INSOL International

Collection of Practical Issues Important to Small Practitioners

England and Wales

May 2019

INSOL Small Practice Technical Paper Series

Collection of Practical Issues Important to Small Practitioners – England and Wales

INSOL International
6-7 Queen Street, London, EC4N 1SP
Tel: +44 (0) 20 7248 3333 Fax: +44 (0) 20 7248 3384

Acknowledgement

INSOL International is pleased to present a study on England and Wales under its Small Practice Technical Papers Series focusing on "A Collection of Practical Issues Important to Small Practitioners". The paper was written by Kevin Lucas FCA FABRP, Managing Director, Lucas Johnson Limited.

INSOL International sincerely thanks Kevin Lucas for providing INSOL members with this very informative and practical paper on England and Wales.

May 2019

Collection of Practical Issues Important to Small Practitioners

By Kevin Lucas FCA FABRP*
Managing Director, Lucas Johnson Limited

The United Kingdom (UK) consists of the countries of England, Wales, Scotland and Northern Ireland. With the exception of Wales, each country has its own laws relating to insolvency matters. This paper provides an overview of practical issues important to small practitioners in relation to England and Wales.

There are many issues that small practitioners have to deal with on a daily basis. Management, business planning and financial control, human resources planning and professional development, marketing and communication, information communication and technology, compliance issues and fees are just a few examples. This paper highlights some of these topics that will be of specific interest to members in other jurisdictions.

1. How to find information about insolvency practitioners in England and Wales

1.1 How are insolvency practitioners organised?

Insolvency practitioners (IPs) are individuals authorised to act as such by a Recognised Professional Body (RPB). A list of RPBs is provided in response to question 2 below.

There have traditionally been three routes into the profession, via accountancy, law or direct entry. This can mean that some IPs are dual qualified, for example as chartered accountants or solicitors.

IPs practice either with other IPs in specialist firms or can be found working in partnership with other accountants and solicitors. Firms can be of all sizes from small boutique practices to large multinational firms.

Some IPs are only permitted to deal with personal / individual insolvency, these tend to be working at firms that only handle individual voluntary arrangements (IVA), often referred to as IVA volume providers, but the vast majority of IPs deal with both corporate and individual insolvency.

Some IPs will have particular skillsets in handling either corporate or individual insolvency, others specialise in particular industries, whilst some specialise in fraud and asset tracing.

1.2 What are the associations to contact and what do these associations do?

The following RPBs are able to authorise IPs in England and Wales:

- Institute of Chartered Accountants in England and Wales (ICAEW) www.icaew.com
- Association of Chartered Certified Accountants (ACCA) www.accaglobal.com
- Insolvency Practitioners Association (IPA) www.insolvency-practitioners.org.uk
- The Institute of Chartered Accountants of Scotland (ICAS) www.icas.org.uk

There is a possibility that there will be a single regulator in the next few years, which may be one of the existing RPBs or a new government regulator, but no firm decision has yet been made in relation to this.

There is also a government department with some responsibility for monitoring IPs namely the Insolvency Service (IS). The IS is an agency for the Department of Business, Innovation & Skills and oversees the recognised professional bodies which authorise IPs in England, Wales & Scotland.

There is one other national organisation that is heavily involved in the insolvency market, but this is not an RPB or a government department. This is R3 (the Association of Business Recovery Professionals) www.r3.org.uk. R3 is the trade association for the UK's insolvency, restructuring, advisory and turnaround professionals. It represents insolvency practitioners, lawyers, turnaround and restructuring experts, students and others in the profession.

* The views expressed in this article are the views of the author and not of INSOL International, London.

Whilst the RPBs and IS deal with regulatory matters, R3 concentrates its efforts on lobbying the government and other stakeholders in the profession to ensure that the UK insolvency and rescue culture remains one of the best in the world. It also promotes and trains the profession and as such has very active training and communications teams.

1.3 Where do you go to get information either when you are looking for someone, or looking for a solution?

A list of IPs can be found by name or geographical location through either the IS or R3 websites. IPs often receive their case work from a network of contacts, usually accountants, solicitors or financiers, who refer businesses and individuals to them for advice.

