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RESPONSE OF THE BAR COUNCIL OF ENGLAND AND WALES AND THE CHANCERY BAR ASSOCIATION TO THE COMMISSION'S CONSULTATION ON THE FUTURE OF EUROPEAN INSOLVENCY LAW

Background Information

The Bar Council

1. The General Council of the Bar of England & Wales ("the Bar Council") represents the interests of some 15,000 barrister members in England & Wales. As the Bar's governing body, its role is to promote and improve the functioning of the Bar and its services to its clients, and to represent the interests of the Bar on all matters relating to the profession, including on changes to law or procedure.

Chancery Bar Association

2. The Chancery Bar Association is one of the longest established Bar Associations and represents the interests of over 1,100 barristers handling the full breadth of Chancery work at all levels of seniority, both in London and throughout England and Wales. It is recognised by the Bar Council as a Specialist Bar Association. Full membership of the Association is restricted to those barristers whose practice consists primarily of Chancery work, but there are also academic and overseas members whose teaching, research or practice consists primarily of Chancery work.

3. Chancery work is that which is traditionally dealt with by the Chancery Division of the High Court of Justice, which sits in London and in regional centres outside London. The Chancery Division attracts high profile, complex and, increasingly, international disputes. In London alone it has a workload of some 4,000 issued

claims a year, in addition to the workload of the Bankruptcy Court and the Companies Court. The Companies Court itself deals with some 12,000 cases each year and the Bankruptcy Court some 17,000.

4. Its members offer specialist expertise in advocacy, mediation and advisory work across the whole spectrum of finance, property, and business law. As advocates they litigate in all courts in England and Wales, as well as abroad.

5. A significant number of barristers specialise in restructuring and insolvency (both corporate and individual), much of which has a cross-border element, or undertake this type of work in the course of their practice. In addition, barristers specialising in commercial law often undertake work with an international element which will or may involve issues arising under the Insolvency Regulation.

6. This response is the official response of the Bar Council and the Chancery Bar Association to the Commission's consultation on the future of European insolvency law. This response has been prepared by Peter Arden QC of Enterprise Chambers, Lincoln's Inn and Mark Arnold of South Square Chambers, Gray's Inn, barristers specialising in restructuring and insolvency, and with considerable experience of cross-border cases, after consultation with other barristers, judges and other experts in this field.

Section I: General Assessment (Questions 1 and 2)

7. It is our view that Regulation (EC) No 1346/2000 on Insolvency Proceedings ("the Insolvency Regulation") in practice is generally effective and efficient. Inevitably, there have been issues as to its scope and effect. However, most of these have been satisfactorily resolved, by the Court of Justice of the European Union (CJEU) and at national court level, in a manner which we believe is consistent with the aims and objectives of the Insolvency Regulation.

8. Coordination and cooperation between jurisdictions is, in our view, of critical importance in this area. Although Chapter II of the Insolvency Regulation contains provisions for the recognition of main insolvency proceedings and the effect of that

recognition, we believe that the addition of a provision permitting the courts in different jurisdictions to cooperate with each other to the maximum extent possible, and to communicate directly with, or to request information or assistance directly from, one another would be beneficial. We consider a provision requiring courts to cooperate with and to give assistance to the office-holder in main proceedings, and possibly also the office-holder in secondary proceedings, would also be beneficial. Such a power and duty has long been part of the law of England & Wales (both at common law and pursuant to statute) and, properly used in appropriate cases, has promoted the efficient and fair conduct of cross-border insolvencies. We refer also to the provisions of Articles Chapter IV, Articles 25-27 of the UNCITRAL Model Law on Cross-Border Insolvency as a useful guide to the manner in which such provisions may be formulated.

Section II: Scope of the Insolvency Regulation

1. Scope of proceedings covered (Questions 3-5)

Pre-Insolvency/Hybrid proceedings

9. We are not aware of any particular problems that have arisen because the Insolvency Regulation does not expressly extend to pre-insolvency and hybrid proceedings. In certain cases, such proceedings have been inserted into Annex A. Again, we are not aware of any particular problems to which this has given rise; the general approach appears to have been that, if a form of proceedings is specified in Annex A, then it falls within the scope of the Insolvency Regulation. We consider that this (ie treating the Annexes as definitive) is the right approach because it avoids uncertainty.

