs**). This regulatory framework closely resembles the regime applicable to Jersey companies. As such, what is said in this guide regarding companies applies equally to LLCs and, therefore, any references to a company should be construed as including a reference to an LLC. Where necessary, additional specific commentary for LLCs has been added in brackets, but the absence of specific commentary should not be construed as meaning that what is said in relation to companies is limited to companies only.

When is a company insolvent?

For the purposes of each of the Bankruptcy Law and the Companies Law, a company is **insolvent** if it is unable to pay its debts as they fall due. This test is often referred to as the cash flow solvency test.

Désastre proceedings under the Bankruptcy Law

In practical terms, where a creditor wishes to liquidate a debtor company in order to recover a debt, the creditor may elect to have the company's property declared *en désastre* (in disaster).

Who may make an application?

An application to have the property of a company declared *en désastre* may be made by:

- a creditor owed a liquidated sum (being a claim that is not subject to a reasonably arguable defence, set off or counterclaim) in excess of the prescribed amount (currently £3,000) other than a creditor who has agreed not to make an application or whose only claim against the company is for the repossession of goods;
- the company; or
- the Jersey Financial Services Commission (**JFSC**).

Making an application

Applications are normally made on an *ex parte* basis in open court. Except with the leave of the court, the Viscount (the executive officer of the court) must be given at least 48 hours' notice of the application.

An application is commenced by the applicant filing a *demande* (petition) to which there is attached (except where the applicant is the JFSC) a statement and an affidavit which set out prescribed information.

Where the applicant is the company, the statement must set out the estimated value of the company's assets and liabilities and the affidavit must verify the contents of the statement and state that the company is insolvent but has realisable assets.

Where the applicant is a creditor, the statement must provide details of the debt owed to the creditor and the affidavit must verify the contents of the statement, state that to the best of the creditor's knowledge and belief the company is insolvent but has realisable assets and specify the grounds on which the creditor believes the company is insolvent.

The granting of a declaration that the property of the company is *en désastre* is a discretionary remedy. Therefore, even where all necessary conditions have been satisfied, the court is not obliged to grant a declaration.

Effect of declaration

The principal effects of a declaration that the property of a company is *en désastre* are as follows.

- **Property vests in Viscount:** all property (whether located in Jersey or elsewhere) and powers of the company vest in the Viscount. Any property which is acquired by, or devolved upon, the company after the declaration has been made will also vest in the Viscount if the Viscount gives the company a notice claiming the property within 40 days of the date on which the Viscount became aware of its existence.

- **Moratorium:** there is a general moratorium on any creditor commencing or continuing any action or legal proceedings against the company or its property to recover the creditor's debt without the consent of the Viscount. The sole remedy of a creditor is to prove for the creditor's debt in the désastre proceedings. A secured creditor may take any action to enforce its security that does not involve commencing legal proceedings, except under the Security Interests (Jersey) Law 2012 (the **2012 Security Law**).
- **No transfers or change of status:** any transfer of shares in the company made without the consent of the Viscount, and any alteration in the status of the members of the company, made after the declaration is void. However, a transfer of shares made by a secured creditor pursuant to the 2012 Security Law is not avoided.
- **Termination of creditors' winding up:** if a creditors' winding up had commenced prior to the declaration being made, the creditors' winding up is automatically terminated.

Conduct of *désastre* proceedings

The Viscount is the executive officer of the court, and unlike a liquidator, is not an agent of the company. The Viscount's principal duty is to gather in, preserve and realise the company's assets for the benefit of, and to distribute the proceeds of realisation among, its creditors.

The Viscount is not required by the Bankruptcy Law to hold any meetings of creditors, but will often hold them to discuss the funding of the *désastre* proceedings, the progress of the *désastre* proceedings or available options in relation to the conduct of the *désastre* proceedings.

The company is required by the Bankruptcy Law to assist the Viscount to realise its assets and distribute the proceeds to its creditors. In particular, the company must give a complete and accurate list of the company's assets, creditors and debtors and such other information as the Viscount may require and must transfer or deliver its assets to the Viscount.

The Bankruptcy Law confers wide powers on the Viscount to deal with the company's assets. In particular, the Viscount has power to institute or defend any legal proceedings relating to the company's assets, compromise debts and other claims, carry on the company's business and generally to exercise any powers relating to the company's assets that the company could have exercised.