Information on the insolvency procedures for corporates / businesses can be found here www.r3.org.uk/get-advice/support-for-business and for individuals here www.r3.org.uk/get-advice/support-for-individuals, however, the best way forward is to have a meeting with the IP to discuss the various options available to the director, debtor or creditor. Most IPs will have a first meeting for no charge to review and discuss available options.

1.4 Are there lists of (qualified / certified) IPs available? How can these lists be accessed?

A directory of all licensed IPs can be found on the IS website. A similar list can be found on the R3 website but only R3 members are listed. If the IP is licensed by a RPB it will state 'licence-holder'. Both websites list contact details for the IP. Further information may be accessed from the IP's firm's website or other social media locations such as LinkedIn.

2. Cross-border issues important to small practitioners

2.1 Information about available insolvency laws that apply to cross-border cases

In England and Wales there are four main sources of law regarding cross-border insolvency:

- EU Regulation on Insolvency Proceedings Recast (2015/848);
- Cross-Border Insolvency Regulations 2006;
- section 426 Insolvency Act 1986; and
- the common law.

2.1.1 EU Regulation on Insolvency Proceedings Recast (2015/848)

Cross-border insolvency proceedings that involve companies with their centre of main interests (COMI) within any EU Member State (apart from Denmark) are governed by the EU Regulation on Insolvency Proceedings Recast (2015/848). The EU Regulation does not harmonise domestic insolvency law in the different Member States, but rather provides rules to determine the proper jurisdiction for a debtor's insolvency proceedings; the applicable law to be used in those proceedings; and to require mandatory recognition of those proceedings in other EU member states.

There is a rebuttable presumption that a company's COMI is where its registered office is located - unless the debtor has moved its registered office in the three months preceding the application to open main proceedings - this new qualification was introduced by the EU Insolvency Regulation recast to prevent abusive forum shopping.

Main insolvency proceedings have universal scope and are aimed at encompassing all of the debtor's assets. The EU Regulation also allows the opening of territorial insolvency proceedings in the Member State where the debtor has an establishment. These territorial proceedings may be secondary, when opened after main proceedings are opened, or independent, when opened before main proceedings are opened. The effects of territorial insolvency proceedings are limited to the assets located in that Member State.

Where a company has its COMI in England and Wales, only the Courts in England and Wales will have jurisdiction to open main insolvency proceedings. These insolvency proceedings would then be governed by UK law in all respects, save for some exceptions including security interests and rights under contracts of employment in other Member States. Other EU jurisdictions will automatically recognise the procedure and the office-holder will be able to exercise all of his / her powers over assets situated in other Member States.

The UK held a referendum on its membership of the European Union in June 2016. The majority of people voted for the UK to leave the EU. It is not yet known whether the UK will leave the EU following the adoption of a withdrawal agreement or will leave the EU without an agreement, a so called "hard Brexit". It is currently impossible to predict what the future for Brexit holds and, accordingly, its effect on cross-border insolvencies. If the EU Regulation no longer applies, the UK will still have section 426 of the Insolvency Act, the CBIR and the common law to assist EU Member States seeking recognition in the UK. However, the EU Member States do not have an equivalent to section 426 or the common law (except Ireland) and only a few have the Model Law to assist UK insolvency practitioners.

2.1.2 Cross-Border Insolvency Regulations 2006

In May 1997, the United Nations Commission on International Trade Law (UNCITRAL), drew up the Model Law on Cross-Border Insolvency (the Model Law). The Model Law is designed to assist States to equip their insolvency laws with a modern legal framework to more effectively address cross-border insolvency proceedings.

The Model Law was implemented in Great Britain (England, Wales and Scotland) as the Cross-Border Insolvency Regulations 2006 (CBIR). The CBIR provides that the Model Law, with certain modifications, has the force of law in England, Wales and Scotland. There are no reciprocity provisions in the CBIR and consequently, English Courts can recognise eligible foreign insolvency proceedings even if the foreign jurisdiction would not recognise proceedings commenced in England and Wales. Northern Ireland has separately implemented the Model Law.

