PROPOSED AMENDMENTS TO THE JERSEY COMPANIES LAW AND THE INTRODUCTION OF A NEW INSOLVENCY (ADMINISTRATION) PROCEDURE

Jersey has remained a leading international finance centre (IFC) for the past 60 years. Political and economic stability, coupled with our strong regulatory and legal framework and renowned forward-thinking, has helped us maintain the edge that sets us apart from other IFCs.

To continue as a world leader in finance with the Jersey company remaining the vehicle of choice for international transactions, probably the most significant proposed amendments to our Companies (Jersey) Law 1991 (the "**Companies Law**") for over a decade have been put forward.

The proposed amendments, primarily technical, are aimed at maintaining the flexibility of our corporate framework and enhancing the ease of doing business in an IFC such as Jersey.

The interaction between our Companies Law and other Jersey legislation will also require consequential amendments to the following connected laws, regulations and orders:

– Bankruptcy (Désastre) (Jersey) Law 1990;

– Financial Services (Disclosure and Provision of Information) (Jersey) Law 2020;

– Companies (Transfer of Shares – Exemptions) (Jersey) Order 2014;

– Companies (Demerger) (Jersey) Regulations 2018; and

– Companies (GAAP) (Jersey) Order 2010.

Proposals have also been put forward regarding introducing an additional insolvency regime for Jersey. This proposed regime (similar to the UK administration and Chapter 11 proceedings in the USA) will assist a company in recovering when it is essentially viable but technically insolvent due to cashflow issues.

PROPOSED AMENDMENTS TO THE COMPANIES LAW

There are a significant number of proposed changes, including the following:

REMOVAL OF THE REQUIREMENT FOR PUBLIC COMPANIES TO HAVE AT LEAST TWO MEMBERS

Currently, under the Companies Law, a public company must, in principle, have at least two members.

Comment: this will harmonise Jersey law with UK law.

REMOVAL OF THE REQUIREMENT FOR A PAR VALUE COMPANY TO HAVE A SPECIFIED AUTHORISED SHARE CAPITAL IN ITS MEMORANDUM OF ASSOCIATION

Comment: removing the statutory requirement for a par value company to specify a maximum authorised share capital in its memorandum of association will 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). Members will, however, be able to set a limit if desired.

CHANGE OF NAME

To allow a change of name to be effected by any method set out in the company's articles of association – a company will still be required to notify the registrar of the name change, and the change will only be effective upon the issue by the registrar of an altered certificate of incorporation.

Comment: currently, a company may only change its name by way of a special resolution.

REMOVAL OF THE 30-MEMBER RULE

A private company will no longer be deemed a public company by having more than 30 members; a public company with more than 30 members can become a private company.

Comment: this will reduce the current administrative burden on companies and reflect that using such a 30-member limit may not serve a current-day purpose. No longer being deemed a public company or becoming a private company will remove the requirement that would otherwise have existed for such companies to have their accounts audited and/or filed. A company may still elect to be a public company.

This proposed amendment is also crucial in relation to the circulation of a "prospectus" by a company. A company is deemed to be a public company if it circulates a prospectus. Following the amendment of the definition of a prospectus in 2021, the status of a company which issued a prospectus under the old definition, but which would not be a prospectus under the new definition is unclear. It is therefore proposed as follows: (i) to apply the new definition to all companies resulting in a company deemed a public company by circulating a prospectus under the old definition will not be treated as a public company had the status of the prospectus been assessed using the new definition; and (ii) if a company is deemed public by virtue of issuing a prospectus under the new definition in respect of securities which are subsequently repaid/redeemed then the company should cease to be deemed public upon the repayment/ redemption.

USE OF ELECTRONIC SEALS

To permit the use of electronic company seals.

Comment: the use of electronic seals is envisaged by the Electronic Communications (Jersey) Law 2000. This amendment will be a modernising provision. Public companies commonly use electronic seals.

ALTERATION OF CAPITAL OF PAR VALUE AND NO-PAR VALUE COMPANIES

To clarify a company may alter its share capital by special resolution in any manner.

Comment: this would negate any suggestion that the list of alterations in our Companies Law is exhaustive.

TRANSFER AND REGISTRATION

To (i) allow shares to be transferred by any means of transfer as set out in the company's articles of association; and (ii) permit no requirement for an instrument of transfer where a company is purchasing its own shares (otherwise than on a stock exchange).

Comment: these amendments will provide flexibility for companies with a high level of share movements and unable to avail of any exemptions. Currently, when a company purchases its own shares, a repurchase contract is required (for off-market purchases), so there should be no requirement for an additional instrument of transfer. In practice, the repurchase contract may be treated as the instrument of transfer. This change will only reflect what has already happened in practice.

