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Insolvency Law Committee response to the Insolvency Service consultation on the proposals for reforms of the process to apply for bankruptcy and compulsory winding up

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Introduction

1. We refer to the Insolvency Service consultation paper entitled "Reform of the Process to Apply for Bankruptcy and Compulsory Winding Up" published in November 2011 (the **Consultation**). This response has been prepared by the City of London Law Society (**CLLS**) Insolvency Law Committee.

2. The CLLS represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

3. The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees. This response in respect of the Insolvency Service consultation on the proposals for reforms of the process to apply for bankruptcy and compulsory winding up has been prepared by the CLLS Insolvency Law Committee.

4. In this response, which focuses mainly on the proposals contained in the Consultation relating to corporate debtors and compulsory winding-up, we have made a number of general comments rather than confining our comments to the particular questions raised. This is because we consider that, as an initial step, it is necessary to address key

assumptions underpinning the Consultation. We have set out in the Appendix a summary of our responses in relation to the consultation questions, although these should be read in the light of this response as a whole.

General comments

5. We generally agree with the consensus reached following earlier consultations that the process by which an individual can file for his or her own bankruptcy could potentially be streamlined, removing the need for automatic court involvement in the process, provided that appropriate safeguards were in place.

6. We would, however, emphasise the need for there to be procedures to ensure that an individual receives appropriate advice as to the available options, and the very serious consequences of bankruptcy, before seeking a bankruptcy order. The bankruptcy of an ill-informed debtor who made an application remotely and who then failed to co-operate with a process that they did not expect could prove more expensive to the court system, and less beneficial to that individual, than the procedures currently in place.

7. The previous proposals have been significantly extended far beyond the initial concept of providing a "voluntary" way to enter into an insolvency procedure, so as to provide individuals with a similar procedure to a creditors' voluntary liquidation. The Consultation now proposes that the same procedure could also apply to a bankruptcy petition presented by a creditor, even in the face of debtor opposition[1], unless the debtor chooses to refer the matter to the court. A petition willingly presented by a debtor is significantly different to a petition presented by a creditor. The fact that the creditor, rather than the debtor, is taking this step suggests that there is some element of dispute, if only as to whether the debtor considers that he or she should be made bankrupt at that stage as a result of their inability to pay the admitted sum. If this were not the case, the debtor would, presumably, have presented the petition.

8. The Consultation states that it does not have any impact on any human rights issues.[2] We find this surprising in the light of articles 6(1) of the European Convention of Human Rights[3] which requires decisions impacting on individuals to be made in a “fair and public hearing” and

1 Page 38 of the Consultation Paper
2 Page 96 of the Consultation Paper
3 Incorporated into English law by the Human Rights Act 1998

"by an independent and impartial tribunal". It is difficult to imagine a more important issue for an individual than being made bankrupt as the effect of bankruptcy would deprive an individual of his property and, potentially, ability to work. Notwithstanding this, under the proposals there is no "public hearing", no "tribunal" and the Adjudicator is not demonstrably impartial.[4] The current legal regime entitles a debtor who opposes a statutory demand or a bankruptcy petition to a hearing. The proposals envisage that this right to a hearing would come at the cost of paying a fee and only upon payment of that fee would the debtor benefit from his human right of an impartial hearing.

9. If there is any disagreement as to whether a bankruptcy order should be made, the matter should be referred to the court because, as noted in the Consultation, the Adjudicator "*will not have a Judge's capacity to weigh up competing interests and exercise discretion when making decisions"*.[5] It should not be for the Adjudicator to decide whether any disagreement is sufficiently material to be referred to the court, particularly given the draconian consequences which follow an individual being declared bankrupt.

10. The previous proposals have also been extended by the proposal that a similar procedure could also apply to the compulsory liquidation of companies. We do not consider, for the reasons set out below, that it would be appropriate for the proposed streamlined procedure to be extended to apply to the compulsory liquidation of companies.

11. We are also concerned at the inclusion of the proposals contained in the Consultation for a pre-action process aimed at encouraging constructive debtor/creditor dialogue. We do not consider that these proposals fully take into account the key differences between a litigation claim made by one party against another seeking damages and a class remedy such as bankruptcy or winding-up. Where an individual or company is potentially insolvent, every stakeholder is likely to be affected by an agreement between the debtor and one or more of its creditors.