Office-holders from any overseas' jurisdiction may apply to the court in England and Wales to be recognised. The recognition of foreign insolvency proceedings is not automatic. It requires an application to a local court to gain recognition and relief.

The Model Law, as applied in the United Kingdom by virtue of the CBIR also uses the concept of COMI. The Model Law does not define COMI but notes that the concept derives from the EU Insolvency Regulation. Where there is any conflict between domestic insolvency law and the provisions of the CBIR, the latter will prevail. Conversely, where there is any conflict between the CBIR and the EU Regulation on Insolvency Proceedings, the EU Regulation will prevail.

The English Court of Appeal recently held in the case of *Re OJSC International Bank of Azerbaijan* [2018] EWCA Civ 2802 that it does not have jurisdiction under the CBIR to grant a permanent stay on legal enforcement in respect of English law debt owed by a foreign company. This would infringe the common law rule known as the 'rule in Gibbs'. This rule is derived from the case of *Anthony Gibbs* (1890) 25 QBD 399 which stipulates that English law governed legal obligations can only be discharged under English law (unless the creditor agrees otherwise).

2.1.3 Section 426 Insolvency Act 1986

Under section 426 of the Insolvency Act 1986, courts in the Channel Islands, Isle of Man or certain designated countries can apply to the UK courts for assistance in insolvency proceedings. There is a positive obligation on the courts of the UK to assist each other, and also the courts of "any relevant country or territory" (designated by the Secretary of State – these are mostly Commonwealth countries but with certain exceptions, such as India). The types of assistance that can be provided pursuant to a letter of request from the court of a designated country are broad and, in providing assistance, the UK court can apply either UK insolvency law or the relevant foreign insolvency law.

2.1.4 Common law

At one point, case law provided that courts in England and Wales had a similar power at common law, to that under section 426 of the Act referred to in 2.1.3 above, that is to exercise any powers which would be available to the overseas jurisdiction requesting assistance in a domestic insolvency. However, in subsequent cases, the judiciary have rowed back on this principle. A form of 'modified universalism' has been settled on in recent cases, whereby there is a common law power to assist a foreign court in foreign insolvency proceedings, but no assistance should be given which would result in the UK court exercising powers comparable to those that would be exercisable in the context of the foreign insolvency, but which would not ordinarily apply to a UK insolvency.

2.2 How to enforce claims in your country / how to do it / whom to get advice from?

Claims against parties subject to formal insolvency proceedings should be enforced by making a claim to the relevant IP handling the case. There is no need to take any further action, unless the claim is for a secured debt or is disputed. At that point proceedings may need to be started in the country of origin and in England and Wales depending on the law governing the right to a claim.

Claims from foreign creditors will in general be treated in the same way as claims from creditors in England and Wales; the exchange rate used will be the midpoint rate on the date the insolvency proceedings commenced under mandatory provisions of the Insolvency Act 1986 and the Insolvency Rules 1986. However, if there is a concurrent liquidation of the same company in the foreign jurisdiction, then a creditor proving its claim in England and Wales will only be entitled to share in any distribution once any amount received in the foreign proceedings have been taken into account.

For further information regarding the enforcement of foreign judgments, see answer to question 6.3 below.

2.3 What are the key criteria to consider when tracing and recovering assets in your country?

The ability to trace assets in England and Wales is dependent on the nature of the asset.

Ownership of leasehold and freehold property in England and Wales can be found by a search of HM Land Registry although this does not record if properties are held on trust for others. (www.gov.uk/government/organisations/land-registry/about)

Ownership of motor vehicles is more difficult to establish, but if the registration mark is known the registered keeper (not the owner) can be traced by written request to the Driver & Vehicle Licensing Agency (DVLA). (www.gov.uk/get-vehicle-information-from-dvla)

Companies must notify Companies House of those individuals with significant control over the organisation, which will indicate who are the true owners behind an entity. (www.gov.uk/government/organisations/companies-house)

There are no national and / or easily accessible registers for other types of assets, but there are some good investigators within IP practices that can assist in tracing what may seem like the untraceable.

