STATES OF JERSEY

DRAFT COMPANIES (AMENDMENT NO. 8) (JERSEY) REGULATIONS 202- (P.108/2021): COMMENTS

Presented to the States on 3rd February 2022
by the Economic and International Affairs Scrutiny Panel
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STATES GREFFE

COMMENTS

Introduction

P.108/2021 Draft Companies (Amendment No. 8) (Jersey) Regulations 202- relates to the Creditors Winding up Regime and complements existing provisions. If approved as drafted, P.108 would allow a creditor with a debt of £3,000 or more, having first issued a demand for payment which has not been satisfied within 21 days, to apply to the Court for the company to be wound up and for a liquidator to be appointed.

As the law currently stands, a company incorporated in Jersey can be brought to an end in four principal ways:-

- Désastre: Bankruptcy (Désastre) (Jersey) Law 1990 (the 'Bankruptcy Law')
- Summary Winding Up: (Companies (Jersey) Law 1991 Articles 145 – 154A)
- Creditors' Winding Up: (Companies (Jersey) Law 1991 Articles 156 – 186)
- Court Winding Up: (Companies (Jersey) Law 1991 Article 155)

The proposals seek to amend the Companies (Jersey) Law 1991 (the "Companies Law"), by way of Regulations and Order, to permit a creditor to bring a winding up application, and for the appointment of a liquidator or provisional liquidator to be made from a register of private sector insolvency practitioners to be kept and maintained by the Viscount. The process is summarised on page 4 of the Report accompanying the proposition.

Background

The Panel was informed that the formal consultation process, in the shape of a published Consultation Paper on the draft legislation, was undertaken between July – September 2021. However, the Panel understands that the project had been under discussion for a number of years and that, most recently, the Association of Restructuring and Insolvency Experts (ARIES)[1] and the Financial and Commercial Sub-Committee of the Law Society (the Sub-Committee) had come together to seek that Government proceed with reforms. Accordingly, the consultation and draft legislation was developed following discussion with representatives from ARIES and the Sub-Committee.

In relation to the consultation process, responses were received from a number of consultees which included the Viscount's Department, the Jersey Financial Services Commission, Carey Olsen, Law Society of Jersey, Ogier and ARIES. These appeared to show universal support for the underlying principles of the amendment, but certain concerns were expressed as to particular aspects of the proposals.

The concerns expressed by the respondents covered 3 main areas namely:

1. Deemed commencement date of the winding up
2. Statutory demand
3. Provisional liquidator

These are discussed in more detail below.

[1]ARIES is a committee made up of senior lawyers from local law firms which includes Carey Olsen, Mourant, Bedell Cristen, Appleby, ObenLaw, Walkers and Collas Crill together with insolvency practitioners including EY, Grant Thornton and Deloitte.

Deemed commencement date of the winding up

The Proposal, as currently drafted, states that the default position for the commencement of the winding up is deemed to be the date of the application before the court, although the court may set another date as it thinks fit (which could be the date of the court order if the court considers it appropriate). The concern raised following the consultation process was that the winding up should commence from the date of the actual court order and not be retrospective. It was considered that otherwise, there is a 'significant uncertainty as to the validity of routine transactions entered into by a company which will be detrimental to Jersey's reputation as a leading finance centre'. Law firms may have to qualify opinions to address this risk and conduct litigation searches in routine matters to see if there is any pending litigation.

The Panel was advised that there are two main options for the commencement date:

1. The date of the initial application
2. The date that the actual winding up Order is made

Whilst there was support for both options from respondents to the consultation, the proposals take the second option as the default position with, as a result of concerns expressed in the consultation process, a further clause being inserted to permit the court to set another date as it deems fit. The Panel was informed that, although the position varies in other jurisdictions, the position in England and Wales is that a winding up is generally deemed to commence at the date of the initial application, and similarly in Cayman, Singapore and Hong Kong.

