Response to Proposed changes to the European Insolvency Regulation: Call for Evidence

This response to the Proposed changes to the European Insolvency Regulation: Call for Evidence has been prepared on behalf of a joint working party of the CLLS Insolvency Law Committee, the Insolvency Lawyers' Association and the Association of Business Recovery Professionals (R3).

The City of London Law Society (CLLS) represents approximately 15,000 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. The CLLS responds to consultations on issues of importance to its members through its 19 specialist Committees. This response has been prepared by the CLLS Insolvency Law Committee whose members are listed in Schedule 1.

The Insolvency Lawyers' Association (the ILA) provides a forum for c.470 full, associate, overseas and academic members who practise insolvency and restructuring law. The membership comprises a broad representation of regional and City solicitors, barristers and academics. The Technical Committee is responsible for identifying and reporting to members on key developments in case law and legislative reform in the insolvency and restructuring marketplace and has participated in preparing this response.

R3 represents insolvency practitioners authorised to practise in all jurisdictions of the UK. R3's membership comprises licensed insolvency practitioners, lawyers and other professionals involved in the insolvency and turnaround industries. Over 97% of authorised insolvency practitioners are members of R3. It has a total of 3,070 full and associate members. The working party members who have participated in this response on behalf of R3 are listed in Schedule 2.

The joint working party welcomes the opportunity to provide comments on the Proposed changes to the European Insolvency Regulation: Call for Evidence.

In the limited time available to respond to the Call for Evidence we have produced an initial response to the questions you have raised, focusing in particular on the questions of opt-in and the listing of schemes of arrangement as you suggested in your covering email. We would be happy to provide you with our further comments on the wording of the proposed amendments and their practical application in due course, in particular if the decision is made to opt into the amended Regulation on Insolvency Proceedings (the **Regulation**). We understand that there will be further opportunities to provide such comments in due course.

Q1. Do you believe the UK should opt in to negotiations on the Commission's proposed Regulation? Please explain the reasons for your opinion

We very firmly believe that the UK should opt in to the negotiations on the proposed Regulation. As referred to below, we do not consider that it would be workable for the UK to be bound by the Regulation in its original form so if the UK fails to opt into the current negotiations, we should assume that the Commission would exercise its right to decide that the existing Regulation should cease to be applicable to the UK. This could have the significant detrimental economic and reputational consequences for the UK set out below.

Since 2002 and the introduction of the Regulation there has been an improvement in the efficiency and effectiveness of cross-border insolvency cases. The Regulation has provided clear rules for the allocation of jurisdiction and simplified and removed previous formalities (and therefore costs) in relation to the recognition and enforcement of insolvency processes which otherwise would have required multiple individual applications for recognition in each Member State where recognition was required. Further, the Regulation has on the whole provided a successful framework in which the various insolvency regimes in EU Member States can operate and interact. We consider that the UK should be seen to support any measures which increase cross-border efficiency and effectiveness and reduce costs.

From a UK perspective (and by way of example) the Regulation has facilitated cases such as MG Rover, Nortel, Schefenacker and Wind Hellas to make use of the UK jurisdiction (and its flexible restructuring processes) enabling preservation of the greatest value for creditors as a whole. Without the Regulation, such cases would at worst have suffered the fate of a disorderly break up in the UK and across Europe and at best the proceedings would have been centred in another EU Member State lacking the broad range of flexible insolvency procedures and access to financial and professional service firms on offer in the UK. The ability to use UK proceedings and have them automatically recognised across the EU facilitates the rescue of economically viable entities which could otherwise fail. While the companies to be rescued may not always be UK incorporated companies, there is likely to be a significant number of UK creditors and employees who will benefit from this process.

The operation of the Regulation in the UK has also provided a significant source of business to those operating in the restructuring market, including financial and professional services firms. For example on 14 January 2009, the English court appointed administrators in respect of 19 companies in the Nortel Group. This was on the basis that, in accordance with Article 3 of the Regulation, the English court was satisfied that 18 EMEA group companies (incorporated outside the UK) had their centre of main interests in England. Hence the court accepted that it had the requisite jurisdiction to open main insolvency proceedings. These types of cases contribute to the wider economy, in terms of the work they generate for professional services firms and the people they employ. The latest progress report for Nortel Networks UK Limited (in administration) dated January 2013 refers to professional services fees in excess of $228m. The report also makes clear that the work has been apportioned in relation to the different EMEA companies which are also subject to English administration proceedings.

