Consultation Response Paper:

The Introduction of a Creditors' Winding Up Regime

JANUARY 2022

Government of JERSEY

Consultation Response Paper: Proposed Amendments to the Companies (Jersey) Law 1991: Creditors' Winding Up Regime

SUMMARY OF CONSULTATION

On 19 July 2021, the Chief Minister's Department published a Consultation Paper proposing amendments to the Companies (Jersey) Law 1991 (the "**CJL**") which would permit a creditor (and not just a shareholder) to apply to the Royal Court for an insolvent Jersey company to be wound up with the appointment of a liquidator to conduct the winding up. The Liquidator is to be appointed from a public register of practitioners to be kept and maintained by the Viscount. The Consultation was open from 19 July 2021 to 6 September 2021.

The Government had the advantage of views from industry representatives and the Viscount of the Royal Court ahead of the publication of the Consultation, which views had informed the drafting of the relevant amending legislation, drafts of which were attached to the Consultation Paper, namely:

(i) the draft Companies (Amendment No. 8) (Jersey) Regulations 202-
(ii) the draft Companies (General Provisions) (Amendment NO. 6) (Jersey Order 202-

The intention is that the additional process will complement the existing provisions and accordingly the amendments deliberately echo many of the provisions already within the CJL and in the Bankruptcy (*Désastre*) (Jersey) Law 1990 ("**BDL"**). By following established concepts and processes, both here and in other jurisdictions, the scheme will be familiar to practitioners aiding its use domestically and for insolvencies with a cross-jurisdictional element.

OVERVIEW OF CONSULATION RESPONSES

Six responses to the Consultation were received by the Government of Jersey and Jersey Finance Limited. These responses came from two law firms, an Advocate responding in their individual capacity, the Association of Restructuring and Insolvency Experts ("ARIES"), the Law Society of Jersey, and the Viscount of the Royal Court. All respondents supported the introduction of the creditors' winding up process. There was broad agreement on a number of the proposals although reservations were expressed by some respondents as to the need to introduce a statutory demand process and the ability to appoint a provisional liquidator. This is discussed in more detail below. The Government of Jersey has taken careful note of all responses and made amendments to the proposals as considered appropriate.

SUMMARY OF PROPOSALS

As noted in the Consultation Paper, Jersey is a leading international centre for financial services, offering flexibility in a well-regulated environment, and with a wide body of experienced professionals. The Government of Jersey keeps the CJL under review to ensure that it is able to provide solutions for those acting within its framework in an appropriate and legitimate manner. It has been identified that it would be of benefit to introduce, alongside existing procedures, a means by which a creditor of a company can apply to the Royal Court for an insolvent company to be wound up with a liquidator appointed to conduct the winding up. This is not something currently available under Jersey law.

As noted above, the new procedure would draw on the existing processes within the CJL and the BDL, as well as looking to the procedures in place in other jurisdictions, including, but not limited to, England, the Isle of Man and Guernsey. By following established concepts and processes, it is hoped the procedure will be familiar to practitioners, investors, and intermediaries alike. It is grounded on tried, tested, and widely understood procedures, reflecting the reality of complex cross jurisdictional commerce today and enhancing certainty in relation to exit and contingency planning.

Thus, whilst giving local creditors a further option to pursue an unpaid debt, the proposed process ensures a debtor is also protected with the court's involvement, notice provisions and the approval requirements for a liquidator.

In summary, the path to a creditor's winding up is for a creditor to issue a statutory demand to the company for a sum at or over the prescribed minimum (currently £3,000 matching the threshold in the BDL) unless there is other evidence available, such as a clear event of default of an agreement, when a statutory demand will not be required. If the company fails to pay the debt due within 21 days of the issue of the statutory demand and has not disputed the debt is due and owing within that 21 day period then, save where the creditor has agreed not to issue an application or the claim is for the repossession of goods, the creditor may immediately apply to the court to wind up the company with notice to the company. The form of application will be by way of a Representation accompanied by a supporting affidavit.