Due to strict Data Protection laws, tracing individuals may be more difficult. For example, there is no requirement for an individual to register themselves in a town or city, but private tracing websites may be helpful.

Social media (for example, Facebook, LinkedIn, Instagram and Twitter) can be quite useful in helping identify and locate individuals and assets.

If searching for an individual subject to formal insolvency proceedings, the Insolvency Service website is very helpful. (www.bis.gov.uk/insolvency)

When it comes to tracing assets that individuals wish to hide, unfortunately the UK has been ranked quite highly on the Financial Secrecy Index and is significantly higher than certain well-known tax havens meaning tracing can be quite difficult.

Once ownership of an asset has been established domestic law can be used to take control.

2.4 What rights and / or powers does a foreign insolvency officer have to act directly (i.e. without any enforcement proceedings) in England and Wales?

As stated at 2.1 above, the EU Insolvency Regulation establishes rules on the jurisdiction to commence insolvency proceedings and the law that applies to such proceedings in EU Member States. Where a company has its COMI in a Member State, only that state will have the jurisdiction to open main insolvency proceedings. The appointment of the insolvency practitioner will be recognised automatically in all other Member States and the insolvency practitioner will be able exercise all powers, subject to certain limited exceptions.

A foreign insolvency office-holder from a non-EU country will not be automatically recognised and will be required to apply for recognition pursuant to the options outlined in 2.1 above. A foreign office-holder can apply to the English and Welsh courts for recognition of the foreign proceeding in which he / she is appointed under the CBIR if the debtor has a place of business or assets in England or Wales, or if England or Wales is an appropriate forum for any other reason (schedule 1, Articles 4 and 15, CBIR).

It may be beneficial in certain cases to commence separate or secondary proceedings and seek a UK IP to be appointed to deal with the matter in the UK in order to work towards a common goal.

2.5 Are there State aid supported proceedings available in England and Wales that foreign IPs can use?

There are no State aid supported proceedings as such. However, if an individual or business has its COMI in England and Wales and a bankruptcy order or a winding up order is obtained, the IS immediately becomes trustee in bankruptcy or liquidator respectively and has a duty to act in that role without any further financial support being necessary.

3. Marketing of small practices

3.1 What are the marketing strategies that are used by the practitioners?

The traditional sources of work for IPs are assignments referred by accountants, solicitors and financiers. There are many financiers of businesses in England and Wales including banks, asset-based lenders and groups of individuals (e.g. peer to peer lending). In addition, a small number of cases will be referrals from sundry other sources and direct self-referrals, such as from the internet.

With smaller firms, most referrals come from fellow accountancy and legal professionals whilst for larger firms of IPs, financiers are a major source of work. In addition to this, smaller IP practices will find it beneficial to network with larger firms as conflicts in taking insolvency appointments may arise for the larger firms. Smaller IP practices may find themselves precluded from working on larger cases where a funder wishes to use a certain (larger) firm on its ‘panel’ to perform a piece of work.

The creditors in insolvency proceedings hold the ultimate control over who deals with each insolvency and are the largest potential source of work; however, creditors are often widely spread and not coordinated. One of the largest creditors is the UK government (HMRC) on the basis of unpaid taxes; however, the government remains impartial on the identity of the office-holder handling the insolvency proceeding in all but the highest value or fraud cases.

Marketing strategies are not dissimilar to the sale of other services available to businesses. IPs have traditionally promoted their firms through brochures, newsletters and other promotional literature. This is nearly always in an electronic format.

General advertising and advertorials in appropriate newspapers / magazines / websites are used to promote brand awareness of the firm and show the skills available within the organisation. More

specific adverts and other forms of direct marketing may be used by IPs and their agents to attract work, especially by those IPs providing personal insolvency advice. It is not unknown for such firms to use advertisements, direct mail, emails, phone calls and SMS to attract customers. Seeking to market a business by offering a commission to a work introducer is, however, strictly forbidden.

As most referrals come from fellow accountancy and legal professionals, networking is essential. IPs attend many networking events organised by their firm, other professionals, those in the financial arena and other networking groups.