Other examples include Wind Hellas where the UK was chosen due to the flexibility of its insolvency processes. Preserving the opportunity for the UK to participate in these types of cross border workout or insolvency cases is essential to maintaining the UK's pre-eminent reputation as a restructuring jurisdiction. That will in turn maximise the tax revenue and employment opportunities that can result from the conduct of such cases in this jurisdiction.

Competitors in this market based in the EU would no doubt welcome any decision by the UK to opt out of the amendments to the Regulation and would see it as an opportunity to gain real commercial advantage. Furthermore, in many cases, the UK is chosen over a reorganisation pursuant to Chapter 11 of the US Bankruptcy Code because of the pan European recognition to such proceedings afforded by the

Regulation. If there were no such benefit in using a UK procedure, many restructurings could end up being done out of the US (with the loss of reputation to the UK and opportunity to UK professionals that this would entail).

The risk of damaging the UK's reputation as a leading commercial centre by opting out of the proposed Regulation should also not be underestimated. At a time when business operates on an ever more global basis, methodologies to assist and rescue companies which are encountering financial difficulties need to be addressed on a similar global level.

It is therefore clearly in the UK's interests to remain at the centre of a global corporate rescue culture and not to retreat from cross-border insolvency treaties which seek to promote this culture. Furthermore, investor confidence in the insolvency and restructuring processes that are available if things go wrong will encourage those doing business to deal with UK companies at the start of their life-cycle. If financiers and investors are concerned that there is no clear framework for the recognition of insolvency processes if the borrower were to become distressed, this may cause those financiers and investors to insist that borrowing vehicles be established elsewhere in Europe. There is also a risk that investors may insist that a different law (other than English law) govern the finance documents if they have concerns about cross-border recognition. This could impact upon the ability to use an English Scheme of Arrangement to vary or discharge the indebtedness under such agreements for the reasons given below.

Finally, the Regulation must be seen in the context of the other cross-border insolvency developments of which it is part. It would make no sense for the UK to be part of the EEA Winding Up Directives for insurance undertakings and credit institutions having refused to participate in the broader regulatory regime that applies to other companies. In addition, the UNCITRAL Model Law which the UK has adopted through the Cross Border Insolvency Regulations uses a similar concept of centre of main interests. There could be a mismatch in the case law if the Model Law applied in the UK while the Regulation was inapplicable.

Q2. What would be the consequences of not opting in to the negotiations, in the event that the Council decided that the existing Regulation could no longer apply to the United Kingdom, for:

(a) Insolvency proceedings in the United Kingdom;

(b) UK creditors;

(c) UK businesses.

We consider that opting out of the negotiations would be contrary to the interests of the UK. The consequences of not opting in are that the existing benefits of the current Regulation could be lost entirely. It would be possible in theory for the UK to retain the benefit of the existing Regulation. In practice, other Member States are likely to resist this on the basis that such selective participation is unworkable. Indeed the UK would be left with the worst of both worlds if it remained subject to the outdated Regulation whilst other Member States benefited from the extended scope and clarification that an amended Regulation should provide.

This would put the UK at a serious disadvantage. It would be particularly acute in cases where more than one set of proceedings was taking place in relation to the same entity, as is the case with the Nortel estates in France where the UK would fall outside the new regime. Assuming the Regulation would fall away entirely, the consequences of lacking an automatic framework for recognising other Member States' insolvency proceedings in the UK and for insolvency proceedings in the UK not to have automatic recognition in the EU outside the UK, would be significant. Obtaining recognition of UK insolvency proceedings in other states would be more time consuming, costly and less certain in their outcome. Recognition would need to be determined, as was the case before the enactment of the Regulation, on a state by state basis.

Practitioners would consider this to be a retrograde step. The UK presently enjoys a position as one of the leading Member States in the restructuring and insolvency arena, providing means of restructuring businesses that are unavailable in other jurisdictions. In the World Bank "Doing Business" Report 2013, the UK is currently ranked 8th in the Doing Business Measure: Resolving Insolvency.

There is a risk that if the UK is not on a par with other jurisdictions it will risk losing its current commercial advantages, with the result that work opportunities for professional services businesses reduce accordingly. It may also result in multi-national businesses choosing to locate their businesses elsewhere or deter counterparties from doing business with UK businesses due to the uncertain, time consuming and potentially very costly recovery process that would apply in the UK, should the businesses in question fail. This is recognised in the World Bank Doing Business Report 2013 which states "having a sound financial market infrastructure, courts and creditor and insolvency laws and credit and collateral registries improves access to credit."