10. As long as the Annexes are treated as definitive, we do not consider that there is any real need formally to extend the Insolvency Regulation so as to provide expressly that it applies to pre-insolvency and hybrid proceedings. In our view, all that is necessary is to replace Article 1(1) with words to the effect that the Insolvency Regulation applies to the insolvency proceedings referred to in Annex A. It may then be left to individual Member States to decide for themselves whether certain procedures for which their national law provides should be included within Annex A. On the basis of the principle of mutual trust that underpins the operation of the

Insolvency Regulation generally, it should not then be open to other Member States to look behind the list and determine for themselves whether proceedings in any given case constitute insolvency proceedings.

11. While avoiding uncertainty, such an approach will also permit flexibility where appropriate. By way of example only, the English scheme of arrangement is a flexible and useful restructuring tool. The fact that it does not fall within the Insolvency Regulation, however, has not meant that its flexibility or utility has been diminished. On the contrary, the availability of the scheme in relation to companies which have a sufficient connection with England & Wales (eg because the debt is governed by English law), whether their COMI is elsewhere within the EU or outside the EU altogether, has worked to the advantage of creditors generally as results have been achieved which would not necessarily have been capable of achievement under the law of their COMI. It would be regrettable if, by extending the ambit of the Insolvency Regulation, such flexibility were to be lost, with the likely consequence that creditors' interests generally will be adversely affected.

Extension of the Insolvency Regulation to individual debtors

12. The extension of the Insolvency Regulation to insolvency proceedings involving individual debtors generally would be beneficial. We note from Recital (9) that this is what was originally intended. We also note that the Insolvency Regulation already applies to most forms of insolvency proceedings relating to individuals in England & Wales, without any distinction being drawn on account of their being professionals, self-employed persons, sole traders or otherwise. We have the following points to make in this regard:

    a. We believe that centre of main interests ("COMI") may not be an appropriate test for jurisdiction in relation to individuals, at least without further definition. We expand on this below. The primary reason for our concern, however, arises out of the practical problems experienced (despite the guidance to be derived from the Virgos-Schmit report, paragraph 75) in trying to locate the COMI of international business persons who operate in

the computer age from wherever they happen to be. Jurisdiction based on habitual residence for a specified minimum period prior to the opening of the proceedings would be more appropriate and create less uncertainty.

b. For similar reasons, the presence of an establishment may not be an appropriate test for jurisdiction in relation to individuals for the purposes of opening secondary proceedings. Jurisdiction based on the presence of assets would seem more appropriate and would create less uncertainty, while focusing on what is likely to be the principal reason for opening secondary proceedings in relation to individuals in most cases.

c. It appears that there are substantial differences between the procedures in different jurisdictions. We believe that it may be necessary to undertake a comparative study of the procedures to establish whether or not a scheme such as that introduced by the Insolvency Regulation can be extended to individual proceedings generally throughout the EU.

2. International dimension of insolvency proceedings (Question 6)

13. We believe that it is important that there is jurisdiction within EU Member States to recognise and provide assistance to insolvency proceedings commenced outside the EU. As stated above, the courts of England & Wales have had and exercised such a jurisdiction for a long time, both at common law and pursuant to statute. The United Kingdom has introduced the provisions of the UNCITRAL Model Law on Cross Border Insolvency, and we consider that it would be beneficial if those provisions were introduced on an EU-wide basis.

14. Where insolvency proceedings are opened outside the EU in circumstances where the debtor has its COMI outside the EU but operates or has assets in more than one Member State within the EU, we consider that the addition of a provision enabling the court of one Member State to take the lead by assuming the role of determining whether the non-EU proceedings should be recognised and, if so, providing that such recognition take effect throughout the EU, would be beneficial. As to this, we believe that:

a. The conduct of that exercise by the court of one EU Member State will obviate the need for duplication in other Member States. The judgment recognising the non-EU insolvency proceedings could itself be recognised automatically throughout the EU on the basis of the principle of mutual trust which already underpins the operation of the Insolvency Regulation: see Recital (22) and the judgments of the EJEU in *Eurofood* (at paragraphs [39]-[40]) and *MG Probud* (at paragraphs [27]-[28]). On that basis, it would also be subject to the same exception, where recognition would be manifestly contrary to the public policy of a particular Member State.

