CORPORATE RE-DOMICILIATION: CONSULTATION ON GOVERNMENT PROPOSALS: CLLS INSOLVENCY COMMITTEE COMMENTS

1. **INTRODUCTION**

1.1 This note sets out the CLLS' Insolvency Law Committee's (the "**Insolvency Committee**") additional points on the response to the Corporate Re-domiciliation Consultation Document prepared by BEIS, HMRC and HMT ("**Consultation Document**") issued in October 2021. The response does not comment on the advantages, disadvantages or rationale for re-domiciliation. The Insolvency Committee considers that these matters are fully addressed in the joint response of the Company Law Committees of the Law Society and the CLLS (the **"Company Committees")** dated 7 January 2022 (**"Response"**).

1.2 As a matter of general principle, the Insolvency Committee does not believe that companies would choose to use the proposed new re-domiciliation regime as a means of taking advantage of United Kingdom restructuring and insolvency processes such as administrations, schemes of arrangement, restructuring plans or indeed liquidations.

1.3 Each of these processes is governed by its own, well-established, criteria which can and do operate independently of the proposed new redomiciliation process. They apply a "test" based upon the factual location of a company's operations rather than (simply) its place of incorporation. Alternatively, as is the case with schemes of arrangement and restructuring plans, they adopt a "liable to be wound up" threshold. That focusses upon sufficient connections with this jurisdiction (including the use of English law agreements) as well as the likely benefit to creditors in this jurisdiction or utility of any relief given by the English courts. The jurisdictional requirements for these insolvency and restructuring procedures have been developed by the courts and the legislature over hundreds of years and it is not necessary (or advisable) to review these requirements for the purposes of the current consultation.

1.4 Hence the Insolvency Committee agrees with the Company Committees that the solvency questions raised by the proposed redomiciliation regime are most appropriately addressed as "gating issues" to determine whether or not it is appropriate for a company to relocate to this jurisdiction. The Insolvency Committee accepts that a balance must be drawn between creating a re-domiciliation process that is at the same time adequately policed but not so onerous as to make it unattractive to corporate entities choosing to re-domicile to the United Kingdom.

1.5 The Insolvency Committee believes that the responses the Company Committees propose draw the correct balance insofar as concerns the specific insolvency questions raised by the process. Section 2 of this note addresses particular questions in the Consultation Document. Where this note is silent on any specific question, the Insolvency Committee has nothing to add to the Company Committees' Response.

2. RESPONSES TO SPECIFIC QUESTIONS IN THE CONSULTATION DOCUMENT

Question 1: Advantages

The Insolvency Committee does not consider that a re-domiciliation regime is necessary to facilitate the United Kingdom's ability to assume jurisdiction for and subsequently to conduct restructuring or insolvency proceedings for corporate entities redomiciling here from other jurisdictions. Additionally, we believe that in a case of outward re-domiciliation, it is for the receiving jurisdiction to determine what if any gateways it needs to impose to restrict "forum shopping" to take advantage of the receiving jurisdiction's own restructuring and insolvency procedures in place of those in the United Kingdom.

We note in any event that the fact of a company's incorporation in the United Kingdom will not necessarily determine the question of whether the UK is either able (or indeed should) assume jurisdiction for that company's insolvency processes. See section 1.3 above.

Question 6: What evidence supports the economic benefits of countries permitting re-domiciliation?

We agree with the Company Committees that it is difficult to quantify the economic benefits of a re-domiciliation process. The Insolvency Committee gained direct experience of these difficulties when making submissions to the Insolvency Service about the importance of preserving the United Kingdom's access to the Recast Insolvency Regulation in a post Brexit world. CLLS members and their clients are understandably reluctant for confidentiality reasons to publicise likely cost savings – or costs incurred – from undertaking a restructuring process in this jurisdiction. Additionally, the Insolvency Committee found that – understandably – CLLS member firms were unwilling to provide detailed evidence on costs for their own reasons of commercial and client confidentiality.

