States of Jersey

Economic Development Department

Summary of Responses

Green Paper dated 25 November 2011 proposing amendments to the Companies (Jersey) Law 1991

Date: 5 February 2013

SUMMARY OF CONSULTATION

On 25 November 2011, the Minister published a Green Paper seeking the views of the public over proposed amendments to the Companies (Jersey) Law 1991 ("the Law"). The purpose of the proposed amendments was 'to confirm and strengthen the competitiveness and standing of the Jersey company, a vehicle used both for local business needs and as one of the key tools of the international finance industry'.

The consultation period closed on 17 February 2012. The Green Paper was made available on the internet and in paper form.

The Green Paper identified 34 separate proposals for amendment. Some of the proposals were of a substantive nature and invited detailed response to 46 specific questions. Other proposals were of a relatively minor nature designed to clarify or ensure parity with connected legislation.

To assist in the consultation process and further inform the responses, possible solutions were provided for all the issues outlined. It was made explicit in the introduction to the Green Paper that these solutions were drawn from a wide provenance and did not necessarily represent the views of Government.

OVERVIEW OF CONSULTATION RESPONSES

In all, two individual responses were received by the Economic Development Department, one from Appleby and one from the Association of Investment Companies. One further combined response was also received from five Jersey Law firms (Bedell Cristin, Carey Olsen, Mourant Ozannes, Ogier and Voisin).

No additional responses were received by Jersey Finance Limited.

Comments were also received from the Funds Division of the Jersey Financial Services Commission ("JFSC") and the Deputy Registrar of Companies.

In addition to the public responses, the Economic Development Department commissioned two external reports (one from a practising UK barrister and one from a Professor of Law and Finance at the University of Oxford).

The responses and reports are analysed below. Given the number of proposed amendments and for ease of exposition, the text of the Green Paper is reproduced in small type.

PROPOSED AMENDMENTS AND RESPONSES

1. Registrar's approval for the circulation of prospectus (Articles 1 and 29) (Article 5 of the Companies (General Provisions) (Jersey) Order 2002)

Summary of Issue

A prospectus, being an invitation to acquire or apply for securities, is defined under Article 1 of the Law.

Where a prospectus is circulated to more than 50 people, the Registrar's consent is required regardless of the type or nature of investors to whom it is circulated (Article 5 of the Companies (General Provisions) (Jersey) Order 2002 made pursuant to Article 29(1)).

There are occasions where company securities are offered only to sophisticated or institutional investors and where the transactions have to be completed in very short timescales. Ensuring the Registrar's prior approval to the prospectus, or 'term sheet', puts considerable pressure on the Registrar.

Many jurisdictions provide specific exemptions from prospectus approval and/or content requirements where circulation is limited to, say, institutional or high net worth investors or where there is a large minimum value investment requirement.

By way of example, for the UK, section 85 of the Financial Services and Markets Act 2000 requires that a prospectus be approved by the 'competent authority of the home State' which, for the UK, is currently the Financial Services Authority. Section 86 of that Act provides for specific exemptions e.g. where the offer is made only to qualified investors ('qualified investor' having its own lengthy definition) or to fewer than 150 persons per European Economic Area (EEA) State or where the minimum denomination for the securities on offer is €50,000 or equivalent.

These parameters are the subject of continuing review. With reference to the above example, Directive 2010/73/EU (amending the Prospectus Directive (2003/71/EC)) requires the UK before 1 July 2012 to raise the minimum denomination to €100,000.

Possible Solution

The following possible solutions are proposed:

(i) to amend the definition of prospectus in the Law to allow the Registrar to issue a derogation (e.g. allowing the Registrar to determine whether a particular class of term sheet should or should not be classified as a prospectus);

(ii) to amend the Law to allow for the definition of prospectus to be amended from time to time by Ministerial Order;

(iii) to amend the Companies (General Provisions) (Jersey) Order 2002 so that the Registrar's consent is not required in particular defined contexts; and/or

(iv) to amend the Law to provide for specific exemptions to the need for prior approval (as in section 86 of the UK Financial Services and Markets Act 2000 and Directive 2010/73/EU).

Views are sought on the identified issue and solution and, more particularly, as follows:

Q1 Which (if any) of the identified proposals (or which combination of them) is to be preferred as a solution to the issue?
Q2 What definition of prospectus should be adopted or at what level should any exemption criteria be set?
Q3 Would the definition or applicable criteria for exemption be best set by Regulation or by Ministerial Order (whether on the advice of the Registrar or otherwise)?

Responses

Q1 Which (if any) of the identified proposals (or which combination of them) is to be preferred as a solution to the issue?

The combined response considered that option (ii) would be the simplest option, with the Ministerial Order providing maximum flexibility. Another respondent considered that 'either or both' options (ii) or (iii) would be preferable. The third considered that a combination of (i) and (iv) would provide the most flexibility.

One report thought that option (i) put considerable burden on the Registrar, added uncertainty and could be seen as slow and inefficient from the point of view of the issuer. Option (ii) might also point to uncertainty through allowing the Minister to make changes from time to time and giving the impression of political regulation of (and thereby interference with) the issuing of securities. The author considered option (iii) to provide the most appropriate mechanism for change.

Q2 What definition of prospectus should be adopted or at what level should any exemption criteria be set?

One report considered that the exemption levels should be set with reference to the main target markets in which such prospectuses are likely to be issued.

Another respondent suggested that Jersey followed the Guernsey position where the consent of the Registrar is not required if the securities are to be listed on an IOSCO approved exchange. In this way, investor protection would be achieved through compliance with the exchange requirements and the need for any duplicating approval from the Registrar would be avoided.

One respondent recommended that the exemption levels should mirror those in the UK legislation and EU Directive, exempting prospectuses as follows:

- the total consideration for the securities being offered does not exceed €5,000,000 in a 12 month period (or equivalent amount);
- the offer is made to fewer than 150 persons (raising this from the existing 50 person threshold);
- the offer is made only to 'qualified investors'; or
- the securities being offered have a minimum denomination of €50,000 (or equivalent amount).

The combined response also gave a detailed proposal, considering that the Jersey prospectus rules should not apply where:

- the total consideration for the securities being offered does not exceed €100,000 (or equivalent amount) (in essence, a *de minimis* rule);
- the securities are to be listed on certain nominated exchanges (and, to these ends, it recommends nominating those exchanges currently set out in Schedule 4 of the Collective Investment Funds (Unregulated Funds) Order 2008);

- the offer is made to fewer than 100 persons (raising this from the existing 50 person threshold) and, further, in calculating the number of persons, certain defined persons should be excluded (institutional investors, high net worth individuals and other sophisticated investors);
- there is a minimum subscription of €100,000 (or equivalent amount); or
- the securities being offered have a minimum denomination of €100,000 (or equivalent amount).

The JFSC raised the following points:

- An amendment to the definition of 'prospectus' in Article 1(1) of the Law so that it does not apply to an invitation communicated to fewer than 100 persons (as opposed to the current 50) would create a disparity with Article 3(3) of the Collective Investment Funds (Jersey) Law 1988, which also uses the limit of 50 as part of the definition of an 'offer to the public'.
- There is a difference between merely doing away with the requirement for the registrar's consent to the circulation of a prospectus and exempting certain offers from all (or some) of the prospectus rules altogether. If the latter approach is adopted, this will need to be considered in the light of the Collective Investment Funds (Certified Funds – Prospectuses) (Jersey) Order 2012 ("the CFPO") and the Jersey Listed Fund Guide, which requires that an offer document complies with the requirements set out in the Schedule to the CFPO.

The combined response further proposed that the exclusion for director and employee share options schemes, currently present in Article 3(2)(c) of the Companies (General Provisions) (Jersey) Order 2002, be moved from the Order and into the definition in the Companies Law itself.

Q3 Would the definition or applicable criteria for exemption be best set by Regulation or by Ministerial Order (whether on the advice of the Registrar or otherwise)?

One respondent considered that Ministerial Order would provide maximum flexibility. All other respondents considered the precise form of subordinate legislation to be immaterial or did not comment.

Government Position

The Government considers that it would, as a matter of principle, be appropriate to introduce new exemptions to the rules relating to prospectuses contained in Part 3 of the Companies (General Provisions) (Jersey) Order 2002 so that those rules no longer apply to offers of securities to sophisticated investors who would have little or no need for the information prescribed by those rules.

The Government intends to proceed with option (ii), i.e. to introduce a provision into the Law, which allows for the definition of 'prospectus' to be amended from time to time by Ministerial Order.

Further consultation will take place with the Jersey Financial Services Commission and other interested parties about the precise scope of the proposed exemptions.

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2. Clarification of treatment as a public company (Article 17(2)(c))

Statement of Issue
Article 17(2)(c) was inserted into the Law by the Companies (Amendment No. 4) (Jersey) Regulations 2010 and came into effect on 5 April 2010.

Its purpose was to make it clear that a 'market traded company' (as defined in Article 102(1) of the Law) has to be treated as a public company, if it were not one already.

However, Article 102(1) also defines 'exempt companies' which, as the description implies, are not to be treated as market traded companies. Article 17(2)(c) does not reference 'exempt companies' and thereby fails to make clear that they are also exempt for the purposes of Article 17(2).

In practical terms, the current wording suggests that a private company which is an 'exempt company' would nevertheless have to be treated as a public company and be required to have its accounts audited when it would not otherwise have to do so.

Possible Solution
The clear solution is for Article 17(2)(c) to be amended to exclude any company which is an exempt company as defined by Article 102(1).

Responses

All respondents who responded to this point supported the possible solution.

Government Position

The Government intends to move ahead with amendments that are in line with the possible solution presented.

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3. Calculation of number of members for change of status to public company

(Article 17A)

Summary of Issue

Articles 16 and 17 deal with the change in status of a company from public to private and vice versa, with a key factor being the number of members. Article 17A provides that, in determining whether a company has more than 30 members for the purposes of Articles 16 and 17(2), no account is to be taken of certain members - generally those who are (or have in the past been) directors or employees of the company.

Article 17A does not currently extend to directors and employees of subsidiaries of the company concerned. Corporate groups will often have directors and employees of subsidiaries who are members of their parent company. It is considered that these members, too, should be excluded from the count. The rationale is the same as for the existing provision; namely, that members who are only members by dint of their direct involvement in the business (whether that business is carried on through a single company or a group of companies) should not be counted when assessing the transition requirements for a private company becoming a public company.

Possible Solution

Article 17A could be amended so that, when determining whether a company has more than 30 members for the purposes of Articles 16 and 17(2), no account is to be taken of:

(i) a member who is a director or is in the employment of the company or any subsidiary of the company, or

(ii) a member who, having been a director or in the employment of the company or any subsidiary of the company

(a) was at the same time a member of the company or that subsidiary of the company, and

(b) has continued to be a member of the company or that subsidiary of the company since ceasing to be a director or in the employment of the company or that subsidiary of the company.

Views are sought on the identified issue and solution and, more particularly, as follows:

Q4 Does the identified solution give rise to any potential concerns and, if so, how would they best be dealt with?

Q5 Should consideration be given, in the alternative, to raising (or abolishing) the threshold membership level or, indeed, replacing it with a different test? What implications would arise in each circumstance and what extra considerations and/or protections would be needed?

Responses

Q4 Does the identified solution give rise to any potential concerns and, if so, how would they best be dealt with?

One respondent raised no concerns about the identified solution. Another considered that the threshold membership test should be abolished but, if not, the identified solution should be adopted subject to 'that' in sub-paragraph (ii) being changed where it occurs to 'any' (i.e. to create a wider exemption).

Q5 Should consideration be given, in the alternative, to raising (or abolishing) the threshold membership level or, indeed, replacing it with a different test? What implications would arise in each circumstance and what extra considerations and/or protections would be needed?

One respondent raised no concerns over the existing threshold level but did suggest that consideration be given in certain circumstances to a system of 'aggregating' members for the purposes of counting. This would ensure that if, for some reason, investment in a company needed to be split amongst several nominees or related investment vehicles, the different members which resulted, and which representing in essence a 'combined' holding, would not all count towards the threshold figure.

One report noted that the solution only seemed to work for subsidiary companies and, arguably, the same logic should apply to a member of a company who is a director or employee or a parent or sister company.

The combined response considered that the threshold membership level should be abolished. English law did not provide for the distinction on the basis of number of shareholders and there was no reason of principle or practice for Jersey to retain it.

This view was echoed by the academic commentator who declared himself to be unclear as to what function is served by having a minimum number of members requirement.

The JFSC queried whether, if the 30-member limit for private companies were abolished, a requirement should be introduced that all companies which are Collective Investment Funds should have to be public companies.

Government Position

The Government intends to abolish the 30-member limit for private companies. Its original purpose, which was to limit access to private status, no longer has any relevance in a modern company law regime.

This will require a number of amendments to be made to the Law:

(i) Article 3(3) will need to be repealed;

(ii) Article 16(1) will need to be amended so as to delete the words 'which has not more than 30 members';

(iii) Articles 16(2) to 16(10) will need to be repealed;

(iv) Article 17(2)(a) will need to be repealed;

(v) Articles 17(3) to 17(6) will need to be repealed;

(vi) Article 17(8) will need to be amended so as to delete the words 'the making of an order under paragraph (6) or' and 'the relevant Act of the court' and 'as the case may be';

(vii) Articles 17A and 17C will need to be repealed.

