The Insolvency Service

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DEAR INSOLVENCY PRACTITIONER
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Message from Nick Howard
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Dear Insolvency Practitioner

Attached is a special edition of Dear IP concerning The Insolvency (England & Wales) Rules 2016.

As might be expected, Policy Unit is busy dealing with queries about the new Rules and there are some differences of opinion on interpretations. While it is only a Court that can give a binding interpretation of the law, the enclosed article sets out the policy intentions, and how we believe the Rules support those, in relation to common themes. .

Further questions will inevitably arise, please continue to feed these in to us and we will provide further details through Dear IP to set out the policy intentions.

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57) The Insolvency (England and Wales) Rules 2016

Limited Liability Partnerships

We are working with colleagues on the amendments required to update the Limited Liability Partnerships Regulations 2001and intend to address this in a further statutory instrument later this year (subject to Parliamentary time). In the meantime, the savings provisions provided in the Deregulation Act 2015 and Small Business, Enterprise and Employment Act 2015 (Consequential Amendments) (Savings) Regulations 2017 (SI 2017/540) and the Insolvency (England and Wales) Rules 2016 (Consequential Amendments and Savings) Rules 2017 (SI 2017/369) ensure that, for LLPs, the status quo is preserved.

Insolvent Partnerships Order 1994 and Administration of Insolvent Estates of Deceased Persons Order 1986

The consequential amendment regulations referred to above (SI 2017/540) make the necessary amendments to both the IPO and the AIEDPO so that they are updated in line with both the Insolvency Act 1986 and the 2016 Rules.

Financial Services Sector

It is the Government's intention to ensure that the legislation concerning the insolvency of financial institutions is clear in relation to the recent general corporate insolvency reforms. In January 2017, the Government laid regulations, *The Deregulation Act 2015, the Small Business, Enterprise and Employment Act 2015 and the Insolvency (Amendment) Act (Northern Ireland) 2016 (Consequential Amendments and Transitional Provisions) Regulations 2017*, to amend HM Treasury's modified insolvency regimes to take account of general corporate insolvency reforms which came into force in May 2015, October 2015, and April 2016. These regulations came in to force on the 6 April 2017. The Government intends to bring forward a further statutory instrument to finalise consequential amendments resulting from the Insolvency (Amendment) Act Northern Ireland 2016. The consequential amendments relate to the insolvency of friendly societies in Northern Ireland, in particular on the qualification, authorisation and regulation of insolvency practitioners.

In addition, the Government intends to bring forward a further statutory instrument concerning the insolvency of financial institutions to take account of the general corporate insolvency reforms which came into force in April 2017. In the interest of maintaining the coherence of the current legislation relating to the insolvency of financial institutions, the statutory instrument will disapply the reforms for the majority of HM Treasury's modified insolvency regimes while their impact is assessed and decisions are made about implementation. For a small number of regimes, the instrument will align HM Treasury's modified insolvency regimes with the reforms. For example, the instrument will amend the Financial Market

Infrastructure (FMI) administration regime in line with the reforms. The reforms will also be implemented for financial institutions which are companies (e.g. insurance companies) and individuals to which HM Treasury legislation applies company and individual insolvency law with modifications.

The Government will bring forward the remaining statutory instruments for this approach in due course.

Application of the 2016 Rules to voluntary arrangements agreed prior to 6 April 2017

The Insolvency Service's view is that the starting point for all insolvency practitioners acting as supervisors in an ongoing voluntary arrangement will be to look at what the proposal and/or its standard terms and conditions (T&Cs) say about how the supervisor should interact with creditors once the proposal has been accepted. These will be the contractual arrangements between the debtor (individual or company) and their creditors.

We understand that there are varying T&Cs in existence, some of which set out in full what will happen if the proposal needs to be varied whilst in force. Where there is no reference to either the Insolvency Act or the 1986 Rules, this is the contract and so the terms will continue to apply. But there are standard T&Cs which make reference to both the Insolvency Act and the 1986 Rules and so we need to consider how to deal with these cases. We will use the standard T&Cs attached to the IVA Protocol as the example here.

The starting point of contractual interpretation is the ordinary meaning of the words of the contract. In the IVA Protocol, we think the key term is that paragraph 19(1), read with the definitions, enables the supervisor to call meetings "in accordance with the Act and the Rules", which means the Act and the Rules "as amended".

