VOISIN LAW

Consultation on Amendments to the Jersey Companies Law and New Administration Regime | 1

A consultation has been launched in relation to changes to the Companies (Jersey) Law 1991 (the "Law") and the introduction of a new administration regime.

Given that the Law was last amended in 2014 and the changes that have occurred over the last decade, the proposed updates to the Law are to be welcomed to ensure that Jersey remains competitive and that the Law reflects how modern companies are operated in practice.

The consultation contains a significant number of potential changes, including the following:

Removal of requirement for public companies to have at least two members

Currently there is a requirement for a public company to have at least two members and removing this requirement will harmonise Jersey law with UK law in this area.

Remove requirement for par value companies to have a specified authorised share capital

Another proposal is to remove the requirement for par value companies to specify a maximum authorised share capital in their memorandum of association. This is a helpful amendment which would bring a par value company in line with a no par value company (whose memorandum of association can state it may issue an unlimited number of shares).

However, it is proposed that shareholders can still set such a limit if desired.

Procedure in relation to the change of name

It is proposed to allow a change of name to be effected by any means provided for by the company's articles of association rather than only by way of special resolution.

This would harmonise Jersey law with UK law in this area and there would still be a requirement for companies to notify the Jersey Company Registry of the change and for the name change only to be effective once the Jersey Company Registry issues an altered certificate of incorporation.

Abolition of 30 member rule

The consultation proposes that there will be an abolition of the 30 member rule so that a private company will no longer be deemed to be a public company simply due to it having more than 30 members.

This change will reduce the administrative burden on companies and reflect that the use of such a 30 member limit may not serve a current day purpose. For example, this will allow companies with more than 30 shareholders to maintain private status and would remove the requirement for such companies to have their accounts audited and for the accounts to be filed.

Company Seals

It is proposed to amend the Law to expressly allow for electronic company seals.

The Electronic Communications (Jersey) Law 2000 already envisages the use of electronic seals and this helpful amendment will clarify the position in relation to company seals.

Contributions of assets to companies other than in respect of an issuance of shares

The consultation also proposes to amend the Law to expressly permit contributions of assets to be made to a company other than in respect of an issuance of shares and permit the transfer of the amount or value of that contribution to either: (i) the share premium account or stated capital account (as appropriate) or (ii) to any other account of the company (other than the nominal capital account).

Although it is already market practice that such capital contributions can be made to a company (structured as a gift or donation with no terms for repayment), currently under the Law a "capital contribution" must first be made into a non-capital account and then transferred into a company's share premium / stated capital account. This amendment would therefore expressly permit such "capital contribution" be made direct to a capital account rather having to be made via a non-capital account.

Rectification of register of members for manifest errors

It is proposed to amend the Law to give the directors an express power to rectify a manifest error in the register of members without a court order with consent from all parties impacted by the change.

In practice, this undoubtedly already takes place, and this helpful amendment would save court time and costs and will avoid having to go to court to correct genuine errors when there is no protection required.

Direct Voting

It is also proposed to amend the Law to clarify that direct voting is permitted, subject to the articles of association. This would expressly allow a member to send in a voting form which is taken directly as the vote rather than the member having to appoint a proxy who then votes on the member's behalf.

Filing of Shareholder Agreements

The consultation proposes to amend the Law to provide that an agreement, such as a shareholders' agreement, will not have to be filed with the Jersey Company Registry under Article 100 of the Law if it contains a term stating that in the event of a conflict between that agreement and the articles of association then the agreement will prevail and the shareholders will amend the articles of association.

This is a very helpful amendment which provides clarity and aligns with market practice.

Ratification of distributions

It is also proposed to amend Article 115 of the Law, to permit directors to ratify a distribution without a court order where a distribution has been made and there has been a technical breach, provided that the company is solvent.

Although the proposed change will not permit directors to change the classification of a payment after the event and convert it into a distribution where there was no such intention at the time of making the payment, it is a helpful proposal as it will reduce cost and the administrative burden associated with court applications.

Migrations

A number of helpful amendments are also proposed in relation to migrations, including:

- Effect of issue of certificate of continuance within Jersey – amending Article 127P of the Law to confirm the current position and expressly provide that, on a continuance of a foreign body corporate into Jersey, the resultant Jersey company is the same body corporate as the foreign entity.
- Effect of continuance overseas – amending Article 127V of the Law to confirm the current position and expressly clarify that a company which has continued is not treated as having been liquidated / dissolved and that legal personality continues.
- Notice to creditors of application to Commission for authorization to seek continuance overseas – to include a de minimis threshold of £10,000 so that notices to creditors are not required for creditors with claims under this amount. This would mirror the position taken in relation to mergers and would avoid the administrative burden of having to send out notices to all creditors, even ones with de minimis claims.