b. We accept that the decision whether to recognise the non-EU insolvency proceedings should not itself be automatic but should depend on the application of defined criteria so as to ensure that a similar approach will be adopted regardless of the Member State in which the application for recognition is made.

c. While consideration may be given to permitting others to apply for recognition of the non-EU insolvency proceedings in appropriate circumstances, the primary applicant should in most cases be the non-EU liquidator.

d. The consequence of recognition of the non-EU insolvency proceedings by one Member State should simply be that the courts of all Member States assume obligations of co-operation of the kind provided for in Chapter IV, Articles 25-27 of the UNCITRAL Model Law on Cross-Border Insolvency. For the avoidance of any doubt, we do not consider that the consequence of recognition should be that the insolvency law of the Member State where recognition was first granted should have universal effect throughout the EU (as would be the case in respect of main proceedings under Article 4, subject to the exceptions in Articles 5-15).

e. Just as recognition of main proceedings under the Insolvency Regulation does not of itself prevent the opening of secondary proceedings in another Member State (Articles 16(2) and 27), so too recognition of non-EU insolvency proceedings by the court of one Member State should not prevent the

opening of secondary proceedings, if appropriate, if the debtor has an establishment in another Member State.

f. As to the identification of the Member State which should assume the role of considering whether non-EU insolvency proceedings should be recognised, we consider the most practical and convenient course would be to provide that it is the Member State before the courts of which the application for recognition is first lodged.

Section III: Competent court to open insolvency proceedings (Questions 7-9)

15. For the purpose of establishing the jurisdictional requirements to open insolvency proceedings, our experiences suggest that a distinction is to be drawn between the test applicable to companies and other legal persons on the one hand and individuals on the other.

Companies and other legal persons

16. In the case of companies and other legal persons, our view is that COMI is and remains the appropriate test for jurisdiction. We accept that issues have arisen as to the scope and application of the test. However, those issues have now largely been resolved by the judgments of the CJEU and national courts. We do not believe that there is a better test and it has the benefit of being shared by the UNCITRAL Model Law on Cross-Border Insolvency. A change in the test now would give rise to uncertainty, litigation and a risk of inconsistent outcomes under different codes.

17. Although companies do seek to change their COMI, we do not believe that this is necessarily abusive. The location of COMI involves an inquiry which is necessarily factual in each case where a request is made to open main proceedings. A proper application of the COMI test ought to ensure that a purported change, where it is abusive, will fail. In applying that test, proper regard should be given in each case to whether the change is real or apparent, whether it has a sufficient degree of permanence, and the reasons behind it.

18. We accept that an attempt to move COMI simply in order to benefit from a more favourable insolvency regime may be abusive. However, we do not accept that this will inevitably be so in every case, as question 9 appears to imply. A distinction is to be drawn between, on the one hand, a case where the debtor wishes to take advantage of a more flexible insolvency regime than would otherwise be available for the benefit of itself and its creditors and other stakeholders generally and, on the other hand, where the debtor wishes to engineer a situation where it can avoid debts incurred in the Member State where its COMI was originally situated; or otherwise act so as to prejudice the interests of creditors or other stakeholders (including employees), either generally or in certain specific cases. We consider that the court which has to decide where COMI is located in any particular case will be best placed to determine on the facts of that case whether any attempted move has been effective or abusive.

19. We do not consider that it is necessary for the Insolvency Regulation to include any further guidance as to what is, or is not, abusive in any particular case. In particular, we do not consider that the introduction of a test to be applied by reference to the lapse of a specific period of time between the attempted move and the request to open proceedings is either necessary or appropriate. As we see it, the main problem with such an approach is that it would impose an unacceptable degree of inflexibility into an exercise which has necessarily to be performed on a case by case basis. In addition, it may itself give rise to abuse to the extent that it may work to the prejudice of creditors to whom debts have been incurred or who have extended credit in the Member State to which the debtor has moved, within the relevant period preceding the request to open proceedings. Further, any requirement for creditors unanimously to agree to the move may encourage some to "hold out" in an effort to secure some additional benefit.

