Response to the Call for Evidence

Proposed changes to the European Regulation on Insolvency

Consultation Issued: 07 Feb 2013 / Response date: 25 Feb 2013

INTRODUCTION

There follows the response of the Insolvency Practitioners Association to the Call for Evidence on Proposed Changes to the European Regulation on Insolvency ("EC Reg"), as prepared by the Corporate Consultation Committee of the IPA; a committee comprised of IPA members with particular interest and expertise in the field of corporate insolvency. Further information about the IPA may be found at the end of this document.

This response is not intended to reflect the views of every member of the Association, who are themselves at liberty to submit their own responses, but rather to reflect the broadly agreed views of the Association and its Corporate Consultation Committee (CCC).

OVERVIEW OF RESPONSE AND GENERAL REMARKS

The objects for which the IPA is established are, for the public benefit, to promote and maintain high standards of practice in the performance and discharge of all those functions, powers and duties which are attached or incidental to "Insolvency Administration Offices" and the performance and discharge of such functions; ancillary to which the Association is empowered to advise and make recommendations to any government department or other body regarding any changes in law or practice affecting Insolvency Administration Offices or otherwise relating to Insolvency Administration, and to promote and support any policies calculated to improve any aspect of Insolvency Administration.

We consider that the subject matter of the consultation does not impact greatly upon the performance of our regulatory functions as Recognised Professional Body for the purposes of the authorisation of Insolvency Practitioners. Our responses, therefore, are predominantly in respect of those proposals which directly affect the functions of insolvency practitioners.

We have not responded to those that are outside of either our sphere of direct knowledge, or that of the members who have participated in preparing this response.

It is noted that the proposals broadly address those concerns raised by the IPA in its response to the Consultation on European Insolvency Law in June 2012.

QUESTIONNAIRE

Question	Response
Q1. Do you believe the UK should opt in to negotiations on the Commission's proposed Regulation? **Please explain the reasons for your opinion.**	Yes. The UK needs to retain its influence in cross-border restructuring issues, particularly given increasingly complex corporate structures. Cross-border issues may become even more prevalent in the event that Scotland becomes an independent state. Participation in the current regulation brings an element of certainty to cross-border arrangements, which is of benefit to both practitioners and creditors, and to the broader economy.

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) (b) UK creditors;** **(c) (c) UK businesses.**	In the event that the UK opts out of the new EC Reg, there exists the possibility that application of the existing EC Reg could be withdrawn. Alternatively, the UK could be left with an alternative regulation to that in operation across the remainder of Europe. Neither position would be satisfactory. Such a position would be to the detriment of UK insolvency proceedings (and practitioners seeking to effectively administer the affairs of insolvent entities with cross-border assets or liabilities) as it would increase the complexity of cross-border cases. The creditor population would experience diminished returns due to diminished asset realisations and increased procedural costs. UK business generally could suffer both directly as a result of the diminished return of funds to the economy, and indirectly as a result of the UK being seen as a less attractive market in which to locate.
Q3. What is the likely impact of the proposal to extend the scope of the Regulation?	It is difficult to assess the practical impact of the proposals. Whilst we would broadly support the inclusion of sufficiently robust pre-insolvency schemes, we suggest that if further procedures are to be included, there should be clear criteria for inclusion; for example, the procedure should be established in national statute law and be designed to address prospective insolvency. In the absence of clear inclusion criteria we would have some concerns about the potentially negative impact on both cross-border asset recoveries in UK proceedings and UK creditors position in foreign insolvencies, in the event that less robust procedures were admitted to the list contained in Annex A.
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?	See answer to Q3 above.
Q5. Should Schemes of Arrangement be added to Annex A to the Regulation?	We are not convinced of the benefits of including Schemes of Arrangement. It is understood that such schemes are not infrequently used for purposes other than addressing prospective insolvency and it may tarnish all such schemes were they to be assumed to be insolvency processes. More generally, we would have some concerns about the inclusion of any process within Annex A that was not necessarily for this purpose.