The Viscount must sell the company's assets by public auction or public tender but may sell assets by private contract where the assets are perishable or were offered for sale by public auction or public tender but were not sold or where the Viscount considers it unnecessary or inadvisable to sell them by public auction or public tender.

Once the company's assets have been realised, the Viscount will supply all of the creditors with a report and accounts and pay a final distribution. The Viscount must then give the registrar of companies a notice stating that the final distribution has been paid. The company will be dissolved once the notice has been registered by the registrar.

Effect of *désastre* on secured creditors

Where the company owns immovable property located in Jersey that is secured in favour of a creditor by a *hypothec* (a form of encumbrance), the immovable property will vest in the Viscount subject to the *hypothec*.

Where the company owns intangible movable property located in Jersey (such as shares or a bank account) that is secured in favour of a creditor by a valid security interest under the Security Interests (Jersey) Law 1983 (the **1983 Security Law**), if the security interest was created by means of:

- possession of certificates of title or control, the property will vest in the Viscount subject to the security interest; or
- assignment of title, the property does not vest in the Viscount, and the creditor may deal with the property as if no declaration had been made.

Where security has been taken under the 1983 Security Law by way of assignment so that the relevant intangible movable property does not vest in the Viscount, the Viscount may apply to the court for an order vesting the property in the Viscount and directing that it be sold. The Viscount must account to the secured creditor for the sale proceeds after deducting the costs and expenses of sale.

Where security is taken under the 2012 Security Law, the secured party may still enforce its security interest despite the property of the company being declared *en désastre* (and irrespective of whether the secured assets have vested in the Viscount).

Where the company owns property located outside of Jersey that is secured in favour of a creditor by a valid security interest, the rights of the secured party will be determined by the law which governs the security interest. The Viscount will have such rights in relation to the property as the company had.

Potential liabilities of a creditor

If the company was not insolvent at the time the declaration was made, the company may claim damages against the creditor that made the application for any loss suffered as a result of the declaration unless the creditor acted reasonably and in good faith in making the application.

In addition, the court may (and in practice generally does) require a creditor making an application to indemnify the Viscount against the costs of carrying out the *désastre* proceedings.

Creditors' winding up under the Companies Law

A creditors' winding up may be initiated either by the shareholders of the insolvent company (voluntary liquidation) or, since March 2022, by a creditor (involuntary liquidation).

Voluntary Liquidation - Procedure

- First meeting of members: to commence the procedure, the company must hold a meeting of members at which the members pass a special resolution to wind up the company by way of a creditors' winding up and nominate a person to be appointed as liquidator.

  Under the Companies Law, a special resolution is a resolution that is required to be passed by a majority of two thirds (or such higher majority or unanimity as may be specified in the company's articles of association) of members who (being entitled to do so) vote at a meeting of the company of which not less than 14 days' notice has been duly given.

  The creditors' winding up commences at the time the special resolution is passed. Within 14 days of the special resolution being passed, the company must publish a notice in the Jersey Gazette advising that the special resolution has been passed.

  A creditors' winding up may also result from the conversion of a summary (or solvent) winding up if, during the course of the summary winding up, it becomes apparent that the company cannot pay its debts within six months of the commencement of the summary winding up, or if they fall due after that date, as they fall due.
- First meeting of creditors: a meeting of creditors must be convened, to take place in Jersey on the same day as, and immediately after, the meeting of members. The company must notify its creditors of the meeting by giving them at least 14 days' notice by post and publishing an advertisement in the Jersey Gazette at least 10 days prior to the meeting. The following actions will take place at the first meeting of creditors.
  - Statement of affairs: the directors must present to the meeting a statement of affairs of the company which must be verified by an affidavit sworn by some or all of the directors.
  - Liquidator: the person nominated by the creditors, or if no person is nominated by the creditors, the person nominated by the members, is appointed as liquidator with effect from the conclusion of the meeting. If the creditors and members nominate different persons, a director, member or creditor may apply to the court for directions. The liquidator must notify the registrar of companies and the creditors of the liquidator's appointment within 14 days of being appointed.
  - Liquidation committee: the creditors may appoint a liquidation committee consisting of up to five persons. In addition, the company may appoint up to five persons to be members of the liquidation committee, unless the creditors resolve that some or all of such persons shall not be members of the committee, in which case, such persons will not be members unless the court directs otherwise. The Companies Law confers limited powers on the liquidation committee relating to the conduct of the winding up, including power 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.