20. Although the question is not specifically raised, we consider that the presence of an establishment is the appropriate test for determining jurisdiction to open secondary proceedings. However, we believe that Article 3(2) should be amended to make it clear that the time at which the possession of an establishment must be established is or at least includes the time at which the main proceedings are opened. At present,

the wording of the Article suggests that the establishment must be demonstrated at the time that a request to open secondary proceedings is made. By that time, however, steps may have been taken in or in consequence of the main proceedings which have the effect of bringing to an end the establishment in the place where secondary proceedings might usefully be opened. If secondary proceedings have a useful purpose, we consider that it would be detrimental to creditors if the opportunity to open them had been lost in these circumstances. We also consider that it would be sensible to revise the definition contained in Article 2 so as to include reference to "human means and assets or services". This would correct the reference to "goods" which has a more limited meaning in English, and would ensure that the definition is consistent with that adopted in the UNCITRAL Model Law on Cross-Border Insolvency, Article 2(e). Finally, we also consider that it would be sensible for provision to be made emphasising that the power to open secondary proceedings in any particular case is discretionary and should only be exercised where the court to which application is made is satisfied that they are necessary: see paragraph 29 below.

Individuals

21. More difficulty has been experienced in applying the COMI test to individuals for the purpose of establishing jurisdiction to open main proceedings. In addition, more cases have arisen involving abusive attempts to move COMI with a view to benefitting the debtor to the prejudice of creditors.

22. A certain amount of guidance can be derived from the Virgos-Schmit report, at paragraph 75. In general, however, the very concept of COMI can be difficult to apply to individuals. It is not always clear, for example, where the international businessman conducts the administration of his interests on a regular basis, especially if he does so from more than one place, or from wherever he happens to be with the aid of his laptop. We consider that a more satisfactory test would be one based on the debtor's habitual residence for a minimum period of time. The one possible exception to this might be where the debtor lives in one Member State but habitually works in another. In such a case, the courts of both Member States should

have jurisdiction to open main proceedings, albeit only one of them should be permitted to do so, namely the one where a request to open such proceedings is first made and accepted.

23. There have been a significant number of cases of abusive (attempted) relocation of COMI, apparently in an attempt by the debtor to obtain the advantages of a more favourable insolvency regime in furtherance of his own interests rather than those of his creditors. In general, the courts in England & Wales have been able to deal with cases of proven abuse by annulling the bankruptcy order on the basis it ought never to have been made. In an effort to prevent future abuse, two practices have been developed where the debtor himself applies to open proceedings. The first is to require the debtor to file more detailed evidence in order to establish that his COMI really is in England & Wales. The second is for the court to adjourn the hearing of the debtor's application and require notice to be given to creditors so that they can appear and make representations in opposition to the opening of proceedings if they wish to do so.

24. It is likely that there will be attempts to abuse the process whatever the jurisdictional requirements for the opening of main proceedings. We consider, however, that the introduction of a test based primarily on habitual residence, as suggested above, should substantially reduce the risk of abuse.

25. The application of the establishment test for the purposes of determining whether there is jurisdiction to open secondary proceedings has also given rise to difficulties. In part, this arises out of the difficulty of applying the test as defined to individuals. In addition, however, it is questionable whether the focus on economic activity is appropriate in all cases. In many cases, for example, the need or desire to open secondary proceedings in relation to an individual will arise out of the need to realise property, particularly real property, located there. Such a case need not involve economic activity, but its absence should not prevent proceedings being opened to enable the property to be realised for the benefit of creditors where that is appropriate. We suggest that a more appropriate jurisdictional test for the opening of secondary proceedings would be the presence of assets.