The first question is whether the reference to "the Rules as amended" includes a new set of Rules repealing and replacing the 1986 Rules. We believe it does. The 1986 Rules will have been repealed and there are no transitional provisions in relation to this aspect of VAs. In addition, even if they had not been repealed, they would not be compatible with the Insolvency Act as amended after April 2017. This is further supported by section 17 of the Interpretation Act 1978, which says:

> *"17 Repeal and re-enactment.*
> *(1)Where an Act repeals a previous enactment and substitutes provisions for the enactment repealed, the repealed enactment remains in force until the substituted provisions come into force.*
> *(2)Where an Act repeals and re-enacts, with or without modification, a previous enactment then, unless the contrary intention appears,—*
> *(a) any reference in any other enactment to the enactment so repealed shall be construed as a reference to the provision re-enacted;*
> *(b) in so far as any subordinate legislation made or other thing done under the enactment so repealed, or having effect as if so made or done, could have been*

> *made or done under the provision re-enacted, it shall have effect as if made or done under that provision."*

Consequently, we believe that the reference to the Rules in the Protocol T&Cs is updated to a reference to the 2016 Rules. We, therefore, do not think that voluntary arrangements using these – or similar – T&Cs require a supervisor to hold a variation meeting in every case to consider amending references to the 1986 Rules.

The next question is: does the supervisor retain the power to call meetings or could they use "decision procedures" in accordance with the 2016 Rules and Act. The 2016 Rules and Act as amended remain silent on how decisions are taken once in a voluntary arrangement is in place; provision is only made for procedure leading up to the voluntary arrangement being agreed. While we believe it is clear that the supervisor has the power to call a meeting, we do not believe they should feel restricted to only using a physical meeting. We expect supervisors to take advantage of the new and varied decision making procedures that are available under the Act as amended and the 2016 Rules.

We are aware that R3 are reviewing their standard terms and conditions in light of both the recent Green v Wright judgment and the 2016 Rules.

<u>Dealing with modification requests in CVAs and IVAs and a creditor's inability to change a vote once it is cast (r15.31(8))</u>

We appreciate that there may need to be negotiation around proposed modifications to CVAs and IVAs, especially where those modifications may be conflicting. It was never the policy intention to restrict the use of such negotiations and there is nothing in the Rules to prevent the convener from asking creditors to submit their proposed modifications ahead of the decision date. By doing this, the nominee could ensure time for meaningful dialogue with creditors and the debtor/company.

<u>Deadlines: requests for physical meetings</u>

We have been asked about the timing of a creditor's ability to request a physical meeting in a section 100 decision process (under rule 6.14(6)(a)) and how the wording used fits with the wording used in rule 15.4(b), which concerns the deadline for a creditor casting an electronic vote.

In the majority of decisions, if a physical meeting is requested it must be done within five days of delivery of the notice under rule 15.8. This will always mean that the request will be received ahead of the decision date. However, in the case of section 100 decision, the notice period might only be three business days; therefore a different rule is needed for timing of such requests in that process. The policy intention (in all cases) is that a request for a physical meeting must arrive before the decision date.

The policy intention with regard to electronic voting is that creditors may cast their votes up until the decision closes (i.e. 23:59 on the decision date).

We believe that the 2016 Rules are capable of supporting both these policy intentions.

Request for physical meeting following a paragraph 52(1)(b) report in an administration

If an administrator is issuing a proposal under paragraph 52(1)(b) of Schedule B1 then she or he will not be seeking a decision from the creditors. Therefore, section 246ZE and the five business days time limit imposed by rule 15.6(1) will not apply in these cases. Creditors, however, may of course requisition a decision under paragraph 52(2) and must do so within eight business days of delivery of the administrator's proposals, in accordance with rule 15.18(2).

Do creditors' notices have to comply with standard content

While a strict interpretation of the 2016 Rules may lead you to think that if a creditor does not comply with the standard notice provisions, such a notice (e.g. of objection to deemed consent) is invalid. However, rule 1.9(1)(b) does say quite clearly that a document may depart from the required contents if "the departure (whether or not intentional) is immaterial."

We believe that the intention is plain: if it is clear what the creditor is seeking in their notice, it should be accepted.

Rule 1.45

Concern has been expressed that as r1.45(4) only refers to the office-holder, it is only the office-holder who can take advantage of the assumed consent with regard to electronic delivery. However, the policy intention behind this rule is to encourage electronic delivery of documents wherever possible and the assumed consent provision applies to all senders; 1.45(4) defines the term for office-holder to assist with clarity.