In addition, from a costs perspective, if the Regulation falls away, the UK legislation, court practice, and procedures which have been operating for the last ten years would need to change. We consider that the costs of such changes are likely to be at least as burdensome as those envisaged on the implementation of any changes required to adhere to any amendments to the Regulation.

From a technical perspective, the Regulation is designed to complement other European measures such as the Brussels Regulation and Rome I as well as its "sister regulations" in relation to credit institutions and insurance undertakings. Consequential changes may therefore be necessary to the practice and approach in relation to these provisions, should the UK opt out of the Regulation.

Q3. What is the likely impact of the proposal to extend the scope of the Regulation?

We are generally supportive of the steps taken to extend the scope of the Regulation; in particular we consider that it is a useful to include pre-insolvency/rescue proceedings within its scope. Doing so recognises the growing trend and importance of taking early action to prevent business failure and encourage business rescue. Extending the Regulation to such processes means that the proceedings will be given automatic and immediate European wide effect which is essential in today's market, where many businesses have interests that cross many borders. We do have some more detailed comments on the wording of the proposed amendments and their

practical application. We are happy to provide you with more assistance on these matters in due course. At present we consider that it would be more appropriate to provide you with detailed comments if or when the decision is taken to opt into the negotiations on amendment to the Regulation.

Q4. What are the likely costs and benefits of the amendments to the scope of the Regulation for UK insolvency proceedings; UK creditors and UK business?

It is generally accepted that business rescue provides a better return (or chance of return) for creditors than formal insolvency proceedings. The proposed extension of the scope of the Regulation to rescue procedures should mean that UK creditors benefit from these processes. In addition, the recognition of rescue processes in respect of UK businesses across Europe should bring about cost savings so that insolvent or financially impaired estates or groups of companies can be managed in a co-ordinated way. Many of the proposed amendments including the increased scope, the exhaustive nature of the proceedings listed in Annex A, encouraged cooperation, and indeed some of the simple clarifications to the existing Regulation are welcomed and will bring costs savings by addressing previous areas of uncertainty.

We recognise that the amendments to the Regulation will give rise to some implementation costs. We consider that these costs would be far outweighed by the benefits that should result from any increase in the number of restructurings taking place in the UK following the amendments.

Q5. Should Schemes of Arrangement be added to Annex A to the Regulation?

We are firmly of the view that Schemes of Arrangement should not be added to Annex A to the Regulation. We consider that the benefits derived from the different jurisdictional thresholds for sanctioning Schemes of Arrangement (broadly permitting rights under English law governed contracts to be varied through an English Scheme in appropriate circumstances) are capable of providing a better outcome in terms of value to creditors. Additionally, we believe that Schemes provide the UK with an important commercial advisory opportunity as well as enhancing the reputation of the UK as a leading commercial centre. This has been exemplified by recent schemes such as Rodenstock (€305m restructuring), SEAT PG (€1.5bn restructuring), Cortefiel (€1.4bn restructuring) and Global House Investment ($1.7bn restructuring). It is unlikely that any of these scheme based restructurings would have been capable of facilitation in the UK had schemes of arrangement been subject to the jurisdictional thresholds imposed by the Regulation.

Many common law jurisdictions have a rule that an English law governed agreement can only be varied or modified by a process that is recognised and effective as a matter of English law. Hence it may well be necessary to use an English Scheme to vary an English law governed agreement if the effects of that Scheme are to be recognised in other common law jurisdictions (e.g. in Asia). If it were only possible to have a compromise proceeding in the place where the debtor had its centre of main interests, it is not clear whether that proceeding would be recognised outside the EU to the extent that it purported to vary an English law agreement. This could make the conduct of cross border restructurings more difficult.

Whilst the amendments to the Regulation seek to improve cooperation and coordination for group companies, they do not offer a complete solution. A Scheme bears considerable value in a group context. A Scheme can provide a complete and comprehensive mechanism for delivering a restructuring for complex multijurisdictional groups outside insolvency proceedings and at an earlier stage. By way of recent example, a scheme was recently used to restructure debts of €1.7bn for Dutch and Bulgarian entities in the Vivacom Group. This would not have been feasible under the Regulation, whether in its current form or in a form that included the proposed amendments. Hence the use of Schemes of Arrangement in restructurings outside the Regulation far outweighs the advantages of having a Scheme automatically recognised by virtue of its inclusion within the scope of the Regulation.