Having reviewed the application from a creditor, if it is deemed appropriate in all the circumstances, the court will approve the commencement of the winding up application and fix a date for the hearing of the application. Assuming the creditor's application is successful, the court will order the winding up of the company and appoint a liquidator(s). The liquidator will be required to have certain experience and qualifications and to be registered on the Register of Approved Liquidators to be kept and maintained by the Viscount (with annual re-registration). The liquidator(s) must then notify interested parties and proceed to wind up the company. After the commencement of the winding up, no action shall be taken or proceeded with against the company save with the leave of the court.

The liquidator(s) will have the same powers as are currently available under the CJL.

SUMMARY OF RESPONSES

There was consensus around many of the proposals but on some topics, there was a divergence of views. This document summarises responses to each section of the Consultation Paper and confirms the changes that will be incorporated into the eighth amendment to the CJL.

Sections and questions are described as per the original consultation which should be read alongside this document, together with a copy of the CJL. Some respondents did not comment on all the questions in the Consultation Paper and accordingly unless otherwise indicated the words *all respondents* or *half the respondents* or similar should be read to mean all those that responded on the particular point.

The Path to a Creditors' Winding Up

Q1. Do you agree with the suggested method of application for a creditors' winding up, i.e., by way of a Representation supported by an affidavit? If not, please provide details and alternative suggestions.

Q2. Do you have any comments on the proposed time periods in the creditors' winding up application process specified more precisely in the draft Regulations, e.g., the time within which a notice must be placed in the Jersey Gazette? If not, please provide details.

Q3. Do you have any views on calling the proposed process the same name as the existing process set out in Art.155 of the Companies Law? If you think the new process should be called something else, please provide suggestions.

All respondents agreed with the proposal that the method of application should be by way of a Representation supported by an affidavit. All respondents confirmed the time periods for the process were acceptable.

The majority of respondents were of the view that the proposed process did not require a new name. However, one respondent did suggest either "Compulsory Winding Up" or "Court Ordered Winding Up" might be a more appropriate title for the process. They went on to consider that a distinction might in fact be made between the insolvent and solvent processes in the CJL. For the time being, and after consideration with the drafter, the current nomenclature has been left untouched with distinctions made as set out in the draft. This may be reconsidered should it become necessary to do so.

Statutory Demand

Q4. Do you agree that only creditors with a debt of £3,000 or more should be able to instigate winding up proceedings? If not, why not?

Q5. Do you agree with the suggested requirement for the issue of a statutory demand?

Q6. Do you think that the process provides sufficient comfort to a creditor that company assets will not be dissipated? If not, please explain why.

Q7. It is envisaged that a statutory demand is served in most cases. However, where there is other clear evidence of insolvency or consent, it is not required. Do you agree with this proposal? Is this wording too imprecise?

There was consensus amongst all respondents that the threshold for the issue of an application for a winding up should reflect the current threshold in respect of a *désastre* under the BDL. Two respondents suggested the threshold should be increased to, say, £20,000 for both the creditors' winding up and for a *désastre.* The comment was made that for example, one could apply for a winding up or a *désastre* of a multi-million-pound entity on the basis of a £3,000 debt. It is considered that this is the case whatever the amount and that, importantly, the court will always have a discretion in relation to the grant of the application. No changes to the BDL are currently in contemplation and the support for the consistency between the two regimes is noted. It is also noted that the £3,000 figure is not out of kilter with threshold figures in other jurisdictions. The figure will be kept under review and considered with the Viscount.

There was a divergence of opinion on whether a statutory demand should be a means by which the proposed creditors' winding up procedure could be evidenced. Certain of the respondents expressed the view that the requirement to issue a statutory demand might be the trigger for a termination event or commercial contract default resulting in detriment to a company, even if the winding up application is later dismissed. Consequently, there was also concern that the 21 day period was too long. One respondent made the argument that applications for a *désastre* are usually made on short notice (48 hours) supported by an affidavit concerning insolvency and that if there has been a failure to pay a debt within a reasonable time, this will of itself be evidence of insolvency. The fact that there would be a divergence between the regimes under the CJL and BDL was pointed out.