Removal of requirement for a solvency statement when buying back/redeeming fully paid up shares for nil consideration

Helpfully, it is proposed to remove the requirement for a solvency statement when redeeming shares for nil consideration.

The same is also proposed in relation to share buyback for nil consideration and to also remove the need for shareholder resolutions approving the buyback and buyback contract when buying back shares for nil consideration.

It is also suggested that directors be permitted to ratify a redemption or repurchase of shares where there was a requirement for a solvency statement and the directors failed to do so at the relevant time, which would be similar to the proposal in relation to the rectification for distributions as outlined above.

Death of a sole director

The consultation also proposes to amend Article 73 of the Law to provide that in the event of the death of a sole member and director and in the absence of any provision in the articles of association to cover the situation, the deceased's executor or personal representative shall have the power to appoint a new director.

This amendment is to prevent the situation where the death of a sole member and director results in there being no one able to appoint a director, so resulting in the need to make a Court application.

Removal of headcount test for members' schemes of arrangement

It is also proposed to abolish the headcount test for members' schemes of arrangement.

The current test might have the potential to result in the blocking of a scheme even where the holders of 75% of the voting rights of scheme shareholders have voted in favour. Indeed, in 2019 the Jersey court noted in relation to the headcount test "that the sooner this provision is given some attention by the legislature, the better" and this is viewed as a welcome change.

Summary winding up

The consultation also proposes to amend the Law in relation to summary winding up to remove references to the 6-month period, for example in relation to passing of the solvency statement.

This is a helpful amendment as references to the 6 month period is viewed as unnecessary and can cause confusion, particularly given the lack of clear consequences in the event that, where directors have stated that the company will be able to discharge its liabilities within 6 months, unforeseen liabilities subsequently arise and fall due after that period.

Internet voting and electronic register of members

Further proposed amendments include amending the Law to expressly allow telephone and internet voting unless the articles of association provide otherwise and to clarify that electronic register of members are permitted by the Law.

New Administration Regime

In addition to the proposed amendments to the Law, a new administration regime is also being considered as part of the consultation.

Currently there is no Jersey law corporate rescue procedures equivalent to English law administration and for some time there has been a call for a specific process which assists a business to recover when it is essentially viable but facing cash-flow issues which makes it technically insolvent.

In summary, it is proposed that the process should be commenced by way of application to the Royal Court of Jersey and such application should be available to, amongst others, the company, its directors, its shareholders or one or more creditors.

The test that would need to be satisfied for the administration to be granted is that the company is insolvent on a combination of the cash-flow and balance sheet tests and that the administration is reasonably likely to achieve the purpose of either the survival of the company as a going concern or a more advantageous realisation of the company's assets than would be effected on a winding up.

The Court will appoint an administrator from the list of Approved Liquidators maintained by the Viscount. This is to ensure that the proposed administrator is a regulated professional with the necessary expertise.

Once appointed, the administrator will be tasked with reviewing how the business is operating and setting out a plan for restoring the business to solvency, with all the property of the company being taken into his custody or control. Importantly, the administrator will have wide powers and will be able to do what is necessary or expedient for the management of the affairs, business and property of the company.

Once an administration is declared by the court, it is proposed that no legal action will be permitted against the company and the company will not be placed into liquidation without leave, save that the rights of secured creditors are to be fully preserved including as to enforcement.

Conclusion

The proposed amendments to the Law are helpful and reflect recent legal developments both domestically and internationally and will assist in modernising certain provisions of the Law and should provide helpful clarity in areas that have previously been unclear.

The fact that a number of the proposed amendments should also reduce the administrative burden on companies and in some areas lower the likelihood of a court application being required is also very helpful.

With regards to the new administration regime, there have been calls for such a procedure for many years and a modern and effective corporate insolvency regime is key for the financial services industry. Indeed, a procedure which may allow a company to be rescued as a going concern and which may achieve a better result for creditors as whole is to be recommended.

Similar schemes have been implemented in other jurisdictions and have been seen to work well with other remedies and this will be a welcome addition to the procedures currently available.