Interaction between the Insolvency Regulation and the Brussels 1 Regulation (Question 10)

26. Issues have arisen concerning the interaction of the Insolvency Regulation and the Brussels I Regulation. However, we consider that they have for the most part been resolved in a satisfactory manner by case-law. In order to ensure that the two Regulations dovetail as originally intended, we consider that a provision which confirms that, where it applies and subject to the exceptions for which its terms provide, the Insolvency Regulation confers exclusive jurisdiction on the Member State where main insolvency proceedings have been opened, would be beneficial. This would clarify and give effect to the decision of the CJEU in *Seagon v Deko Marty Belgium NV* (Case C-339/07).

IV: Group of companies (Question 11)

27. We believe that the current treatment of groups of companies is correct; each company within the group is and ought to be dealt with as an independent entity. What matters is that the various insolvency proceedings are coordinated across the group. This already happens, but it could be enhanced by providing a stronger jurisdictional basis for cooperation and assistance between jurisdictions. This could usefully be based on the provisions of Chapter II (Articles 31-34) of the Insolvency Regulation, with such revisions as may be necessary, and Chapter IV (Articles 25-27) of the UNCITRAL Model Law on Cross-Border Insolvency.

28. We believe that the concept of a single group insolvency proceeding is wrong as a matter of principle. First, it assumes a particular model for groups of companies; but there are substantial differences between the functional and structural characteristics of groups. Secondly, it would work only for groups within the EU, but many groups are both within and without the EU. Thirdly, the proposed test for jurisdiction – the place of the registered office of the parent – is too rigid and open to abuse. Further, in the case of many groups having a substantial presence in the EU, the registered office of the parent or ultimate parent may well be offshore; for example, in the Cayman Islands. Moreover, just as each group company has its own separate corporate

identity, so too it will often have its own creditors. It is right that, where necessary and appropriate, the interests of such creditors generally be represented and protected by one liquidator. If they were to be treated instead merely as a separate class or classes within a single insolvency proceeding for the entire group, this would inevitably give rise to a proliferation of class issues, the likely consequence of which will be to render the restructuring process far more difficult to achieve in many cases. Finally, permitting only one insolvency proceeding to be opened in relation to the whole group would be insufficiently flexible to permit the opening of separate proceedings in relation to one or more members which may be justified so as to ensure that local creditors gain such protection or other benefit as may be afforded under local law.

V. Coordination between Main and Secondary Proceedings (Questions 12-15)

29. The opening of secondary proceedings in England & Wales has been relatively rare, and only for some good reason; for example, to secure for creditors or classes of creditors a benefit under local law which is not available without the opening of secondary proceedings, or otherwise so as to assist the main proceedings. We note that, where main proceedings have been opened in England & Wales, the opening of unnecessary secondary proceedings in another Member State can, in appropriate cases, be avoided by permitting an officeholder in this country to treat creditors as if they had the same preferential status as they would enjoy under local law, even if they would not otherwise enjoy that status under English law. We believe that, properly exercised so that secondary proceedings are opened only where they are shown to be necessary, the jurisdiction is correct as a matter of principle, and is beneficial.

30. Main and secondary proceedings can be coordinated satisfactorily, and often are. However, coordination depends upon cooperation between office-holders and it would be enhanced by the introduction of a stronger jurisdictional basis for cooperation and assistance generally between different jurisdictions, including between the courts of different Member States. We note in this connection that an obligation of cooperation between the courts of different Member States has already

been recognised in case law in England & Wales. In our view, however, it can only assist if the existence of such a duty were to be expressly recognised so as to encourage a uniform approach throughout the EU. This could usefully be based on the provisions of Chapter IV (Articles 25-27) of the UNCITRAL Model Law on Cross-Border Insolvency.

31. Although Article 34 permits secondary proceedings to be closed without liquidation by a rescue plan, a composition or a comparable measure, secondary proceedings themselves must be winding-up proceedings of a type listed in Annex B: see Article 3(3), read with Article 2(c). We believe there is no reason in principle why secondary proceedings should be confined to winding-up proceedings in this way. In the absence of any good reason to maintain the distinction, we consider that this requirement should be abandoned so that secondary proceedings can take the form of any insolvency proceedings referred to in Annex A.

VI. Applicable law (Questions 16-19)

32. In general terms, we believe that the provisions on applicable law are generally satisfactory and, further, that the exceptions to the general rule are justified. That said, we are aware that the terms of certain of the provisions may give rise to difficulties, although few such problems have so far manifested themselves in practice.