Events can vary from an informal drinks reception to a formal business club, seminars and / or conferences to educate others or show case a firm's skills. Since the UK Bribery Act 2010 came in to force in the UK, there has been a reduction in the number of events taking place.

Some larger firms place members of staff on secondment in the recovery departments of financial institutions to help develop closer relationships and inform and educate the respective organisations in how they work. This practice has, however, come under scrutiny in recent years for ethical reasons and as a result secondment opportunities have reduced.

3.2 How do IPs raise and manage the cost of marketing?

The costs of marketing are a business expense and as such must be paid out of fees earned from insolvency assignments.

Many will employ software to monitor the sources of their income and seek to manage their annual marketing spend accordingly.

3.3 What are the effective marketing tools?

From experience it appears that no one marketing tool works better than any other, the success of any marketing strategy comes from getting the right mix at the right time with the right work referrer.

It takes time to build good relationships with work referrers. Presentations at conferences, writing papers for appropriate journals and highlighting past successes provides a positive showcase for the skilled IP. However, the IP needs to continually renew his / her sources of work by regularly attending networking events and looking out for new streams of work from previously untapped sources.

4. Financing options for small businesses

4.1 Are there viable financial options for smaller businesses from conventional financing sources?

There are always viable options for smaller, profitable businesses to obtain financing. The finance may be accompanied by a personal guarantee, especially where the business is not as profitable as others.

Since the 2008 financial crisis, access to finance from all sources has changed significantly and much more emphasis has been placed on a borrower's ability to repay borrowing as opposed to the value of the security behind the borrowing.

New funding solutions have also emerged and are rapidly taking over from conventional sources at the smaller business end of the market with peer to peer lending being one of these to grow incredibly quickly.

Professional practices have not been immune to these changes and borrowing to fund working capital tied up in work in progress and debtors has also become more difficult as a number of accountants, solicitors and insolvency practitioners have themselves gone through insolvency processes.

Finance by way of loans and overdrafts are still far more common than equity investment. Security is very often required, whether it be from the borrower or from management.

5. How do practitioners get remunerated?

5.1 What are the available models to determine fees - percentage based or time based?

In England and Wales, IPs' fees are agreed by creditors on one of three bases by reference to:

- hourly rates;
- a fixed fee; or
- a percentage of realisations.

These bases can be mixed, but the tasks or areas of work applying to the different bases must be clearly defined.

There are 3 classes of creditors in insolvency proceedings as follows:

- secured;
- preferential; and
- unsecured.

The class of creditors responsible for approving the fees is the class whose return will be reduced by the fees charged – for example where only secured and preferential creditors will receive a return, these categories of creditor will determine the fees. Where there is a creditors' committee, it will be the committee that determines the fees as opposed to the general body of creditors.

Both the creditors and the IP have the option to ask the court to intervene if they think the fees are too high or too low.

In solvent liquidations, the IPs' fees are determined by the shareholders.

The fees of the IP are paid in accordance with a priority laid down in the Insolvency Act 1986, which is after certain expenses and charges properly incurred, but prior to distributions to creditors.

6. Litigation and funding litigation

6.1 Funding causes of actions - who are the best funders?

A search of the internet will reveal a number of insolvency litigation funders. It is a reasonably mature market, although there are only a relatively small number of funders in the market place after the government changed the law, which saw premiums for adverse costs insurance become unrecoverable from the defendant.

Because the market is relatively small, there are no 'best funders' and it is often best to approach a broker to explore the majority of the market.

Creditors may wish to fund certain types of litigation, although this is uncommon.

Two other alternatives are for rights of action to be sold / assigned to a third party, often for a percentage return of any successful outcome; or, alternatively, the IP may be willing to fund the work to the point a claim is discovered and ready to bring to trial.

6.2 Are there alternatives to litigation, for example arbitration or mediation?

In recent years there has been an increasing effort to encourage parties to engage in Alternative Dispute Resolution (ADR) and courts like to see that this has been considered prior to proceedings being issued. ADR has become a well-established term covering both arbitration and mediation and ADR is heavily encouraged by the courts. A number of IPs are registered mediators. A search of the internet will reveal those qualified as mediators. A mediator does not need to be qualified in insolvency to be appointed in an insolvency mediation.