Conversely, the remaining respondents strongly supported the proposals for a statutory demand. They considered it an essential part of a modern process to demonstrate insolvency as seen in many other jurisdictions. Furthermore, it was noted that agreement defaults are more often the event which trigger a statutory demand being served, as opposed to a statutory demand being the event which triggers a termination clause in a commercial contract.

Having weighed these considerations, on balance, it was considered that the introduction of a statutory demand process was beneficial providing good evidence of a company's insolvency. The Viscount supported the statutory demand process, and the Government will consider the introduction of it in the BDL in due course with the Viscount. Again, this will be kept under review particularly as to the potential introduction of a means to dispute or cancel a statutory demand where appropriate.

There was general agreement amongst the respondents that the wording "clear evidence" in the proposed amendments to Article 157A(2) might cause confusion, not being a legally recognised term. This Article has, therefore, been amended to remove any uncertainty.

Please see below for commentary on question 6.

Appointment of a Provisional Liquidator

Q8. Do you consider that the ability to appoint a provisional liquidator is desirable? Please provide reasons.

Q9. Are there any other factors or safeguards that should be taken into account or powers that should be given to a provisional liquidator? Should the creditor or the company be able to apply to remove a provisional liquidator?

The proposals include provisions permitting the court to appoint a provisional liquidator where there is real concern that between the presentation of the application to the court to wind up the company and the making of a winding up order by the court, the company's affairs will not be properly conducted, or its assets will be dissipated.

Half of the respondents strongly supported the proposals that the court might appoint a provisional liquidator where it was appropriate in the circumstances. These respondents expressed the need for provisional liquidator options to ensure that Jersey has a clear and modern procedure in line with comparable offshore international finance centres as well as onshore jurisdictions such as England and Wales. This would provide comfort in relation to dissipation alongside the existing provisions. No further safeguards were considered to be needed with regards to a provisional liquidator's powers as under the proposals a creditor can apply to court to remove a provisional liquidator. Furthermore, in practice, the affidavit supporting the application to appoint the provisional liquidator would have to set out clear justification and grounds for appointment of a provisional liquidator. Any order made by the court will also set out the functions to be carried out by the provisional liquidator in relation to the company's affairs.

However, the other half of the respondents argued that it was not necessary for a provisional liquidator to be appointed in order to protect a creditor from a delinquent director dissipating assets, as there were existing powers available, and a remedy was available by way of a freezing (or Mareva) injunction and/or expediting the hearing. Such appointment could of itself trigger a termination event under a commercial contract and/or finance document.

Similar provisions to those proposed are available in other modern competitor jurisdictions. In the Government's view, on balance, the benefits of having this option available to the court where it is necessary, outweigh the disadvantages, and so it is reasonable and proportionate to include legislation to enable the appointment of a provisional liquidator. Consequently, the Government has proceeded with the proposal in respect of the possible appointment of a provisional liquidator

from the Register of Approved Liquidators (the more permanent appointment of which will subject to approval by the court, if appropriate).

Security

Q10. Do you think any additional points need to be covered in respect of secured creditors?

There was some concern that a minor creditor might abuse the proposed creditors' winding up process by forcing a secured creditor to pay the debt owing to avoid having to deal with the application for a creditors' winding up. Consequently, the Government has clarified the wording of the Regulations to make it plain that the court order is discretionary and that the court can order other parties to be convened to the application. However, the Government took the view that an order will only be made if it is proportionate and on the basis the court is content with the evidence that the company is cash flow insolvent. All creditors are entitled to attend and vote at the creditors' meeting and thus can make representations without the need to be convened to the proceedings. A creditor is also able to apply to the court for an order appointing an alternative liquidator. Consequently, the Government felt that no further amendments were required by the Regulations to provide additional protection for secured creditors.