In the light of this proposal, the JFSC's query concerning whether if the 30-member limit for private companies were abolished, a requirement should be introduced that all companies which are Collective Investment Funds should have to be public companies will be considered further.

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4. Date of company status change (Article 17B)

Summary of Issue
Articles 16 and 17 provide a mechanism for companies voluntarily to change their status from private to public and vice versa. Article 17B provides for the Registrar, upon being notified and provided with a copy of the necessary special resolution, to issue an altered certificate of incorporation. However, it remains unclear from Articles 9, 16 and 17 as to precisely when the change of status takes effect i.e. whether it is the date of the special resolution, the date of the notification to the Registrar, the issue date of the altered certificate of incorporation or another date.

Possible Solution
One obvious solution would be to import into Article 17B language similar to that used for changes of name at the end of Article 14(2). This would confirm that the change of status takes effect from the date upon which the altered certificate of incorporation is issued.

Views are sought on the identified issue and solution and, more particularly, as follows:

Q6 Is there a preferred alternative to the date of the change being linked with the issue of the altered certificate and, if so, on what basis is it to be preferred?

Responses

Q6 Is there a preferred alternative to the date of the change being linked with the issue of the altered certificate and, if so, on what basis is it to be preferred?

One respondent considered that the change of status should take place on the date of the special resolution. However, one commentator felt such a solution would be unsatisfactory since nobody outside of the company would know of its altered status.

The combined response agreed with the proposed solution. The academic commentator agreed, noting it to be entirely in keeping with the general principle of the significance of the issuance of the certificate of incorporation with regard to matters of corporate status in company law, which principle is importantly manifested in Article 9(3) and elsewhere as described.

Government Position

The Government intends to move ahead with amendments that are in line with the possible solution presented.

<u>5. Prohibition on commissions and discounts (Article 35(1))</u>

Summary of Issues

There are three issues with Article 35, which bars the issue of shares at a discount and the application of the company's shares or capital in payment of a commission.

First, the term 'discount' when applied to a share is nowhere defined in the Law though is widely understood to mean a discount to a share's nominal value.

Second, there is an unnecessary duplication in that Article 35(1)(a) prohibits discounts for par value companies and Article 35(1)(b) - which applies to both par value and no par value companies - also prohibits discounts (a prohibition which makes no sense for no par value companies).

The third issue is that the term 'capital money' appears only in Article 35(1)(b) and is also nowhere defined in the Law. (It is thought that the term derived originally from section 552 of the Companies Act 2006).

Possible Solutions

On the first point, it could be made express that the discount referred to is a discount to the nominal value of a par value share. For clarity, there could be an express prohibition in Article 35(1)(a) against the application of a company's shares or capital, whether directly or indirectly, in the provision such a discount.

On the second point, the reference to discount in Article 35(1)(b) could be removed.

On the third point, the term 'capital money' could be replaced with a phrase such as 'any sum standing to the credit of its capital accounts'. Alternatively, if a separate definition of 'capital' is adopted (as per amendment 26 below relating to the characterisation of distributions), then the term 'capital money' in Article 35(1)(b) could simply be replaced with the term 'capital'.

Responses

All respondents who commented on these issues, agreed to the possible solutions identified (without distinction between options).

Government Position

As set out below, the Government intends to abolish the prohibition against discounts and commissions contained in Articles 35 and 36 of the Law. Accordingly, this proposed amendment will no longer be necessary.

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6. Removal of vestigial provisions on commissions (Article 36)

Summary of Issue

A common feature of company legislation around the world has been the restriction on a company to use its capital funds to pay commission on the purchase of its own shares. Without such rules, the concern was that the amount actually received by a company from an investor in exchange for its shares could be substantially less than might appear. This, in turn, might give a misleading impression to creditors and to other investors concerning the size of the company's capital base.

Existing provisions in the Law permit the payment of commissions but only if

(i) the company's Articles authorise such payment (Article 36(1)(a)),

(ii) commission payments do not exceed 10% of the allotted share value (or such lesser percentage as is specified in the Articles) (Article 36(1)(b)); and

(iii) for a public company, various disclosure obligations are met (Article 36(1)(c)).

A failure to comply with certain of the disclosure obligations at Article 36(1)(c) is an offence (Article 36(2)).

Given the move towards increased flexibility on rules surrounding distributions and other "maintenance of capital" provisions in the Law (to which see amendments 13, 24, 25 and 26 below, for example) the restrictions in the Law on the payment of commissions are now considered by some to be outdated and unnecessary.

Possible Solution

One proposal is to retain the obligation for any payment of commissions to be expressly authorised in the company's Articles, but to abolish both the 10% cap on the rate of commission and the extra disclosure requirements for a public company (together with the associated offence).

Such changes would bring the Law into line with Guernsey Law i.e. s.294 Companies (Guernsey) Law 2008. At the same time, it might be noted that the UK law (at s.553 of the UK Companies Act 2006) retains the 10% cap on commission payments.

Views are sought on the identified issue and solution and, more particularly, as follows:

Q7 Is there any compelling argument for retaining the 10% cap on commissions?

Q8 Should the rules on payment of commission be relaxed for both private and public companies or should public companies retain both some form of 'cap' and disclosure obligation?

Responses

Q7 Is there any compelling argument for retaining the 10% cap on commissions?

One response recommended the adoption of the position in Guernsey (*viz* abolition of the cap and disclosure obligations, but the retention of express authorisation through a company's Articles).

The remaining responses considered that a 10% cap was unnecessarily restrictive and offered no compelling reason for its retention. The combined response expressed the view that the fiduciary duty to act honestly and in good faith in the best interests of the company provided sufficient protection to existing shareholders.

The combined response further considered that making the payment of commission contingent upon express authorisation in the Articles merely provides a 'trap for the unwary'. Instead, the default position should be a permissive one i.e. a regime which allowed for commissions to be paid, with any exclusions or fetters on this permission having to be expressed in a company's Articles.

One report concluded that the retention of the 10% cap appeared outmoded and, in most cases, would offer no meaningful protection for creditors. However, it recommended caution, expressing concern that to jettison the cap could theoretically permit a 100% commission and effect what would amount to a full return of capital i.e. the issue of shares for no net gain.

The academic report supported the relaxation of commission rules, concluding that to abandon restrictions regarding payments in to capital accounts seemed entirely consistent with the move away from the traditional capital maintenance regime (and, in particular, the lack of significance which now attached to capital accounts when payments are made out to shareholders).

Q8 Should the rules on payment of commission be relaxed for both private and public companies or should public companies retain both some form of 'cap' and disclosure obligation?

One respondent thought that the market and investors would expect some form of limit or disclosure for the purposes of transparency. It proposed the removal of the existing cap, but the retention of a disclosure obligation where the commission exceeded 10% of the capital raised.

The combined response considered that any dilution of the rules on commissions should be taken across public and private companies, not least because directors' duties apply equally across both cases. They noted that disclosure obligations are no longer present in the UK law (at s.553 of the UK Companies Act 2006) and gave anecdotal evidence of clients expressing surprise at such obligations remaining in Jersey law.

Government Position

Upon further reflection the Government considers that there is a compelling case for repealing Articles 35 and 36 of the Law altogether and intends to do so. The prohibitions contained in those Articles no longer fulfil any useful purpose and are unduly restrictive.

Given that a company is free to set the nominal value of its shares, it is doubtful that the prohibition against discounts offers any real protection for creditors.

As for the prohibition against the payment of commissions out of capital, this now appears out of step with modern Jersey company law in which the significance of the maintenance of capital concept has been much diminished. There is no longer a prohibition against the giving of financial assistance and it is now possible for both par value companies and non par value companies to make a distribution to shareholders out of capital (subject to the making of a solvency statement by the directors).

The abolition of the statutory prohibition against the issuing of shares at a discount to their nominal value or the payment of commissions out of capital would not prevent a company from including an equivalent prohibition in its Articles of association, if that were considered appropriate.

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7. Enabling transfers to capital accounts (Article 39 and 39A)

Summary of Issue

The maintenance of share capital is a longstanding principle of company law across many jurisdictions. Nominal share capital of a limited company is traditionally ring-fenced as an ultimate security for creditors and a quid pro quo for the limited liability status enjoyed by the company.

For Jersey companies, this principle is reflected through the provisions (some of which were recently amended) relating to the maintenance of capital accounts.

The Law allows for the creation of par value companies (whose shares are expressed to have a nominal value) and no par value companies (whose shares carry no nominal value).

*For **par value companies,** sums representing the aggregate nominal value for the issued shares are to be retained in a share capital account.*

If shares are allotted and issued by a par value company for a premium above the nominal value, the extra amount and value of the premium raised (over and above the nominal value) is to be retained in a share premium account.

Another account, a capital redemption reserve account, was also utilised in the past to maintain the capital base of a company when shares were repurchased or redeemed.

These three accounts are defined in Article 1 of the Law as the capital accounts for a par value company.

*For **no par value companies** Article 39A requires that a 'stated capital account' be maintained for each class of issued share. As shares in a no par value company do not by definition have a nominal value, there is a requirement that the directors transfer into the stated capital account 'the amount and value' of the issued share capital together with 'every amount which the company, by special resolution, resolves to transfer into the account from a profit and loss account or from any capital or revenue reserve' (Article 39A(3)(c)).*

There is felt to be an imbalance between no par value companies and par value companies, with this ability of a no par value company to transfer monies into the stated capital account not being mirrored by any parallel ability of a par value company to transfer monies into its share premium account.

This imbalance is particularly noticeable in light of the changes brought about by Companies (Amendment No. 9) (Jersey) Law 2008 both to Article 39 and to Part 17 of the Law (being the Part dealing with distributions). These changes confirmed that a distribution can be debited to a par value company's share premium account or a no par value company's stated capital account respectively.

Industry practitioners have identified benefits in balancing the position in relation to the two types of companies and further increasing flexibility by allowing the transfer of funds into a par value company's share premium account.

Possible Solution

This could be achieved by mirroring in Article 39 (for share premium accounts of par value companies) the transfer provisions which currently subsist in Article 39A(3)(c) (for stated capital accounts of no par value companies).

Such a change would ensure a greater degree of symmetry in the operation of a par value company's share premium account and a no par value company's stated capital account, permitting the directors to transfer company funds into identified capital accounts for both par value and no par value companies, from which they can then be distributed accordingly.

Views are sought on the identified issue and solution and, more particularly, as follows:

Q9	***Are there any identifiable downsides or risks presented through the suggested extension to a par value company of what might be considered a 'capitalisation mechanism'?***
Q10	***Given that the Law typically requires shareholder approval (e.g. through a special resolution) only in cases where there is likely to be an impact on shareholders' legal or contractual rights, should the requirement for a special resolution be retained in relation to transfers from profit and loss accounts or from any capital or revenue reserve accounts into stated capital accounts and (dependent on the above) transfers into share premium accounts respectively?***

Responses

Q9 Are there any identifiable downsides or risks presented through the suggested extension to a par value company of what might be considered a 'capitalisation mechanism'?

The responses unanimously supported the suggested extension and were unable to identify any downsides or risks in introducing the further flexibility. The reports thought that the suggested change seemed fair, that, generally speaking, the law should aim for symmetry in such matters and that, given the move away from traditional capital strictures (and the lack of importance attached by the market to a company's legal capital figures) there was little reason to object to the assimilation of treatment across both share types.

Q10 Given that the Law typically requires shareholder approval (e.g. through a special resolution) only in cases where there is likely to be an impact on shareholders' legal or contractual rights, should the requirement for a special resolution be retained in relation to transfers from profit and loss accounts or from any capital or revenue reserve accounts into stated capital accounts and (dependent on the above) transfers into share premium accounts respectively?

The majority of responses considered that the law should not require shareholder approval for transfers into stated capital or share premium accounts. The combined response suggested that such approval requirements as may be considered necessary could be placed into the Articles of association. One respondent recommended that the requirement for a special resolution be retained. Another reserved a general concern about the change reaffirming share premium as 'capital' (which, in light of recent case law, it thought might limit the opportunities for Jersey in providing solutions for structured transactions).

Government Position

The Government consider that there is merit in providing for the symmetry and flexibility which would flow from extending to par value companies the ability currently only enjoyed by no par value companies to move profit funds into capital accounts.

As to the procedure for doing so, it was implicit in the wording of the question that requirements for shareholder approval in such matters were looking to be retained only where shareholders' legal or contractual rights were likely to be impacted.

None of the responses identified how such rights might be adversely affected by the removal of the shareholder sanction in such a case. The one respondent who came out in favour of retaining the special resolution procedure for such transfers offered no justification for that view.

As such, the Government will look to remove the requirements for a special resolution in Article 39A(3)(c) and ensure that the parallel abilities to be introduced for par value companies contain no such procedural requirement.

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8. Branch Registers (Article 49)

Summary of Issue

Under Article 49 of the Law, a public company which transacts business in an overseas jurisdiction is permitted to keep a branch register of members in that jurisdiction.

The Law is unclear as to whether a shareholder who is not resident in the same jurisdiction as the branch register can be placed on that register, whether upon the issue or transfer of shares.

Possible Solution

The Law could be clarified to confirm that it is possible to place non-resident shareholders on a branch register. One suggested method of doing so would be to add the words "including those" after the word "members" in Article 49(1).

Views are sought on the identified issue and solution and, more particularly, as follows:

Q11 Are there any contingent issues which might arise from non-resident shareholders being able to be placed on branch registers?

