The Insolvency Service

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DEAR INSOLVENCY PRACTITIONER
Issue 77 – June 2017

Message from Nick Howard
Head of Insolvency Practitioner Regulation

Dear Insolvency Practitioner

Attached is the latest edition of Dear IP.

In this issue:

Information/Notes page(s):

28) Requisitioning a decision making process

Article 27 in Dear IP 75 clarified the revised guidance that reflects practice that has been in place for a number of years. The Insolvency Service continues to recognise and value the work that insolvency practitioners carry out in compulsory liquidations and bankruptcies, and also the general contribution that they make to this field of work.

The principle behind the guidance remains that the Official Receiver is appointed as liquidator/trustee as a result of bankruptcy or winding up orders made by the court and will remain as liquidator/trustee unless:

- The majority of creditors by value seek the appointment of an insolvency practitioner to replace the Official Receiver as liquidator/trustee.
- 25% of creditors by value requisition a decision procedure for the purpose of removing the Official Receiver and the Official Receiver is replaced as office holder.
- The Official Receiver thinks the skills of an insolvency practitioner are required.

Under the Insolvency Act 1986 (s.136 & s.294) creditors were able to require the Official Receiver to call a first meeting of creditors provided they met the 25% threshold. This was interpreted historically and operationally as being 25% of unsecured creditors.

Following amendments to the Insolvency Act 1986 and the coming into force of the Insolvency (England and Wales) Rules 2016 on 6 April 2017 the Official Receiver may now be removed and replaced by a decision procedure (s.136 & s.298 of the Insolvency Act 1986) on the requisition of creditors. This replaces, at least in the first instance, a creditors' meeting convened for this purpose. The requisitioning process has been amended but the threshold remains the same.

The decision procedure includes the following:

- 25% in value of creditors can request that the Official Receiver, as liquidator, seek nominations for the purpose of choosing a person to be liquidator in place of the Official Receiver. If nominations are received, the Official Receiver must start a decision procedure. The same percentage can require the Official Receiver as trustee to commence a decision procedure to remove the Official Receiver from office as trustee. If there is a resolution to remove the trustee, nominations must be sought for the Official Receiver's replacement.

- There are various decision-making options (including, electronic voting and virtual meetings) but the default decision procedure being adopted by the Official Receiver will be a decision by correspondence.

- 10% in value, 10% of total or 10 creditors (or contributories) can request that the chosen decision-making procedure be changed to a physical meeting. A valid request will terminate any ongoing process which will then be replaced by the convening of a physical meeting of creditors (and/or contributories).

In producing guidance for the new process, we returned to the provision setting out the 25% threshold, which refers to 25% of all creditors (including secured creditors).

A strict interpretation of the legislation could have the following consequences:

- It could have the perverse consequence of allowing a secured creditor to prevent the requisition of a decision procedure despite that creditor being unlikely to be subsequently taking part in the process.
- A change in operational policy would make it harder for creditors to secure the appointment of an insolvency practitioner as liquidator/trustee. Under the strict interpretation of the legislation, creditors would need the support of 25% of all creditors rather than the support of 25% unsecured creditors.

The Official Receiver will therefore continue with the operational policy. Although it may not constitute a valid requisition if 25+% in value of unsecured creditors make a requisition under s.136 & s.298 the Official Receiver will commence the procedure. This may result in creditors appointing an insolvency practitioner as liquidator or trustee in place of the Official Receiver.

As noted in Article 27 in Dear IP 75, it is a fundamental principle of the guidance that the Official Receiver will follow the wishes of the majority of creditors when they wish to seek an appointment of an insolvency practitioner.

If an insolvency practitioner feels there is an issue over an appointment, which they cannot resolve with the caseworker in the Official Receiver's office, they should contact the Official Receiver directly to see if they can resolve the issue. Most issues should be resolved at that stage; if problems persist, the insolvency practitioner should contact the Senior Official Receiver with a view to resolving the situation.

Any enquiries regarding this article should be directed towards David.chapman2@insolvency.gsi.gov.uk

73) Third Party Monies and the ISA

The case of *Safier v. Wardell and Others [2017] EWHC 20 (Ch)* brought into focus the policy relating to the payment of third party monies into the Insolvency Services Account (ISA). The judgement confirmed the existing policy, as set out in Dear IP (chapter 5, article 10) and this article reaffirms the position regarding the payment of funds into the ISA and the charging of fees.