6.3 Enforcing judgments - local and foreign

A local judgment creditor may enforce a judgment or order for the payment of money by one or more of the following methods:

- issuing a writ / warrant of control (formerly called a warrant of execution);
- a third-party debt order;
- a charging order;
- an order for sale;
- a stop order or stop notice;
- an attachment of earnings order;
- the appointment of a receiver.

Instigating insolvency proceedings against an individual (bankruptcy) or company (winding up) is also available.

There are a number of tools available to obtain recognition of a foreign judgment and these include:

- the EU Regulation on Insolvency Proceedings Recast (2015/848);
- the common law;
- the Brussels Regulation Recast (1215/2012);
- the Civil Procedure Rules;
- the Lugano Convention and Hague Convention; and
- the Foreign Judgments (Reciprocal Enforcement) Act 1933).

Under the EU Insolvency Regulation, judgments that concern the course and closure of insolvency proceedings and compositions approved by that court are recognised without further formalities. Automatic recognition is also available for judgments that derive directly from the insolvency proceedings and that are closely linked to them.

The Brussels Regulation Recast (1215/2012), regulates jurisdiction and the recognition and enforcement of judgments between EU Member States. It has direct effect in the UK and in other Member States except Denmark and requires the courts of one Member State to recognise and enforce (subject to some relatively minor exceptions) the judgments of courts in other Member States. It applies to litigation commenced on or after 10 January 2015, and judgments given in proceedings commenced on or after 10 January 2015.

Under the Foreign Judgments (Reciprocal Enforcement) Act 1933 (the 1933 Act) judgments made by a “recognised court” may be registered in England and Wales. The 1933 Act only applies to judgments of courts in jurisdictions which have entered into a reciprocal arrangement with the UK. The 1933 Act operates by permitting a judgment creditor (for a sum of money, which includes a decree, order, decision a writ of execution or writ of control, or a determination of costs / expenses by an officer of the court) from a recognised court to register the judgment with the High Court. The judgment will not be registered until it is considered final in its originating jurisdiction and rendered by a court of competent jurisdiction, therefore something like an interim order will not be capable of enforcement. Once the judgment has been registered it has the same status as, and may be enforced as, a judgment of the English and Welsh court.

7. Licensing and regulation of IPs

7.1 How are IPs regulated?

There are four RPBs (the names of which are listed above in the answer to question 2) which regulate IPs in England and Wales. The RPBs maintain standards within their membership by training and regular inspection and monitoring of their members. The IS in turn monitors the RPBs.

7.2 Who can become an IP or which professionals regularly work as IPs?

Anyone who has passed the Joint Insolvency Examination (JIE) and has the required number of hours of experience can apply for an insolvency licence. Licences will not be given to anyone who is a bankrupt or is disqualified from being a director. Most IPs have either an accountancy background or have trained 'on the job'. There are a small number of lawyers acting as IPs. Civil servants who work in the IS are not usually qualified as IPs because there is no need for them to hold the qualification.

7.3 What kind of work is carried out by IPs in the UK?

The following roles must be carried out by a qualified IP:

- Nominee and Supervisor of an IVA;
- Trustee in Bankruptcy;
- Nominee and Supervisor of a Company Voluntary Arrangement;
- Liquidator in both solvent and insolvent liquidations (voluntary liquidation and compulsory liquidation / winding up);
- Administrator; and
- Administrative Receiver.

IPs also carry out fixed charge or LPA receivership work, but this work can also be carried out by non-IPs. An IP can also act as a special manager or provisional liquidator when it comes to a winding up (court-based liquidation), but these roles are often carried out by non-IPs or the IS.

The IPs work includes the following:

- realisation of assets;
- agreement of claims;
- investigation into the reasons for failure / insolvency;
- investigation of historic transactions; and
- investigating the conduct of the director(s).

IPs are also consulted on informal debt forgiveness procedures as the skills used in formal procedures are directly transferable.

7.4 Who appoints an IP?

In any formal insolvency procedure (except in a solvent liquidation) creditors can choose who the IP will be through a decision procedure or request made to the Official Receiver in a bankruptcy and compulsory liquidation only. However, where creditors do not use the powers given to them it will be the choice of the person the IP is approached by as set out in the table below.