Furthermore, a Scheme of Arrangement is a procedure under English companies' legislation that is also employed outside of insolvent restructurings. In addition, a Scheme will not always be a fully collective process since Schemes are often used to compromise claims between a company and some, as against all, of its creditors. It is therefore arguable that a Scheme does not fulfil the definition or satisfy the characteristics of proceedings as set out in Article 1 of the Regulation.

Outside the restructuring context Schemes are employed in a range of other circumstances that do not relate to companies in financial distress at all. Examples are the use of Schemes in solvent corporate reorganisations, acquisitions and demergers, returning capital to shareholders, or in removing minority shareholders. For many years Schemes have also been used by insurance companies to bring an end to their exposure to long term liabilities resulting from matters such as asbestos risks. As the Scheme procedure has such a variety of uses, we do not consider that it is appropriate to treat Schemes in the same way as treated as an insolvency process under the Regulation. Not all Schemes of Arrangement relate to or concern financially distressed entities. The result is that seeking to include in the Regulation only those Schemes that applied to financially distressed entities, while superficially attractive, would create material difficulties of definition and application in practice.

Q6. What are the likely impacts of the proposed amendments to the jurisdiction to open insolvency proceedings for UK insolvency proceedings, UK creditors and UK business?

The proposed amendments to jurisdiction for opening insolvency proceedings largely reflect the current approach of the UK courts and essentially follow the clarification that we have received to date on the operation of the Regulation and guidance given by the Court of Justice of the European Union. It is helpful that the proposed amendments exclude restrictions on the movement of centre of main interests and that no "look back" period is introduced into the assessment of a centre of main interests. Such amendments would have caused serious challenges to the application of the Regulation in cases such as those highlighted in our answer to question 1. In addition, the amendment to recital 4 (which clarifies that the Regulation seeks to "avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position to the detriment of the general body of the creditors….") is also to be welcomed. This provides legislative recognition of the benefits of moving the centre of main interests to utilise the best insolvency or restructuring proceeding possibly available.

As we have already mentioned, we will provide you with more detailed comments on the proposed amendments in due course. We do consider that the ability for creditors resident or domiciled in a Member State different to that where insolvency proceedings take place to challenge the opening of main proceedings may create uncertainty and delays and could be potentially unworkable. We consider that these aspects are best dealt with by the local courts. Such rights are not objectionable given that rights of appeal are seen as a fundamental right under EU law. However, all creditors should be given this right of appeal. Local creditors are not always granted a right of appeal under the relevant local law. The development of a two tier appeal system is undesirable. Most importantly, however, the rights of individual creditors to appeal would need to be carefully balanced in cases where speed and certainty is of the essence.

Q7. What are the likely impacts of the proposed amendments for opening secondary proceedings for UK insolvency proceedings, UK creditors and UK business?

We consider that proposed amendments for secondary proceedings should reduce the number of competing proceedings that are commenced in relation to the same distressed entities. The amendments also advocate a more co-ordinated approach to any multiple proceedings that may be necessary. These should improve the chances of business rescue both in the UK and across Europe. The proposed amendments which facilitate and encourage rescue should also assist in the more efficient and expeditious conduct and disposal of proceedings, again promoting rescue rather than value destroying formal liquidation proceedings. This should in turn reduce the cost of proceedings to the ultimate benefit of UK businesses and their creditors.

Q8. Do existing UK systems meet the proposed requirements for publicity and lodging of claims in the amended Regulation?

We do not consider that the proposed requirements for publicity in lodging claims will require significant changes to the existing systems in the UK. But it should be recognised that some changes will be required to meet the objectives of the amendments. We are unable to comment on the costs of upgrading and maintaining the UK system. On the assumption that the figures suggested in the Commission's report and referred to the impact assessment of this Call for Evidence are broadly accurate, relatively speaking the costs are far outweighed by the benefits that would be gained by opting in. Those costs should not be considered a determining factor in whether the UK opts in to the amendments. Irrespective of the changes that may be required as a result of the amendments, UK businesses would in any event benefit from the introduction of a modernised register of claims at a national level.

Both the London Gazette and Companies House presently have publicly available information in relation to insolvency cases. The Gazette's website is the only online source which provides most of the information required by Article 20(a) free of charge. The Gazette does not however provide details of the closure of proceedings. The Companies House web check service provides some limited free information regarding a company's insolvency history. For a small fee it provides access to all the documents filed at Companies House in relation to a company's insolvency proceedings. These documents provide most of the information required by Article 20(a).