A liquidator or trustee is under a duty to pay monies into the ISA in the circumstances set out in regulations 5 and 20 of the Insolvency Regulations 1994. Whether the circumstances apply depends upon the facts of each case. It is primarily for a liquidator or trustee to form a view as to whether the Regulations do or do not apply to particular monies. **In cases of doubt, EAS is content to discuss matters with the insolvency practitioner.**

Regulations 5(1) (winding up by the court) and 20 (bankruptcy) require that (subject to the exception for local bank accounts) a liquidator or trustee is required, at specified times, to pay all monies received by him in the course of carrying out his functions as such into the ISA. In the case of a voluntary winding up, regulation 5(2) requires the liquidator, at specified times, to pay into the ISA the balance of funds in his hands or under his control relating to the company.

Such functions are, for the purposes of regulations 5(1) and 20, set out in sections 143 and 305(2) of the Insolvency Act 1986, and relate only to "the assets of the company" and the "bankrupt's estate" respectively. Therefore, if on the particular facts of a case, monies are received by a liquidator or trustee which do not belong to the company or the bankrupt's estate then those monies are not received by the liquidator or trustee *"in the course of carrying out his functions as such"*.

Where a liquidator or trustee receives monies to which a third party claims he is entitled, and genuine doubt exists as to whether the monies received belong to the company or bankrupt, those monies should be paid into the ISA pending resolution of the third party claim. In practice, funds are often paid by a third party in order to secure the annulment of a bankruptcy order. For the purpose of regulation 5(2), any monies in the hands or under the control of a liquidator which do not belong to the company are not funds *"relating to the company"*.

In general, this means that where monies are received by a liquidator or trustee, which do not arise from the realisation of assets belonging to a company or the bankrupt's estate, they should not be paid into the ISA. The fact that funds received by the liquidator or trustee are used to discharge insolvency expenses or for payment to creditors does not necessarily mean that they were received in the course of carrying out his statutory functions.

The ISA cannot be used as a local bank account to facilitate third party funds being paid to creditors. Suspense accounts will only be opened where there is some question as to the ownership of the funds and, once that question has been resolved, the funds will either be transferred to the general account or returned to the insolvency practitioner.

Where a liquidator or trustee forms the view that the monies received fall outside the regulations, they should ensure that the reasons for that decision are fully documented. **EAS does not need to be advised of the decision**. Requests by insolvency practitioners to EAS to open a suspense account in the ISA, without Secretary of State or other fees being charged, **must** be supported by a written explanation of the reasons why a suspense account is required and also why fees should not be charged.

Where a trustee receives third party funds in order to secure the annulment of a bankruptcy order and agrees to pay creditors on behalf of that third party, those funds are not assets of the bankrupt and should not form part of the trustee's receipts and payments. It follows that the trustee cannot charge remuneration in their capacity as trustee on the receipt and handling of those funds, although it is possible that a separate agreement may be reached with the third party outside of the bankruptcy to cover the costs of handling and distributing the funds.

Where a bankrupt is seeking an annulment on the grounds of payment in full, provision should be made for the payment of the Official Receiver's fees and costs, which for post 21 July 2016 cases will include payment of the general fee.

EAS is aware of a number of recent instances where funds have been paid into the ISA by a trustee or liquidator, alongside a request for those monies to be placed on suspense, when the circumstances clearly did not justify this; for example, some insolvency practitioners have requested that the proceeds of PPI claims be placed on suspense where in fact those monies are clearly bankruptcy assets and subject to fees.

If a trustee wishes to realise an asset, including any sale to relatives of a bankrupt, that is a realisation and those funds should be paid into the ISA and fees will be applied. If a trustee decides not to realise an asset and instead accepts funds from a third party to discharge the debts and costs of a case, the funds should not be paid into the ISA. Generally, if the sum received relates to the realisation of particular asset, the money will be an asset and should be paid into the ISA. If the sum paid is to discharge the debts and costs of the bankruptcy with a view to securing an annulment, the money should not be paid into the ISA and will not attract a fee.

Other common examples encountered by EAS include:

- Where a bankrupt uses their pension funds to repay debts, this is a voluntary payment by the debtor and is there fore an asset which attracts a fee.

- In relation to paragraph 99 of Schedule B1 to the Insolvency Act 1986, any former administrator's outstanding costs will attract the Secretary of State fee but the administrator will be paid as a priority over Insolvency Service fees.

- With regard to bankruptcy cases where there is a former supervisor of an IVA, a charge would arise in accordance with section 276(2) of the Insolvency Act 1986 or rule 6.46A of the Insolvency Rules 1986.

EAS Operational process

- Third party funds credited to the Insolvency Service account after 1 July 2017, which do not arise from the realisation of assets belonging to a company or the bankrupt's estate will be refunded immediately to the sender.