Responses

Q11 Are there any contingent issues which might arise from non-resident shareholders being able to be placed on branch registers?

None of the respondents considered there were any issues arising from non-resident shareholders being able to be placed on branch registers.

The academic report suggested that, if the primary reason for keeping an overseas branch register was to use it as a reference source for identifying members in a specific jurisdiction, the utility of the branch register could be undermined by confirming the proposed position.

The other report pointed to a possible risk that, in a dispute involving the company and shareholders, the court in the overseas country might seek to exercise extra-territorial jurisdiction over a non-resident member simply by virtue of the name being included on that register.

The JFSC stressed the importance of making it clear that a full register of members (including those on the branch register) must be maintained in Jersey.

Government Position

Having considered the issues raised, none of the respondents considered that there were any contingent issues, but did identify certain practical benefits for companies whose shares are listed on foreign exchanges. Therefore, while the Government notes the points raised in the reports, it intends to proceed with clarifying this point in the manner suggested.

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9. Redemption and repurchase of shares in specie (Articles 55 and 62)

Summary of Issue

The prevailing view is that Articles 55 and 57 permit a redemption or repurchase of shares in cash or 'in specie'. The UK decision often cited as authority for this view is BDG Roof-Bond Limited (in liquidation) v Douglas [2000] 1 BCLC 401.

In this case, a former director and shareholder of a company sold 50% of his shares in that company back to the company itself in exchange for money and certain assets belonging to the company. He then resigned from the company which subsequently went into liquidation.

The liquidator brought an action claiming several breaches of statutory requirements including the former director having been paid both in cash and in property when "payment" under s.159(3) UK Companies Act 1985 Act allowed only monetary consideration to be given for share repurchases. The High Court disagreed with the liquidator and held that "payment on redemption" under s.159(3) was not restricted to a monetary consideration.

Some leading UK practitioners continue to have reservations about this decision and, given this uncertainty, it is proposed to amend the Law to put the matter beyond doubt.

Possible Solution

The following alternatives have been proposed by way of clarificatory wording:

(i) after the word "payment" in Articles 55(9)(a), 55(12)(c), 62(2)(b) and 62(6), the following words are added "(for the avoidance of doubt in cash or otherwise)"; or

(ii) a separate definition of "payment" is included in Parts 11 and 12 (only) of the Law, the effect of which would be to countenance payments in cash or in specie.

Responses

There was unanimous support for the proposal, with all those who expressed a preference, opting for the first of the two possible solutions.

Government Position

Subject to the views of the law draftsman, the Government will look to introduce clarifying wording in line with the first of the possible solutions.

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10. Repurchase of shares represented by depositary receipts (Article 57)

Summary of Issue

Until the mid-1990s, all registered shares were issued in what is now called 'certificated form'. This meant that, in addition to having his or her name notified on the shareholder register, every shareholder also received a paper certificate evidencing the shareholding. Transfers were completed by signing a transfer form and delivering this, together with the paper share certificate, to the buyer.

This paper-based transfer process still applies to non-listed shares i.e. those in private or non-listed companies. However, shares listed on a stock exchange will often be (and in some circumstances have to be) issued in uncertificated form.

Currently, Jersey companies can issue uncertificated shares if they are settled by a settlement system recognised by the Companies (Uncertificated Securities) (Jersey) Order 1999. At the time of writing, the only settlement system which has applied and been granted the necessary recognition is CREST.

In consequence, a Jersey company can only list its shares in uncertificated form directly on the London Stock Exchange, AIM (the Alternative Investment Market, a sub-market of the London Stock Exchange), PLUS and the Channel Islands Stock Exchange (CISX) (these being the only markets where a Jersey company can avail itself of CREST settlement).

Should a Jersey company wish to list its shares on any other market it will have to list depositary receipts instead. In very basic terms, this involves a depositary bank in the relevant jurisdiction taking the shares in the Jersey company and issuing to investors depositary receipts representing those shares which can then be listed and traded in their place.

Article 57 of the Law provides two mechanisms by which a company can repurchase its own shares: an on-market repurchase and an off-market repurchase.

Where depositary receipts representing shares in a Jersey company are listed rather than the shares themselves, it is not clear how the company can follow the repurchasing requirements contained in Article 57.

As the shares are not listed and are not, therefore, being purchased on-market, the on-market repurchase mechanism appears to be ruled out.

Under Article 57(3)(b), the off-market repurchase option bars those shares which are to be repurchased from voting on the initiating special resolution required to sanction or approve the repurchase. However, at the time of the resolution, it may not be possible to identify which shares are to be repurchased. As a result, it is not possible to identify which shareholders are eligible and which are not eligible to vote on the proposed repurchase.

Possible Solution

One proposal is for Article 57 to be amended to provide that, where shares are represented by listed depositary receipts (including depositary shares or interests in shares), the on-market repurchasing mechanism will apply to those shares. A listed company would then be able to enter the market to buy the depositary receipts subject to an obligation then to procure the cancellation of those depositary receipts and the underlying shares.

Such a proposal would not be intended in any way to affect or displace existing mechanisms for a company to repurchase its own shares, including the ability to repurchase shares by way of contingent purchase contract.

Views are sought on the identified issue and solution and, more particularly, as follows:

Q12 Are there likely to be any practical issues or undesirable consequences with assuming this approach?

Responses

Q12 Are there likely to be any practical issues or undesirable consequences with assuming this approach?

No practical issues or undesirable consequences were identified in any of the responses or reports, all of which supported the possible solution set out (whilst reinforcing that any amendment should not affect or displace existing mechanisms).

One of the responses suggested that provision should be made to allow depositary receipt holders to vote directly or appoint their own proxies rather than vote through a proxy nominated by the receipt holder but appointed by the issuer who is the registered shareholder.

Government Position

The Government will look to implement changes in line with the identified solution.

In addition, it intends to consult further about the suggestion of amending the Law so as to make it possible for the holders of depositary receipts to exercise voting and other rights directly as if they were registered shareholders.

11. Authority to undertake on-market share repurchases (Article 57(4)(c))

Summary of Issue

Article 57(4)(c) states that a shareholder resolution authorising a purchase by a company of its own shares on a stock exchange may only confer such authority for a maximum of 18 months.

As of 1 October 2009, the UK has amended its legislation for public companies, replacing the previous 18 month period with a new 5 year period (the maximum permitted by Article 1(4)(a) of Directive 2006/68/EC).

There would not appear to be any reason why the Law should not seek parity with the UK and with Europe on this point.

Possible Solution

Parity could be achieved through a simple amendment to Article 57(4)(c) to refer to a 5 year period rather than an 18 month period.

Responses

There was unanimous support of the proposed extension to five years.

Government Position

The Government will look to implement changes in line with the identified solution.

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12. Surrender of shares (Article 60)

Summary of Issue

Article 60 enables shares to be forfeited or surrendered for failure to pay an amount due on the shares. However, there is no express provision in the Law which permits fully paid up limited shares to be cancelled for no consideration should both the company and the relevant shareholder agree.

If the shares are fully paid up and no money would be paid on a cancellation, such a cancellation of shares is thought unlikely to cause any prejudice to the company or its members.

Possible Solution

Article 60 could be amended to provide that fully paid shares may be surrendered to the company by a member on condition that no cash or other cause, benefit or consideration is received by the member from the company in respect of such surrender.

Views are sought on the identified issue and solution and, more particularly, as follows:

Q13 Would a surrender of shares be likely to have any practical impact on the issued or authorised share capital of a company and, thereby, on the company's creditors. If so, how should this be dealt with (cf Article 55(17) on redemption of shares)?

Q14 Should the Law provide for the accounting treatment occasioned by the surrender and, if so, what should that treatment be?

Responses

Whilst two of the responses supported the proposal, the combined response did not, citing concerns about how such a surrender might work as a means to defeat security interests which had been taken over the shares in question.

Further reservations were also expressed in the responses, questioning what safeguards could be introduced to guarantee there was no tacit connection with other supposedly unrelated transactions for value and how to ensure that the shareholder's decision to surrender was genuine and truly for no consideration.

The combined response, along with others, questioned whether there was any real business need for such provisions.

Q13 Would a surrender of shares be likely to have any practical impact on the issued or authorised share capital of a company and, thereby, on the company's creditors. If so, how should this be dealt with (cf Article 55(17) on redemption of shares)?

Subject to the comments summarised above, the general view was that upon surrender, the issued share capital would need to be reduced accordingly, with a transfer of an amount equal to the reduction from the nominal capital account either to another capital reserve or to the profit and loss account (both options were suggested).

One report did seek to highlight the many issues which would be raised through the introduction of such a provision, issues which largely surrounded the treatment of the 'released' capital. The other report considered that it would be desirable to align the mechanism closely with Article 55, noting that Art 55(17) equivalent provisions may be necessary for no par value companies.

Q14 Should the Law provide for the accounting treatment occasioned by the surrender and, if so, what should that treatment be?

Save for the suggestions surrounding the transfer mechanisms (as above), the general view was that the law should not prescribe the accounting treatment.

Government Position

The prevailing thread running throughout the responses to the consultation is that there is no strong commercial need for this proposed amendment. No respondent has identified a tangible benefit to legal, accounting or commercial practice though many have identified issues, some of them relatively complex, which would need to be addressed and resolved if the amendment were to go ahead as suggested. Further, it is already possible to achieve much the same result by using the power under Article 57 to repurchase the shares in question for nil (or nominal) consideration.

For these reasons, the Government does not intend to take forward this amendment.

13. Abolition of the court sanction for reduction of capital (Articles 61 – 63)

Summary of Issue

As mentioned above, one of the guiding precepts of company law across jurisdictions is the maintenance of capital.

At present, if a Jersey company wishes to reduce its share capital it must adopt a formal procedure and seek the approval of the Royal Court (Part 12 of the Law).

Some industry practitioners consider that the official sanction of the Royal Court is a useful mechanism whether to obtain official approval or to ensure that minority interests are not being compromised.

Others consider the procedure to be unnecessary, cumbersome and outdated, particularly given that other parts of the Law (such as those relating to the sanction for distributions at Article 115) now seek to protect creditors through the use of solvency statements rather than through more traditional 'maintenance of capital' requirements.

In the UK, the necessity of a court procedure has been removed for private companies, largely on the basis that, more often than not, they had only minimal paid up share capital which provided no real protection for creditors in any case.

Possible Solution

It is suggested that reductions of share capital by Jersey private companies should be freed from the requirement for court sanction (although it may be retained as an option). In substitution (or as an alternative) private companies could be allowed to reduce their capital by special resolution supported by a solvency statement of directors. This option would require additional provisions being made to replace requirements which currently form part of a court order under the existing regime.

Views are sought on the identified issue and solution and, more particularly, as follows:

Q15 ***Are there clear benefits in retaining the court procedure as the only (or an optional) route for reduction of capital in private companies e.g. in providing protection for minority shareholders, comfort and certainty to directors, foreign courts, financial authorities etc?***

Q16 ***Were the court procedure to be abolished or rendered discretionary:***

- ***(i)*** ***would the combination of a special resolution and directors' solvency statement stand as a sufficient replacement for the existing court procedure or should further safeguards or conditions be considered?***
- ***(ii)*** ***what additional provisions would be necessary in order to replicate the requirements of existing court orders?***

Q17 ***Should an out-of-court share capital reduction procedure be provided for public companies as well as private companies?***

Q18 ***Would an out-of-court procedure for either type of company make Jersey a more attractive jurisdiction for incorporation or risk having an adverse effect on the reputation of Jersey companies?***

Responses

Q15 Are there clear benefits in retaining the court procedure as the only (or an optional) route for reduction of capital in private companies e.g. in providing protection for minority shareholders, comfort and certainty to directors, foreign courts, financial authorities etc?

One respondent noted that the familiarity of the court procedure in UK equity capital markets, combined with GAAP's recognition of it as an established means of transferring capital to distributable profit, supported its retention. Further support for its retention was the Royal Court's willingness to sanction reductions even where Article 115 distributions would be available.

The combined response agreed that there were clear benefits in retaining the court procedure as an optional route e.g. where there are complicating factors, uncertainty over solvency and for reasons of familiarity and established tax treatment. In other circumstances, however, the ability to reduce capital by way of an out-of-court process could be beneficial for both types of company e.g. for costs reasons.

Q16 Were the court procedure to be abolished or rendered discretionary:

(i) would the combination of a special resolution and directors' solvency statement stand as a sufficient replacement for the existing court procedure or should further safeguards or conditions be considered?

(ii) what additional provisions would be necessary in order to replicate the requirements of existing court orders?

One respondent was concerned as to whether an out-of court procedure might be capable of abuse by members/directors who might force through a reduction with undue haste to the detriment of creditors or minority shareholders. They noted that perhaps one mechanism for the protection of minority shareholders and creditors in out-of court reductions would be to graft sufficient time into the procedure to allow those parties to consider matters, and leave the onus on them to go to court to challenge the reduction should they wish to.

The combined response expressed the view that the combination of a special resolution and directors' solvency statement should stand as sufficient replacement for the existing court procedure. It considered that the provisions necessary in order to replicate the requirements of existing court orders should be modelled on equivalent provisions in the UK Act. It further considered that it would be helpful if the amendments were to clarify that a reserve arising on a reduction of capital that had not been the subject of a court confirmation was to be treated as a realised profit.

Q17 Should an out-of-court share capital reduction procedure be provided for public companies as well as private companies?