Registration of Liquidators

Q11. Do you have any comments relating to the eligibility criteria for approved liquidators that wish to be appointed in Jersey? If so, please provide details.

Q12. Do you agree that a company director or shareholder should not be permitted to act as a liquidator for a company that is subject to a creditors' winding up application, unless specifically permitted by the court?

Q13. Do you agree that the concept of a proposed bond for approved liquidators is an appropriate means of security in addition to professional indemnity insurance?

Q14. Do you agree with this approach in relation to liquidators from outside the jurisdiction? Should these liquidators be required to register in a separate part of the register? Should they have a minimum qualification and experience level?

Q15. Do you agree that liquidators wishing to appear on the Register of Approved Liquidators should be required to register annually? If not, how frequently do you think they ought to apply to register?

Q16. Do you agree that the proposed sum of £800 is appropriate? If not, please provide an indication of the fee level you consider would be more appropriate with reasons.

Q17. Do you agree that the requirement to register as a liquidator and/or provisional liquidator and be placed on the Register of Approved Liquidators should apply to the appointment of all liquidators appointed under the Companies Law and/or Bankruptcy Law howsoever appointed? If not, why not?

Overwhelmingly, the respondents agreed with the eligibility criteria for approved liquidators that wish to be appointed in Jersey. However, one respondent considered the proposal that a liquidator be a Jersey resident a potential breach of the Human Rights (Jersey) Law 2000 and/or anti-competitive. The comment was also made that a foreign liquidator could be recognised in Jersey by the court by way of parallel proceedings, whereas if an application is made under Article 157 of the CJL they could not be appointed. The respondent believed this may encourage the use of parallel proceedings.

The Government takes its obligations under the Human Rights (Jersey) Law 2000 very seriously. The benefits to the interests of the creditors in ensuring that a liquidator is appointed who understands Jersey's unique laws and regulations and socio-economic-political landscape are greater than any disbenefits from enacting such legislation. Furthermore, the benefits resulting from the imposing of the criteria outweigh any potential behaviour that might be considered as anti-competitive. It is not therefore considered that this breaches any human rights. Additionally, in the Government's view, such criteria would not restrict access to justice. However, to ensure consistency with definitions used across Jersey's other laws and regulations an amendment has been made to the residency requirement of a Jersey liquidator so that the Regulations will now require a liquidator to be "ordinarily resident" in Jersey as opposed to "resident". A person not ordinarily resident can be appointed alongside a 'Jersey' liquidator.

All the respondents agreed that the same eligibility criteria should apply to liquidators from outside of the jurisdiction and that such liquidators should be required to register in a separate part of the register. In order to tighten the Viscount's supervision of the Register of Approved Liquidators, the Government has specified in the Order that any changes that occur which mean that a liquidator no longer meets the eligibility requirements for the Register of Approved Liquidators, must be notified to the Viscount within 21 days of any such changes, following which the Viscount must remove the liquidator from the Register of Approved Liquidators.

All respondents agreed that a company director or shareholder (of the relevant company) should not be permitted to act as a liquidator for a company that is subject to a creditors' winding up application unless specifically permitted to do so by the court.

All respondents generally agreed with the concept of a bond for liquidators and the requirement to register with the Viscount annually. All respondents who commented agreed £800 was a reasonable sum for the Viscount to charge for registration (and re-registration).

The majority of respondents were firmly of the view that the requirement to be an approved liquidator should not apply to a summary winding up - which is a solvent process. The costs and expense of using a specialist liquidator is therefore not usually justified. On this basis, the Government has decided not to include such a requirement within the Order at this point.

The Winding Up

Q18. Do you think the liquidator (or provisional liquidator) should have any additional powers? If so, please specify.

Q19. Do you consider that any further controls on the remuneration of the liquidator are desirable or practical?