- For any third party funds that predate 1 July 2017, please submit your requisitions to Estate Account Services in order to withdraw the funds currently held in the ISA which do not arise from the realisation of assets belonging to a company or the bankrupt's estate.

[First published in Dear IP no. 39, October 1997]

Any enquiries regarding this article should be sent to CustomerServices.EAS@insolvency.gsi.gov.uk

27) EC Insolvency Regulation: filing with Companies House

When the new Insolvency (England and Wales) Rules 2016 come into force on 6 April 2017, the Registrar of Companies will introduce new forms. The forms will be in a new format and will contain a new identifier.

On 26 June, the Insolvency Amendment (EU 2015/848) Regulations 2017 deliver new filing requirements to the Registrar for England & Wales, Scotland and Northern Ireland. Forms will be made available on GOV.UK.

Where there are insolvency proceedings in another member state and an undertaking is approved by creditors, insolvency practitioners are required to give notice to the registrar by filing:

England & Wales	Scotland	Northern Ireland	Form title
IE01	IE01(Scot)	IE01(NI)	Notice of approval of an undertaking by an office holder in respect of assets in another member state
IE02	IE02(Scot)	IE02(NI)	Notice of approval of an undertaking proposed by the member state liquidator to local creditors in the UK

Where companies are subject to an order opening group co-ordination proceedings, practitioners are required to give notice to the registrar by filing:

England & Wales	Scotland	Northern Ireland	Form title
IE03	IE03(Scot)	IE03(NI)	Notice of an order opening group co-ordination proceedings

Where there are insolvency proceedings in another member state, practitioners are required to notify the registrar where there is consent to the dissolution of a company by a member state liquidator, or where those proceedings have ceased. This should be done at the same time as sending the notice of final account prior to dissolution or early dissolution, and moving from administration to dissolution, which must be accompanied by either of the following forms:

England & Wales	Scotland	Northern Ireland	Form title
IE04	IE04(Scot)	IE04(NI)	Statement of insolvency proceedings in another member state with consent to dissolution
IE05	IE05(Scot)	IE05(NI)	Statement of insolvency proceedings in another member state without consent to dissolution

General enquiries may be sent to: lcross@companieshouse.gov.uk

47) Director Conduct Reporting Service – Feedback Survey

The Director Conduct Reporting Service (DCRS) was launched on 6 April 2016. With insolvency practitioners having three months to submit a report, the majority of reports started to flow through the process from mid-June 2016.

Almost immediately, practitioners and their staff started making use of the online survey to provide constructive feedback on this new digital service. As with most new processes, there was initially an influx of feedback, but the use of the online survey reduced considerably as user experience increased.

Although not much has changed with the DCRS form over the past 14 months, the Insolvency Service has been reviewing all the feedback received. This has been used to influence planned changes to the DCRS form, which should improve completion and provide more relevant information upon which to make a decision. These improvements will be implemented over the next few months and further communications will be issued nearer the time of release.

Ongoing feedback from insolvency practitioners and their staff is important in helping the Insolvency Service develop its digital service. It will also help to establish how well our changes are working.

Access to the online survey can be found at the top of each page within DCRS by clicking on the word "feedback". The survey takes less than five minutes to complete and can help shape how DCRS looks in future.

Any enquiries regarding this article may be sent to DCAS@insolvency.gsi.gov.uk

90) Dealing with animals – availability of guidance from Animal and Plant Health Agency

This article is being issued to remind insolvency practitioners that there are legislative requirements concerning the welfare of animals and that an office holder, as a keeper of those animals, will be responsible for ensuring that those requirements are not compromised. In the case of farmed species (cattle, sheep, pigs, poultry and, in some cases, horses and camelids) there are a range of disease control requirements that may be in place concerning the way in which they are kept, their movement, transport and method of sale. Where an office holder is dealing with farmed livestock they should contact the Animal and Plant Health Agency (APHA) (03000 200 301), choosing the 'other enquiries' option, in the first instance, for advice.

If animals are of a species that may be endangered, consideration should be given to contacting the CITES (Convention on International Trade in Endangered Species of Wild Fauna and Flora) Unit at the APHA. To establish if an animal is an endangered species a check may be made on the CITES database.

Most animals that are considered wild, dangerous or exotic require a licence. This will be issued by the relevant local authority. If there are concerns regarding the legitimacy of a wild/dangerous animal or advice is required on any possible actions, the local authority should be able to assist.

Any enquiries regarding this article may be sent to SOR.Operations@insolvency.gsi.gov.uk

91) Legal Profession Privilege *re Shlosberg [2016]*

A recent Court of Appeal case *re Shlosberg [2016]* EWCA Civ 1138 has clarified the way in which Legal Professional Privilege material can be used by a trustee in bankruptcy.

