CONSULTATION ON THE FUTURE OF EUROPEAN INSOLVENCY LAW

RESPONSE OF THE INSOLVENCY PRACTITIONERS ASSOCIATION CORPORATE CONSULTATION COMMITTEE

Please indicate your role for the purpose of this consultation

- Other

Please indicate the size of your company

- Small

Please specify

The Insolvency Practitioners Association is a membership body recognised by the Secretary of State for Business, Innovation & Skills for the purposes of authorising Insolvency Practitioners under the Insolvency Act 1986. As of April 2012, the IPA has over 2,100 members, of whom over 550 are currently licensed insolvency practitioners. The IPA currently licenses 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.

Have you had practical experience with cross-border insolvencies and if so, in what capacity?

- Yes

If so

- As a Regulator of Insolvency Practitioners

Please indicate the country where you are located

- United Kingdom

Please provide your contact information (name, address and email-address)

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I. GENERAL ASSESSMENT

1. In your view, does the Insolvency Regulation operate effectively and efficiently to coordinate cross-border insolvency proceedings?

Yes - largely

If so, which main problems have you faced or noticed?

Some difficulties have been identified by our members, in connection with voluntary liquidation and administration cases, where a Court order is required in order for them to receive recognition. Additionally, some concerns have been expressed about "bankruptcy tourism", as noted below.

2. Which principal changes, if any, would you suggest to improve the existing legal framework for cross-border insolvency in the EU?

- The adoption of UNCITRAL by all EU Member States who are signatories to the Insolvency Regulation ("EU Member States") (see question 6)
- Automatic recognition of administration and creditors' voluntary liquidation proceedings, as of the date of commencement cases without the requirement for a Court Order. (see question 22)
- Establish a publicly-available register of all main proceedings opened in EU Member States. (see question 23)

II. SCOPE OF THE INSOLVENCY REGULATION

1. Types of proceedings covered

3. In your view, has it created problems that the Insolvency Regulation does not, in principle, apply to pre-insolvency or hybrid proceedings and that the effects of such proceedings are therefore not recognised EU-wide?

- No

4. Should the Insolvency Regulation accommodate national legal procedures which provide for the restructuring of a company at a pre-insolvency stage or which leave the existing management in place?

- Yes – in principle

If so, which type of pre-insolvency or hybrid proceedings should be covered by the Insolvency Regulation and recognised in other Member States?

Some proceedings which are already covered by the Insolvency Regulation can leave existing management in place (for example, the UK company voluntary arrangement procedure). 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.

5. Should the Insolvency Regulation be applicable to over-indebted private individuals and self-employed persons?

- No, not unless they enter into a formalised procedure with is recognised in national statute.

If so, how could the Insolvency Regulation be amended to accommodate the recognition and coordination of civil bankruptcy procedures in different Member States?

Not applicable

2. International dimension of insolvency proceedings

6. In your view, has it created problems in practice that the Insolvency Regulation does not contain provisions for the recognition of insolvency proceedings outside the EU or the coordination between proceedings inside and outside the EU?

- Yes

If so, should the Regulation be amended to address these problems?

Our members have reported some difficulty with recognition of non-EU cases and we that the Regulation should require EU Member States to adopt the UNCITRAL Model Law on Cross-Border Insolvency.

III. COMPETENT COURT TO OPEN INSOLVENCY PROCEEDINGS

7. In your view, is it appropriate that jurisdiction for opening main insolvency proceedings is determined by the location of the debtor's centre of its main interests ("COMI")?

- Yes – we can see no practical alternative if the office holder is to effectively administer the estate.

8. Does the interpretation of the term "COMI" by case-law cause any practical problems?

- No – Members have commented that recent case-law has been of assistance in clarifying the position.

9. Is there any evidence of abusive relocation of "COMI" by the debtor to obtain a more favourable insolvency regime?

- Yes – anecdotally, we are aware of practices whereby non-UK debtors are assisted in securing a UK bankruptcy order as the UK bankruptcy regime is viewed as preferable to that operating within their own domicile. However, we further understand that our Courts are aware of this issue and are endeavouring to prevent such abuses by declining to make bankruptcy orders in such cases.

  Furthermore, we are aware that in the UK there have been cases in which the official receiver has applied for bankruptcy orders to be annulled on the grounds that the debtor has fraudulently claimed to have his COMI in the UK. See for example *Re Mitterfellner* [2009] BPIR 1075, and *Steinhardt v Eichler* [2011] BPIR 1293.

10. Are there problems with the interaction of the Insolvency Regulation with the Brussels I Regulation which have not been solved satisfactorily by case-law?

- No

IV. GROUP OF COMPANIES

11. In your view, does the Insolvency Regulation work efficiently and effectively for the insolvency of a multinational group of companies?

- No

We are advised that the Insolvency Regulation works effectively if all members of the group have their COMI in and EU Member State. Problems are reported where members of the group are not subject to the Insolvency Regulation or the UNCITRAL Model Law on Cross Border Insolvency.