Most respondents agreed that existing powers should apply to liquidators and/or provisional liquidators without extension, and that no further controls were required on the remuneration of liquidators (the investigatory powers of the Viscount being noted). Although one respondent was of the view that the liquidator's powers should mirror those available to the Viscount as set out in Article 26 of the BDL, it is considered that the Viscount has a unique role and that the existing powers for liquidators are sufficient.

Supervision of the Liquidation and Costs of the Liquidation

Q21. Do you agree all liquidators and provisional liquidators should be subject to enquiry by the Viscount regardless of whether they are appointed by way of a creditors' winding up, a summary winding up or a court (just and equitable) winding up? If not, please provide details.

Q22. Do you have any comments in relation to the recovery of the Viscount's disbursements?

It should be noted that there was a typographical error in the Consultation Paper and that there was no Question 20 for respondents to consider.

In respect of Q21, most respondents were of the view that the summary winding up process should not be included within the proposed provisions. On the basis that these are company matters where there are no insolvency considerations, the Government has removed this from the proposed amendments.

Concerns were raised that any enquiry process might be abused by delinquent directors and disgruntled shareholders, and that, therefore, there should be written into Article 8 of the Order a minimum requirement before a complaint can be dealt with by the Viscount. Accordingly, the Order has been amended so that matters of complaint which are referred to the Viscount must first be referred to the liquidator for resolution. In the event the liquidator does not deal with the complaint satisfactorily or within a reasonable time frame, the complainant may then refer the complaint to the Viscount.

Article 8 has also been renamed to more accurately reflect the purpose of the provisions so that it is now called "Investigations into conduct of liquidators". It is of course the court that ultimately supervises the liquidator as an officer of the court.

In respect of the recovery of the Viscount's disbursements – where in fact incurred –, most respondents were of the view that the costs of any investigation, including disbursements, should come out of the public purse as the Viscount would, in effect, be performing a public role in monitoring the performance of liquidators. These respondents were also of the view that a creditor should not have to suffer additional costs in this respect. One respondent, however, was of the view that the usual adversarial costs rules should apply, i.e., that the party applying to the Viscount should pay and that undertakings akin to those given to the Viscount in *désastre* proceedings should be given to the Viscount in the context of winding up proceedings and that Article 30 of the BDL should be reflected in the draft Order.

On balance, it was decided that the status quo should be maintained for the time being and that the costs and disbursements should be borne by the public purse, noting that any potential cost would be offset, in part at least, by registration and re-registration fees for liquidators. The Government notes the court has discretion in respect of the orders made in the creditors' winding up process and thus if the court felt it appropriate to make such other order as it thought fit in the circumstances, it has the discretion to do so.

The broader comment was made that there may be a reduction in income to the Viscount's department as corporate insolvencies which would previously have been conducted by the Viscount by way of a *désastre*, are instead conducted by a liquidator as a creditors' winding up. There was also a concern that the Viscount would be left to deal with situations where there is uncertainty as to the recovery of assets resulting in a loss or a corporate failure. That said, the respondent supported the proposals and noted that the fees generated in respect of the registration of liquidators may well offset, at least in part, any loss sustained by the Viscount's department.

Protection for Third Parties

Q23. Do you think that if the company was not insolvent at the date the application for winding up was made (whether the process was instigated by way of a statutory demand or otherwise), the company should have a right of action against the applicant to recover damages for or in respect of any loss sustained by the company as a consequence of the application, unless the applicant in making the application, acted reasonably and in good faith?

Q24. Do you think the provisions at Article 186A are sufficient to provide protection? Should any other category of person be added? Do you consider that any additional measures should be taken to protect third parties? If so, please provide details.

Q25. Do you agree that the proposed winding up provisions should relate only to Jersey registered companies, or should the winding up provisions be extended to include foreign companies carrying on business in Jersey or with property in Jersey?

Q26. Do you have any comments on the relevant commencement date for the winding up or connected timings?