This case concerns, amongst other things, whether and to what extent a trustee in bankruptcy is entitled to use documents which were subject to legal professional privilege in favour of the bankrupt, prior to his bankruptcy. This case held that while the trustee can take possession of privileged documents under section 311(1) of the Insolvency Act 1986, the right to assert (and therefore waive) privilege in a document does not pass to the trustee, that right is personal to the bankrupt. While the trustee can inspect the documents and use the privileged information to realise the bankrupt's estate, the trustee cannot use it outside his/her statutory functions.

It had previously been thought that the trustee would be able to waive privilege in the same circumstances in which, prior to his bankruptcy, a bankrupt would have been able to do so, provided that the documents in question concerned property within the bankruptcy estate or otherwise related to his estate or financial affairs

Following the judgement, guidance has been issued to Official Receivers, extracts of which are set out below.

Extract from OR guidance:

A bankrupt is required to deliver up all records, including privileged material, to the trustee. The trustee can deploy privileged material against the bankrupt but may not otherwise use privileged material in a manner that would amount to a waiver of privilege. Where the trustee is deploying privileged material in court, they ought to apply for an order under CPR 31(22) that the material not be disclosed further.

The trustee, in an exceptional case, may ask the bankrupt to voluntarily waive privilege so that the documents can be disclosed onwards. This would be on a voluntary basis only and we would expect a properly advised bankrupt to refuse to give such a waiver.

Any enquiries regarding this article may be sent to *Georgina.Maskell@insolvency.gsi.gov.uk*

92) Early notification of potential high profile insolvencies

The office of the Chief Executive of the Insolvency Service would appreciate early notification of any potential high profile insolvencies. In particular, we would like to know about any cases that could result in significant redundancies, could have impact at local and national level, and/or would attract significant media and ministerial interest. Early notification will allow us to prepare and put in place protocols to deal with such insolvencies, handle high volume of redundancies, or prepare for briefing of ministers and/or officials. All notifications will be treated in the strictest confidence.

Please send all notifications to advance.notification@insolvency.gsi.gov.uk

Such a notification would be separate from the obligation to notify the Secretary of State about redundancies using the HR1 process –

https://www.gov.uk/government/publications/redundancy-payments-form-hr1-advance-notification-of-redundancies.

Any enquiries regarding this article may be sent to advance.nofication@insolvency.gsi.gov.uk

93) Retailer insolvency and Refunds / Chargeback – guidance to be given to consumers who have made prepayments or have paid for goods or services

Summary
This article provides guidance for insolvency office holders on the information to be given to consumers about claiming refunds from card issuers where a retailer has become insolvent before delivering goods or services. It includes standard wording which should be put on the insolvent retailer's website.

Background
In July 2016 the Law Commission published a report on Consumer Prepayments on Retailer Insolvency. The full report, including an executive summary, is available at: Consumer Prepayments on Retailer Insolvency.

In the event of retailer insolvency, consumers often stand to lose prepayments made in advance of receiving goods or services unless there are sector based protections in place for them (e.g. for travel).

Law Commission recommendations
The Law Commission made a number of general recommendations designed to improve the chances of consumers regaining prepayments they have made. The Government is considering these further and intends to publish a full response in summer 2017.

One area of the Law Commission's recommendations relates to consumers who have paid for a product by credit or debit card. A consumer who has paid by credit or debit card for undelivered goods or services has the ability to recover money through the card issuer as card payments are protected by statutory and voluntary schemes.

Payments by credit card (including charge cards issued under a Consumer Credit Act regulated agreement) are protected by a statutory scheme: section 75 of the Consumer Credit Act 1974 gives consumers a legal claim against the card issuer where the goods or services cost more than £100 and less than £30,000 and are not delivered.

For both credit and debit cards (including pre-paid cards), the card schemes (which set the rules governing payment transactions between the card issuer and the merchant acquirer) provide a system of "chargeback". Chargebacks are voluntary schemes, where the rules are set by the card schemes, which allow the card issuer to ask the merchant acquirer to reverse a payment made by card and is not subject to minimum or maximum monetary limits. Claims for a chargeback must be made within time limits and these vary across card schemes.

The Law Commission found that the statutory and chargeback voluntary schemes operated by the card schemes, collectively referred to as chargeback in this article (but

referenced as refund in the consumer communications – see Annex A and B), need to be better understood. The Commission made a number of recommendations to the Insolvency Service, UK Cards Association (UKCA - the body representing the card payments industry's issuers and acquirers), insolvency practitioners and card issuers to achieve this.