- Final meetings: once the affairs of the company have been wound up, the liquidator must prepare an account of the winding up which shows how the winding up was conducted and how the company's assets were distributed and present it to a meeting of members and a meeting of creditors. At least 21 days' notice of each meeting must be given by post together with a copy of the liquidator's account.
- Dissolution: within seven days of the date on which the final meetings of members and creditors are held (or, if they are held on separate dates, the date of the later meeting) the liquidator must file with the registrar of companies a return in respect of each meeting and (in the case of a public company) a copy of the liquidator's account. The registrar will register the return and (if applicable) the liquidator's account and the company is deemed to be dissolved three months after the date of registration. (An LLC is dissolved upon the registration of the return by the registrar).

Involuntary Liquidation - Procedure

- Application: To commence the procedure, a creditor must make an application to the 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.

  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, for 21 days after service of the demand, failed to pay the sum or otherwise dispute the debt to the creditor's satisfaction.
- Provisional Liquidator: 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 for the winding up.
- Liquidator: 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. The liquidator must notify the registrar, the Viscount and the directors and creditors of the company (to the extent known to the liquidator) of the liquidator's appointment within 14 days of such appointment.

  A creditor may, within seven days of the meeting of creditors (see bullet point below), 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 JFSC, the Minister for External Relations and Financial Services or any other person.
- Meeting of creditors: Within 7 days of the liquidator's 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.
- Liquidation Committee: the creditors may appoint a liquidation committee consisting of up to five persons. In addition, the company may appoint up to five persons to be members of the liquidation committee, unless the creditors resolve that some or all of such persons shall not be members of the committee, in which case, such persons will not be members unless the court directs otherwise.
- Dissolution: 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.

  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. Within seven days of the date on which the final meetings of members and creditors are held (or, if they are held on separate dates, the date of the later meeting) the liquidator must file with the registrar of companies a return in respect of each meeting and (in the case of a public company) a copy of the liquidator's account. The registrar will register the return and (if applicable) the liquidator's account and the company is deemed to be dissolved three months after the date of registration.

- Termination: 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. The termination does not affect the validity of any actions undertaken during the liquidation.

Effect of commencement of creditors' winding up

The principal effects of the commencement of a creditors' winding up are as follows.

- Cessation of business: the corporate state and capacity of the company continue until it is dissolved, but from the commencement of the winding up, the company must cease to carry on its business except as may be required for its winding up.
- Powers of directors: all of the powers of the directors cease (except to the extent sanctioned by the liquidation committee or, if no liquidation committee has been appointed, the creditors) and such powers are vested in the liquidator.
- Moratorium: no action may be taken or proceeded with against the company except with the leave of the court and subject to such conditions as the court may impose. A secured creditor may take any action to enforce its security that does not involve commencing legal proceedings except under the 2012 Security Law. An eligible creditor may still apply for a declaration that the property of the company is *en désastre*, and if the declaration is granted, the creditors' winding up will automatically terminate.
- No transfers or change of status: a transfer of shares in the company without the consent of the liquidator, and any alteration in the status of the company's members, made after the commencement of the winding up is void. However, a transfer of shares made by a secured creditor pursuant to the 2012 Security Law is not avoided.
- Invoices, letters etc: every invoice, order for goods or services or business letter issued by or on behalf of the company must contain a statement that the company is in liquidation.

Liquidator

Like the Viscount, the liquidator's principal duty is to gather in, preserve and realise the company's assets for the benefit of, and to distribute the proceeds of realisation among, its creditors. The property of the company does not, however, vest in the liquidator and remains vested in the company.

The liquidator may only pay a class of creditors in full or compromise any claim by or against the company with the sanction of the court or the liquidation committee or (if no liquidation committee has been appointed) a meeting of creditors. The liquidator may, without such sanction, exercise any other power of the company as may be required for its winding up.

To be eligible to be appointed as a liquidator, the potential appointee must be the Viscount or be:

- a natural person who is not a director, the secretary or an employee of the company or one of its subsidiaries or holding companies; and
- licensed in the United Kingdom to act as insolvency practitioner or a member of the Institute of Chartered Accountants in England and Wales, the Institute of Chartered Accountants in Scotland, the Association of Chartered Certified Accountants or the Chartered Accountants of Ireland; and
- registered as an approved liquidator and entered on the Register of Approved Liquidators.

