Response of the Insolvency Law Committee of the City of London Law Society to the consultation document on changes to the Insolvency Act 1986 and the Company Directors Disqualification Act 1986 to be made by a Legislative Reform Order for the modernisation and streamlining of insolvency procedures, issued by the Insolvency Service in September 2007

Introduction

The City of London Law Society ("**CLLS**") represents approximately 12,000 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.

The CLLS responds to Government consultations on issues of importance to its members. The CLLS Insolvency Law Committee, made up of solicitors who are expert in their field, have prepared the comments below in response to the proposals, aimed at modernising and streamlining insolvency procedures, contained in the consultation paper. Members of the working party will be glad to amplify any comments if requested.

We welcome the modernisation and streamlining of insolvency legislation, subject always to the protection of the interests of creditors and other stakeholders in the insolvency process.

Proposal 1

(a) To introduce a provision requiring creditors to 'opt-in', by responding to a notice sent to them at a specific stage in each relevant form of insolvency procedure, if they wish to receive notices, reports and other information issued by the insolvency office-holder during the conduct of the proceedings and/or wish to participate in the insolvency process by having a say in relation to matters such as agreeing the basis of the office-holder's remuneration. This proposal will also require various provisions within the 1986 Act to be amended to be read subject to new provisions which will allow such communications to be sent only to "opted in" creditors, rather than to all known creditors, as is currently required.

Comment

In practice, many creditors only wish to know the likely level of dividend and when that dividend is likely to be paid. However, a cost saving is only likely to be achieved through this proposal if it is structured carefully so as not to increase the burden on insolvency office holders.

For example, we would suggest that "opt-in" notices should be required to be sent along with the first general circular required to be made in each type of process (after the initial meeting or court hearing by which the process is initiated and a committee of creditors elected) so that the distribution of the "opt-in" notice does not become, of itself, an additional step.

We note that if no unconnected creditor decides to "opt-in" then the procedure would fall away and all notices and reports would have to be sent to all known creditors. Others whom you have consulted would be better placed than us to know, but we would have thought that such an outcome may well be very common in low value insolvencies where the dividend is likely to be nil. If that is correct, it would weigh against this proposal in terms of efficiency, insofar as it may be introducing an additional step that will be unlikely to have any application in a large number of cases.

In order to satisfy the "necessary protection" requirement of the preconditions set out at page 7, we agree that, notwithstanding that a given creditor has chosen not to opt-in by the given date, he or she should be permitted to "opt in" at any time by giving notice to the office holder, and he or she should be notified of any change in the identity of the office holder; any change, or proposed change, of the process (such as a move from administration into liquidation); any change to the estimated dividend or the likely timing of the payment of dividends should be communicated to all known creditors; any

requirement to submit a formal claim or proof if any failure to do so might invalidate their right to participate in a distribution of assets.

We would make a further point. In light of the opportunities afforded by the adoption of proposal 1(c), we are concerned that the "opt-in" proposal may become redundant. By this we mean that posting information on a website introduces automatically an element of "opt-in" and "opt-out". If, at the start of a process, or soon after the start of a process, all known creditors are notified of a website on which statutory material will be posted, they will have the option to check that website from time to time (ie to "opt-in") if they wish to remain involved and informed. A formal process to "opt-in" would be unnecessary in such a scenario.

It might be said that some insolvencies would not warrant a stand-alone website, and we would accept that. However, we think it likely that all, or almost all, licensed insolvency practitioners will have their own website and would be able to post information relating to their appointments on that website from time to time in a manner that is easily accessible to the public.

Proposal 1(b)

To update insolvency legislation to make it explicit that communication can be effected electronically in cases where the 1986 Act requires documents or information to be "in writing" or "written" and to remove the references in sections 95 and 98 of the 1986 Act to notices of the meetings held under those sections to be sent "by post".

Comment:

We agree that where there is a need to provide clarity in this area by legislative means and welcome this proposal. We note that detailed rules on the use of electronic communications are to be contained in revised Insolvency Rules.

Proposal 1(c)

To enable insolvency office-holders to provide information to creditors and members by sending a link to a website on which information is posted.