The main disadvantage with the current databases is that: (i) they are historic and there is often a time delay between the commencement of the insolvency and the materials being made available (this can vary from days to weeks to months); and (ii) they are not always easy to search (in particular the Gazette). In order to meet the transparency objectives of the Regulation and avoid duplication of proceedings, the time taken to make the information available needs to be improved and the search facilities need to be made easier and more reliable. Having an online mechanism seems the most appropriate way of doing this.

In addition to the Companies Register and the Gazette, the Central Registry of Winding-up Petitions at the Companies Court maintains a register of all winding-up petitions issued in England and Wales. Whilst it is possible to search against a company's name by telephone or by attending the offices of the Companies Court in person, there is no central register of administration applications or notices of intention to appoint administrators. However, a search of the central registry of winding-up petitions may reveal any outstanding administration applications (both in and out of court) issued in London against the company in question. In addition calls can be made to the Chancery division of the nearest court to the company's registered office and trading address, to see if an administration application has been issued. However, not all courts are willing or able to respond to such requests. This patchwork coverage should be replaced by a comprehensive one.

In summary, whilst much of the information is already available, in order to be useful and meet the requirements proposed by the amended Regulation, the information needs to be processed more efficiently and made more readily available and accessible. Ignoring the costs of any upgrade, having an updated register may even bring about costs savings in the medium to longer term. A more simple and streamlined system would benefit all who need to find information concerning insolvency and restructuring proceedings.

Q9. Do you foresee any issues with the minimum 45 day notice period for foreign creditors to lodge their claims?

Generally speaking we do not foresee any insurmountable issues with the minimum 45 day notice period for foreign creditors to lodge their claims. Indeed it should be recognised that in many complex cases creditors will usually be allowed further time in which to lodge their claims. There will be some amendments required to some of the Insolvency Rules (but if the UK were to opt out of the Regulation, there would need to be changes to the legislation in any event).

There may nevertheless be particular instances where having a fixed minimum claims lodgement period would not promote the interests of the creditors. An example would be where a company is looking to agree a proposal with its creditors and is under severe financial and time pressures to resolve those issues. It may therefore be advisable for the claims lodgement process to have some flexibility built in to address such cases.

It would be helpful to clarify whether the 45 day notice period is intended only to apply where claims are submitted for distribution purposes or whether the 45 day notice period is also intended to apply to the submission of claims for voting purposes at creditors' meetings. In some schemes of arrangement cases the ability to set a short

claim "bar date" can be beneficial to its overall success in effecting the restructuring (perhaps another reason why schemes ought to remain outwith the Regulation).

Q10. What are the likely costs and benefits for UK interests under the proposed changes?

We consider that the proposals to amend and improve notice periods will give third parties better visibility of ongoing restructuring or insolvency proceedings and thereby avoid duplicate proceedings and the unnecessary costs that would result from the commencement of such proceedings. We also consider that it might be helpful to standardise claim forms. Even if the UK opts out from this consultation process and the reforms to the Regulation under consideration, UK creditors participating in proceedings in other Member States will still be subject to the changes and need to familiarise themselves with the way the changes will operate in practice.

Q11. Will the proposed framework improve insolvency proceedings for members of groups of companies in the EU?

We consider that the proposed alterations to the conduct of insolvency proceedings in groups of companies could lead to greater efficiencies and enhanced benefits for creditors and other stakeholders.

Q12. Are there any specific costs or benefits you can identify for UK interests (individuals and companies in insolvency proceedings, UK creditors and UK businesses)?

We consider that the proposed alterations to the conduct of group insolvencies should save costs. The proposed amendments introduce greater flexibility and in fact adopt many of the practices pioneered by UK restructuring and insolvency practitioners.

Q13. What changes to UK insolvency legislation would be required to give effect to the proposed Regulation?

We consider that there will be some changes required, in particular, to the Insolvency Rules and statutory forms as identified in the Call for Evidence. In the time allowed we have not carried out a detailed assessment of the possible impact of the proposed alterations to the Regulation to the UK insolvency legislation but we are happy to assist with this analysis in the future assuming that the UK does not opt out of the negotiation process. We also consider that this may be addressed in conjunction with the ongoing modernisation project that is currently being undertaken by the Insolvency Service.

25 February 2013

SCHEDULE 1

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