Two respondents were not in favour of an out-of-court procedure being available to public companies. One of them expressed the view that this could have an adverse impact on the reputation of Jersey public companies if minority shareholders were disadvantaged in some way and considered that parity with the UK on this matter was to be preferred.

The combined response did not see any reason to distinguish between private and public companies in this respect, and believed that the reduction of capital of public companies by way of an out-of-court procedure may be welcomed by clients in some cases.

Q18 Would an out-of-court procedure for either type of company make Jersey a more attractive jurisdiction for incorporation or risk having an adverse effect on the reputation of Jersey companies?

As noted above, one respondent expressed the view that this could have an adverse impact on the reputation of Jersey public companies if minority shareholders were disadvantaged in some way.

The combined response expressed the view that the amendment would make Jersey more attractive as it would lower the cost of doing business. It did not consider that the amendment would have an adverse effect on the reputation of Jersey companies.

Government Position

The Government intends to proceed with the proposal to introduce an out-of-court procedure for reductions of capital for both private and public companies. It considers that this would achieve consistency with the provisions relating to distributions and repurchases, which already enable a company to effect a return of capital to shareholders without the consent of the court.

Those provisions rely instead on the combination of a special resolution and a solvency statement made by the directors to protect shareholders' and creditors' interests. It is envisaged that the same procedural requirements will apply to an out-of-court reduction of capital.

For the reasons given in the responses the Government considers that companies should continue to be able to seek the sanction of the court for a reduction of capital as an alternative to the out-of-court procedure.

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14. Ratification of breach of director's duty (Article 74(2))

Statement of Issue

Article 74(1) enshrines into the Law the fiduciary and general duties of company directors to their company. These duties are a key constituent of the Jersey corporate governance regime.

Article 74(2) contains a ratification process for any breach of a director's duty which, reflecting the fundamental importance of these duties, requires the obtaining of authorisation from "all of the members of the company".

As currently drafted, this would include members who have no entitlement to vote e.g. holders of deferred shares. (In some cases, Articles of association contain provisions whereby shares are automatically converted to deferred shares if the holder becomes a 'bad leaver', for example; in such an instance, the holder of the deferred share is intended no longer to be involved with the company and holds a 'worthless share'.) Such circumstances might preclude a company from ever being able to use the Article 74(2) procedure. Alternatively, the holder of a deferred (or similar) share might be encouraged to use what amounts to a power of veto as a negotiating tool.

The unanimous consent principle in UK common law, often known as the Duomatic rule (though Re: Duomatic Ltd (1969) was not the first case to formulate it), specifically allows for certain decisions to be made through the unanimous consent of members. In such circumstances, the members concerned are specifically those 'with an entitlement to vote' and would not, therefore, include a member who holds a deferred share. As currently drafted, Article 74(2) appears at odds with this principle.

As to the 'unanimous consent' threshold set for ratification, it is noted by some that s.239 of the UK Companies Act 2006 provides for a parallel ratification process for a director's negligence, default, breach of duty or breach of trust. The default position under this section is for ratification to be carried by ordinary resolution of a company's members (though individual company Articles can raise the threshold e.g. to require special resolution or unanimous consent).

Possible Solution

Article 74(2) could be amended to clarify that an act or omission of the directors can be authorised or ratified by all those members who enjoy an entitlement to vote.

Views are sought on the identified issue and solution and, more particularly, the following associated points:

Q19 ***Is there a case for introducing an express ability in the Articles to adjust the resolution requirements for ratification of director's default? If so, is there an equal a case for adjusting the Law to mirror s.239 of the UK Act in providing for a lower default requirement e.g. ordinary resolution?***

Q20 ***In any event, should specific provision be made in the Law (as in s.239(3) & (4) of the UK Act) to disregard the vote not only of any director whose default is being ratified (should that director also be a member) but also any member connected with him?***

Responses

Q19 Is there a case for introducing an express ability in the Articles to adjust the resolution requirements for ratification of director's default? If so, is there an equal case for adjusting the Law to mirror s239 of the UK Act in providing for a lower default requirement, e.g. ordinary resolution?

The combined response expressed the view that the default position should be that an ordinary resolution of shareholders is required, with similar provisions to the UK Act in relation to the eligibility to vote. It was also thought that a company should be permitted, in its Articles of association, to provide for a higher threshold approval requirement.

Another two respondents agreed that ratification should be by ordinary resolution (or subject to a higher threshold set out in the Articles). One of these respondents suggested that ratification by resolution passed at a meeting rather than a written resolution would give members a better opportunity to express their views.

Another respondent considered that amendment to ensure that only voting shareholders need consent was appropriate but that a single statutory threshold would be appropriate, rather than allowing Articles to vary the threshold.

The JFSC stated that some hedge funds are set up in such a way that only the holders of management shares are entitled to vote. Other shareholders have an economic interest only and would therefore not be involved in any decision to ratify a breach of duty by the directors.

Q 20 In any event, should specific provision be made in the Law (as in s239(3) & (4) of the UK Act) to disregard the vote not only of any director whose default is being ratified (should that director also be a member) but also any member connected with him?

The combined response expressed the view that these provisions should be included, provided that they would not apply in circumstances where unanimous shareholder approval (of all shareholders entitled to vote) was in fact obtained (this being to deal with situations where all of the shareholders are also directors and the action being ratified is an action taken by all such directors). The other respondents also expressed the view that the votes of the defaulting director and any connected member should be disregarded.

Government Position

The Government intends to amend Article 74(2) so that:

(i) an act or omission of a director need only be ratified by those members of the company who are entitled to vote;

(ii) ratification requires an ordinary resolution or such higher majority as may be specified in the company's Articles of association;

(iii) any director whose breach of duty is the subject of the proposed ratification and any members connected with him shall not be eligible to vote on the resolution.

For the purposes of (iii) it is proposed that the definition of 'persons connected with a director' contained in section 252 of the Companies Act 2006 be incorporated into the Law.

It is not intended that the proposed amendments should affect the ability of a company to ratify a breach of duty by a director under the *Duomatic* principle, i.e. by unanimous consent of all shareholders entitled to vote. Appropriate wording will be included in Article 74(2) to clarify this.

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15. Annual general meetings (Article 87)

Summary of Issue

Article 87 requires every company to hold an annual general meeting but Article 87(4) permits this to be dispensed with by agreement between all the members.

In practice, it is often administratively inconvenient to arrange for such an agreement to be entered into following the incorporation of a company.

In reality, very few private companies hold annual general meetings and some will not have a valid dispensing agreement between members. As a result, it may become necessary, following procedural reviews, for ratification meetings to be held.

Possible Solution

Article 87 could be amended so that an agreement to dispense with annual general meetings can, in the case of private companies only, be included in the Articles of association of the company.

Responses

One respondent agreed with the possible solution and also suggested that an amendment to the law could also be made to allow retrospective ratification of a failure to hold annual general meetings where the waiver was not obtained.

Another respondent agreed with the proposed solution but expressed the view that provision would still be needed to allow a member (or a certain minimum percentage of members) to requisition an annual general meeting and noted that Article 87(6) of the Law would no longer be needed if the agreement to dispense with an annual general meeting was included in a company's Articles of association.

The combined response supported the proposed solution and noted that, in addition to the reasons given in the Green Paper, they consider the requirement for any new member, within two months of becoming a member, to have to agree specifically to adhere to an agreement waiving the requirement for an annual general meeting, to be administratively inconvenient.

The academic response noted that under English law the Companies Act 1985 made it possible for private companies to opt out of holding annual general meetings by passing an elective resolution - essentially an ordinary resolution which had a 21 day notice period. However, each member was given the right to compel a company which had made such an election to hold an annual general meeting. However, the UK's Company Law Review led to the abolition of any requirement, even presumptive, for private companies to hold an annual general meeting and consequently only public companies are required to hold an annual general meeting under the current UK Act.

The JFSC indicated that, should the proposal go ahead, it might require a COBO fund that is a private company to hold an AGM, and a Collective Investment Fund to be a public company.

Government Position

Having considered the responses the Government has concluded that it would be beneficial to amend Article 87 so that a private company is no longer required to hold an annual general meeting unless its Articles of association expressly require it to do so.

This will remove the administrative inconvenience highlighted in the responses of having to put in place an agreement between shareholders to dispense with an annual general meeting.

The original proposal envisaged that an agreement to dispense with the annual general meeting could be enshrined in the company's Articles of association. This would have meant that existing private companies wishing to take advantage of the new dispensation (in all likelihood the vast majority) would have had to amend their Articles. Upon further reflection the government has concluded that this would create an unnecessary administrative burden and that it would be more appropriate to require those few private companies that wish to hold an annual general meeting to make specific provision for this in their Articles.

The Government considers that public companies should continue to be required to hold an annual general meeting, unless the meeting is dispensed with by agreement between all the members in accordance with Articles 87(4) – (7).

The Government does not consider that it is necessary to include a specific provision in Article 87 enabling members to requisition an annual general meeting. The Law already makes provision (in Article 89) for members to requisition a meeting of the company.

16. Thresholds for special resolutions (Article 90)

Summary of Issue

Article 90 provides that a resolution is a special resolution when it is passed by a two-thirds majority or, if the company's Articles of association specify, a greater than two-thirds majority. 'Majority' in this context means the majority of persons who (being entitled to do so) vote in person, or by proxy, at a general meeting (or a separate meeting of a class of members of the company, as the case may be).

There is a view amongst some practitioners that these provisions already give a company sufficient flexibility through its Articles of association to specify particular thresholds for particular special resolutions i.e. allowing one threshold to differ from another (subject always to the requirement that the requisite majority be at least two-thirds). However, it is felt that Article 90 would benefit from greater clarity on this point and should be amended to provide expressly that this is the case.

Equally, and despite it being commonly understood that "greater majority" in Article 90(1A) could extend to a requirement for unanimity, some consider that it would be beneficial for this also to be more expressly stated.

There would be identifiable advantages in practice to retaining and confirming this flexibility. Article 11(1) allows a company to alter its memorandum and Articles through special resolution. A company wishing to entrench particular provisions within its Articles of association e.g. to protect or empower a minority shareholder, could specify a suitably increased majority or a requirement of unanimity for those Articles whilst at the same time retaining a lower (though not lower than two-thirds) majority in respect of alterations to the remaining Articles.

Possible Solution

Article 90 could be amended
(i) to clarify that a company may, in its Articles of association, specify different general or specific thresholds in respect of special resolutions (subject always to the requirement that the requisite majority be at least two-thirds) and
(ii) to confirm expressly that the relevant "greater majority" could extend to a requirement for unanimity (whether of all members, all members entitled to vote, or all such entitled members who attend and vote (in person or by proxy) at the relevant meeting, as might be specified in the company's Articles).

Views are sought on the identified issue and solution and, more particularly, as follows:

Q21 Is there any argument for restricting the ability to apply different thresholds in respect of different special resolutions?

Responses

Q21 Is there any argument for restricting the ability to apply different thresholds in respect of different special resolutions?

One respondent expressed the view that the clarifications outlined in the consultation paper should be adopted and states that the application of different thresholds in respect of different special resolutions should be a matter for the shareholders. Another respondent stated that this greater flexibility is likely to be of benefit to the Island.

Another respondent stated that the possible solution makes perfect sense but notes that there is always the risk that entrenching particular provisions may result in undue power to minority shareholders and/or could lead to deadlock where major decisions are concerned. However, the respondent states that if members wish to create such a structure, that is indeed a matter for them and the law should be flexible enough to allow members to do so.

The academic response notes that the substance of the proposed approach would be to achieve consistency with what is possible under UK law.

The combined response supports the possible solution and states that the respondents are not aware of any compelling arguments to restrict such ability.

The JFSC drew attention to the provisions relating to the passing of resolutions contained in its Guide on Open-Ended Unclassified Collective Investment Funds.

Government Position

The Government intends to proceed with the proposed amendment.

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17. Consent to short notice of general meetings (Article 91)

Summary of Issue

Article 91 of the Law requires 14 days written notice to be given in advance of meetings of a company unless a company's Articles expressly state otherwise.

Article 91(3)(b) allows for a shorter notice period if certain requirements are met. Specifically, for meetings other than the annual general meeting, a majority of members who together hold not less than 95% of the total voting rights can agree a 'short notice' meeting to have been duly called.

For private companies, this threshold for consent to a short notice general meeting is higher than the 90% currently required by section 307(6)(a) of the UK Companies Act 2006.

The language of the existing Law also creates some uncertainty over whether the test has two limbs i.e. (i) a majority in number and (ii) holdings of not less than 95%.

Possible Solution

Amendments could be made to Article 91 both to mirror s.307(6)(a) of the UK Act (reducing the threshold to the lower 90% level for private companies) and to make it clear that there is no 'two limb' test.

Views are sought on the identified issue and solution and, more particularly, as follows:

Q22 Is there any basis for reducing the short notice threshold to 90% for Jersey public companies?

Responses

Q22 Is there any basis for reducing the short notice threshold to 90% for Jersey *public* companies?

The combined response supported the possible solution and noted that the respondents did not see any reason of policy or practice to treat public companies in a different way to private companies in respect of such threshold for consent to short notice. Two other respondents agreed. Another respondent agreed and noted that consistency with the UK market, where most of Jersey's public companies raise capital, would appear desirable.