The Government welcomed the Law Commission's recommendations on chargeback and this guidance implements those recommendations for the insolvency practitioner industry. UKCA have implemented recommendations regarding refund / chargeback guidance for consumers and a Code of Best Practice for card issuers on the provision of information to consumers on chargebacks.

Guidance for insolvency practitioners

The Insolvency Service has worked with R3, the Insolvency Lawyers Association, ICAEW, UKCA, card schemes (Mastercard and Visa), the Law Commission and consumer groups to develop the guidance in this article on the information which should be made available to consumers when seeking a chargeback where there has been a retail insolvency. The main element of the guidance is that a **standard notice** should be published by the office-holder on the insolvent retailer's website.

Research by UKCA shows that, in 2016, 77% of national retail sales were made by card. Therefore, it is likely that in all retail insolvencies which feature consumer deposits / prepayments or payments, some would have been paid by card. Publication of the standard notice would therefore be expected in the majority of retail insolvencies (subject to the comments below).

Reclaiming money through a chargeback will often provide consumers (including those who have made a prepayment) with the best chance of getting their money back following a retailer's insolvency. Following this guidance there is likely to be an increased awareness of the payment card industry's card chargeback facility amongst consumer creditors enabling them to recover their money where a card had been used to make the payment.

Notice to be published on retailer's website

- It is common practice for insolvency office-holders in large retail insolvencies to ensure the retailer's website is maintained for a period in administration or following liquidation. Where this occurs the office-holder should publish on the retailer's website the **standard notice for consumers at Annex A or B**, in relation to payments made by credit and debit cards for goods or services which have not yet been received.

- As time limits for chargeback vary across card schemes, the standard notice should be published in circumstances where it is possible that goods or services may be delivered, but where it is not yet certain that they will be.

- Annex A should be used where there is a possibility that pre-paid goods and services will be supplied by the due date. Annex B should be used where pre-

paid goods and services will not be supplied by the due date (and should replace Annex A when there is certainty that goods and services will not be supplied).

- The standard notice should also be published on social media sites maintained by the retailer, if the office-holder considers that is the best means of drawing it to consumers' attention.

- In relevant cases where the retailer did not maintain a website, office-holders should draw the contents of the standard notice to consumer creditors by other means (e.g. for small retailers, by a notice in the shop window or correspondence with consumer creditors).

- It may be appropriate for the standard notice to be hosted on an insolvency related site in place of, or in addition to, the retailer's website, e.g. in circumstances where the retailer's site is used to direct traffic to that site where information about the insolvency procedure is hosted.

- The standard notice should be displayed prominently on the website, taking into account other information (e.g. for employees) which may also need to be displayed with appropriate prominence.

- It may be appropriate to publish other information alongside the standard notice, e.g. where it is known that some goods or services will be provided where fully or partly prepaid for, or not to publish the notice at all where all prepaid contracts will be honoured.

Other evidence of insolvency

- The standard notice should be sufficient evidence of insolvency for a card issuer to deal with chargeback claims, but where this is not the case the office-holder should provide consumer creditors with other evidence or information (e.g. confirmation that goods and services will not be delivered) as card issuers may reasonably require.

- In the case of a travel failure, and where there is a bond or insurance scheme in place such as provided by ATOL or ABTA, the consumer creditor is advised to speak to their card issuer regarding what specific form of evidence it requires for a failure of this type.

The office-holder should use their professional judgement when following this guidance, the overriding objective being to make those consumers who have made payments for goods and services which are not expected to be delivered aware of their ability to apply for a chargeback from their card issuer.

According to the Law Commission, some insolvency practitioners are concerned that telling consumers about chargeback could be seen as preferring one set of creditors at the expense of others. The Insolvency Service does not believe that is the case.

Any enquiries regarding this article may be sent to Policy.Unit@insolvency.gsi.gov.uk

Annex A

XXXXXX (in administration / liquidation)

Notice to customers regarding credit and debit cards

At present it is uncertain that goods and services ordered before [the company] entered [administration / liquidation] will be supplied. If you have made a deposit for or paid for goods or services by credit or debit card (including charge and pre-paid cards) and the goods or services are not going to be received by the due date, you may be able to get your money back by claiming a refund from your card issuer.

Please contact your card issuer as soon as you can if this may apply to you (there is no need to wait until the due date before contacting your card issuer). Further information including on time limits that apply is available from the UK Cards Association Credit and debit cards: A consumer guide.