Statutory Demand

The Proposal, as currently drafted, states that a creditor should serve a statutory demand on a debtor requiring payment of the relevant debt within 21 days, failing which application will be made to court for a winding up (unless the debt is paid or disputed). This is a means of evidencing the insolvency of the debtor. The concerns raised during the consultation period stated that this will be an event of default/termination in a commercial agreement (even if no application is ultimately brought or the application is unsuccessful); minority creditors will be able to pressure larger value creditors causing considerable 'mischief' and forcing larger creditors to buy them out (in order to ensure that a threatened application is not progressed).

The Panel was informed that a demand process is tried and tested in other jurisdictions (such as in England & Wales, Scotland, BVI, Cayman, Mauritius, Singapore, Australia, New Zealand and Canada); other respondents including the Viscount and ARIES were strongly supportive of the concept, the latter considering it essential to a modern insolvency regime. The Viscount also indicated within her approval that the introduction of a similar concept into the Bankruptcy Law should be considered at some point. The Panel was further informed that, whilst the need to ensure that Jersey continues to have a reputation as a creditor friendly jurisdiction to support commercial work is acknowledged, the introduction of this regime in its totality will underline that concept, and facilitate the process particularly in cross-border situations due in part to the familiarity of the process. Being a creditor friendly jurisdiction does not mean that there should not be a fair process for a debtor. Institutional lenders will be familiar with the concept.

Provisional Liquidator

The Proposal, as currently drafted, states that the court can, at a first hearing (or any time thereafter) appoint a provisional liquidator (with powers to be given by court) where there is a risk of dissipation of assets/misconduct [such as, by way of example, destruction of files, computer records] by delinquent directors, pending the appointment of a liquidator. The concern raised stated that there is no need for this as there are alternatives such as an injunction; small value creditors have the opportunity to cause 'mischief' by threatening such applications.

The Panel was informed that it is correct that there are alternatives including injunctions or reliance on provisions in the Companies Law which permit a liquidator to set aside a transaction in certain circumstances (such as a preference or a transaction at an undervalue) or to take action against a director, both to recover assets. The latter, coming after the event, are obviously not useful if assets have already been placed out of reach or the director has left the jurisdiction – or indeed if documents or computer records have been destroyed. The Panel was also informed that it is not clear how small value creditors are able to cause 'mischief' by threatening such applications for a provisional liquidator, which can only come as part of an application for a winding up as a whole (requiring evidence of insolvency). It is not a standalone application. It can only be made as part of the application for the appointment of a full liquidator to wind up an insolvent company. It is an interim appointment pending a decision on the winding up application essentially to preserve the status quo. It was also informed that any application for a provisional liquidator must be supported by a sworn affidavit setting out the risk of dissipation of assets and/or misconduct with the grounds for such belief (not dissimilar to the requirements to obtain an injunction). The court will consider this and only make the order where it is appropriate to do so.

ARIES submitted that this provision was essential for a modern system and that Jersey was significantly behind comparable jurisdictions (including Cayman, Singapore and Guernsey) with institutional lenders said to expect it to be part of the Jersey regime, and being surprised to learn that it was not so already.

The Panel queried what qualifications the provisional liquidator would need to have and was informed that, in other jurisdictions, these were usually Chartered Accountants or similar and should also be considered fit and proper persons. A Register of Approved Liquidators would be established and be administered by the Viscount with the Practitioners able to renew their registration annually for a fee.

Conclusion

The Panel has been assured that consideration was given to all comments received during the consultation process and, on balance and after making certain amendments in recognition of such concerns, it was considered appropriate to proceed with the proposals as set out in the proposition. For its part, the Panel has received the benefit of presentations at which it sought clarification of the proposals, particularly as regards those areas where consultees had expressed differing opinions. The Panel accepts the explanations then provided and notes the following statement in the Minister's letter to the Panel;

The responses received were carefully considered by officers and certain changes made or decisions crystallised based on those responses, the discussions overall, and further consideration by policy officers of the position, including in other jurisdictions. It was

this combination of factors on which it was considered appropriate to proceed with these proposals.

Where there was a continuing divergence of views, the matter was very carefully considered and the position adopted which was considered would optimise the operation of the process and on the basis of the strong support for the proposals from certain respondents in counter balance to the opposition of others.

The Panel is grateful to the Minister for deferring this proposition from the previous States sitting to allow it to undertake further work and accordingly, supports the proposition.