The academic response and another response agreed that the current test should be read as a two limb test. The academic response noted that moving to a single limb test would conflict with the goal of consistency with the UK provision as subsection 307(5) of the UK Act requires both a majority in number and the requisite voting threshold. It also noted that reducing the short notice threshold to 90% for Jersey public companies would no longer be consistent with the UK as the EU Shareholder Rights Directive (2007/36/EC) has required the UK to disapply the short notice provisions as regards companies admitted to trading on regulated markets. It suggested that the merit of changing the requirement for both public and private companies to a 90% threshold would be greater ease of use and suggested that it might be appropriate to use a formula that permits companies to insert a higher threshold if they wish by their Articles, as in the UK.

Government Position

The Government intends to amend Article 91 so as to reduce the threshold for consent to short notice to 90% or such greater majority as may be specified in the company's Articles of association. This amendment will apply to both public and private companies.

Upon further reflection the Government does not consider it desirable or necessary to move to a single limb test.

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18. Corporate representatives (Article 93)

Summary of Issue

It is not clear under Article 93 of the Law whether more than one corporate representative can be appointed by a corporate member of a company to attend at a meeting of the company, a class of shareholders or a meeting of creditors.

Subsection 323(1) of the UK Companies Act 2006 has clarified this point for UK companies, specifically allowing for more than one such representative. Subsection 323(4) further provides for what happens when representatives of the same corporate member vote in the same way and in opposite ways.

Possible Solution

It is proposed that Article 93 be amended to mirror s.323 of the UK Companies Act 2006 and specifically provide for multiple corporate representatives and to determine how concurring and conflicting exercise of their voting powers is to be treated.

Responses

All responses supported the proposed solution.

Government Position

The Government intends to proceed with the proposed amendment.

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19. Resolutions in writing (Article 95)

Summary of Issue

Article 95 permits resolutions (other than a resolution to remove an auditor) to be passed by way of written resolution rather than at a general meeting of the company's members (or class of members).

This Article is considered by some practitioners to allow a company, in its Articles of association, to provide that a written resolution can be passed by fewer than all of the members entitled to vote, adopting whatever threshold is set out in the Articles (subject, in the case of a special resolution, to a two thirds requirement).

It is felt that Article 95 should be amended to confirm this position in more express terms.

Possible Solution

Article 95 could be amended to allow Articles of association to make provision for the thresholds required to pass written resolutions (subject, in the case of a special resolution being passed by way of written resolution, to a requirement that the requisite majority be at least two-thirds of all members entitled to attend and vote on that special resolution).

If the suggested amendments to Article 90 (see above) are taken forward, it is also proposed to provide the same flexibility to specify in the company's Articles different thresholds for different resolutions, including special resolutions, if passed by way of written resolution.

Subject to the views of respondents, there is no current inclination to adopt the very detailed procedural provisions set out at sections 288 – 300 of the UK Companies Act 2006 which also allow private (though not public) companies to pass written resolutions (other than those removing directors and auditors) by majority rather than unanimous voting. Instead, amendments will seek to allow Jersey companies to retain the flexibility in their Articles of association to adopt whatever procedural or other requirements they consider appropriate in connection with such written resolutions. The prohibition on removal of an auditor by written resolution is, however, intended to be retained.

Views are sought on the identified issue and solution and, more particularly, as follows:

Q23 Which, if any, of the more detailed procedures present in the UK Act should be adopted (e.g. circulation requirements) and on what basis?

Q24 Do these proposals otherwise give rise to any potential concerns and, if so, how would they best be dealt with?

Responses

Q23 Which, if any, of the more detailed procedures present in the UK Act should be adopted (e.g. circulation requirements) and on what basis?

The combined response supported the possible solution and considered that the detailed provisions could be left to be dealt with by a company in its Articles of association. This would enable companies to tailor the procedures to their particular requirements. In some cases, those procedures could mirror the UK Act provisions, however in other circumstances companies may prefer other arrangements.

Another respondent agreed that it would be beneficial to allow written resolutions to be passed by a specified majority that is less than unanimous and agreed that the Articles of Association of a company could allow flexibility with regard to procedural requirements.

Another respondent expressed the views that currently a written resolution must be signed by all members who are entitled to vote, that the elaborate provisions contained in sections 288 to 300 of the UK Act are unnecessary and probably too inflexible. They considered that there is much to be said for the Law not being too prescriptive and, on matters of internal administration such as this, leaving it to the company to determine its own procedures in its Articles.

Another respondent suggested that it should be clarified that the written resolution may be proposed by members as well as directors.

The academic response noted that it seems desirable to amend Article 95 to clarify that it is permitted to introduce a lower than unanimity requirement for written resolutions in specific cases.

Q24 Do these proposals otherwise give rise to any potential concerns and, if so, how would they best be dealt with?

The academic response noted that the principal concern of consultees in the UK when proposals on this subject were suggested, was that a meeting offered an opportunity for an exchange of views and written resolutions might deprive a minority shareholder of the opportunity to persuade others. However, it also noted that votes may be cast by proxy and a decision made before a meeting in fact takes place and

that, where there are a small number of members, a minority shareholder will be able to contact other shareholders and offer his opinions. The response noted that the key protection recommended by the Company Law Review for minority shareholders was a requirement that the proposal be sent to all shareholders at the same time and that this is now reflected in the UK Act. It also suggested that it is probably desirable to establish minimum criteria for what could constitute a written resolution and noted that, whilst section 296 of the UK Act mandates some form of written communication, Article 95(1B) of the Law might at present, if construed at its broadest, be thought to permit a company to allow for oral communication as 'other provision'.

Government Position

The Government intends to proceed with the proposed amendment to Article 95 to make it clear that a written resolution may be passed by such majority as is specified in the company's Articles of association (provided that, where the written resolution procedure is being used to pass a special resolution, the requisite majority shall not be less than two-thirds of all shareholders entitled to vote).

In order to prevent abuse of the written resolution procedure the Government considers it desirable to include a requirement (similar to that contained in the UK legislation) that the proposed resolution is circulated to all shareholders at the same time.

For the avoidance of doubt, it is not to be inferred from the fact that the Government has decided to proceed with the proposed amendment that it considers that Article 95 in its present form requires unanimity for a written resolution to be passed. The proposed amendment is intended to eliminate any existing uncertainty on this point and should not affect the validity of any written resolution passed by fewer than all members entitled to vote prior to the coming into force of the proposed amendment.

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20. Delivery of Proxies (Article 96(4))
(Article 40(1) of the Companies (Uncertificated Securities) (Jersey) Order 1999

Summary of Issue

Article 96 confirms that a member of a company can appoint another person as that member's 'proxy' to attend and vote at company meetings. Article 96(4) confirms that a company cannot through its Articles require more than 48 hours notice of such appointments.

Section 327(3), being the equivalent provision in the UK Companies Act 2006, has been amended to provide that in calculating the 48 hour period no account shall be taken of any part of a day that is not a working day. This is to prevent weekends or Bank Holidays rendering invalid the deadline given for proxy notification. Article 96 of the Law contains no such clarification.

The same potential problem arises for companies whose shares are held by CREST. Article 40(1) of the Companies (Uncertificated Securities) (Jersey) Order 1999 contains provisions similar to those in Article 96 of the Law as regards the notification of proxies prior to meetings.

Possible Solution

Amendments could be made to Article 96 of the Law and to Article 40(1) of the 1999 Order to reflect the changes made in the UK Act.

To facilitate both these amendments, a definition of 'working day' would need to be inserted into both the Law and the 1999 Order.

*The UK Companies Act 2006 defines a working day as a day which is not a Saturday or Sunday, Christmas Day, Good Friday or any day that is a bank holiday under the Banking and Financial Dealings Act 1971 in the part of the UK where the company is registered (*section 1173(1)).

A similar 'working day' definition in both the Law and the Order would likely make reference to the Public Holidays and Bank Holidays (Jersey) Law 1952.

Responses

The four respondents who responded on this possible solution, including the combined respondents, agreed with it.

Government Position

The Government intends to proceed with the proposed amendment.

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21. Auditors and the exercise of discretion by the Commission (Article 102)

Summary of Issue

Article 113D(6) of the Law gives a discretion to the Jersey Financial Services Commission to authorise an individual or a firm who would not otherwise qualify as an auditor under the Law, to carry out an audit for a non-market-traded company.

Article 102 of the Law (as amended by the Companies (Amendment No. 4) (Jersey) Regulations 2009) includes a wide definition of 'firm' as meaning "an entity, whether or not a legal person, that is not an individual and includes a body corporate, a corporation sole, a partnership, and an unincorporated association".

Ownership and control provisions in Article 102 of the Law are designed to cover companies, customary law partnerships and limited liability partnerships. The Law does not give any guidance over what would constitute equivalent ownership and control provisions in the case of other types of incorporated or unincorporated person e.g. corporations sole, unincorporated associations, limited partnerships and (most recently) incorporated limited partnerships or separate limited partnerships.

In the absence of such guidance, the Commission does not consider it appropriate that it should have discretion under Article 113D(6) to authorise firms other than companies, customary law partnerships or limited liability partnerships.

The Companies (Amendment No. 6) (Jersey) Regulations 2011 inserted Article 102(1A) which clarified that in Part 16, unless the context otherwise required, a 'partnership' did not include an incorporated limited partnership or a separate limited partnership. This amendment did not, however, deal with the other potentially problematic categories of applicant auditor.

Possible Solution

One solution would be to amend the definition of 'firm' in Article 102 of the Law to exclude corporations sole, unincorporated associations and limited partnerships (whether in Jersey or elsewhere).

Another solution would be to amend Article 113D(6) by providing a positive list of types of entity which can qualify as a 'firm' for these particular purposes i.e. companies, customary law partnerships and limited liability partnerships.

Views are sought on the identified issue and solution and, more particularly, as follows:

Q25 Is there any perceived need or requirement to continue to allow all forms of entity, including corporations sole, unincorporated associations and limited partnerships, to be able to seek authorisation to audit non-market-traded companies?

Responses

Q25 Is there any perceived need or requirement to continue to allow all forms of entity, including corporations sole, unincorporated associations and limited partnerships, to be able to seek authorisation to audit non-market-traded companies?

The combined response deferred to the view of accountancy firms and practitioners on this question.

Another respondent noted that it appeared overly prescriptive to force auditors to adopt a legal form that may not be their preference. No other respondents addressed this question.

Government Position

The Government does not intend to proceed with this amendment at this moment in time. Further consultation is required with the Jersey Financial Services Commission and representatives of the accountancy profession.

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22. Ability for dormant public company to dissolve without audit (Article 108)

Summary of Issue

A public company may circulate a prospectus relating to its own securities. A private company may also circulate such a prospectus but if it does so then, under Article 17(2)(b) of the Law, it will be treated as a public company.

The core purpose of a fund company is, obviously, to attract subscriptions and it does this by publishing and circulating a prospectus. In doing so, it falls to be treated as a public company.

The Law requires public companies to appoint auditors and Article 108 of the Law requires the filing of audited accounts by all public companies. In most cases this does not cause any issues.

It does, however, prove problematic in the area of non-launched funds (as particularly highlighted during the recent economic downturn). A fund company which (for whatever reason) may never have taken in any cash and never held or owned any assets, is nevertheless required to produce audited accounts before it can be dissolved.

This requirement is regularly questioned by fund promoters particularly where other jurisdictions have statutory exceptions to this requirement.

Section 480(1)(a) of the UK Companies Act 2006 provides that companies which have been dormant since formation are exempt from the requirements relating to the audit of accounts for the financial year. For these purposes, dormancy is defined in s.1169 of the UK Companies Act 2006 as being a period during which 'no significant accounting transaction' has taken place (a significant accounting transaction being one which is required to be entered into the company's accounting records).

Section 256 of the Companies (Guernsey) Law 2008 provides a mechanism which allows any company to pass a 'waiver resolution' exempting the company from audit (providing it is not a type or class of company specifically prohibited from doing so by the States of Guernsey Commerce and Employment Department).

Possible Solution

Two possible solutions present themselves. Article 108 of the Law could be amended to provide an exemption from audit:

(i) to public companies which have been dormant since formation (mirroring the narrower UK position), or

(ii) to public companies which have passed a waiver resolution (mirroring the wider Guernsey position and adopting a similar mechanism).

For solution (i), a definition of 'dormant' would need to be introduced. For solution (ii), the class of companies able to exempt themselves from audit could be those as determined from time to time by Order of the Minister for Economic Development.

Views are sought on the identified issue and solution and, more particularly, as follows:

Q26 Is either of the two proposed solutions to be preferred over the other, and, if so, on what basis?

Q27 With regard to solution (ii), would generalised exemption provisions be likely to have any otherwise undesirable consequences for which additional provision should be made?

Responses

Q26 Is either of the two proposed solutions to be preferred over the other, and, if so, on what basis?

The combined response considered that solution (ii), as the wider approach, was preferable. Another respondent suggested that solution (ii), if it were to be generally available to all types of public companies that were dormant for a defined period of time, would provide maximum flexibility and would be the preferable solution. That respondent suggested that it would be possible to have both solutions (i) and (ii), i.e. that certain classes of public companies (as specified by Order of the Minister for Economic Development from time to time) could be permitted to pass a waiver resolution, and there could be a default provision applying to all classes of public companies that they could be exempt if they have been dormant since formation.

Another respondent recommended that the narrower UK position be adopted.

Another respondent suggested that both solutions as alternatives would be preferable.

