



Department of the Economy

Government of Jersey
19-21 Broad Street
St Helier
Jersey
JE2 3RR

Via email to Louise Richardson – economy@gov.je

16 August 2022

Dear Sirs,

Consultation on Amendments to the Powers of Attorney (Jersey) Law 1995

We are writing to you in relation to your above titled consultation paper.

Jersey Finance maintains a high level of engagement with its members and highlighted this consultation through its weekly Industry Insight publication and through attendance at trade association meetings.

In addition to the responses sent directly to Government, Jersey Finance received one response from member firm Ogier (Jersey) LLP and it is included in the Appendix.

We trust these comment is helpful and we look forward to receiving your reply in due course.

Yours sincerely

Joanna McAviney
Legal and Technical Manager
Jersey Finance

APPENDIX

CONSULTATION RESPONSE

Amendments to the Powers of Attorney (Jersey) Law 1995: Ogier (Jersey) LLP responses to consultation

Please refer also to the annotated draft of the revised law (referred to in question (v)).

Section A: separate legal persons

- i. Do you consider the proposed amendment achieves the desired aim? If not, why not?

No comments.

- ii. Are there any other entities which are not body corporates and which it would be beneficial to add to the list of entities that are able to make a PoA?

The list anticipates foreign legal entities which are comparable in form to 'similar' Jersey entities. Could it also extend to other legal entities not expressly contemplated by the new provisions, executing PoAs in accordance with their applicable constitutional documents? This would remove any potential issues if it is unclear that a foreign legal entity is sufficiently similar to the Jersey legal form in order to be included in the new language. Perhaps by adding a definition of "foreign legal entity" being "a legal person registered or formed outside Jersey other than a [limited liability company,] limited liability partnership or separate limited partnership". This definition could be referred to in each place where the new legal persons are to be inserted.

Given the fuller list of entities now proposed, for completeness, it may be worth clarifying that the formalities for execution apply equally where a *body corporate or legal person* is granting a PoA in some capacity on behalf of a *non-legal person* in respect of which it acts. An example is a corporate general partner granting a PoA on behalf of a '1994 Law' limited partnership. Could the law clarify that, in these instances:

- (i) the body corporate / legal person executing the PoA may do so in the relevant capacity provided (a) the execution formalities for that body corporate / legal person are complied with and (b) the body corporate / legal person has the power and authority to grant the PoA in its capacity on behalf of the non-legal person
 - (ii) any such PoA will be binding on any further body corporate / legal person holding the relevant capacity (eg. replacement general partner) without the need to be re-executed by that replacement person.
- iii. Are there any other associated amendments required?

We suggest the definition of "limited liability company" be expanded to include an LLC registered or formed outside Jersey (in line with the new definition of LLC agreement, and with the approach taken on other foreign legal persons).

Section B: foreign law governed powers of attorney

- iv. Do you consider the proposed amendment achieves the desired aim? If not, why not?

No comments.

- v. Please provide comments on

- a. The removal of the Article 9(4) one year limit and any adverse consequences of doing so; or

To the extent it relates to commercial contracts and arrangements, we support the removal of the one year limit. As the amendments elsewhere attest, in other jurisdictions it is possible to establish powers of attorney that are irrevocable in excess of one year. The limits imposed in Jersey frequently cause friction and frustration in the context of sophisticated donors that are willing to give PoAs for the duration of, say, their investment in a Jersey vehicle. It would benefit Jersey to adopt a more permissive approach that reflects market practice in financial services structuring.

Commercial contracts (such as limited partnership agreements) often last well in excess of one year, and are made between sophisticated counterparties (which may also include individuals) whose agreements are generally not otherwise subject to statutory restrictions (*la convention fait la loi des parties*). There are often good reasons why parties to those contracts would want a power of attorney to remain in force throughout the life of the contract, such as to enable a non-cooperative defaulting investor to be dealt with as provided for under the relevant contract.

It may be that, if accepted, the changes at Article 5(2) in our markup attached provide adequate certainty that PoAs in commercial contracts / arrangements may be made irrevocable if agreed between the parties, with the one year limit remaining as a protection for PoAs granted by individuals in non-commercial circumstances.

- b. Any proposed clarification as to the effect of breaching the one year rule as mentioned in para 15.

As stated in the previous response, we favour the removal of the one year limit. It is reasonable – and will be beneficial to Jersey's reputation as a jurisdiction for commercial activity – that parties should have the certainty of powers of attorney being irrevocable as agreed between them.