33. We believe, for example, that there are inherent difficulties in the provision on detrimental acts (Article 13) although how widespread those difficulties are as a matter of practice is difficult to assess. The difficulties arise from the need to establish, in effect, that an act is wrongful under two systems of law: the law of the main proceedings and the law applicable to the contract. That requirement could be said to be justified on the basis that it accords with the parties' reasonable expectations. However, it can lead to a result where, for example, a transaction could be challenged under its applicable law but not under the law of the main proceedings, and therefore survives. We see the force in the argument for change; however, as we have said, it is not clear whether this is a widespread difficulty and

thus one which justifies a departure from what is otherwise the correct approach; namely, the protection of these legitimate expectations.

34. The CJEU will no doubt be able to give sensible guidance if and when difficulties arise at national level. Unless and until such difficulties manifest themselves, however, we consider that it would be premature for change to be introduced at an EU level in relation to the exceptions provided for in Articles 5 to 15 of the Insolvency Regulation. The danger otherwise is that the introduction of such changes will itself lead unintentionally to other problems instead.

VII. Recognition and enforcement (Questions 20-22)

35. So far as we are aware, there are and have been no problems of recognition and enforcement, and (since the *Eurofood* case) no cases where recognition or enforcement has been declined on the grounds of public policy.

36. We think that it is preferable that there should be an actual court decision, given the consequences of the opening of proceedings which fall within the Insolvency Regulation. However, we acknowledge that there are insolvency proceedings listed in Annex A, including UK proceedings, where there is nothing that can be described as a substantive court decision. At present, there are inconsistencies between the language of the Insolvency Regulation and the proceedings listed in the Annex, and it is desirable that the inconsistency should be eliminated.

VIII. Publication of insolvency proceedings and the lodging of claims (Questions 23-25)

37. We believe that the absence of mandatory publication of the relevant decision could give rise to potential problems, and that publication should be mandatory in a form which is readily accessible. Of the possibilities mooted in question 23, we prefer the third option so that the register is based on a common set of entries to facilitate cross-border searches. The information to be registered should include: (i) the Member State in which proceedings have been opened; (ii) whether the proceedings are main,

territorial or secondary; (iii) the type of insolvency proceeding (by reference to Annex A); (iv) the date (and, where appropriate, the time) when the proceedings were opened; and (v) the contact details of the liquidator or other person to whom inquiries may be addressed.

38. We are not aware of any problems regarding the lodging of claims, or the treatment of claims, or with the provisions of the Insolvency Regulation relating to the use of languages.

IX. Differences in national insolvency laws (Questions 26-28)

39. In our view, differences in national laws (and not merely national insolvency laws) give rise to issues in cross-border insolvency proceedings which have to be addressed. That is inevitable. On the whole, we do not believe that these issues are so great as to create difficulties either for the administration of cross-border insolvency proceedings or the companies themselves. The UK has had considerable experience of cross-border restructuring and cross-border insolvency proceedings, and as that experience has developed, so too have techniques for dealing with conflicts of laws issues, whether those issues arise from differences in national insolvency laws or national laws more widely.

40. We believe that our national law is efficient and strikes the right balance between efficient proceedings and the parties' rights to an effective remedy.

X. Cost of proceedings (Questions 29-31)

41. The costs of cross-border insolvency proceedings, restructuring and reorganisation can be high, but we do not believe that they are disproportionate. Moreover, so far as proceedings are concerned, the courts of England & Wales have the power to review costs and on such a review would inquire as to whether the costs were disproportionate or not.

42. We agree that simplified regimes for particular insolvents are desirable, and the UK has such regimes. However, we do not understand why they would be restricted to self-employed persons (as opposed to individuals generally), and we are not sure why, for example, a substantial SME should be treated in some different way from other enterprises. If the existing corporate proceedings in Annex A are otherwise suitable, then the focus ought to be on ensuring that they are conducted at a cost which is proportionate to the enterprise in question, rather than creating further types of proceedings.

XI. Other issues (Question 32)

43. There is no other matter that we believe should be addressed in the context of the revision of the Insolvency Regulation.

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