Process	IP approached by	Initial appointment by	Who is appointed
IVA	Debtor	Debtor	IP
Bankruptcy	N/A	Court	Official Receiver (IS)
CVA	Directors	Directors	IP
Liquidation – voluntary	Directors	Shareholders	IP
Liquidation – compulsory	N/A	Court	Official Receiver (IS)
Administration	Directors or Shareholders or Secured creditor or Unsecured creditor	Party who approached IP	IP

NB: Administrative Receivership is not listed as this process is now almost entirely redundant.

In most cases the debtor or company is referred to the IP either by their accountant, solicitor or financier.

7.5 Is an IP who gets court appointments as administrator allowed to do advisory work as well?

An IP is authorised to act in all types of insolvency procedures. Court insolvency procedures where IPs are appointed include administration as well as bankruptcy and compulsory liquidation, both of which are initially administered by the Official Receiver (part of the IS) before creditors or the IS appoint the IP. In addition, there is some involvement of the court in dealing with IVAs.

8. Compliance issues

8.1 Tax requirements relevant to smaller practices

IPs practice either as sole traders, in partnership, as LLPs (limited liability partnerships) or as limited liability companies. As such, they are subject to the usual tax requirements of each type of legal entity to submit tax returns and accounts on an annual basis. Those with a turnover of more than £85,000 per annum must register for and charge VAT; however, those delivering IVAs and / or CVAs are exempt from VAT.

8.2 Money laundering and financial crime

IPs must comply with the money laundering regulations of the UK and EU and must not only check the identity of their clients, directors and debtors but also report any suspicions of money laundering to the appropriate authorities. Each IP firm must be regulated for money laundering. Most will be regulated by their RPB.

8.3 The right to access information

Creditors have a right to ask for information on the progress of any case in which they are a creditor. However, progress reports must in any event be issued to creditors by the IP office-holder every 12 months, except in administrations where reports must be issued every six months. At the completion of every case a final report will also be issued.

Where there is a creditors' committee, members of the committee are entitled to access slightly more information than a general creditor.

No creditor has a right to inspect the IP's working paper files and the IP can refuse to allow a creditor inspection of any document they would normally be entitled to see if the IP thinks it should be kept confidential, although a court application can be made to seek to overturn the refusal.

8.4 Corporate governance

As mentioned above, IPs can use any number of business entities to trade through and the governance structure will apply as appropriate. Some IPs will be employees and not owners or controllers of the business entity and therefore have no control or oversight of governance.

Irrespective of the position or level of control of the IP over any business, each should ensure they are mindful of governance and influence it as much as possible because any appointment of the IP is in his / her personal capacity and it is the IP's responsibility to ensure that their cases are handled within the realms of the laws and regulations under which the insolvency operates. It is, however, harder for an IP to influence governance where they are not the owner or controller of the business within which they operate.

8.5 Regulatory authorities

The regulation of IPs is discussed at both 1. and 7. above. The RPBs monitor their IP members, whilst the IS monitors the RPBs.

8.6 Disciplinary matters and the complaints systems in operation

IPs must direct creditors to their own complaints procedure and creditors are encouraged to attempt to resolve complaints this way in the first instance. Where a complaint cannot be resolved or a creditor feels the complaint is not appropriate to raise with the IP (for example, allegations of fraud),

complaints must be initiated through the IS complaints gateway https://www.gov.uk/complain-about-insolvency-practitioner.

These are then reviewed by the IS and complaints warranting further investigation are passed to the IP's RPB. Both disciplinary and complaint matters are handled by the IP's RPB.

In 2015, regulatory objectives were introduced by IS to provide a clearer structure within which RPBs were to carry out their functions of authorising and regulating IPs to ensure consistency and a fair and transparent treatment for those affected by the acts of IPs.

IPs are most commonly disciplined as a result of regulatory visits or complaints being upheld.

The IS also has oversight of IPs and RPBs and the IS may itself apply to court to directly sanction an IP where it is in the public interest to do so.