Alternatively, if the changes at Article 5(2) of our markup are adopted so as to provide certainty in a commercial context, but concerns remain where private individuals execute PoAs in other circumstances, the approach suggested in paragraph 15 could be a suitable solution concerning the latter.

Section C: signing a power of attorney on behalf of the donor

- vi. So far as there is currently uncertainty, do you agree that attorneys should be able to grant further powers of attorney on behalf of donors? Are there risks in doing so? How could they be managed? Should it only be for certain situations – such as for security agreements? Please provide any comments.

It should be possible for attorneys to grant further PoAs on behalf of donors, though this has to be balanced against the risks and any corporate governance considerations, particularly where the PoA is wider and more discretionary in its scope.

- vii. Should such a power have to be expressly stated in the first power of attorney or can it be implied – at least for some situations? Should it be stated within the Law that every power of attorney is deemed to include this authority? Should such implied authorisation be limited to security powers of attorney only?

In most situations, the appropriate solution may be to have the power expressly stated in the first PoA. There may be circumstances where the power can be implied, though these in particular would need to be balanced vs the risks set out above.

- viii. If an attorney is permitted to grant a further power of attorney. should that sub-attorney be able to do the same? Or should the 'chain' stop?

In our view it is reasonable for the chain to be capable of continuing in some circumstances.

Can a distinction be drawn between (i) powers of attorney which are primarily functional in purpose, whether with or without any discretion afforded to the donee, eg. in the context of commercial contracts, such as a shareholder appointing a director of a company to execute share transfer form in certain circumstances, and (ii) those where the discretion afforded to the donee is a primary consideration for the donor. Under (i) the purpose of the power of attorney is simply to *get something done* ie. mechanical, administrative, fulfilling a function of a contract, and the identity of the person who does that thing is not important. Under (ii), the *identity* of the donee (to whose discretion the donor would have entrusted the matter) would be of greater importance to the donor – meaning that it would be more reasonable for sub-grants to be restricted in these cases unless expressly provided for in the original grant.

- ix. Should notice be given to the donor whenever a sub-grant is made? What should be the effect of any revocation?

Unless specifically waived in the terms of the original grant, notice should be given to the immediate donor (and by that donor to *its* donor in turn), although the law should clarify that any failure or delay in giving such notice does not invalidate any actions taken under the power granted.

- x. Are there any particular issues with such an amendment when considering this amendment in a non-commercial context? Should the proposed power only be possible in certain situations and what would those be?

Addressed in our response to (viii) above.

- xi. Do you consider that the drafting of the Draft Law achieves the stated aim? Please provide any comments.

No further comments.

Section D: securing an obligation

- xii. Should it be possible to secure performance of an obligation in this way – as opposed to this only being possible in relation to a security interest or foreign law security?

Yes. From a commercial perspective, it will be beneficial and well-received for PoAs to be irrevocable in the widest possible commercial circumstances. See comments at article 5(2) of the draft law.

- xiii. Does the proposed amendment to Article 5 of the PoA Law (Article 6 of the Draft Law) achieve the stated intention? If no, please provide further comments.

As above.

- xiv. Is it necessary to state, for the avoidance of doubt, that a PoA created under these new provisions (in relation to the performance of an obligation) shall not be construed as creating a security interest under the Security Interests (Jersey) Law (1983/2012). If this is a concern, should this be addressed in an alternative manner?

No comments.

- xv. Are there any circumstances that should be excluded?

We cannot think of any in a commercial context.

- xvi. Should the clarification envisaged in paragraph 31 be made?

No objections from our perspective.

Section E: customary law of agency

- xvii. Does the proposed amendment to Article 10 of the PoA Law (Article 8 of the Draft Law) suitably clarify the interaction between the PoA Law and the customary law of agency? If no, please provide further comments.

No comments.

Section F: other

- xviii. Do you consider the provision at Article 2 achieves the stated intention? Do you consider that this is a helpful addition for the purposes of clarity? Please provide any additional comments.

No comments on this specific addition, though see suggestions above to clarify that the list of non-Jersey legal persons who may execute a Jersey law PoA is not intended to be exhaustive.

General

- xix. Please provide any further comments in respect of the Draft Law and the PoA Law more generally.