12. We consider that the potential consequences of the current proposals for a pre-action process could be to:

(i) further encourage individual creditors to use the threat of bankruptcy or winding-up as a debt collection tool;

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4 In the case, Secretary of State for Trade and Industry v Frid [2004] UKHL 24, the House of Lords held that The Crown is regarded as a single entity in its dealings, even though various aspects of its affairs may be handled through different government departments

5 Page 44 of the Consultation Paper

(ii) encourage an insolvent debtor to reach an agreement with the creditor who made the threat, potentially to the detriment of its other creditors; and

(iii) restrict existing creditor rights. A creditor with (for example) an unsatisfied judgment should not be placed in a position where a debtor can buy further time by making "reasonable" payment offers, which that creditor does not have sufficient information to evaluate properly. Still less should that creditor face potential sanctions if it were to proceed with a compulsory winding-up petition at a time when a "reasonable" offer remained on the table.

Proposals relating to the Compulsory Winding-Up of Companies

Are the proposed changes necessary?

13. As a general introductory point, we think that it is important to emphasise the fact that the position of a company which encounters financial difficulties is materially different from that of an individual. A decision to liquidate a company can already be implemented immediately, without court involvement, using the creditors' voluntary winding-up process set out in Chapter IV of the Insolvency Act 1986 ("**IA**"). It is only where a company does not, for whatever reason, use this process that the court becomes involved. This is very different from the position of an individual debtor, who must go to court if he or she wishes to be declared bankrupt.

14. As noted in responses to previous consultations, we consider that a strong case needs to be made out for introducing any legislative changes (and the period of uncertainty that such changes inevitably bring about). In this case, we do not consider that a strong case has been made out in respect of corporate insolvency, given that the creditors' voluntary winding-up procedure is already available to companies.

The circumstances in which a revised compulsory winding-up procedure might apply

15. Turning to the proposals contained in the Consultation and, in particular, to the circumstances in which the new procedure would be used, the proposals limit the circumstances in which an Adjudicator would consider an application for the compulsory winding-up of a company. The proposals distinguish between decisions of a purely administrative nature (to be dealt with by the Adjudicator) and those which involve the exercise of judgment (to be dealt with by the court).[6]

16. On this basis, it is proposed that the role of the Adjudicator should be limited to winding-up applications *"in circumstances where it is asserted*

[6] Page 44 of the Consultation Paper

that the company is unable to pay its debts or where the company has passed a valid special resolution that it be wound up [by the court."[7] The existing procedure relating to a winding-up petition based on Section 122(1)(b) to (e) and Section 122(a) to (g) IA would therefore remain unaltered.

17. The new procedure would therefore, in practice, apply only where a winding-up petition was based on the assertion that the company was unable to pay its debts. It appears that there is an incorrect assumption underlying the proposals that there is no exercise of judicial discretion when a winding-up petition is made based on such grounds. This is not so. Indeed, in some cases, the exercise of such discretion is a statutory requirement.

18. The circumstances in which a company is deemed unable to pay its debts are set out in Sections 123(1) and (2) IA. Two of these circumstances (impending illiquidity (S123(1)(e))[8] and balance sheet insolvency (S123(2)))[9] specifically require the court to exercise its discretion in deciding whether it would be appropriate to make a winding-up order on this basis, often following the provision of (sometimes conflicting) expert evidence.[10]

19. This leaves (in England and Wales), petitions based on an unsatisfied statutory demand (S123(1)(a) IA) or an unsatisfied judgment (S123(1)(b) IA), both of which will almost inevitably be presented by the relevant creditor rather than by the debtor. These are, however, also areas where the exercise of a discretion or judgment may be necessary when petitions are presented on this basis, either because there are technical legal arguments about (for example) whether the statutory demand was correctly served or because the debtor company wishes to obtain an adjournment, delaying the making of a winding-up order while other alternatives are explored.

Lack of transparency and creditor involvement

20. The perceived benefit of any streamlined compulsory liquidation process must be balanced against any prejudice to creditors inherent in

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7 Page 43 of the Consultation Paper

8 S123(1)(e) IA provides that a company is deemed unable to pay its debts "if it is **proved to the satisfaction of the court** that the company is unable to pay its debts as they fall due".

9 S123(2) IA provides that a company is also deemed unable to pay its debts "if it is **proved to the satisfaction of the court** that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities".