The academic response noted that the UK has distinct exemptions for dormant companies and for small companies and in neither case is a resolution required. The response stated that if it is thought useful to exempt, or permit exemption, from audit for small public companies, this could usefully be proposed as a consultation question in its own right.

Q27 With regard to solution (ii), would generalised exemption provisions be likely to have any otherwise undesirable consequences for which additional provision should be made?

The academic response noted that the Guernsey model raises the possibility of harm to minority shareholders and to mitigate this it requires a 90% majority vote and provides for the resolution to be rescinded at any time on the request of more than 10% of the members. It noted that, moreover, the Guernsey Commerce and Employment Department specifically prohibit particular types of company from making such an election. Large companies may not make such an election unless they are dormant, but small companies may do so. The Guernsey model therefore permits audit exemption in two cases, companies other than large companies and large companies which are dormant.

The JFSC pointed out that in the Guernsey model the only protection for the holders of non-voting shares is the ability of 10% of the members of the company (by value) to require that the waiver resolution be rescinded (as they would not be entitled to vote on the resolution itself). It also queried how a member would contact another member.

Government Position

The Government proposes to adopt the waiver mechanism envisaged by solution (ii), albeit in a simpler form to that which exists under the Guernsey legislation.

In future it will be possible for the members of a public company that is currently required by Article 113(1) to have its accounts audited to pass a waiver resolution exempting the company from this requirement. To prevent abuse of this exemption such a resolution would require unanimous consent from all shareholders entitled to vote. Furthermore, the proposed amendment will provide that the waiver resolution shall cease to have effect if 10% of the members (by value) require this. It is considered that this would afford a sufficient level of protection for the holders of non-voting shares.

23. Extending offence of providing false or misleading information to auditor (Article 113(B)(4)

Summary of Issue

Articles 113B and 113C of the Law apply to companies that are required to appoint an auditor under Article 113.

Article 113B(4) provides that the auditor of a company has right of access to that company's records at all times and that it is entitled to require from the company's officers and the secretary such information and explanations as the auditor thinks necessary for the performance of its duties.

Article 113C(2) provides that an officer of a company or its secretary is guilty of an offence if, knowingly or recklessly, they make a statement to the auditor which is false or misleading in a material respect.

In practice, the auditor will also collect information from employees of the company, as well as persons holding (or accountable for) any of the company's records.

From time to time, the auditor may also need to collect information from a person that was previously an officer, secretary, employee or person holding or accountable for the company's records at a relevant time.

The auditor currently has no statutory entitlement to require information and explanations from such persons.

Possible Solution

One solution would be to adopt similar provisions to those currently contained at sections 499 and 501 of the UK Companies Act 2006. This would require the amendment of Article 113B(4) to allow the auditor to require information and explanations of

(i) any officer of the company,

(ii) the company secretary,

(iii) any employee of the company who appears to be in possession of relevant information,

(iv) any person holding (or accountable for) any of the company's records who appears to be in possession of relevant information, and

(v) any person who previously held a role as (i) – (iv) above at a time to which the information (or explanations) required by the auditor relates (or relate).

The offence outlined in Article 113C(2) would also need to be aligned with this extended list of those who can be approached.

Views are sought on the identified issue and solution and, more particularly, as follows:

Q28 Are there any identifiable downsides or dangers presented through the proposed statutory extension of the existing provisions?

Q29 Is there any need arising in practice or law to qualify the right of access to information and explanations with reference to timing e.g. should it be expressed as a right of immediate access, a right of access as soon as reasonably practicable etc?

Responses

Q28 Are there any identifiable downsides or dangers presented through the proposed statutory extension of the existing provisions?

Four respondents did not identify any such downsides or dangers. However, one of those respondents did suggest that an individual should not be required to provide information that would be protected by legal professional privilege, mirroring the position in sections 499 and 501 of the UK Act. Another of these respondents suggested that there should be an ability for the person who is required to provide information to recover any costs and expenses of so doing, presumably from the company, and that there should also be restrictions in relation to privilege and self-incrimination.

The fifth respondent raised several issues. They questioned whether there is a perceived need for auditors to have access to information from a wider class of persons than currently provided for in Article 113B(4) of the Law, i.e. the officers and the company secretary. They questioned whether there was evidence that auditors do need a right of access against employees and whether, even if there was such a need, it would be justifiable for criminal penalties to be imposed (and if so on whom they should be imposed – the company or the employee) for contravention of such a right. They noted that most employees do not have unfettered rights of access to information and that such a provision might place them in an unfair or difficult position, e.g. if a conflict occurred between what an auditor wanted and what a director was willing to provide. Finally they questioned whether there was a risk that this could drive up the cost of auditing if auditors felt that, to discharge their professional obligations properly, they had to use their extended powers to request information.

Q29 Is there any need arising in practice or law to qualify the right of access to information and explanations with reference to timing e.g. should it be expressed as a right of immediate access, a right of access as soon as reasonably practicable etc?

The combined response expressed the view that a failure to provide immediate access, information and explanations should not amount to a criminal offence, only failure to do so in a reasonable time.

Another respondent suggested that Article 113B of the Law should specify that information or access should be provided ‘as soon as reasonably practicable’ rather than requiring immediate access.

Another respondent suggested that reasonableness would appear to be appropriate as to timing.

Government Position

The Government intends to proceed with the proposed amendment. It considers that there is no good reason why the auditor's right to require information should be limited to current officers or secretary of the company only. As a matter of principle, it seems right that former officers and secretaries of the company should be under an obligation to provide the auditor with such information as he may require relating to the period during which they held office.

The Government considers that it is desirable that the power to require information should extend to current and former employees, who are (or were) not also officers. Such persons may well hold valuable information about the affairs of the company which might not otherwise be readily available to the auditor.

The Government accepts that employees (unlike officers of the company) do not have unfettered rights to information, but does not consider that this is likely to place them in a difficult position vis-à-vis the auditor. There is no prospect of criminal liability attaching to an employee or ex-employee who is unable (as opposed to unwilling) to provide the information requested by the auditor.

The Government is not aware of any empirical evidence to suggest that the cost of audits is likely to increase if the auditor's powers to require information are extended to a wider circle of persons.

The Government agrees that specific provision ought to be made in Article 113B to make it clear that any information obtained from a person pursuant to an amended Article 113B(4) cannot be used in criminal proceedings against that person other than proceedings under Article 113C, and that the auditor's right to require information does not extend to information that is otherwise protected by legal professional privilege.

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24. The scope of the term 'distribution' (Article 114(2))

Summary of Issue

The law in relation to company distributions is found in Part 17 of the Law (Articles 114 – 115B). Prior to the enactment of the Companies (Amendment No. 9) (Jersey) Law 2008, a distribution was only unlawful if it was made from a source not permitted under the Law (as it stood at that time).

The effect of Amendment No. 9, and the consequent revision of Article 115(3), was to place an active responsibility on the authorising company directors, rendering distributions lawful only if they had made (what amounted to) a solvency statement. This statement had to meet specific requirements set out in Article 115(4).

Corporate lawyers have since needed to consider much more closely what constitutes a distribution in order to avoid a transaction being inadvertently rendered unlawful through a failure to make the appropriate Article 115 statement.

This is particularly so in light of the very broad definition of distribution given in Article 114(1) of the Law as meaning "every description of distribution of the company's assets to its members as members, whether in cash or otherwise."

This definition arguably embraces certain types of commercial transaction, including those where value is being given by a subsidiary company either up to its parent or through 'sidestreaming' to another subsidiary (this being treated as a transaction travelling through the parent company).

An example might be an 'upstream' guarantee given to a bank by a subsidiary company to secure borrowing by its parent company. Such a transaction involves the creation of a liability for the subsidiary (albeit contingent) and the transfer of value to the subsidiary company's members i.e. the parent company. From a legal perspective, the transaction may point towards categorisation as a distribution.

This conclusion could prove at odds, however, with the accounting treatment of the same transaction which is likely to focus on whether there is a reduction in the net assets of the company immediately after the transaction is entered into.

In the example of the upstream guarantee, therefore, the accounting treatment would involve a judgment being made as to the likelihood of the guarantee shortly being called upon. If it is judged unlikely, it is acceptable accounting practice merely to highlight its existence in the notes accompanying the subsidiary's accounts. If, on the other hand, there is thought to be a genuine and realistic prospect of the guarantee shortly being called upon, it would need to be included as a real (albeit contingent) liability within the body of the subsidiary company's accounts.

There is felt to be a need to align the legal and accounting tests for transactions of this type and confirm when they are to be treated as distributions.

Possible solution

One proposal would be to insert a new sub-paragraph (e) in Article 114(2) excluding from the definition 'any distribution the effect of which does not reduce the net assets of the company immediately after the distribution is made' (to be assessed in accordance with the generally accepted accounting principles adopted by the company pursuant to Article 104).

Views are sought on the identified issue and solution and, more particularly, as follows:

Q30 Is this further exclusion necessary?

Q31 If so, are the ambit and exercise of the proposed exclusion suggested above clear and workable as a matter of practice or should they be limited further e.g. to group company guarantees?

Q32 Is there likely to be any adverse impact or unintended consequence in not requiring an Article 115 solvency statement for this type of transaction?

Responses

Q30 Is this further exclusion necessary?

Three responses, including the combined response, considered this further exclusion to be desirable. One respondent questioned whether any exclusion from the definition of distribution is really necessary but suggested that if there is a particular concern about group company guarantees, a specific inclusion could be made for them. The academic response also queried whether there is really a significant problem and suggested that there should be little risk of a commercial transaction between a company and its shareholder being characterised as a distribution save in egregious cases.

Q31 If so, are the ambit and exercise of the proposed exclusion suggested above clear and workable as a matter of practice or should they be limited further e.g. to group company guarantees?

Three respondents agreed that the proposed exclusion was clear.

One respondent suggested that the wording suggested by the proposed solution may lead to other problems and cited the example of a loan made by a subsidiary to a parent. They noted that, at first sight, there is no reduction in the subsidiary's asset value because the loss of one asset – cash – is replaced by another asset, i.e. a chose in action against the parent. But they queried what would happen if the parent's financial position was precarious and there was a risk that the loan might not be repaid in full and whether that type of consideration should be relevant in ascertaining whether the subsidiary's net asset position has been reduced or whether the suggested solution is only concerned with nominal asset values rather than the ability to pay.

The academic response queried whether the suggested amendments would be entirely appropriate. The response raised a concern in relation to the interaction of Part 17 and Part 12 of the Law, noting that, under Jersey law, the propriety of payment of distributions has largely been divorced from the question of whether they are paid from capital. The response suggested that, if an amendment were introduced to narrow the range of transactions that constitute a distribution this might have an unwelcome side effect of creating doubt as to whether transactions outside the new statutory formulation of distribution might nevertheless, if they are entered into at a time when the company's capital is impaired, be characterised as an unlawful return of capital. It was suggested that any amendment would need to make it clear that this would not be the consequence.

The academic response also suggests that there may be difficulties with the suggested approach to valuation, noting that the accounting treatment is not necessarily determinative of whether there is a reduction in the net assets. The response suggests that another way to approach the question of the cost of the transaction to the company would be to ask what the market value of such a guarantee would be and suggests that the accounting treatment tends to result in an 'all or nothing' approach with the liability being introduced at full value or excluded entirely.

Q32 Is there likely to be any adverse impact or unintended consequence in not requiring an Article 115 solvency statement for this type of transaction?

The combined response and one other response stated that no adverse impact or unintended consequence was foreseen.

Government Position

The Government understands the need for certainty in this area of law. However, in light of the response to the consultation, it considers that further reflection and consultation are required before deciding how best to proceed with the proposed amendment. It is intended that this is addressed as part of the current set of amendments.

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25. Ability to ratify a distribution (Article 115)

Summary of Issue

Under UK law, a distribution can be made from 'distributable profits' without the need to make any formal solvency statement. There is anecdotal evidence that directors of Jersey companies (perhaps with experience of the UK system and unaware of the requirement under Article 115(3)) authorise distributions without making a solvency statement, thereby rendering those distributions technically unlawful.

The uncertainty surrounding the legal status of an unlawful distribution leads to consequential concerns both for recipient shareholders (over the extent of their liability to repay the distribution) and for authorising directors (over the extent of any personal liability).

Possible Solution

A mechanism could be introduced (with appropriate conditions) allowing for retrospective ratification of a distribution.

The relevant provision could confirm that if a distribution (or part of a distribution) is made by a company to its members without the prior solvency statement required by Article 115(3), the company may later ratify the distribution through the appropriate directors making a statement in prescribed terms.

The prescribed terms would, in all likelihood, be similar to those set out in Article 115(4) e.g. requiring the appropriate directors to form the opinion that:

(i) immediately following the date of the ratification, the company will be able to discharge its liabilities as they fall due; and
(ii) immediately following the date of the distribution, the company was able to discharge its liabilities as they fell due; and
(III) either (as applicable):

(a) for the period of 12 months following the date of the distribution, the company was able to carry on business and discharge its liabilities as they fell due; or
(b) to the extent that the period of 12 months following the date of the distribution has not expired, the company was able and will continue to be able to carry on business and discharge its liabilities as they fall due until the expiry of such period or until the company is dissolved under Article 150, whichever first occurs.

It is not proposed that this option be made available to a company which was insolvent at the date of ratification, even if it had been solvent at the time of the distribution.

Views are sought on the identified issue and solution and, more particularly, as follows:

Q33 Are there any identifiable downsides or dangers presented through the introduction of such a mechanism?