Delivery of documents for a section 100 decision

With regard to the creditors' appointment of a voluntary liquidator, r6.14 is clear that it is the directors of the company who must deliver the notice seeking their (the creditors') decision (6.14(2)) and the statement of affairs (6.14(7)). Where a document is required under the Act or the Rules to be delivered, Chapter 9 of Part 1 of the Rules applies. As stated above, we do not see a problem with the director using electronic delivery as long as r1.45 is followed. However, we do not think that the use of a website to deliver particular documents is open to directors under these Rules.

Progress reports and extension of administration

The Insolvency (England and Wales) (Amendment) Rules 2017 provided an additional savings provision within paragraph 7 of Schedule 2 to ensure that if a

progress reporting schedule had been changed prior to 6 April 2017, then that cycle continues. The additional sub-paragraph says:

> *" (5) Where rules 18.6, 18.7 or 18.8 prescribe the periods for which progress reports must be made but before the commencement date an office-holder has ceased to act resulting in a change in reporting period under 1986 rule 2.47(3A), 2.47(3B) 4.49B(5), 4.49C(3), or 6.78A(4), the period for which reports must be made is the period for which reports were required to be made under the 1986 Rules immediately before the commencement date."*

While we agree that the paragraph could perhaps have been more explicit, we take the view that the inclusion of the 1986 Rule covering progress reports where an administration has been extended (1986 rule 2.47(3B)) leaves the intention that this provision also applies where a reporting cycle has changed due to an extension of an administration sufficiently clear.

Calculation of unconnected creditors in voluntary arrangements

In order to ascertain the second stage of the voting process with regard to voluntary arrangements (VAs), we believe the rules should be read in the following way:-

a) Rule 1.2 says that the requirements of a proof for the purposes of voting in VAs (and others) are satisfied by the convener or chair having been notified in writing of the debt.
b) Rule 15.34(4) and rule 15.34(6)(b) then set out the second stage of the VA voting procedure – that is, if more than half in value of the total value of unconnected creditors (or creditors who are not associates) vote against the proposal, then the decision is not made
c) Rule 15.34(5) (or rule 15.34(7)(c) in relation to IVAs) says that the "total value of unconnected creditors" is those unconnected creditors whose claim has been admitted for voting. Looking back to r1.2 to be admitted for voting a creditor must have notified the convener or chair in writing of their debt. This does not mean that they have necessarily voted as well.

So, assuming that 75% in value of those voting have agreed the proposal, then the 2nd stage of calculating the vote will be:

Value of unconnected creditors who voted against proposal / Value of unconnected creditors who have sent written claim = < 50% - decision made

= > 50% - decision not made.

Delivery to overseas creditors

We are aware that the 2016 Rules are silent are deemed delivery dates for documents sent outside of the UK via postal delivery or document exchange. We hope that where possible people will be making use of electronic delivery or websites to ensure speedy

delivery to all parties. However, we appreciate that this may not always be possible or convenient.

The Interpretation Act addresses the point of when post has been effected in these situations (see section 7 below). We think office holders should take a pragmatic approach and, if at all possible, should extend time limits and deadlines to reflect when notices are likely to be delivered in reality. We recognise that this risks some notices not being delivered in time; we think that provided the office-holder is able to demonstrate that they have made reasonable attempts to deliver to the creditor, this would count as reasonable mitigation. We view this as a better outcome than an inflexible deeming provision.

> *"Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."*

Statements of affairs: what constitutes 'material transactions' under rule 6.17(1)?

This is the same as 1986 rule 4.53B-CVL(1) and should be interpreted as such.

Virtual Meetings

Under rule 15.5 the notice setting the decision procedure as a virtual meeting must contain–

> "(a) any necessary information as to how to access the virtual meeting including any telephone number, access code or password required; and…"

We think that sending a contact number or email address for creditors to contact in order to obtain such details is also acceptable under this rule.

Invitation to form a committee

As insolvency practitioners will know, in order to replicate the position at creditors' meetings (i.e. that a resolution for a creditors'/liquidation committee could be made), the 2016 Rules say that when an office-holder seeks a decision from the creditors, in most cases, they must also seek a decision on whether or not to appoint a committee – see for example rule 3.39(4).

We are satisfied that a decision as to whether creditors would like to form a committee could be taken by deemed consent. In this way, if creditors have already indicated a lack of desire to appoint a committee, the office-holder could simply propose that no committee be formed. If, however, more than 10% by value of the

creditors object to deemed consent, the office-holder would have to use an alternative decision procedure to decide whether a committee should be formed.

We also think it would be acceptable for the office-holder to ask that those who may object to the proposal to not form a committee to provide any nominations for membership when they object.

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