

Jersey insolvency: a new beginning for creditors

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After a lengthy consultation period, Jersey's legislature recently passed the Companies (Amendment No.8) (Jersey) Regulations 2022 (**Amendment No.8**) amending the Companies (Jersey) Law 1991 (the **Companies Law**). This amendment has introduced a new insolvency remedy for creditors of Jersey companies with effect from 1 March 2022. This is an important development for the insolvency legislation of Jersey, bolstering the jurisdiction's position as a leading international finance centre.

Jersey insolvency procedures

The main procedures for winding up an insolvent Jersey company are:

- **Désastre:** an insolvent Jersey company may be liquidated by the Royal Court following a désastre application. The application may be made by either: (i) a creditor (owed a liquidated sum of not less than £3,000), (ii) the company itself, or (iii) in some circumstances, the Jersey Financial Services Commission. If the Royal Court declares the property of the Company en désastre, all the assets of the company vest in the Viscount (the chief enforcement officer of the Royal Court). The Viscount will realise the assets and distribute the proceeds to the company's creditors.
- **Creditors' winding up:** prior to 1 March 2022, this process could only be initiated by the shareholders of an insolvent Jersey company. The shareholders must pass a special resolution and then the shareholders and the creditors each nominate a liquidator. If contested, the liquidator nominated by the creditors leads the process. The liquidator can exercise all the powers of the company as may be required to realise the company's assets, pay the company's debts and liquidate the company.

The Companies Law also contains provisions relating to just and equitable winding up and schemes of arrangement which are broadly similar to the equivalent procedures under the UK Insolvency Act 1986 and the UK Companies Act 1985. The just and equitable winding up remedy

has been used more frequently in recent years, with the words "just and equitable" given a flexible interpretation by the Royal Court.

New creditors' winding up

Prior to 1 March 2022, the main recourse in Jersey for the creditor of an insolvent Jersey company was to seek a declaration en désastre. Amendment No.8 creates another option by permitting a creditor to issue an application to the Royal Court seeking an order commencing the winding up of a debtor company and the appointment of their proposed liquidator.

Who can make an application?

A creditor, with a claim of not less than £3,000 against a Jersey company, may make an application to the Court for an order commencing a creditors' winding up.

What is required to make the application?

To make an application for a creditors' winding up, the creditor must establish that:

- a. the debtor company is unable to pay its debts as they fall due
- b. the creditor has evidence of the company's insolvency or
- c. the creditor has the consent of the company

(together the **Requirements**).

A company will be deemed to be "unable to pay its debts" pursuant to (a) above if within 21 days of the creditor serving a statutory demand (in the prescribed form) on the company it fails to either:

- i. pay the debt it owes to the creditor; or
- ii. dispute the debt to the reasonable satisfaction of the creditor

Therefore service of a statutory demand on the company will be the usual practice prior to a creditor applying to court for a creditors' winding up, barring the exceptional circumstances under (b) and (c) above.

A creditor is not permitted to make the application where (i) the debt is for less than £3,000, (ii) the creditor has agreed not to make the application, or (iii) the creditor's claim is one for the repossession of goods.

What is the procedure for a creditors' winding up?

The creditor must give the company (except in exceptional circumstances) 48 hours' notice

before making the application to the Court. Notice of the application should be placed by the creditor in the Jersey Gazette no later than 24 hours before the application is heard by the Court. The application documents must be provided to the Bailiff's Chambers and the Judicial Greffe by no later than 5pm on the Tuesday immediately preceding the Friday upon which the application will be heard by the Royal Court.

The Court will review the application and determine whether to approve (or dismiss) the commencement of the winding up process and the appointment of a liquidator. Where necessary, for example to prevent the dissipation of assets of a distressed debtor, the Court may also appoint a provisional liquidator at any time between the application being made and the making of the winding up order.

At the hearing, if the Court is satisfied that at least one of the Requirements has been fulfilled, it may grant an order for the winding up of the company and for the appointment of a liquidator (or liquidators) with effect from such time as the Court deems fit. The Court will only appoint a liquidator who is a member of the newly created "Register of Approved Liquidators" which will be administered by the Viscount.

The liquidator will publicise their appointment, call a meeting of the creditors of the company and, in advance of the creditors' meeting, the directors of the company must produce a statement as to the affairs of the company. The liquidator may then exercise all powers of the company to realise the company's assets, pay the company's debts and wind up the company.

What is the effect of the commencement of a creditors' winding up?

The corporate state and capacity of the company continues until it is wound up but, from the start of the creditors' winding up, the company must stop carrying on its business (other than as necessary for its winding up). The Court, after considering the application made, may make an order that a creditors' winding up must commence from the date the application is made or such other date as the Court determines.

The property of the company remains vested in the company but the powers of the directors will cease following the appointment of the liquidator (unless the Court or liquidator sanction their continuance). The liquidator stands in the shoes of the directors and acts as agent of the company.

After the commencement of the winding up, no action can be taken or proceeded with against the company except by leave of the Court.

Implications for a secured creditor

A debtor company becoming insolvent, or being subject to winding up proceedings, will not

affect the power of a secured creditor to enforce its security as long as it had a valid and perfected security interest under the Security Interests (Jersey) Law 2012 (the **SIJL**) before the company became insolvent.

Can the application be disputed by the company?

A company may at any time during the proceedings apply to the Court to dismiss the creditors' winding up. However, the Court may refuse such an application if it is satisfied that the company does not have sufficient assets, at the time of the application, to pay in full the claims of creditors.

If it is later established that the company was not insolvent as at the date of the application, the company may apply to Court to recover damages in respect of any loss sustained by the company as a consequence of a winding up order.

Conclusion

The amendments that came into force on 1 March 2022 mark a new beginning for creditors wishing to enforce their claims against a Jersey company. It is of particular benefit that this creditor mechanism follows a form already familiar to many other jurisdictions, such as England and Wales. Jersey will be able to benefit from the experience of UK insolvency practitioners who are specialist and experienced in its operation and will be able to draw on the catalogue of precedents and case law from these jurisdictions which will likely be considered persuasive to the Jersey courts. These amendments will no doubt enhance Jersey's reputation as a leading financial centre, further strengthening its support for creditors.

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