Q34 Should shareholder approval be required as part of any retrospective ratification procedure (i.e. following a directors' solvency statement) and, if so, at what level should shareholder approval be required?

Q35 If shareholder approval is not required, should the ratifying directors be subject to any other requirement or sanction e.g. an obligation to notify members or the recipients of the formerly unlawful distribution?

Responses

The combined response supported the proposed solution and suggested that any such proposed amendment should also make it clear that the ability to ratify distributions also extends to distributions made before the changes to the Law become effective.

Q33 Are there any identifiable downsides or dangers presented through the introduction of such a mechanism?

Three respondents, including the combined respondents, did not identify any such downsides or dangers.

One respondent suggested that there should be safeguards to ensure that such ratification should only be permitted if the company was solvent at the time of (a) the ratification, (b) the distribution, and (c) a sufficient period after the distribution.

Q34 Should shareholder approval be required as part of any retrospective ratification procedure (i.e. following a directors' solvency statement) and, if so, at what level should shareholder approval be required?

Three respondents, including the combined respondents, did not consider shareholder approval to be necessary.

One respondent was of the view that the ratification ought to be done by the members entitled to vote because the ratification process is, in effect, approving a director's prior action which was otherwise in breach of the director's duties to the company. They suggested that it would be odd for directors to be allowed to ratify their own breaches of duty where distributions are concerned but not in respect of other activities. The response noted that consideration should also be given to whether a member or director who received a distribution should or should not be allowed to participate in the ratification process. The response also noted that a company's membership may have changed between the date of distribution and the date of ratification, and that it would be the latter members who would be ratifying a distribution made in favour of the former members.

Q35 If shareholder approval is not required, should the ratifying directors be subject to any other requirement or sanction e.g. an obligation to notify members or the recipients of the formerly unlawful distribution?

Three respondents, including the combined respondents, did not consider that the ratifying directors should be subject to any other requirement or sanction.

Government Position

The Government is sympathetic to the argument that the legislation in its current form creates an unnecessary 'trap for the unwary' and agrees in principle that there should be a procedure for validating a distribution made without a prior solvency statement, subject to appropriate safeguards. It considers, however, that further reflection and consultation are required before a decision is made as to how best to achieve this.

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26. Characterisation of Distributions (Article 115)

Summary of Issue

Part 17 gives directors clear authority to debit permissible distributions to a share premium account, a stated capital account (both of which fall within the definition of 'capital accounts') or any other account of the company other than the capital redemption reserve or the nominal capital account (as defined by Article 115(8)).

Notwithstanding this express authority, there would not appear to be any mechanism at present by which the directors who decide to debit the distribution to a capital account can confirm that the result of this will be a return of capital.

Possible Solution

The identified issue could be resolved by provisions along the following lines:

(i) to provide a definition for 'capital' in Article 1(1), as being an amount standing to the credit of a capital account;

(ii) to amend Article 115(7)(a) to confirm that, where there are sufficient funds in a capital account (being a share premium account or the stated capital account), distributions debited to that account would be treated as a return of capital to shareholders; and

(iii) to include additional wording that distributions debited to the 'other accounts' as provided for in Article 115(7)(b) (i.e. not the stated capital, share premium, nominal capital or capital redemption reserve accounts) may result in such accounts running into negative balance.

Views are sought on the identified issue and solution and, more particularly, as follows:

Q36 What (if any) are the pertinent domestic or international tax repercussions flowing from the confirmatory language proposed?

Responses

Q36 What (if any) are the pertinent domestic or international tax repercussions flowing from the confirmatory language proposed?

The combined response notes that the precise treatment of certain returns made to shareholders can be a very important issue in terms of the rules of some foreign jurisdictions and that therefore any such proposed amendment to the Law requires careful consideration. The response notes that, in practice, this will require consultation with suitably qualified people in the relevant jurisdictions which will take time.

Government Position

The Government does not intend to proceed with this proposed amendment, as it is not clear that it would serve any pressing practical need.

27. Takeover Offers to Shareholders in Restricted Jurisdictions (Article 116)

Summary of Issue

Articles 116 and 117 of the Law set out the position regarding takeover offers.

For a valid takeover offer to be made the potential purchaser must make an identical offer to every shareholder of the target company. If this offer is accepted by 90% or more of the shareholders to whom the offer is made then the purchaser will have the statutory right compulsorily to buy out the remaining shareholders at the same price and on the same terms as previously offered.

In some cases, however, it will not be possible for the purchaser to make their offer to every shareholder. This might occur when certain shareholders are resident in a different jurisdiction, such as the United States, which has its own (different) specific regulatory requirements relating to the making of offers. On a strict interpretation of the Law, a failure by the offeror to make the offer to every existing shareholder might result in the offer not constituting a valid takeover offer.

Article 116(4) of the Law makes specific provision allowing for a variation of the rules when a shareholder is in a jurisdiction outside Jersey where the law prevents acceptance of the offer in the form given (or otherwise precludes acceptance without complying with conditions which the offeror cannot meet or which it considers unduly onerous). Importantly, however, whilst variation is permitted on matters of acceptance, the wording of Article 116(4) suggests that the offer must still be made to all of the shareholders.

The former UK Companies Act 1985 contained similar provisions to Articles 116 and 117 of the Law. In Winpar Holdings Ltd v Joseph Holt Group plc (2002) the UK courts interpreted these provisions as permitting an offer to be treated as having been made to registered shareholders resident in territories where it was problematic to make such an offer, so long as the offeror took sufficient alternative measures.

This common law approach was enshrined in s.978 of the UK Companies Act 2006. This provides that an offer to acquire shares in a company which has not been communicated to every shareholder is not prevented from being a valid takeover offer if:

(i) those shareholders have no registered address in the United Kingdom;

(ii) the offer was not communicated to those shareholders in order not to contravene the law of a country or territory outside the United Kingdom; and

(iii) the offer is either published in the London, Edinburgh or Belfast Gazette or a notice is published in the relevant Gazette specifying a website or place within the European Economic Area where the offer is available for inspection or where a copy of it can be obtained.

Possible Solution

Amendments could be made to the Law to bring it into line with s.978 of the UK Companies Act 2006 (replacing the requirement to publish in the London, Edinburgh or Belfast Gazette with a requirement to publish in the Jersey Gazette).

Views are sought on the identified issue and solution and, more particularly, as follows:

Q37 Are the exceptions currently offered by the UK legislation sufficient for Jersey companies or would greater (or lesser) protections and notification procedures be advisable?

Responses

Q37 Are the exceptions currently offered by the UK legislation sufficient for Jersey companies or would greater (or lesser) protections and notification procedures be advisable?

The combined response expressed the view that equivalent protections to those offered by section 978 of the UK Act would be sufficient for Jersey companies and suggested that as there are now several Jersey companies which are listed on the London Stock Exchange (including some FTSE 100 companies) a consistent approach between Jersey and the UK would be highly desirable. Another three respondents considered that similar provisions to the UK provisions would suffice.

Government Position

The Government intends to amend Article 116 of the Law so as to introduce a provision equivalent to section 978 of the Companies Act 2006.

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28. Merger and continuance notification periods (Articles 127FC & 127R)

Summary of Issue

Once a continuance overseas has been approved by a company, Article 127R requires the continuing company (amongst other things) to publish a public notice in a Jersey newspaper. Creditors of the continuing company are allowed to object to the continuance within 30 days of that advertisement. If that creditor's claim is not discharged, the creditor then has a further 30 days from the date of its objection notice to apply for a court order restraining the continuance.

In addition, any company member who did not consent or vote in favour of the company applying for continuance into another jurisdiction, and who objects to it, may also apply to court for an order and must do so within 30 days of the last requisite resolution (Article 127S).

Similar provisions and time limits apply for mergers although these have recently been expanded through the Companies (Amendment No. 5) (Jersey) Regulations 2011. Under Article 127FC(1), written notice of the intended merger has to be given to creditors with claims over £5,000 and under Article 127FC(5) the notice has to be published publicly in an approved manner. The merging companies cannot apply to the Registrar to merge until such time as the relevant notices have been given and the time limits have expired (generally 28 days as specified in Article 127FJ).

The notification periods and the periods during which creditors and members may object to a proposed continuance overseas or a merger are considered too long for cases where all members and all creditors are willing to give prior consent to the continuance or merger.

Possible Solution

The periods could either be shortened or be made capable of being waived where all known creditors and all members actively consent to the continuance or merger. This should work further to streamline the continuance and merger procedures.

Views are sought on the identified issue and solution and, more particularly, as follows:

Q38 Are the notification periods for both mergers and continuance generally considered to be too long i.e. should they be reduced from 28/30 days to 21 days or 14 days?

Q39 Should there be an ability to curtail the statutory notification periods if the companies involved in the merger or continuance can demonstrate that all members and relevant creditors have been notified and that all have actively consented?

Q40 For mergers, should any curtailment of the statutory notification period be contingent upon a company achieving active consent not just from all members but from all known creditors (rather than merely those creditors with a claim exceeding £5,000)?

Responses

Q38 Are the notification periods for both mergers and continuance generally considered to be too long i.e. should they be reduced from 28/30 days to 21 days or 14 days?

The combined response suggested that the periods should be reduced to 21 days and that it would be useful if shareholder and creditor notices and objection periods could run concurrently in those cases where they are not currently able to do so.

Another respondent expressed the view that, given Jersey's proximity to Europe and the UK, conformity with equivalents such as the European cross border merger regime or the UK takeover requirements would appear reasonable.

A third respondent expressed the view that, if all members and creditors with claims of £5,000 or over actively consent to the merger or continuance, the statutory periods could be shortened or waived altogether. Absent such consent, the respondent was of the view that these periods should not be reduced to less than 21 days which they suggested was usually adequate time to obtain legal advice and, if necessary, obtain an *ex-parte* interim court order restraining the merger/continuance.

Q39 Should there be an ability to curtail the statutory notification periods if the companies involved in the merger or continuance can demonstrate that all members and relevant creditors have been notified and that all have actively consented?

Those who responded to this question agreed that there should be such an ability.

Q40 For mergers, should any curtailment of the statutory notification period be contingent upon a company achieving active consent not just from all members but from *all* known creditors (rather than merely those creditors with a claim exceeding £5,000)?

One respondent suggested that requiring the consent of all known creditors is likely to be impracticable and seems to set an impossibly high threshold. However, the respondent saw merit in requiring the consent of all creditors where creditors whose individual claims may be less than £5,000 nevertheless make up a significant proportion of the company's overall debts (e.g. 20%).

The academic respondent expressed the view that the unanimous consent exception seems capable of expediting proceedings in appropriate cases and suggested that the critical issue is whether, for creditors, those with claims of less than £5,000 should be excluded from the unanimous consent requirement on the basis that they are not entitled to receive notice in any event. However, the respondent noted that all creditors have the right to object during the relevant notification period and suggested that to exclude small creditors might potentially prejudice their interests.

The respondent suggested that the rationale for excluding small creditors would presumably be that requiring genuine unanimous consent might be disproportionately expensive but argued that the same argument might be made about shareholders, but that no exemption to unanimity is proposed for members with a small value holding. The respondent queried whether there is any reason why companies wishing to avail themselves of this procedure would be more likely to have small creditors than small shareholders. Finally, the respondent suggested that one possible option might be, by analogy with a reduction of capital, to provide for approval on the basis of unanimity of those with claims exceeding £5,000 plus a third party guarantee of payment for the rest.

Two other respondents, including the combined respondents, did not think that any curtailment should be so contingent.

Government Position

The Government intends to proceed with the proposal to shorten the notice periods from 30 days (in the case of a continuance overseas) and 28 days (in the case of a merger) to 21 days in both cases.

In future it will be possible for the 21-day notice and objection periods for creditors and for shareholders to run concurrently where this is not currently possible.

Furthermore, it intends to amend Articles 127FJ and 127T of the Law so as to make it possible to abridge the notice periods in cases where all the members and all known creditors of the company have consented to the proposed continuance or merger.

In the case of mergers, the Government has concluded that it would not be appropriate to exclude creditors with claims below £5,000 from the unanimous consent requirement. Such an exclusion would be difficult to reconcile with the fact that all creditors (regardless of the size of their claim) have the right under Article 127FE to object to the proposed merger.

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29. Demerger and division

Summary of Issue

Currently the only way to demerge a Jersey company into two or more companies, with assets and liabilities transferred by operation of law, is to undertake a scheme of arrangement pursuant to Part 18A of the Law.

Possible Solution

The Law could be amended to create a separate demerger process, reflective of the merger provisions available at Part 18B of the Law.

Part 27 of the UK Companies Act 2006 might stand as a possible model for this purpose subject to two principal modifications; namely, that

(i) unlike the UK provisions which involve a scheme of arrangement, any Jersey provisions would not involve the courts unless members or creditors object (as is currently the position with mergers); and

(ii) unlike the UK provisions which result in the dissolution of the dividing company, any Jersey provisions would allow the dividing company to continue in existence (so as to retain accrued tax losses).

It is likely that these provisions would, in the first instance, be restricted to the demerger of a Jersey company into two or more Jersey companies, though an accompanying regulation-making power could specifically provide for the future development of a more sophisticated demerger mechanism (e.g. allowing for cross-border demergers, demergers into non-company bodies corporate etc).

Views are sought on the identified issue and solution and, more particularly, as follows:

Q41 What are considered to be the chief legal and tax considerations of permitting company demergers outside of the traditional ‘scheme of arrangement’ model?