An appointment of a person who does not satisfy these criteria is void.

The liquidator is entitled to be paid such remuneration as is agreed between the liquidator and the liquidation committee or (if no liquidation committee has been appointed) the creditors, or failing such agreement, as is approved by the court.

The creditors may, at any time, remove the liquidator and appoint a replacement.

Provable debts

All present, future or contingent debts and liabilities to which the company is subject at the time the property of the company is declared *en désastre* or a creditors' winding up of the company commences, or to which the company becomes subject before payment of the final distribution by reason of any

obligation incurred before the time of the declaration or commencement of the creditors' winding up, are provable in the *désastre* proceedings or creditors' winding up.

Where a debt accrues interest, interest to the date of the declaration or commencement of the creditors' winding up is provable as part of the debt, except in the case of a debt secured by a *hypothec*, security interest or pledge, where interest is provable to the date of payment of the claim and payable out of the proceeds of sale of the secured property to the extent that it is secured and can be satisfied from the proceeds of sale.

Where a debt is contingent or of uncertain value, the creditor must make an estimate of its value.

Distribution of assets

The Viscount or liquidator will apply the proceeds of realisation of the company's assets in the following order of priority:

- in payment of the fees and expenses of the Viscount (normally 10 per cent of the value of all assets realised and 2.5 per cent of the value of all assets distributed) or liquidator;
- where the company is a bank, amounts payable to the Jersey Bank Depositors Compensation Board;
- in payment of up to six months' wages or salary and holiday pay and bonuses of any employee, subject to prescribed maximum amounts;
- in payment of any amounts due in respect of health insurance, social security, income tax, goods and services tax, rent and parish rates;
- in payment of all proved debts on a pari passu basis; and
- if a surplus remains, in payment among the members according to their rights and interests in the company.

Where immovable property located in Jersey is subject to a *hypothec*, the proceeds of sale will be applied (after payment of the fees and expenses of the Viscount or liquidator) in payment of the debt secured by it.

Where intangible movable property located in Jersey is subject to a valid security interest under the 1983 Security Law, the proceeds of sale will be applied in the following order of priority:

- in payment of the costs and expenses of the sale;
- in payment of all debts secured by each security interest created over the property (where more than one security interest has been created, priority is determined according to the order of creation); and
- in payment of the balance to the Viscount or liquidator.

Where intangible movable property located in Jersey is subject to a valid security interest under the 2012 Security Law, the proceeds of appropriation or sale will be applied in the following order of priority (subject to any security interest having priority to the one being enforced):

- in payment of the reasonable costs and expenses or appropriation or sale;
- in payment of the debt owing to the secured party that is exercising its power of enforcement;
- in payment of the debts owing to a person with a subordinate security interest who has registered a financing statement in respect of the property where the registration remained effective immediately before the appropriation of sale (and if more than one, in order of priority determined in accordance with the 2012 Security Law);
- in payment of the debts owing to any other person (other than the grantor) who has given the secured party notice that that person claims an interest in the property and in respect of which the secured party is satisfied that that person has a legally enforceable interest in the collateral (subject to the right of the secured party to pay any surplus into court); and
- in payment of the balance to the Viscount or liquidator.

Liability of members to contribute

Where the property of a company has been declared *en désastre* or the company is subject to a creditors' winding up, each present and past member is liable to contribute to its assets an amount sufficient to pay its liabilities, the expenses of the *désastre* proceedings or creditors' winding up and for the adjustment of the rights of the contributories among themselves. A past member who held limited shares is not liable to contribute to the assets of the company:

- unless it appears to the court that the present members are unable to satisfy the contributions required to be made by them;
- if the member ceased to be a member for 12 months or more before the declaration is made or commencement of the creditors' winding up; or
- in respect of a liability of the company incurred after the member ceased to be a member.

A past or present member who held or holds limited shares is not liable to contribute an amount in excess of the amount (if any) unpaid on the shares in respect of which that member is liable. Other provisions apply in the case of a past or present member who held or holds unlimited shares and past and present guarantor members.

Set off and subordination

Each of the Bankruptcy Law and the Companies Law provides for mandatory set off, on the date on which the property of the company is declared *en désastre* or a creditors' winding up of the company commences, in respect of mutual credits, mutual debts or other mutual dealings between the company and a creditor. This is similar to rule 4.90 of the UK Insolvency Rules 1986.