RECTIFICATION OF REGISTER OF MEMBERS FOR MANIFEST ERRORS

To provide that directors have the power to rectify a manifest error without a court order subject to obtaining consent from all parties affected by the change.

Comment: this will avoid going to court to correct genuine errors where no protection is required. This will save court time and costs.

SHARE CERTIFICATES

Clarification that the articles of association may validly disapply the requirements to issue share certificates.

Comment: this change will reflect what already occurs in practice and reduce administrative costs.

RELAXATION OF SIGNING REQUIREMENTS FOR SHARE CERTIFICATES

These may be signed (including by e-signature) by any director or the secretary and any other person authorised by the directors subject to the articles of association.

Comment: this proposed amendment addresses practical issues concerning director availability and/or if the director(s) and the secretary are not in the same place.

VARIATION OF CLASS RIGHTS

The articles of association may specify what is or is not to be regarded as a variation of class rights.

Comment: this will promote certainty and freedom for shareholders to regulate their internal affairs.

PROHIBITION ON REDEEMABLE ONLY SHARES

Remove the prohibition on a company only having redeemable shares in issue (subject to a company not being permitted to have no shares in issue at any time).

Comment: this will allow a company only to have redeemable shares in issue if so wished while ensuring that a company will always have a shareholder.

FULLY PAID-UP REQUIREMENT FOR THE REDEMPTION/REPURCHASE OF SHARES

Remove the fully paid-up requirement for the redemption/repurchase of shares, the need for

a solvency statement when redeeming/buying back shares for nil consideration and the need for shareholder resolutions when approving a buyback of shares for nil consideration.

PURCHASE BY A COMPANY OF ITS OWN LIMITED SHARES

To authorise a purchase of shares by ordinary resolution.

Comment: currently, a special resolution is required to sanction a purchase of shares. This new requirement will harmonise Jersey law with UK law.

DEATH OF SOLE DIRECTOR

Without any specific provision in the articles, the deceased's executor or personal representative shall have the power to appoint a new director.

Comment: this proposed amendment aims to remove the necessity of making a court application where the death of a sole member and director results in no one being able to appoint a director.

DISCLOSURE OF DIRECTORS' INTERESTS

To provide that a general notice of a director's interest/connection with a specified body corporate or firm is sufficient disclosure of any transaction or arrangement that may be made with that person after the date of the notice.

In the event of failure to disclose interests, it is also proposed to include an additional ratification procedure allowing disinterested directors entitled to vote to approve the transaction upon the disclosure of all material facts.

Comment: this will not preclude a disclosure of interests but will remove an additional administrative burden. This will also reduce the use of precious court time when it is not absolutely necessary.

PARTICIPATION IN MEETINGS

To expressly allow telephone and internet voting (unless prohibited in the company's articles).

RESOLUTIONS IN WRITING

It is proposed (i) to confirm that written resolution votes are determined on a poll basis (the law is currently silent) and (ii) that non-unanimous written resolutions be expressly permitted (currently, this must be expressly permitted in the company's articles) and that any provision of the articles overriding the Companies Law is void.

Comment: this will increase flexibility for companies and align the position with other jurisdictions.

FILING OF AGREEMENTS

To provide that, an agreement, such as a shareholders' agreement, will not have to be filed with the registrar where a provision therein states that in the event of a conflict between the agreement and the articles, the agreement prevails, and the articles will be amended.

Comment: this will provide clarity and align with market expectations.

SIGNING OF SOLVENCY STATEMENTS

To amend the various provisions under the Companies Law, only those directors who authorised

a distribution, reduction, or purchase and who remain as directors must make the solvency statement.

Comment: currently, the authorising director(s) must make the solvency statement. This is a practical amendment aimed at addressing the issue that may arise where a director who authorised a distribution, reduction or purchase has ceased to be a director before the solvency statement is made.

RATIFICATION OF DISTRIBUTIONS

Where a distribution has been made involving a technical breach and the company is solvent, the directors will be permitted to ratify the distribution without a court order.

Comment: this will reduce the cost and administrative burden associated with court applications. However, this proposed amendment 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.

APPROVAL BY COMPANY AND MEMBERS OF PROPOSAL FOR CONTINUANCE OVERSEAS

To remove the requirement for separate class consent subject to the articles of association.

Comment: this will reduce the administrative burden of obtaining class consents and prevent disproportionate protections for non-voting and minority shareholders. Individual class members will still retain their general objection rights, so minority protection remains.