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?	There is a risk that proposed amendments to jurisdiction could occasion unnecessary delay in the commencement of proceedings, which may be time-critical in a restructuring context. We would also anticipate some practical difficulties and delays to the bankruptcy and compulsory liquidation processes were there a requirement for creditors to be notified at pre-commencement stage. Similar considerations could apply to DROs. With regard to identifying the national status of creditors, this could also present some practical difficulty (e.g. would RBS be a "foreign creditor" in English proceedings in the event of Scottish independence). Presumably, the creditor's "COMI" would need to be established? (Which has been demonstrated in itself to be potentially contentious). Delays and uncertainties invariably present the risk of increased costs and diminished realisation. There may also be some regulatory impact in this regard. Were such proposals to be implemented, there would need to be legislative clarity to ensure that practitioners and regulators were fully aware what the legal status of an Office Holder's actions were during any hiatus or challenge period. We consider that there needs to be sufficient safe-guards against frivolous challenges, such as the application of a de minimis level and/or some exposure to cost.
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 this will have a positive impact as it may prevent the opening of local proceedings which could undermine the overall restructuring. If a different practitioner is to be appointed in the secondary proceedings, we would suggest there should be consultation with any existing practitioner in the main proceedings.
Q8. Do existing UK systems meet the proposed requirements for publicity and lodging of claims in the amended Regulation?	Probably not. There is no specific register for corporate insolvencies. Currently, individual company files need to be checked at Companies House. No central record is maintained of schemes of arrangement. Amendment to the Insolvency Rules around admission of claims would also be required. [see below]
Q9. Do you foresee any issues with the minimum 45 day notice period for foreign creditors to lodge their claims?	It is assumed that this period would be applicable for the purposed of admitting claims for dividend purposes and not for the time period for claims for voting purposes at commencement of proceedings (such as in a CVL or IVA). 45 days in such circumstances would cause an undue delay to the commencement of cases and could expose UK directors and debtors to unnecessary risk during the intervening period.

	An extension to 45 days would have the effect of delaying dividends in UK proceedings. Whether this delay is considered significant would be a matter best commented upon by creditor bodies.
Q10. What are the likely costs and benefits for UK interests under the proposed changes?	The ability to search for pan-European proceedings should have a positive impact.
Q11. Will the proposed framework improve insolvency proceedings for members of groups of companies in the EU?	We are broadly in favour of the proposals, given the retention of the single-entity model. The provision may be helpful to the efficient administration of insolvency entities where there are multiple COMIs.
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 have some concerns about the costs which could be incurred in UK proceedings as a result of cooperation requirements. However, on balance, these costs are probably off-set by the benefits of not moving to a single COMI system. The requirement of professional competence dictates that Office Holders need to be sufficiently conversant in the domestic legislation applicable to the entity over which they are appointed. Unless the entities affairs are inextricably linked with those of other group members, the domestic Office Holder is probably better placed to administer the entities affairs. We would not, therefore, be supportive of a single COMI for groups and consider that the proposed cooperation probably represents a viable middle position. The level of cooperation required should be tempered by practicability, confidentiality, the interests of the creditors in the proceedings to which the practitioner has been appointed and a general requirement of reasonableness.
Q13. What changes to UK insolvency legislation would be required to give effect to the proposed Regulation?	Were the proposals to be fully implemented, it would appear that legislative and/or Regulatory amendments would be necessary in respect of: • Time periods for submission of claims • Treatment of foreign claims • Publicity and notification to central registers • Provision of information to oversees Office Holders and Courts

ABOUT THE IPA

The Insolvency Practitioners Association (IPA) is a membership body recognised by the Secretary of State for Business, Innovation & Skills (BIS) for the purposes of authorising Insolvency Practitioners (IPs) under the Insolvency Act 1986. It is the only recognised professional body to be solely involved in insolvency and for over fifty years, the IPA is proud to have been at the forefront of development and reform within the industry.

As of 01 January 2013, the IPA has over 2,000 members, of whom 537 are currently licensed insolvency practitioners (IPs). In addition to its recognition under the Insolvency Act for the purpose of licensing IPs, the IPA is also a Competent Authority approved by the Official Receiver for the purpose of authorising intermediaries to assist with debtors' applications for Debt Relief Orders.

The IPA currently license approximately one third of all UK insolvency appointment takers, who are subject to a robust regulatory regime, applied by the IPA's dedicated regulation teams carrying out complaints handling, monitoring and inspection functions. Additionally, the IPA conducts inspection visits of those appointment-takers licensed by the Law Society (Solicitors Regulation Authority), one of the other recognised professional bodies under the Insolvency Act. The IPA also undertakes monitoring visit work for the Debt Resolution Forum, a membership body which sets standards for its members when involved in providing non-statutory debt solutions to insolvent individuals (such as Debt Management Plans).

The IPA has a longstanding and continuing commitment to improving standards in all areas of insolvency (and related) work. It was the first of the recognised bodies to introduce insolvency-specific ethics guidance for IPs, and the IPA continues to be a leading voice on insolvency matters such as the development of professional standards, widening access to insolvency knowledge and understanding, and encouraging those involved in insolvency case administration and insolvency-related work to acquire and maintain appropriate levels of competence and skills.

IPA Corporate Consultation Committee
Valiant House
4-10 Heneage Lane
London
EC3A 5DQ
www.ipa.uk.com

Tel: 020 7397 6407
Email: *alisonc@ipa.uk.com*

Consultation Closing Date: 25 February 2013