Question 15: Should directors who lack good standing be precluded from re-domiciling to the UK?

The Insolvency Committee agrees that it is correct to start from the premise that so long as the directors of a company proposing re-domiciliation can be directors in the UK, they should be capable of remaining directors of the re-domiciled company. The Insolvency Committee also agrees that using the presence of legal or enforcement action against directors as a ground to prevent re-domiciliation requires care if vexatious proceedings

are not unduly to restrict re-domiciliation. Accordingly, the Insolvency Committee agrees that the proper starting point is whether or not a director is qualified to be a director of a newly incorporated United Kingdom company.

Question 18: Are the proposed solvency requirements sufficient and proportionate?

The Insolvency Committee agrees with the Company Committees that the two issues raised by this question are creditor protection and the "gateway" matter of ensuring that re-domiciliation does not allow the entry into the United Kingdom of insolvent companies. The Insolvency Committee agrees that creditor protection should as a starting point be a matter which the departing jurisdiction addresses. While the Insolvency Committee acknowledges – again see section 1.3 above – that incorporation is not the only factor determining the venue for restructuring and insolvency proceedings, it is the clearest starting point. As an aside, the Insolvency Committee questions the extent to which an unscrupulous management team would in any event treat the availability of a United Kingdom insolvency process as a ground to re-domicile to the United Kingdom. The Consultation Document correctly acknowledges – paragraph 1.1 – the "world class" regulatory and legal system of the United Kingdom. The Insolvency Committee regards the sanctions available in United Kingdom restructurings and insolvencies as an important aspect of those regulations and a possible disincentive to the unscrupulous.

The Insolvency Committee agrees with the proposal that companies seeking United Kingdom re-domiciliation should be required to confirm their solvency. The Insolvency Committee also acknowledges the difficulty that auditors might have with the forward-looking nature of the proposed solvency statement. However, the requirement for a statutory declaration of solvency is a long-established feature of English insolvency legislation. In particular, the swearing of a statutory declaration of solvency is a pre-condition to the initiation of a members' voluntary (solvent) liquidation; see section 89 Insolvency Act 1986.

The Insolvency Committee agrees with the Company Committees that if the proposed declaration is to have "teeth", directors swearing such a declaration without having reasonable grounds to do so should be liable to criminal prosecution.

Question 21: What measures should be adopted to ensure re-domiciliation is not used to harm creditors in other jurisdictions?

As stated in our answer to Question 18, the Insolvency Committee regards the position of creditors in other jurisdictions as a matter to be addressed by the departing jurisdiction.

Question 23: Effect the new disqualification rules for dissolved companies

We agree with the Company Committees that if a company that re-domiciles to the United Kingdom is subsequently dissolved, the new provisions for the disqualification of directors in dissolved companies should apply to those directors. In the event of an outward re-domiciliation, the Insolvency Committee considers that directors of the departing company should be subject to the rules of their new jurisdiction in the same way as applies to directors whose companies are re-domiciled into the United Kingdom – see our answer to question 15 above. We do, however, consider that if directors have taken action that would leave them open to sanction in the United Kingdom, they should, to the extent that they remained amenable to United Kingdom jurisdiction, remain capable of facing disqualification or other proceedings appropriate to their actions. The suggestion that disqualification should also result where a departing director is subsequently convicted of an indictable offence is a good illustration of this matter.

Question 25: Are there any other matters relating to insolvency to be taken into account?

The Insolvency Committee has nothing to add to the answers set out above.

Question 29: Outward re-domiciliation

The Insolvency Committee agrees with the observations on "suggested additional features" of the solvency statement rule. In particular, the Insolvency Committee agrees that directors who lack reasonable grounds for swearing such a declaration should face criminal liability.

If you have any queries about this note, please do not hesitate to contact the Chair of the CLLS Insolvency Law Committee, Jennifer Marshall, in the first instance at jennifer.marshall@allenovery.com

City of London Law Society

Insolvency Law Committee

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