CITY OF LONDON LAW SOCIETY – INSOLVENCY LAW COMMITTEE

AMENDMENTS TO THE INSOLVENCY RULES 1986 FOLLOWING THE INSERTION OF SECTION 176ZA INTO THE INSOLVENCY ACT 1986

Introduction

1. The Government is consulting on the draft statutory instrument to be made in accordance with section 176ZA(3) of the Insolvency Act 1986. Set out below are the comments of the Insolvency Law Committee on the draft legislation.

2. It is to be noted that the comments below are not intended to revisit the policy considerations underlying section 176ZA, but are only meant to assist the practical operation of the draft legislation.

Specific drafting issues

3. In rule 4.218(1)(a), for the words "in the course of carrying out his functions in the liquidation", substitute "for payment of general creditors". This is to track the wording in section 176ZA(1) and also to avoid any argument that the current wording includes assets subject to a fixed charge, trust and retention of title.

4. After rule 4.218E(2)(b)(ii), add "or".

Issues of principle

5. The definition of "litigation expenses" in rule 4.218A(1)(c) is expenses relating to the "preparation and conduct of any legal proceedings". On the face of it, this definition will not cover costs incurred by a liquidator in pursuing a claim which is then settled without any formal resort to the court. But it appears to cover the situation where the action is settled immediately after the issue of a claim form. As a matter of policy, is a bright line is to be drawn at the presence or absence of formal legal proceedings? This should be made clear.

6. The regime constituted by the draft legislation appears to be limited to legal proceedings instituted by the liquidators (see rule 4.218B(1)(b)). We believe that it should also apply to legal proceedings existing at the time of liquidation and then continued by the liquidators.

7. Complex liquidations (as demonstrated by BCCI) often involve complex litigations. Legal proceedings launched by the liquidators frequently require procedural and substantive modifications (such as case management and the heads of claim) as the proceedings develop. Accordingly, it is frequently unrealistic to expect the liquidators to estimate with reasonable certainty the attendant costs of litigation.

8. As presently drafted, if the "specified amount" (defined in rule 4.218C(1)(c)) was approved by the creditors but turned out to be insufficient in the course of the legal proceedings maintained by the liquidators, there appears to be no guidance on how the liquidators should proceed. There is no express provision for a second approval of a revised amount by the creditors. Nor is it clear whether the liquidators

may seek approval of a new "specified amount" in respect of the same litigation. There ought to be clear rules setting out the liquidators' options in these circumstances.

9. Accordingly, we propose that rule 4.218E be amended to allow application to court (i) in such circumstances as the liquidators reasonable think it and (ii) after approval of the "specified amount" by the relevant creditors. All applications to court should be made with notice to all relevant creditors.

10. Rule 4.218E(7) provides that the court may order the costs of application to court to be paid as a liquidation expense. However, if the court does not so order, presumably these costs cannot be liquidation expenses. A question then arises as to who should defray these costs.

11. Rule 4.218E may also make clear that the court may deal with any challenge to the liquidator's opinion referred to in rule 4.218A(1)(b).

12. Provisions should be made to the effect that, when seeking approval of the "specified amount", the information to be disclosed under rule 4.218C(1)(a) should be no more than the information the liquidators would be prepared to disclose in an application to the court under rule 4.218E.

City of London Law Society
Insolvency Law Committee
12 October 2007