Most respondents were of the view that if the company was not insolvent at the date the application for winding up was made, the company should have a right of action against the applicant to recover damages for, or in respect of, any loss sustained by the company because of the application, unless the applicant in making the application, acted reasonably and in good faith. These respondents were also of the view that the company's rights should mirror those set out in the BDL.

One respondent, however, disagreed that the company should have such a right. The respondent was of the view that the point of the process is that it is supposed to be quick and simple. Unlike an application under the BDL which is usually made without notice, the debtor will be aware of the application for a winding up. The court also has the power to award costs under Article 2 of the Civil Proceedings (Jersey) Law 1956. It was considered that this option should be available, in line with the BDL, noting the defence of acting reasonably and in good faith.

All the respondents agreed that there were very few other categories of person who would be interested in the conduct of the liquidation save for perhaps the JFSC or a director of the company subject to the winding up. On reflection, it was felt that to add any other category of person would be superfluous. After specific consultation with the Jersey Financial Services Commission ("**JFSC**") on the issue, the Government noted that the JFSC and other parties already have the right to wind up the company via various other Articles under the CJL (e.g., via a summary winding up under Articles 145 to 154A, the already existing creditors' winding up process under Articles 156 to 186, and a court winding up (also known as a just and equitable winding up) under Article 155) or as a creditor of the company themselves, under the new Article 157A. In addition, if any interested party has concerns over the conduct of a liquidator it can make a complaint to the Viscount if necessary.

Most of the respondents did not consider that the provisions should be extended to foreign companies. However, one respondent thought that it should apply to foreign companies on the basis that the proposed amends to the CJL ought to mirror the *désastre* process whereby an application can be made in respect of foreign or "external" companies carrying on any economic activity in Jersey. It was suggested that the Jersey court is regularly concerned with multi-party matters involving companies and trust entities incorporated in Jersey and elsewhere. The need for parallel proceedings would unnecessarily increases costs and causes delay to the detriment of the interests of creditors.

Having considered the concerns raised, on balance the Government felt it was not appropriate to extend the provisions beyond the Jersey registered company at this stage.

In respect of the question asked regarding the commencement date for the winding up, the respondents were split in their views. Half were of the view that the commencement date should be the date of the order and should not be back dated to the date of the application as to do so would be to call in to question the validity of the acts of the directors between the date of the

application and the date of the order. However, the remaining half of the respondents were of the view that the commencement date should be the date of the application rather than the date of the order on the basis that to have it commence from the date of the application would align Jersey to other jurisdictions that have a procedure reflective of the proposed creditors' winding up procedure; that in practice it would provide a default trigger date for finance agreements; it would assist in preserving assets as directors would be on notice not to dissipate assets from the date the application was made; and it would facilitate creditors' claims against delinquent directors, ensuring that the applying creditor is not penalised in costs with the application costs being shared by all creditors who benefit from the winding up process.

Having considered the differing points of view carefully, on balance the Government decided to legislate for the commencement date for the winding up to commence, by default, from the date the application is made. However, to ensure flexibility, the legislation ensures the court has discretion to order the commencement date as being such other date as the court deems fit.

Time Period for Consultation

Q27. Overall, are you satisfied with the proposed creditors' winding up application process? Please provide any additional comments particularly if there are some points of disagreement.

There was universal support for the key proposal to set out a process by which a creditor of an insolvent Jersey company can apply to the court for the appointment of a liquidator. It was considered essential for all parties interested in commercial activities in Jersey, whether at a domestic level or for institutional investors and international financiers, that Jersey has a robust insolvency regime. The overall indication was that the amendments would modernise Jersey's insolvency law framework and enhance Jersey's reputation as a leading finance centre recognising and protecting the interests of creditors and complement existing options.

CONCLUSION

The draft Regulations will be debated by the States Assembly in January 2022 and if passed will come into force some 21 days later – alongside the accompanying Order.

Government would like to take this opportunity to thank consultation respondents, the Viscount and the JFSC for their invaluable input into this process both before and after the consultation.

Further details about the consultation can be found on gov.je/consultations