10 See, for example, BNY Corporate Trustee Services Ltd v Eurosail - 2007- 3BL plc and others [2011] EWCA Civ 227 The complicated question of determining balance sheet insolvency also occupied the court for an extended period of time in Re Colt Telecom Group plc [2002] EWHC 2815. Whilst this was a case involving an application for an administration order, the question as to whether a company was likely to be able to pay its debts took a significant period of time to determine and involved detailed cross-examination of expert witnesses called by both sides.

the new process. Liquidation is a collective remedy, and the views of a petitioning creditor will not always prevail. The procedure outlined in the Consultation does not, however, appear to take account at any stage of the views of the debtor company's other creditors.

21. The impact of excluding those creditors from the process is heightened by the fact that the Consultation does not anticipate a winding-up petition heard by the Adjudicator being advertised. It therefore seems that creditors, who may have a significant economic interest in what happens to the relevant company, will remain unaware of the liquidation process until a winding-up order has been made. This lack of transparency, and any resulting perception that matters were being dealt with behind the scenes by civil servants would be particularly unfortunate where (as is often the case) the petitioning creditor was HM Revenue & Customs.[11]

Section 127 IA

22. Section 127 IA provides that in a winding-up by the court, any disposition of the company's property and any transfer of shares "made after the commencement of the winding-up" (effectively the day when the winding-up petition is presented) is, unless the court orders otherwise, void.

23. The proposal that a winding-up petition which is to be dealt with by an Adjudicator should be neither filed at court nor advertised[12] could both prejudice those dealing with the company in question and, more importantly, create systemic uncertainty, as it would become impossible to carry out a search in order to ascertain whether or not a transaction involving a sale of assets (such as a securitisation or business sale) or a share transfer might be void. This would be expected to have a direct impact on the treatment of such transactions by ratings agencies and could potentially result in an increased number of time consuming and expensive applications to court for the subsequent validation of transactions.

Provisional Liquidation

24. The Consultation Paper does not specifically contemplate the circumstances in which a creditor presenting a winding-up petition also seeks the appointment of a Provisional Liquidator to preserve the company's assets pending the hearing of the winding-up petition. We

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11 In the case, Secretary of State for Trade and Industry v Frid [2004] UKHL 24, the House of Lords held that The Crown is regarded as a single entity in its dealings, even though various aspects of its affairs may be handled through different government departments

12 Page 48 of the Consultation Paper

assume that any petition seeking such relief will automatically be heard by the Court (given that there will almost inevitably be a "dispute" in such circumstances). Presumably this could result in the unsatisfactory position that the petition is determined by the Adjudicator whilst separately the Court is determining the appointment of the provisional liquidation.

Potential scope for confusion

25. A two track process, where an application is heard by either the Court or an Adjudicator, depending on the grounds relied on, has the potential to create uncertainty and confusion, particularly where petitions to the Court are advertised and public, while petitions heard by an Adjudicator would be made without advertisement behind closed doors. The potential for uncertainty would be heightened where the petition was, as is not unheard of, based on a number of grounds, some of which fell within the Court's jurisdiction and some within the Adjudicator's.

Winding-up petitions presented in respect of foreign companies

26. The proposals contained in the Consultation Paper do not distinguish between the position where the debtor is a UK company and that where it is a foreign company. In the latter case, the Courts is required to exercise a discretion in relation to any such "unregistered company" as to whether or not it would be appropriate to make a winding-up order, given the extent of the company's nexus with the United Kingdom[13]. Given the requirement for the exercise of judicial discretion, we do not consider that it would be appropriate for an Adjudicator to deal with winding-up applications relating to foreign companies.

Conclusion

27. In the light of:

(i) the limited circumstances in which a compulsory winding-up petition would be heard by an Adjudicator, unless the statutory tests for illiquidity (S123(1)(e)) or balance sheet insolvency (S123(2)) IA were amended, so that the Adjudicator rather than the Court had to be satisfied (which we believe would be a mistake, as this is matter of judgment which should remain within the jurisdiction of the court);

(ii) the resulting probability that the process would be limited (in England and Wales) to petitions presented by creditors based on an unsatisfied statutory demand or judgment where the debtor was willing to consent to going into compulsory liquidation (but was not willing or able to go into creditors voluntary liquidation);

[13] See, for example, Banque des Marchands de Moscou (Koupetschesky) v Kindersley [1950] 2 All ER 549

(iii) the comparative lack of transparency and the loss of creditor rights of audience under the proposed procedure; and

(iv) the potential for uncertainty and confusion which a two track compulsory liquidation procedure could cause,

we consider that any benefits inherent in the proposals to revise the process to apply for a compulsory winding up of a company are clearly outweighed by the risk that the implementation of the proposals set out in the Consultation, in their current form, could erode creditor rights, create commercial uncertainty and have unintended consequences which could result in creditors being prejudiced.