NOTICE TO CREDITORS OF APPLICATION TO SEEK CONTINUANCE OVERSEAS

- clarification that in the absence of known creditors, the company does not need to send a creditors' notice or public notice;
- notice to creditors is not required where the claim is less than £10,000;
- publication of the creditors' notice of proposed continuance may be done by way of Registry notice; and
- all known creditors with a claim over £10,000 may dispense with the requirement for a creditors' notice/public notice.

SUMMARY WINDING UP

The summary winding up of a company applies to a company that:

(a) has no liabilities;

(b) has liabilities that have already fallen due or that fall due within 6 months after the commencement of the winding up, that it will be able to discharge in full within 6 months of the commencement of the winding up;

(c) has liabilities that will arise more than 6 months after the commencement of the winding up that it will be able to discharge in full as they fall due; or

(d) has a combination of the liabilities mentioned in sub-paragraph (b) and (c)

It is proposed that the reference to the 6-month period in the above-mentioned and other relevant articles of the Companies Law be removed.

Comment: it is believed that references to the 6-month period are unnecessary and can cause confusion, especially in the event where the 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.

CREDITORS' WINDING UP

Commencement and effect – to clarify that where a creditors' winding up order has been made, a creditor with security over a company's assets may enforce his security without the leave of the court and reference to the liquidator.

Appointment and removal of liquidator – to permit creditors to appoint and remove the liquidator by way of written resolution (2/3 threshold), provided that a copy of the resolution is circulated to all creditors once passed.

Directors' powers – upon the appointment of a liquidator provisionally, to permit all the directors' powers to cease except as far as the court or liquidator sanctions their continuance.

MISCELLANEOUS

NOTICES

To simplify and consolidate requirements for notices.

Comment: currently, under the Companies Law, a variety of mechanisms exist where external notices (for example, notices to creditors) are required, depending on the article of the Companies Law under which the notice is given – some notices must be published in a local newspaper and others in the Gazette. It is proposed that all notices must be published in the Gazette.

However, it is essential to note that this will not affect the relevant requirements for notices to be provided to directors, members or known creditors or any filing requirements with the Jersey Financial Services Commission, the Registry, the States of Jersey or Revenue Jersey.

NOTICES TO MEMBERS

To permit notices to members to be given via a company's website.

Comment: this would reflect the position under UK law, albeit that members must be notified of a notice on the website.

PROPOSED ADDITIONAL INSOLVENCY PROCEDURE

Proposals have also been put forward for the introduction of an additional insolvency procedure for Jersey in the form of an administration-type procedure – similar to the UK administration and Chapter 11 proceedings in the USA – aimed at assisting a business to recover when it is essentially viable but faces cashflow issues so technically insolvent.

It is proposed that a court application would commence the process. Such court application may be made by the company, its directors, shareholders or creditors, the Jersey Financial Services Commission and any previously appointed liquidator (including a provisional liquidator).

The court would have discretionary power to make or not to make the administration order, dismiss it, adjourn the hearing, seek further information, convene other parties, make an interim order, or do such other order as it thinks fit.

The court would appoint the administrator using a list of approved liquidators maintained by the Viscount. The administrator's objective will be to set about restoring the business to solvency. The administrator has control or custody of all of the company's property and has the power to do whatever is necessary or expedient for the management of the company's affairs, business and property.

No legal action would be permitted against the company after an administration was declared. The company may only be placed into liquidation on the leave of the court. The rights of creditors will be fully preserved, including as to enforcement.

Comment: this proposed procedure will be familiar to practitioners, investors and intermediaries. Similar procedures have been tried and tested across multiple jurisdictions and have been seen to work well alongside other remedies.

CONCLUSION

Our Companies Law was last amended in 2014. Change has been ever so rapid since then, and this update is timely to ensure that Jersey remains the vehicle of choice for international transactions. This will also consolidate Jersey's position as a leading IFC for over six decades.

Comments and industry feedback on the proposals are currently under review. We will keep you updated on all developments. From experience, initial and final proposals tend to vary only slightly.

WHY CHOOSE LEXSTONE LAWYERS?

Lexstone Lawyers is a commercially minded and pragmatic pure law firm based in Jersey, specialising in investment funds, capital markets, commercial law, banking, real estate, private wealth, financial services, employment, environment and intellectual property of all levels of complexity. We offer a no-nonsense approach, making us an innovative and dependable law firm you and your clients can trust. We understand how clients want to do business; your clients are our clients. We are a member of Lawyers Associated Worldwide (LAW), which gives clients access to leading international advice around the globe.

For further information,
please contact Howard O'Toole

Howard O'Toole
Consultant
T: +44 (0)1534 480 700
E: howard.otoole@lexstone.je