Under the Bankruptcy (Netting, Contractual Subordination and Non-Petition Provisions) (Jersey) Law 2005 (the Netting Law), a set-off provision or a close-out netting provision (as those terms are defined in the Netting Law) contained in an agreement will be enforceable in accordance with its terms despite the insolvency of any party to the agreement or any other person or any lack of mutuality of obligations.

For more information about the Netting Law, refer to our guide 'Bankruptcy (Netting, Contractual Subordination and Non-Petition Provisions) (Jersey) Law 2005'.

Other potential options

It is worth briefly mentioning some of the other options that are available where a company is in financial distress or insolvent.

Just and equitable winding up

A company may be wound up by the court under the Companies Law on the grounds that it is just and equitable or expedient in the public interest. An application for a just and equitable winding up may only be made by the company, a director or member, the JFSC, the Minister for External Relations and Financial Services or the Minister for Treasury and Resources. An application for an expedient winding up in the public interest may only be made by the Minister for External Relations and Financial Services, the Minister for Treasury and Resources or the JFSC.

Although this option is of no assistance to a creditor, it may, for example, be of assistance to the directors of a company where a company has no realisable assets, since in such circumstances, it is not possible to institute *désastre* proceedings.

Compromise or arrangement

While not an insolvency procedure, another possible option for a company that is insolvent or in financial distress is a compromise or arrangement between the company and its creditors (or a class of them) under the Companies Law.

A compromise or arrangement, which is:

- approved at a meeting of creditors (or a class of creditors) by a majority in number who represent at least three quarters in value of the creditors (or class of creditors); and
- sanctioned by the court,

will be binding on all of the creditors (or all of the creditors of the relevant class), the company (or if the company is being wound up, the liquidator) and the contributories of the company.

Transactions which may be set aside

For an overview of the type of transactions which may be set aside upon the insolvency of a company, refer to our guide 'Challenging transactions in an insolvency'.

Some key differences with foreign insolvency regimes

The key differences between the Jersey insolvency regimes and foreign insolvency regimes include the following:

- there is no balance sheet test of solvency (ie a Jersey company will not be deemed to be insolvent where its liabilities exceed its assets if it is able to pay its debts as they fall due);
- there are no procedures equivalent to administration or administrative receivership;
- there are no procedures equivalent to US chapter 11 bankruptcy procedures; and
- Jersey law does not provide for the appointment of a receiver (although a Jersey company may create a charge over any of its non-Jersey assets and a receiver may be appointed in respect of them if permitted under the law governing the charge).

Recognition of foreign insolvency officeholders

The EU Regulation on Insolvency Proceedings does not apply to Jersey.

A foreign insolvency officeholder appointed by a foreign court or under foreign law in relation to a Jersey company has no authority to act in Jersey (eg to gather evidence, examine documents and witnesses or to deal with property located in Jersey). Consequently, the foreign insolvency officeholder must apply to the Jersey court to have the foreign insolvency officeholder's appointment and authority to exercise powers in Jersey recognised. This is normally done by a letter of request from the foreign court administering the insolvency.

In the case of courts of a relevant country or territory (currently Australia, Finland, Guernsey, the Isle of Man, the UK and the Republic of Ireland), the Bankruptcy Law confers on the Jersey court the power to assist, to the extent it thinks fit, the courts of the relevant country or territory in all matters relating to the insolvency of a Jersey company.

In the case of courts of a non-relevant country or territory, the Jersey court has inherent jurisdiction to assist the foreign court on the basis of comity where the foreign court would provide assistance on a reciprocal basis.

UK administration

It is possible for a Jersey company in financial difficulty to be placed into administration under the UK Insolvency Act 1986 where its centre of main interests is in the UK or by the Jersey courts issuing a letter of request to the English courts. In some instances, an administration may achieve a better outcome for all stakeholders than *désastre* proceedings or a creditors' winding up.

Where it is necessary to seek the assistance of the English courts, such process will commence by making an application to the Jersey court asking it to issue a letter of request to the English court. The Jersey court will only issue a letter of request if it is satisfied that an administration is in the best interests of the company's creditors.

Contacts

A full list of contacts specialising in corporate law can be found here.