Proposals relating to The Pre-Action Process

The Pre-Action Process

28. The reforms proposed in the Consultation are, as noted in the Foreword to the Consultation Paper, "designed to encourage debtors and creditors to communicate with each other, and thereby reach a solution which is satisfactory to both of them, without recourse to a bankruptcy or winding up application…"

29. While it is clearly useful to encourage constructive dialogue between a debtor and its creditors, we do not consider that it would be appropriate to introduce what is effectively a mandatory pre-action protocol for insolvency proceedings.

30. The position where a company is facing imminent insolvent liquidation is very different to the position where parties are contemplating (for example) a negligence action. In many cases, the debtor's liquidity position and the existence of other pressing creditor claims will significantly limit the scope of any resulting dialogue where there had been no such dialogue before the threat of commencing insolvency proceedings.

The risk of encouraging the shift from a class remedy to a debt collection tool

31. There is also a more fundamental concern, in that the proposed pre-action process assumes that there is a dispute involving two parties which can be resolved by an agreement between those parties. The key difference between bankruptcy and other litigation is that where an individual or company is potentially insolvent, every stakeholder is likely to be affected by an agreement between the debtor and one of its creditors. The bankruptcy and compulsory winding-up procedures are therefore intended to protect the interests of all creditors.

32. There is a clear risk that, as currently proposed, the pre-action procedure could encourage debtors to put off restructuring negotiations

until the last moment and, when such negotiations do occur, agree ad hoc bilateral deals with creditors which lack transparency, rather than proposing viable long term solutions which are fair to all their creditors and which have been approved by an insolvency practitioner.

33. The pre-action procedure may also further encourage creditors to use the threat of bankruptcy or compulsory winding up as a debt collection tool, if there is a perception that the debtor is being encouraged to agree a settlement of that creditor's claim (potentially ignoring the position of other creditors).

34. The validity of such ad hoc arrangements entered into with creditors may be challenged under S239 or 340IA as "Preferences" or potentially under S238 or 339IA as "Transactions at an Undervalue" if the debtor in question subsequently goes into bankruptcy, liquidation or administration. Such arrangements may also, if entered into by a company and detrimental to the general body of creditors, result in disqualification procedures being initiated in respect of that company's directors. There is therefore a risk that, once again, the unintended consequence of the proposed measures may be an increase, rather than a reduction, in court involvement.

Impact on creditor rights and increased litigation risk

35. The imposition of a mandatory pre-insolvency process in the form proposed could significantly erode the existing rights of an unpaid creditor, owed an undisputed amount, to petition for the debtor to be wound-up. It is, for example, stated that a creditor would not have complied with the requisite mandatory pre-action process if it "*proceeded [to make an application to wind-up the debtor] despite a debtor's reasonable attempts to settle the claim".*[14]

36. The question of what is "*reasonable"* in this context could give rise to significant disputes which could increase, rather than reduce, the level of court involvement in the insolvency process. This is a complex question requiring sometimes detailed consideration and application of judicial discretion.

[14] Page 31 of the Consultation Paper

37. The apparent shift away from the protection of legitimate creditor interests is highlighted by the suggestion in Question 15 of the Consultation paper that there could be civil (or even criminal) sanctions imposed on a creditor who commences winding-up proceedings but has not complied with the mandatory pre-action process because, for example, it rejected a "reasonable" settlement proposal.

38. Adopting sanctions of this nature could significantly alter the balance of any commercial negotiations if a creditor, having (for example) obtained judgment against the debtor, was then obliged to chose between:-

(i) accepting a settlement which that creditor considered unreasonable; and

(ii) taking the alternative option of commencing winding-up proceedings, knowing that they potentially faced a penalty if the court disagreed with their view of what was "reasonable".

There should be no question of a party suffering civil or criminal liability based on their assessment of whether a settlement proposal was reasonable in the relevant circumstances.

39. Given that it is always open to a debtor to communicate with its creditors, and that a number of effective statutory mechanisms are already available with which to implement a viable debt restructuring solution, it is not clear why it appears that a creditor could be required to justify its decision to apply for a compulsory winding-up, rather than keeping the onus on the debtor to make timely and realistic proposals.