Annex B

XXXXXX (in administration / liquidation)

Notice to customers regarding credit and debit cards

If you have made a deposit for or paid for goods or services by credit or debit card and the goods or services are **not** going to be received by the due date, you may be able to get your money back by claiming a refund from your card issuer. Please contact your card issuer as soon as you can if this may apply to you. Further information including on time limits that apply is available from the UK Cards Association Credit and debit cards: A consumer guide

58) Fees charged on Annulment of a Bankruptcy order

The introduction of the Insolvency Proceedings (Fees) Order in July 2016 resulted in various changes to the structure of bankruptcy fees. The new Fees Order provides that both the full administration fee and the new general fee should be charged in all cases following the making of the bankruptcy or winding up orders. Stakeholders have sought clarification of the Official Receiver's position regarding costs in annulment applications and the Insolvency Service has recently reviewed the fees that are charged when bankruptcy orders are annulled.

The new Fees Order came into force on 21 July 2016 and all cases where the bankruptcy and winding up petitions were presented on and after that day are subject to the new fee structure.

Bankruptcy orders are annulled on one of three bases:

- On the grounds existing at the time of the order was made, the order ought not to have been made (s282(1)(a) Insolvency Act 1986).
- That, to the extent required by the rules, the bankruptcy debts and the expenses of the bankruptcy have all, since the making of the order, been either paid or secured for the satisfaction of the court (s282(1)(b) Insolvency Act 1986).
- The creditors approve a proposed individual voluntary arrangement (IVA) and the bankrupt (or the Official Receiver) applies to the court to annul the bankruptcy order (s261(2) Insolvency Act 1986).

Historically, when an application was made on the grounds of 'ought not to have been made', the Official Receiver has asked for costs to be awarded based on actual disbursements and a fee based on time and rate (limited to the full value of the administration fee). When an annulment order is made on these grounds, it will have the effect of setting aside the bankruptcy order on the basis it should not have been made in the first place. We will therefore be continuing with the approach we have previously taken of only seeking costs in ought not to have been made cases on a time and rate basis, along with actual disbursements. The new fee structure includes the general fee (£6,000) which is not specifically related to the actual cost of the case. The Official Receiver will not seek the general fee in cases where the order ought not to have been made.

When the bankruptcy order is validly made, the fees set out in the Fees Order flow automatically. The new fee structure does not allow for discretion to apply anything other than the full administration fee and the full general fee when a bankruptcy order is annulled on the basis that that the debts and the expenses have been paid in full.

This means that:

- Where the order is made on a petition presented or application made before 21 July 2016, all fees as set out in previous Fees Order (including the Secretary of State fee) should be paid in full.
- Where the order is made on a petition presented or application made on or after 21 July 2016, all fees as set out in The Insolvency Proceedings (Fees) Order 2016 (including the £6,000 general fee) should be paid in full.

These are statutory fees agreed by Parliament. The amount of work carried out in the insolvency and the time that has elapsed since the insolvency order are not material to the charging of the fees.

When the annulment follows a post-bankruptcy order IVA, the Official Receiver will always seek the full administration and general fees as per the Fees Order.

Any enquiries regarding this article should be sent David.chapman2@insolvency.gsi.gov.uk

59) The recast Insolvency Regulation (EU 2015/848)

The EU Regulation 2015/848 (the recast Regulation) comes into force, in part, on 26 June 2017. The recast Regulation, which deals with cross-border jurisdiction, cooperation, recognition and enforcement of insolvency proceedings in the EU, replaces EC Regulation (1346/2000) (the original Regulation) making changes to existing provisions and introducing areas of new policy.

The recast Regulation has direct effect in the UK but we have made the Insolvency Amendment (EU 2015/848) Regulations 2017 (the implementing Regulations) to facilitate the smooth operation of the recast Regulation in different parts of the UK. The implementing regulations introduce procedural requirements which practitioners dealing with certain types of cross-border insolvencies will need to be aware of in addition to the provisions of the recast Regulation. We have noted below some of the key changes in the recast Regulation and the implementing Regulations.

It should be noted that, due to the timing of the general election and the dissolution of the previous Parliament, it was not possible to lay the implementing Regulations before Parliament 21 days before commencement, as is convention.

It may also be noted that the implementing Regulations make changes to insolvency law in Northern Ireland and to devolved areas of corporate insolvency law in Scotland. The administration in Northern Ireland and the Scottish Government has agreed this approach.

Scope

The recast Regulation's scope is broader than the original Regulation. Article 1 brings into scope interim proceedings, based on laws relating to insolvency, which have the purpose of rescue, adjustment of debt, reorganisation or liquidation. Annex A contains an exhaustive list of such procedures for each Member State. It should be noted that schemes of arrangement are not included in the list of procedures covered by the recast Regulation.