In certain commercial contracts, to achieve the parties' desired intentions despite the maximum one year for which a PoA may be made irrevocable, the practice has developed of providing for PoAs taking effect upon certain events happening (for instance, on a default in payment of an amount due under a partnership agreement), and being irrevocable for the maximum permitted period in each case. For clarity, could the law provide that where a power of attorney is expressed to take effect upon occurrence of a specified event, unless otherwise stated in the document granting the power of attorney the occurrence of one such event will not affect the validity of the grant of the power of attorney in respect of any subsequent such event with each being a separate and recognised PoA.

- (b) contains the following certificate or certificates signed by the donor of the power or by any person mentioned in Article 3(2)(a) or (b), that is to say –
 - (i) a certificate at the end to the effect that the copy is a true and complete copy of the original, and
 - (ii) if the original consists of 2 or more pages, a certificate at the end of each page of the copy to the effect that it is a true and complete copy of the corresponding page of the original.
- (2) Where a copy of a power of attorney has been made which complies with paragraph (1), the power of attorney may also be proved by a copy of that copy if the further copy itself complies with that paragraph, taking references in that paragraph to the original as references to the copy from which the further copy is made.

5 Powers of attorney given ancillary to security or in respect of obligations or contracts

- (1) In this Article –
 - “appropriate Security Interests Law” means whichever Law applies to the relevant security interest, being the Security Interests (Jersey) Law 1983 or the Security Interests (Jersey) Law 2012;
 - “bankruptcy” includes any insolvency proceedings of a similar nature to bankruptcy in any place outside Jersey;
 - “foreign law” means any law other than the law of Jersey;
 - “security interest” means, as the case requires, a continuing security interest to which, as referred to in Article 1A of the Security Interests (Jersey) Law 1983, that Law applies or a security interest within the meaning of the Security Interests (Jersey) Law 2012, and “security agreement” and “secured party” have corresponding meanings.^[5]
- (2) ~~Where~~ Paragraph (2A) applies if a power of attorney is expressed to be irrevocable and is given –
 - (a) for the purpose of facilitating the exercise of powers of a secured party under the appropriate Security Interests Law in respect of a security interest or of powers given ~~pursuant to~~ under a security agreement in respect of a security interest; ~~or~~
 - (b) ~~pursuant to~~ under, in connection with, for the purpose of, or as ancillary to, security governed by foreign law; ~~or~~
 - (c) for the purpose of securing the performance of an obligation owed by the donor to the donee ~~or under an agreement to which the donor is party (irrespective of whether the donee is also party to that agreement); or~~ [This amendment contemplates, for instance, limited partnership agreements where the obligations concerned may be owed to fellow limited partners of the donor, but the donee will be the general partner – alternatively where the donee is any director

of a corporate entity to whom obligations are owed, rather than the corporate entity itself.

(d) otherwise by the donor under a contract to which the donor is party. *[In some cases the appointment of attorney is made in an agreement for purposes that are not directly connected with an obligation. This amendment seeks to extend irrevocability as widely as possible in this context.]*

~~then, so (2A)~~ For as long as the security interest ~~or, security, or obligation~~ is effective or the donor is party to the contract, the power of attorney ~~shall not~~ cannot be revoked –

- (a) (i)—in any case, by the donor without the consent of the ~~donee~~ donee;
- (b) (ii)—if the donor is an individual, by ~~his or her~~ the donor's death, incapacity or bankruptcy; or
- (c) (iii)—if the donor is a body corporate, limited liability company, limited liability partnership or separate limited partnership, by its bankruptcy or dissolution.^[6]

- (3) A power of attorney to which paragraph (2) applies may be given to the ~~secured party or the person taking security governed by foreign law and persons deriving rights under them respectively or to some person nominated by the secured party or person taking security governed by foreign law and those persons shall be following persons, and those persons are~~ duly constituted donees of the power of attorney for all the purposes of the power but without prejudice to any right to appoint substitutes given by the power:—

(a) the secured party, the person taking security governed by foreign law ~~or,~~ the person securing performance of an obligation or any person nominated in the contract;

(b) a person nominated by the secured party, the person taking security governed by foreign law or the person securing performance of an obligation.

- (4) This Article shall have effect notwithstanding any enactment or rule of law, in force in Jersey or elsewhere, which vests property in any person on death, bankruptcy or any other disability or incapacity and the donee of a power of attorney to which paragraph (2) applies shall be entitled to act thereunder as if the power of attorney had been given also by the person in whom the property so vests.
- (5) A person acting under and in accordance with a power of attorney to which paragraph (2) applies shall not be guilty of an offence under Article 23 of the Probate (Jersey) Law 1998.

6 Protection of donee and third persons in certain circumstances where power of attorney is revoked

- (1) In this Article –