The contents of the Pre-Action Notice

40. It appears that the proposed contents of the pre-action notice are trying both to bring the claim (and its seriousness) to the debtor's attention and, at the same time, to set out the creditor's position. The difficulty in trying the cover this second limb is that a creditor would, in the same notice, be asking whether the debtor can afford to pay the debt and (prejudging its answer) setting out the extent to which the creditor would be willing to amend its repayment terms[15].

41. In the absence of reliable financial information from the debtor, it is difficult to imagine the pre-action notice containing anything other than a high level statement to the effect that the creditor would be prepared to consider any reasonable payment proposal put forward by the debtor, if supported by its financial projections and business plan.

42. Given the key concern appears to be that of how best to bring the debtor and creditor together, so as to initiate a constructive dialogue before a bankruptcy or winding-up petition is filed at court, one solution

[15] See proposed contents of a Pre-Action Notice on Page 29

might be to include additional wording in a statutory demand. The pro forma statutory demand served on an individual debtor could, for example, include a clear statement setting out:

(i) the consequences of being declared bankrupt;

(ii) a summary of the alternative options available to an individual facing financial difficulties (such as debt relief orders and individual voluntary arrangements); and

(iii) the importance of seeking appropriate, independent debt advice (together with details of where to go to obtain this).

A statement which clearly sets out the importance of addressing the issue immediately, together with suggestions as to what the individual's next steps should be, in terms of considering their available options, might go some way towards facilitating dialogue at an earlier stage.

Proposals relating to Bankruptcy

43. We do not propose to comment in detail on the procedural points (such as those relating to the payment of fees) set out in the Consultation, as others responding to the Consultation will have greater experience in this area. We would, however, take this opportunity to make two points of more general application.

What amounts to a "Dispute"?

44. The Consultation states that the new procedure should only apply to undisputed applications where there is "essentially no disagreement between the parties". The Consultation does not define what would amount to a "dispute" or "disagreement" for these purposes, but it appears from the fact that a creditor bankruptcy petition may proceed in the face of debtor opposition[16], that there is an unspoken requirement that a debtor's opposition should, to be treated as a dispute, have legal merit. The question of what threshold should apply when considering whether or not this is the case, is unclear from the Consultation.

45. It is also unclear whether an Adjudicator, having decided that a debtor's opposition to a petition lacks legal merit, has to provide a reasoned argument supporting his or her conclusion. Logic and natural justice suggest that they should, as otherwise there would be no clear appeal process, but the time and cost involved in preparing such a statement has not obviously been taken into account in the cost/benefit exercise set out in the Consultation.

[16] Page 38 of the Consultation Paper

46. A dispute involving an individual debtor will, in any event, often not relate to the existence of the debt on which the bankruptcy petition is founded, but rather to whether bankruptcy is the most appropriate option and/or whether more time should be granted before a bankruptcy order is made. The proposals also give rise to possible disputes as to whether the pre-action process has been properly complied with.[17] As acknowledged in the Consultation, it is the Court, rather than the Adjudicator, which will be best placed to resolve a dispute of this nature, as it involves balancing the competing interests of stakeholders.

Bankruptcy Tourism

47. Section 279(1) IA provides that a bankrupt may be discharged from bankruptcy one year after the date on which the bankruptcy commences. This provision has encouraged a significant number of individuals resident in other EC jurisdictions to apply for the making of a bankruptcy order in the United Kingdom, when faced with financial difficulties, rather than go into an equivalent procedure in their own jurisdiction (where they may only receive a discharge after a number of years).

48. As far as citizens of EC member states are concerned, a bankruptcy order should only be made in respect of that individual where it is established that their "centre of main interests" is in the United Kingdom. Establishing whether or not this is the case involves the exercise of judicial discretion after, in many cases, seeking the provision of evidence to support the debtor's claim to a UK COMI.[18]

49. It is not clear whether an Adjudicator would be in a position to carry out this exercise, particularly where the applicant applied remotely for the making of a bankruptcy order, selecting the evidence with which to support its petition. If they are not in a position to do so, there is a risk that the procedure set out in the Consultation could be abused by those who do not, in reality, have a UK COMI.