The recast Regulation also features a significant change in that secondary proceedings are no longer restricted to terminal procedures and may now take the form of any procedure listed in Annex A. As such, Annex B of the original Regulation has disappeared. The implementing regulations therefore make changes to facilitate wider conversion of insolvency proceedings from one type of proceedings into another in cross-border cases.

Jurisdiction

The recast Regulation makes a number of subtle but important changes to jurisdiction, including a definition of centre of main interests (COMI).

Article 3 of the recast Regulation introduces 'look back periods' where the general presumption that a debtor's COMI is located in the place of the registered office does not apply if the registered office has been moved to another Member State within the 3 month period prior to the request for the opening of proceedings.

Similar provisions also apply to individuals. The presumption, in the case of an individual carrying on business, that COMI is located in the principal place of business, will not apply if this has been moved to another Member State within the 3 month period prior to the request for the opening of proceedings. In the case of individuals not carrying on business, the presumption that COMI is located in the place of habitual residence will not apply if this has been moved to another Member State within the 6 month period prior to the request for the opening of proceedings.

Article 4 of the Regulation introduces an explicit obligation on the court opening proceedings to examine whether it has jurisdiction [and on which grounds in Article 3]. This requirement may be entrusted to insolvency practitioners (as defined in Article 2(5)) in cases where proceedings are not opened by a court. The implementing Regulations make changes to procedural rules so that applications for provisional liquidations and interim receiverships must contain the same declaration as to jurisdiction currently required for other types of insolvency applications, in order to signpost the court's obligation to consider the issue. In addition, a nominee will be required to examine jurisdiction, making a declaration in their invitation to creditors to consider a CVA proposal or in their report under section 256A in respect of an IVA proposal.

Practitioners should also note the amended definition of 'establishment' in Article 2(10).

Undertakings

Article 36 provides that, in order to avoid secondary proceedings being opened in another Member State, an insolvency practitioner may offer an undertaking in respect of the assets located in that jurisdiction, that the insolvency practitioner will comply with the distribution and priority rights under the laws of that Member State when dealing with those assets. This may be viewed, to an extent, as the codification of what has been common practice in the UK for several years.

It is important to note that the procedural rules to be applied by an insolvency practitioner when offering an undertaking to creditors in another Member State are those of the local jurisdiction (i.e. the Member State in which secondary proceedings will not be opened if the undertaking is approved, subject to Article 38). The implementing Regulations therefore set out the procedure that a member State liquidator must comply with in offering and obtaining the approval of UK creditors to an undertaking. It should be noted that the required majority for approving an undertaking is the same as that required for approving a CVA.

Where an office-holder in proceedings in England and Wales, or in Scotland in respect of proceedings relating to a company, proposes to offer an undertaking to

creditors in another Member State, as well as complying with local procedural rules in the Member State concerned, the implementing Regulations require additional procedures to be followed. An office-holder must (in addition to the requirements of Article 36 itself) inform *all* creditors of a decision to reject the proposed undertaking, or, where approved: send a copy to *all* creditors with a notice informing them of the approval of the undertaking and of its effect; deliver a copy to Companies House in the case of companies; or file the undertaking on the court file or bankruptcy file in the case of an individual. The office-holder may also choose to advertise the undertaking in the relevant Member State but this is a discretionary matter.

Group coordination

Chapter V of the recast Regulation introduces a range of new provisions aimed at ensuring the efficient administration of insolvency proceedings relating to different companies forming part of a group.

As well as requirements for insolvency practitioners to cooperate and communicate with counterparts in other proceedings and courts in other Member States (which build on enhanced provisions elsewhere in the recast Regulation), a new group coordination procedure is set out in Section 2 of Chapter V.

The implementing Regulations set out procedural rules for making an application to the court for the opening of group coordination proceedings in England and Wales (procedural rules for court applications in Scotland are the responsibility of the Lord President's Office). In addition to the information required by Article 61, applicants must ensure they have provided details identifying relevant insolvency practitioners and proceedings.

Where an order is made opening coordination proceedings, the applicant must deliver a copy of the order to office-holders in England and Wales, their equivalents in proceedings in other parts of the UK, and to member State liquidators. The equivalent provisions apply in Scotland. Office-holders in England and Wales and their equivalents in Scotland must then deliver a copy of the group coordination order to Companies House.

Practitioners should note that, when acting as office-holders, creditor approval is not required in respect of the decision to participate or not in a group coordination, even though Article 64 gives Member States the ability to impose such a requirement if they so choose. The fact that the implementing Regulations do not impose such a requirement does not prohibit an office-holder from seeking approval or consulting creditors if they consider it appropriate, but this is at the office-holder's discretion.

