

Landmark changes to Jersey's creditor's winding up regime come into effect

Stephen Alexander and Chazha Hick report on Jersey's recently expanded insolvency regime



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Jersey has recently expanded its insolvency regime by introducing amendments to the Companies (Jersey) Law 1991, with the key change being that creditors of an insolvent Jersey company may now apply to the court to initiate a creditor's winding up (a procedure which, previously, only the debtor company could commence voluntarily).

Other important changes brought about include the granting of power to the Court to appoint a provisional liquidator and the creation of a new Register of Approved Liquidators. The Companies (Amendment No.8)¹ (Jersey) Regulations 2022 (Amendment No.8), which governs these changes, came into force on 1 March 2022. The new mechanisms and tools it has introduced will serve to afford creditors with high levels of protections and flexibility, maintaining the robustness of Jersey's insolvency regime and, in turn, the jurisdiction's position as an attractive location for international business.

When a creditor may apply for a creditor's winding up

Prior to the introduction of the new developments, a creditor's winding up could only be commenced by special resolution of the shareholders at a general meeting of the debtor company. A creditor may now apply to the court for an order to commence a creditors' winding up. There are certain requirements which must be met for a creditor to be able to

do so, namely that the creditor has a claim against the debtor company for not less than a prescribed minimum liquidated sum of JEP 3,000 and the company is unable to pay its debts. 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. In addition, the creditor must either have evidence of the company's insolvency or it must have the consent of the company to make the winding up application. The application made under the new provisions must be by Representation (a local procedural step) accompanied by an affidavit. Further details of the procedure for the new creditor-led winding up mechanism are set out in the Royal Court Practice Direction 22/01 and include the requirement for creditor to place notice of the application in the Jersey Gazette.²

Effect of a creditor's winding up

The effects of a voluntary creditors' winding up commenced by special resolution of the shareholders at a general meeting of the debtor company also apply to the new creditor's winding up instigated by creditors by court order. For instance, from commencement of the winding up process, the company must cease to carry on its business, except in so far as it may be

deemed beneficial and required for its winding up. Furthermore, 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. In order for the status of the companies' members to be changed after commencement of the winding up or a transfer of the company's shares to occur, such activity must have been sanctioned by the liquidator prior to being initiated, otherwise it will be voided. 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.

Appointment of a provisional liquidator

The amendments provide that the court may, at any time after an application for a creditors' winding up instigated by a creditor, appoint a provisional liquidator. The introduction of this new change brings Jersey into line with a number of other jurisdictions, both onshore and offshore, which already have this protective tool in place. The intention of this aspect of Amendment No.8 is to make use of a provisional liquidator in circumstances where, in the interim period between an application being brought and the order being made effecting the winding up, there may be an immediate risk of dissipation of company assets or loss or destruction and, as such, it may be



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necessary to take urgent steps to preserve the debtor company's assets, books and records. The role of a provisional liquidator is therefore a critical way in which Jersey's insolvency regime bolsters the protection afforded to creditors.

The court can appoint a person nominated by the applicant creditor or selected by the court as the liquidator and it has the discretion to request the applicant to furnish such further information as the court requires, as well as to order other parties be convened to the application. The court may also dismiss the application and may also make such further orders as it thinks fit. The steps that must be taken following the appointment of a liquidator under the new provisions include that the liquidator must, within 7 days of their appointment, call a meeting of creditors to take place 21 days after the date of the order (or the next working day). Notice of the meeting must be published in the Jersey Gazette not less than 10 days before the day for which the meeting has been called. At that meeting, the creditors are furnished with such information which is in the possession of the liquidator concerning the company's affairs as they may reasonably require.

Where a liquidator has been appointed by the court, a creditor may, within 7 days of the creditor's meeting, apply to the court for an order appointing some other person as the liquidator. Amendment No.8 also includes a provision 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 debtor company will have a right of action against the applicant to recover damages for any loss sustained as a consequence of the order (unless the applicant had made the application while acting reasonably and in good faith). Such an action must be brought within 12 months from the date of



the application for the creditor's winding up.

At any time during the course of the creditors' winding up which has been ordered by the court, a company may apply to the court for an order terminating the creditors' winding up. A prerequisite for making a successful application is that the court is satisfied that the property of the company is at the time of the application sufficient to pay in full claims filed with the liquidator or those which the liquidator has been advised will be filed within the prescribed time. 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 expansion of the creditor's winding up regime also includes the establishment of a Register of Approved Liquidators, which will be published online by the Viscount. The Viscount will also exercise certain supervisory powers in the context of the new creditor's winding up, including, for example, the ability to investigate a liquidator where there are circumstances which justify an investigation.

Impact

The amendments will serve to ensure that Jersey continues to enjoy its reputation as a leader among the offshore international finance industry by putting into place greater flexibility and protection for creditors. Ultimately, this reassures creditors that a range of options and protective remedies will be available to them in Jersey for the purposes of debt recovery. The amendments demonstrate a continuing intention on the part of the legislature to adapt and improve the existing framework. Specific developments, including the production of a publicly accessible register for liquidators and supervisory functions over liquidators on the part of the Viscount, will also have the effect of increasing confidence and transparency in the insolvency process. ■

Footnotes:

- 1 Available at: <<https://www.jerseylaw.je/laws/enacted/Pages/RO-013-2022.aspx>>.
- 2 Available at: <<https://www.jerseylaw.je/courts/Pages/RC-22-01.aspx>>.



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