Q42 Is there a market demand for demerger provisions of this type and, if so, to what degree does it extend to cross-border demergers and to demergers into non-company bodies corporate?

Responses

Q41 What are considered to be the chief legal and tax considerations of permitting company demergers outside of the traditional 'scheme of arrangement' model?

The combined response supported the proposed amendment and considered that there are a number of circumstances where the ability to demerge and divide assets could be useful. For instance, it suggested that in relation to mergers and acquisitions, the ability to carry out a demerger which ensures that the target companies only hold assets which it is intended to sell could be very useful. It stated that whilst a scheme of arrangement could also be used to achieve a demerger, in practice some clients may prefer to pursue a statutory demerger as it may be perceived to be a less costly route and approval requirements may be less onerous.

Another respondent stated that although there is uncertainty in the UK on the tax treatment of foreign distributions, it does not envisage that the precise legal mechanism of the demerger would affect the tax treatment of shares received in the demerged entity.

A third respondent stated that the chief legal considerations would be protection of creditors, protection of shareholders and clear identification of asset ownership and that the demerger agreement would need to clearly address these.

A fourth respondent agreed that the Law should, if possible, provide a separate, non-court mechanism for demerger (unless creditors and members object) rather than relying on a scheme of arrangement. The response identified some practical legal issues which could arise as being (i) how are debts to be transferred to the demerged entities? (ii) how are claims to be transferred to the demerged entities? (iii) what would happen to non-consensual liabilities e.g. liabilities in tort or statutory liabilities? (iv) would the dividing company have automatic rights of indemnity from the demerged companies for tax or other liabilities?

Q42 Is there a market demand for demerger provisions of this type and, if so, to what degree does it extend to cross-border demergers and to demergers into non-company bodies corporate?

The combined response considered that there is a market demand for demerger provisions involving Jersey companies but saw less need for the provisions to deal with cross border demergers. The response noted that in practice the same position could be achieved using the migration provisions of the Law (albeit this would take longer than a straight cross border demerger) and that cross border demerger provisions would also require some thought in terms of the interface of Jersey and relevant foreign law. For these reasons the combined respondents inclined to the view that it would be best to focus efforts on Jersey company demergers,

Another respondent stated that if a market demand for mergers is identified, they saw no reason why it should not extend cross-border and into non-company bodies corporate. They expressed the view that there should always be a court intervention.

The academic response noted that the UK demerger provisions follow on from section 427A of the Companies Act 1985, introduced in 1987 to ensure compliance with the Sixth Company Law Directive. It noted that during the Company Law Review there was discussion of the possible need for a statutory merger provision (similar to that found in Part 18B of the Law) but this was not ultimately taken forward and there was no discussion of any need for a demerger provision.

Government Position

Given the broad support for this proposal the Government intends to introduce a regulation making power into the Law, which will allow for the introduction of a demerger procedure, which does not require the implementation of a court-sanctioned scheme of arrangement.

The Government will consult further about the detail of the proposed procedure.

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30. Definition of 'relevant supervisory body' (Article 135(3))

Summary of Issue

The current definition of a 'relevant supervisory authority' in Article 135(3) is "an authority discharging in a country or territory outside Jersey supervisory functions corresponding to those of the Commission in respect of bodies corporate."

This definition needs to be amended to match that now contained in the more recent regulatory laws.

Possible Solution

Article 135(3) can be amended to embrace the more recent formulation and define a 'relevant supervisory authority' as, "in relation to a country or territory outside Jersey, an authority discharging in that country or territory any function that is the same as, or similar to, a function of the Commission."

Responses

The three respondents who responded on this question, including the combined respondents, agreed with the possible solution.

Government Position

The Government intends to proceed with the proposed amendment.

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31. Creditors' winding up (Article 169A)

Summary of Issue

There is a disparity between the Law and the Companies (General Provisions) (Jersey) Order 2002 as to procedure at creditors' meetings.

Article 169A(4) of the Law states that, for a resolution to pass at a creditors' meeting, it must be supported by creditors the value of whose votes are "at least half" the value of the votes of the creditors voting.

Article 8(5) of the Companies (General Provisions) (Jersey) Order 2002, on the other hand, requires "a majority" to pass a resolution at a creditors' meeting.

Possible Solution

This issue lends itself to a simple solution; namely, an amendment to Article 169A(4) of the Law to replace the words "at least half" with words which would require a majority.

Responses

The three respondents who responded on this question, including the combined respondents, agreed with the possible solution.

Government Position

The Government intends to proceed with the proposed amendment.

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32. Quoracy at a creditors' meeting (Article 169A)

Summary of Issue

The quoracy provisions in Article 169A(5) of the Law have the potential to cause a deadlock in a creditors' winding up.

The requirement for three creditors (or their proxies) to be present at a creditors' meeting could mean that, where there are a number of creditors with small claims and a single major creditor, the smaller creditors could act to prevent a meeting being quorate frustrating the major creditor and causing inequity.

As of 6 April 2010, the equivalent UK provision (Rule 12.4A of the Insolvency Rules 1986) has been repealed and replaced with a new rule (Rule 12A.21) providing that a quorum of 'at least one creditor entitled to vote' renders a creditors meeting competent to act.

Possible Solution

This issue could be easily resolved through the mirroring in the Law of the changes which have been brought into force in the UK (as described above).

Responses

The three respondents who responded on this question, including the combined respondents, agreed with the possible solution.

Government Position

The Government intends to proceed with the proposed amendment.

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33. Striking off a company with no valid registered office (Article 205)

Summary of Issue

Under Article 67(1) of the Law, a company is required at all times to have a registered office in Jersey, to which all communications and notices may be addressed. Article 67(2) of the Law provides that a company does not comply with that requirement unless the occupier of the premises that comprise the registered office authorises their use for that purpose.

The Registrar may refuse to incorporate a company if he or she is not satisfied that the occupier of the premises has given such authorisation.

However, if once it has been incorporated a company is subsequently without a registered office (e.g. because the Registrar is not satisfied on the question of occupier's authorisation) the company will nevertheless remain on the Companies Register (despite committing a criminal offence under Article 67(9)).

It will continue on the Register until one of the existing strike-off provisions in Article 205 of the Law can be utilised e.g. failure to file an annual return. Unless the situation is remedied, strike-off will then occur three months after notification by the Registrar. During that period, the company continues to be a Jersey company but does not have a valid registered office and, as such, no genuine local presence.

Possible Solution

A new provision could be included in Article 205 of the Law to provide the Registrar with the power to strike off a company where it has been without a registered office for a specified period.

Views are sought on the identified issue and solution and, more particularly, as follows:

Q43 Is it considered appropriate to be able to strike off a company where it has been without a registered office for a specified period?

Q44 If so, what should the specified period be?

Responses

Q43 Is it considered appropriate to be able to strike off a company where it has been without a registered office for a specified period?

The combined response expressed the view that that this is a question of policy for the Jersey Financial Services Commission but that the firms consider it appropriate to strike off a company where it has been without a registered office for a specified period. Another two respondents agreed that such striking off is appropriate whilst another respondent considered that this is only appropriate where it is also possible to reinstate the company. The academic response considered the provisions of Delaware law and notes that these provide strong support for the proposed amendment to the Law.

Q44 If so, what should the specified period be?

The combined response considered that three months seems an appropriate period. Another response suggested that the specified period should be six months from the date of service of a notice by the registrar in accordance with Article 67(6) or (8) of the Law or an unsuccessful appeal to the court under Article 67B of the Law. A third response suggested a period of not less than two years and suggested that the former registered office should be obliged to take reasonable steps to inform the company or its owners that it has ceased to have a registered office and is liable to be struck off.

Government Position

The Government intends to amend Article 205 of the Law so as to confer on the registrar a power to strike off a company that is without a registered office. It is envisaged that this power will be exercisable in accordance with the existing procedure under Article 205, i.e.:

(i) if the registrar has reason to believe that the occupier of the premises that are the company's registered office no longer authorises their use for that purpose, he may give notice to the company requiring it to change its registered office within 14 days;

(ii) if the company does not comply with this notice, the registrar may publish on his website and serve on the company a notice pursuant to Article 205(6) stating that at the end of the period of 3 months following the date of the notice the name of the company will be struck off the register and the company dissolved unless the company complies with the requirements of Article 67;

(iii) if the company does not comply with the notice, Articles 205(7) – (11) take effect.

34. Electronic Communications (Various)

Summary of Issue

There is no express provision in the Law for electronic communications and the only existing references in the Law to the Electronic Communications (Jersey) Law 2000 are at Articles 4(4) and 5(5).

The inability of practitioners to utilise electronic communications gives rise to unnecessary delay, expense and inconvenience.

By way of comparison with the UK, specific provisions for electronic communications are woven throughout the UK Companies Act 2006 (sections 298, 333, 360A, 1069, 1070, 1259 and Part 3 of Schedule 4).

Possible Solution

There are two possibilities with dealing with this issue: namely,

(i) to introduce into the Law a new generalised clarification e.g. confirming that nothing in the Law prevents the circulation of notices and equivalent documents by electronic means unless, in the case of those emanating from a company, that company's Articles specifically provide otherwise; and/or

(ii) to introduce specific provisions into the Law, authorising electronic methods of communication for particular documents and/or in particular circumstances

Views are sought on the identified issue and solution and, more particularly, as follows:

Q45 Is one or other of the identified solutions to be preferred and, if so, why?

Q46 In relation to the second solution, which types or categories of communications should be opened up to electronic methods?

For example:

- ***administrative or internal notices issued or circulated by the company itself e.g. notices to shareholders under Article 87(2) or terminating company agency under Article 23(4)?***
- ***third party notices to and from the company e.g. notices to and from the Commission under Article 16 or to and from the Registrar under Articles 42(2), 67(5) etc?***
- ***statutory or public notices e.g. a notice of intention to merge under Article 127FC(5)(a) which is currently required to be published by a company 'in a newspaper circulating in Jersey' (with no reference to electronic publication on the web pages of such a newspaper)?***

Responses

Q45 Is one or other of the identified solutions to be preferred and, if so, why?

The combined response expressed the view that solution (i) is to be preferred as it is simpler and notes that a company can make more detailed provision for electronic communications in its Articles of association, should it wish to do so.

Another respondent suggested introducing a generalised clarification confirming that nothing in the Law prevents the circulation of notices and equivalent documents by electronic means unless, in the case of those emanating from a company, that company's Articles of Association specifically provide otherwise.

A third respondent suggested that a general provision is preferred, with flexibility as to how it may be implemented.

A fourth respondent thought solution (ii) may be better and, with reference to the example given in the Green Paper, believed administrative or internal notices issued by the company could legitimately be sent by electronic means but that electronic means would not be suitable for third party notices or statutory or public notices not least because the electronic means would only be conveying a copy rather than an authentic instrument.

The academic response noted that the UK Act is drafted so as to state explicitly at each point throughout where it is contemplated that electronic communication may be employed. It suggested that, even if this is thought to be unnecessarily detailed and a more general provision is made, it is probably desirable to make legislative provision as regards procedural aspects of electronic communication, which will assist in co-ordinating expectations of users of the Law.

The academic response further noted that, in the UK and Delaware, for electronic communication to be validly used by a company in communicating with shareholders, the recipient must have consented to receive communication by that means and that a fax or email, when coupled with prior consent to receive communication in this form would constitute due notice. However, the response noted that posting documents on a website would not by itself constitute notice without a specific communication to the shareholder notifying them of the presence and significance of the materials on the website. Another general principle adopted in the UK is stated to be that the communication must be legible and permit the recipient to retain a copy. The response noted that the UK has also, as regarded communications sent to a company, adopted the consent principle and specified the circumstances under which an electronic communication will be deemed to be authenticated.

Finally the academic response noted that different considerations may be thought to apply as regards communications between a company and the Registrar and noted that in the US the SEC requires electronic filing of all information that issuers of publicly-traded securities are required to send to it. Further, that the UK Act requires the Registrar to permit electronic communication of notifiable documents and contains provision for this to be made mandatory in the future by the Secretary of State.

Q46 In relation to the second solution, which types or categories of communications should be opened up to electronic methods?

For example:

- **administrative or internal notices issued or circulated by the company itself e.g. notices to shareholders under Article 87(2) or terminating company agency under Article 23(4)?**
- **third party notices to and from the company e.g. notices to and from the Commission under Article 16 or to and from the Registrar under Articles 42(2), 67(5) etc?**
- **statutory or public notices e.g. a notice of intention to merge under Article 127FC(5)(a) which is currently required to be published by a company 'in a newspaper circulating in Jersey' (with no reference to electronic publication on the web pages of such a newspaper)?**

The combined response considered that such communications should include notices, proxy forms and other communications between a company and its shareholders where the Articles of Association permit this or they have otherwise consented to the same. The combined respondents noted that, in relation to communications with the JFSC/Registry, this would depend on the ability of the JFSC/Registry to receive the same in such manner.

Another respondent stated that whilst it is desirable for companies to be allowed to use electronic communications, not all forms of electronic communications may be suitable and careful consideration needs to be given to which ones may be utilised.

Government Position

Following further reflection and consultation with interested parties the Government has decided not to proceed with the proposed amendment on the grounds that existing legislation already makes adequate provision for the use of electronic means of communication between a company, its members and third parties: see Article 11 of the Electronic Communications (Jersey) Law 2000.