50. The costs involved in the Official Receiver's office dealing with such cases and, where necessary, seeking an annulment of the bankruptcy order under Section 282 IA, may well prove greater than any cost

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17 See, for example, Page 40 of the Consultation Paper, which provides that this would be a pre-condition of the Adjudicator making a bankruptcy order

18 Establishing a debtor's COMI is not always easy to determine as highlighted by the recent case of Irish Bank Resolution Corporation Ltd v Quinn [2012] NI Ch1 (10th January 2012). The case involved an application to annul/rescind the bankruptcy order made by the Northern Irish Court in respect of Mr Quinn. On the facts and evidence presented, it was held that on a balance of probabilities Mr Quinn's COMI was not in N.I. and the bankruptcy order was annulled

savings involved in those cases being initially dealt with by an Adjudicator rather than by the Court.

51. One possible solution would be to provide that, unless the debtor certified that it had been resident and domiciled in the United Kingdom for a specified period of time (for example 5 years), the matter should automatically be heard by the court rather than by the Adjudicator.

26 January 2012

Appendix

Question 1: Should documents relating to a bankruptcy or winding-up case remain with the party who created them, and be open for inspection there by persons so entitled?

We consider that this proposal may make it more difficult for a party with a legitimate interest to view relevant documents and that it may therefore reduce the transparency of the bankruptcy or winding up process.

If this suggestion were to be adopted, a creditor would have to apply to a (potentially very busy) insolvency practitioner for permission to come to their office and review documents, a scenario which carries the inherent risk that the insolvency practitioner might to try to deter that creditor, seeing their request as a time-consuming nuisance.

At the moment such documents can be inspected by creditors at court during normal court hours. We consider that this should continue to be the case.

Questions 2 to 10

These are procedural issues relating to the payment and administration of application fees, and the position of creditors without internet access, which we consider others are better qualified to comment on

Questions 11 to 15 and Question 401A: The Pre-Action Process

We refer to Paragraphs 27 to 41 above.

We agree that it is clearly useful, where practical, to encourage constructive dialogue between a debtor and its creditors. There may also be a benefit in a creditor taking steps to emphasise the gravity of the debtor's position, so that the debtor is encouraged to take advice as to the options available to him or her at any earlier stage than may currently be the case.

We would, however, not support the introduction of any form of mandatory pre-action protocol for insolvency proceedings, as the position where a company is facing imminent insolvent liquidation is very different to the position where parties are contemplating (for example) a negligence action. The key concerns relating to this proposal are that:

(i) A protocol of this nature assumes that a debt claim involves only the debtor and the relevant creditor. It would therefore encourage the debtor to agree a deal with the creditor in question, potentially to the detriment of the debtor's other creditors. Insolvency legislation is intended to protect the interests of those creditors as a class.;

(ii) This would, in turn, result in what are currently class remedies being increasingly used as a debt collection tool by individual creditors;

(iii) A debtor could use arguments that the pre-action protocol had not been properly followed as an additional basis for dispute; and

(iv) The proposal takes no account of the fact that a creditor may need to act quickly to preserve the assets available to meet creditor claims. The suggestion that a pre-action process should be followed is very difficult to reconcile with the scenario where creditors feel forced to seek the appointment of a provisional liquidator. Failure to act quickly could result in significant losses for creditors which it is impossible to put a figure on the purpose of the Impact Assessment.

We would suggest that, rather than introduce a system which was both cumbersome and open to abuse, it might be more appropriate, as suggested in Paragraph 41 to consider amending the form of Statutory Demand (particularly those served on individual debtors) so that they make clearer the consequences of being declared bankrupt and set out where the debtor can obtain advice in relation to their available options.

Question 16: COMI

While guidance as to whether or not a debtor can make an application, given its COMI, might be helpful, this is a complex and fact-specific issue, the case law on which is continuing to evolve. We would suggest that any case where there is any doubt as to the debtor's COMI should properly be dealt with by the court, particularly given the potential issues with "bankruptcy tourism" described in paragraphs 46 to 50 above.

Questions 17 to 27

These are procedural issues relating to the personal bankruptcy which, as noted above, we do not propose to comment on in detail.

Questions 28 and 29

These are matters of Scottish law which we do not propose to comment on

Questions 30 to 39: Extending the Adjudicator's role to determining applications for winding up on the grounds that the company is unable to pay its debts

We refer to Paragraphs 12 to 26 above.

We do not consider, for the reasons set out in those paragraphs, that it would be appropriate for a streamlined procedure to be extended to apply to the compulsory liquidation of companies in the manner contemplated by the Consultation.

THE CITY OF LONDON LAW SOCIETY
INSOLVENCY LAW COMMITTEE

Individuals and firms represented on this Committee are as follows:

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