V. Coordination between Main and Secondary proceedings

12. Has the system of secondary proceedings in general been helpful to protect the interests of local creditors or to facilitate the administration of complex cases?

- No

If so, how could it be changed?

Our members have reported that secondary proceedings can occasionally be helpful. However in most situations they only add costs and complications. We suggest that an undertaking given by the office holder in main proceedings to respect local priorities when distributing funds to creditors could, in most instances, remove the need for secondary proceedings.

13. Does the coordination between main and secondary proceedings work satisfactorily overall?

- No

We are advised that a problem area is the question of whether certain assets (or realisations derived from them) fall to account of the main or secondary proceedings. This is reported to have caused problems with the allocation of the costs of the proceedings.

14. Does the duty to cooperate between insolvency practitioners work efficiently and effectively?

- Yes - as far as we have been made aware.

15. Has it created any problems that the Insolvency Regulation does not contain a duty of cooperation between the insolvency practitioners and the foreign court or between the relevant courts themselves?

- Yes.

We are advised that some further clarification of the level of cooperation required between these parties would obviate the uncertainties which currently might disincline insolvency practitioners from bring cross-border proceedings.

VI. Applicable Law

16. Do you consider that the Insolvency Regulation's provisions on applicable law are in general satisfactory?

- No

If so, what are the main problems?

It has been suggested by a large member firm that Article 13 is deficient in that it does not provide any redress for the victim of a detrimental act; it is only concerned with the rights of the beneficiary.

17. In particular, are the exceptions to the general rule justified by the need to protect legitimate expectations and the legal certainty of transactions?

- No

If so, what would need to be amended?

We suggest that Article 13 should be amended

18. Does the provision on rights in rem operate satisfactorily in practice?

- Yes – as far as we are aware

If so, how should it be amended?

19. Does the provision on detrimental acts operate satisfactorily in practice?

- No

If so, how should it be amended?

Please see our answers to questions 16 and 17 above.

VII. Recognition and enforcement

20. Are there any problems of recognition of the decision opening the proceedings or with the recognition and enforcement of further decisions during the proceedings?

- Yes

Please specify

We are advised that the commercial reality of smaller cases is that cross-border enforcement is generally not considered to be economically viable. Any improvements that would facilitate cost-effective cross-border enforcement would be welcomed by UK practitioners and creditors.

21. Are you aware of cases where a Member State has refused to recognise insolvency proceedings or to enforce a decision on the grounds of public policy?

- No

Please specify

22. Should the definition of the decision "opening insolvency proceedings" be amended to take into account national legal regimes where there is not or not always an actual court decision opening the proceedings?

- Yes

If so, how could this be done?

In the UK this applies particularly to creditors' voluntary liquidations and administrations where the appointment is made out of court. The Regulation should be amended to make it clear that the date of the opening of proceedings is the date on which any of the procedures listed in Annex A is commenced, removing the need for reference to the judgment of a court.

VIII. Publication of insolvency proceedings and the lodging of claims

23. Do you agree that the absence of mandatory publication of the decision opening insolvency proceedings is a problem?

- Yes

If so, please specify which type of information should be registered.

There should be a central register of all insolvency proceedings opened in all EU member states. The information files and recorded should be minimal: the company or individual name, company number, type of proceedings as listed in Annex A, the date of the commencement of the proceedings and the country of institution of proceedings. This should be sufficient to put anyone searching the register on notice.

This data is already captured in the UK the Individual Insolvency Register and Companies House and could, presumably, be made available to a central EU register, relatively easily.

24. Are there any problems in general with the lodging of claims in another Member State or the treatment of foreign creditors?

- No

25. Are there any difficulties with the Insolvency Regulation's rules on languages for information to creditors and the lodging of claims? In particular, have you experienced difficulties with lodging claims in a foreign language, for example, delays or high translation costs?

- No

IX. Differences in national insolvency laws

26. In your view, do the differences in national insolvency law create obstacles to the proper administration of cross-border insolvency proceedings or difficulties for companies having cross-border activities or assets in different Member States?

Yes We are advised that some problems have been experienced by members, not so much with differences in the applicable insolvency laws, rather with the wide differences in other laws which may be relevant in insolvency proceedings (e.g. landlord and tenant laws and retention of title).

27. In your view, are there important inefficiencies in your national insolvency law?

- No

28. Do you consider that your national insolvency law strikes an adequate balance between the need for efficient proceedings and the parties' right to an effective remedy?

- Yes

X. Cost of Proceedings

29. In your view, are the costs of cross-border insolvency proceedings disproportionate with respect to the debt?

- Yes – see question 20.

30. In your view, are the costs of cross-border restructuring or reorganisation disproportionate?

- No

31. Should there be simplified insolvency regimes at reduced costs for certain debtors, in particular self-employed persons and SMEs?

- No

XI. Other Issues

32. Is there any other aspect which should be addressed in the context of the revision of the Insolvency Regulation?

33. Do you want to upload a file?

- No