As the group coordination is a voluntary process, office-holders who have not objected to inclusion in group coordination, are not subject to the coordinator's recommendations or the coordination plan. However, where an office-holder does not follow these, they must give reasons for doing so under Article 70. The implementing Regulations require such reasons to be given to creditors as soon as reasonably practicable.

Dissolution

Article 48 prevents a company subject to insolvency proceedings from being dissolved until all proceedings in respect of that company have been closed or the member State liquidators acting in respect of those proceedings have consented to dissolution.

In cases where there are parallel proceedings open in at least one other Member State, the office-holder is required by the implementing Regulations to deliver to Companies House additional information when delivering an account and statement under section 106(3) or section 146(4) or a notice under paragraph 84(1) of Schedule B1. The information required is: confirmation of other open proceedings; details identifying those proceedings and the details of the member State liquidator(s); and confirmation as to whether or not the member State liquidator(s) has consented to dissolution of the company. This notice must be delivered at the same time as delivering the above notices but practitioners should note it is only required where there are other proceedings open in another Member State.

The implementing Regulations make further provision, amending the dissolution provisions contained in the Insolvency Act 1986, to prevent dissolution in contravention of Article 48.

Priority of costs

The implementing Regulations make clear where in the order of priority, costs fall which are incurred under Articles 30 (costs of publication in another Member State and registration in public registers of another Member State) and 59 (costs of cooperation and communication in proceedings concerning members of a group of companies).

Standard forms

The recast Regulation makes provision (Article 88) for the creation of a number a few standard forms for use across all Member States. These comprise:

- Request for access to information (Article 27(4) – requesting access to certain information relating to 'consumer' debtors in national insolvency registers where access to such information is conditional). Use of this form is mandatory.[1]
- Notice of insolvency proceedings (Article 54 – informing known foreign creditors of the opening of proceedings). Use of this form is mandatory.
- Lodgement of claims (Article 55 – permits foreign creditors to file their claim using the standard form, instead of in accordance with prescriptive rules in the local law of the Member State in which proceedings have been opened). Use of this form is optional.

[1] Provisions relating to insolvency registers and the interconnection of insolvency registers do not come into force until 2018 and 2019.

- Objection with regard to group coordination proceedings (Article 64(2) – to object to inclusion in group coordination proceedings or to the person proposed as coordinator). Use of this form is optional.

The forms will be available on the European e-Justice Portal: https://e-justice.europa.eu/home.do?plang=en&action=home

Drafting approach in the implementing regulations

Practitioners may notice the continued use of the term 'member State liquidator' in the implementing Regulations even though the recast Regulation uses the new term of 'insolvency practitioner'. The existing term has been retained for the sake of familiarity. The same approach has been used in relation to specifying jurisdiction in that the existing references to 'main', 'secondary' and 'territorial' are retained in preference to references to Article 3 of the recast Regulation.

In respect of Scotland, the implementing Regulations introduce a new concept of "office-holder" and also of 'identification' of a company debtor, insolvency proceedings and 'office-holder' that do not currently exist in the Insolvency (Scotland) Rules 1986. This approach follows the identification provisions contained in the new Insolvency (England and Wales) Rules 2016[1] in order to achieve greater consistency in Great Britain. It also reflects the current intention to use this approach in the modernised Scottish Rules when they are made, though this is subject to further agreement and consultation.

Practitioners should note that the implementing Regulations do not apply to limited liability partnerships (LLPs).

Any enquiries regarding this article should be sent Policy.Unit@insolvency.gsi.gov.uk

[1] See rule 1.6.

60) The Insolvency (England and Wales) Rules 2016: further updates

Timing of the preparation of the statement of affairs under section 99 of the Insolvency Act 1986.

We are aware there is some concern that the wording of s.99 - 'The directors of the company must, before the end of the period of seven days beginning with the day after the day on which the company passes a resolution for voluntary winding up…' - means that the statement of affairs cannot be prepared until after the company resolution.

The policy intention is that the wording simply sets a time for the last date that the statement of affairs can be prepared and sent. We believe that the drafting of s.99(1) achieves this and does not prevent the document being prepared and sent ahead of the company resolution.

On-going Issues

We continue to keep the 2016 Rules under review and will, where needed and with Ministerial agreement, bring forward further amendments. We would be grateful to be kept informed of any issues that arise from working through cases under the new Rules.

Enquiries regarding this article should be sent to Policy.Unit@insolvency.gsi.gov.uk