Comment:

We welcome this proposal. As recognised in the consultation paper, websites are increasingly being used by office-holders in practice as a convenient, flexible and cost effective tool for the dissemination of information to creditors.

As described above, we further consider that the use of websites to hold reports to creditors may negate the need for, or use of, "opt-in" provisions in many cases.

Proposal 1(d)

To provide a more flexible legislative framework in relation to the meetings which are held in insolvency proceedings. The proposal would allow insolvency office-holders to hold meetings that are required to be held as part of their conduct of insolvency cases in a flexible way, rather than requiring those attending such meetings to be present at a physical venue or attend by proxy, as is the case now.

Comment:

We welcome the additional flexibility that this proposal would allow. It will be of particular assistance when creditors are located in different countries, as is increasingly the case.

Proposal 2

To remove a requirement that is imposed upon liquidators and trustees in bankruptcy, requiring them to obtain sanction for certain actions they propose to take as part of their conduct of the case.

Comment:

We note that the proposal only applies in relation to the power to compromise debts owing to the estate (page 26, third paragraph). On balance, we support this proposal.

The collection of debts owing to the estate can be a complex task in cases where the debtor is unwilling or unable to pay. The decision as to whether to settle a claim at less than full value requires experience and judgment and the office holder is best placed to make that decision.

As a matter of risk management, we would expect that, in practice, even if formal sanction is no longer needed, office holders will continue to consult a creditors' committee, if one is available, on any potentially contentious settlement before taking a decision.

Proposal 3

Moving to allow discretionary advertising of the appointment of a voluntary liquidator and to remove the restrictions on the form any such advertising can take.

Comment:

We agree that office holders should have greater flexibility and discretion as to the method of public announcement, but we do not believe that they should have the power to dispense with any form of public announcement altogether, if that is indeed what is contemplated by this proposal. At an early stage in proceedings, office holders are reliant on information provided to them by the management and the company's readily available records. The "known" creditors may not be an accurate reflection of the true creditor base.

It must be recognised that any move from certainty to flexibility in the permitted methods of advertising would, in theory at least, increase the risk of liability for office holders. However, in our experience, the courts are slow to interfere in the general exercise of discretion by experienced and commercial insolvency practitioners and so that risk may be largely illusory.

Proposal 4

To remove a requirement imposed upon liquidators to summon annual meetings of members and/or creditors for the purpose of laying an account of their acts and dealings and of the conduct of the winding up during the previous year.

Comment:

We support this proposal in circumstances where (a) the relevant information will be made available to creditors by some other means and (b) a creditor or creditors having a minimum percentage of the value of the debt have the power to require the office holder to convene a general meeting of creditors.

Proposal 5

To remove the requirement for any document in insolvency proceedings to be sworn by affidavits and to replace it with a less burdensome requirement for such documents to be verified by a statement of truth in accordance with the Civil Procedure Rules 1998.

Comment

The requirement to swear affidavits in some circumstances can lead to unnecessary expense for the estate because it is time consuming and requires the involvement of a Commissioner of Oaths or an independent solicitor.

We believe that witness statements subject to a statement of truth would be adequate in those cases where affidavits are still required.

Proposal 6

Removing the requirement for an insolvency practitioner, acting as liquidator, to submit to the Secretary of State on the conduct of the directors of a company if he has already submitted such a report as administrator of the same company.

Comment:

We agree with this proposal. A reduction in pure duplication would be welcome. However, we think that it is important that the liquidator be required to consider whether, in light of any new information, a supplemental report should be submitted.

Proposal 7

To remove a requirement that exists for the Insolvency Services Account ("ISA") kept by the Secretary of State to be held with the Bank of England ("the Bank").

Comment

We support this proposal, for the reasons given in the consultation paper. The commercial banking sector is self-evidently the appropriate place for the ISA to be maintained given the Bank of England's move away from providing retail banking services and it is anticipated that this proposal will lead to costs savings for insolvent estates.

Proposal 8

To remove the power of the court to order that a person owing monies to a company in liquidation pay those monies into an account, in the liquidator's name, at the Bank of England.

Comment

We welcome this proposal. As set out in the consultation paper, section 151 is obsolete.

The Insolvency Law Committee of the City of London Law Society

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