9. Best practices

9.1 Client money rules

There must be clear separation of client and firm money. Funds for each appointment must be kept separately (either in a separate bank account, or separate sub account with a bank that operates a global client account and is able to provide the required undertaking regarding the separation of funds).

In relation to a winding up through the court (compulsory liquidation) or an individual bankruptcy, all client funds must be held in separate client accounts with / through the IS.

9.2 IT security

IPs are no different to many businesses and must operate a sensible IT policy including unique passwords, strict controls over external access to systems, restrictions on internet access, segregation of duties, multiple / daily backups, disaster recovery plans and encryption of portable devices. BYOD or "bring your own device," is popular in many workplaces because it brings freedom to employees and to employers. It means that workers can bring their own computers, tablet PCs, smartphones and other productivity and communication devices in to their places of work for professional activities. However, this presents a challenge for businesses to ensure that customer data in not breached, especially with the General Data Protection Regulations imposed EU wide since May 2018 and incorporated into UK law separately via the Data Protection Act 2018.

9.3 Licensing requirements

IPs have to be authorised to act as such by an RPB. Part of the requirement for authorisation is to hold a general enabling bond which is designed to protect creditors against fraud or dishonesty by the IP. Taking appointments without authorisation is a criminal offence; however, disappointingly the use of the term "Licensed Insolvency Practitioner" is not protected in law and anyone can call themselves this, although they would be guilty of false advertising. Anyone seeking a properly regulated IP should either check their credentials on the IS website or ask the IP to confirm their IP number – something unique to each Licensed Insolvency Practitioner.

9.4 Insider dealing

It is a criminal offence to become involved in insider dealing. Such bad practice would be also likely to lead to a loss of authorisation to act as an IP by the relevant RPB.

9.5 Local employment law requirements

The IP as an employer must comply with UK employment law and in dealings as an IP must observe current legislation. There are minimum wage rates that must be paid, minimum holiday days that must be provided, and all employees must have a right to work in the UK.

In carrying out insolvency work, it is common for IPs to have to dismiss employees of an insolvent company at short notice, which leads to claims for unfair dismissal. This remains a controversial area within UK employment law as not only are such payments guaranteed by the state but a failure to carry out certain tasks in certain timescales is a criminal offence. The entire profession is currently waiting on the outcome of a case in the criminal court (at the time of writing this is expected to be June 2019) to understand whether IPs are going to be excused from the consequences given the incompatibility of the employment laws and reality of dealing with an insolvent business.

9.6 Codes of Ethics

The Insolvency Code of Ethics for IPs replicates the International Ethics Standards Board for Accountants (IESBA) code of ethics. It is standardised across each RPB.

Each IP may have additional codes / requirements to follow depending on their RPB – for example a Chartered Accountant (designated by the letters ACA or FCA) whose RPB is the ICAEW will also have to abide by the code of ethics and by-laws of the ICAEW. The Insolvency Code of Ethics is being reviewed in 2019 and whilst the detail is likely to change, its general objective will remain the same.

Each IP is required to advise creditors that they are bound by the Insolvency Code of Ethics.

Statements of Insolvency Practice (SIPs) are issued to insolvency practitioners with a view to maintaining standards by setting out required practice and harmonising practitioners' approach to particular aspects of insolvency.

SIPs set principles and key compliance standards with which insolvency practitioners are required to comply. They apply in parallel to the prevailing statutory framework. Departure from the standards established in SIPs is a matter that may be taken into account in the event of disciplinary or regulatory action.

SIPs are issued to insolvency practitioners under procedures agreed between the RPBs, acting through the Joint Insolvency Committee.

9.7 Time management for IPs

IPs must ensure that they make the most effective use of their resources and that cases are dealt with by the most appropriate grade of staff. It is particularly important to ensure that remuneration is charged on the basis of time properly spent.

Where remuneration is based on a time spent basis it is accepted practice that time is charged in units of 6 minutes. SIP 9 must be followed by IPs and firms must maintain time recording systems in accordance with this standard. The IP and his / her staff will usually update the time recording system at least on a weekly basis. When reporting to creditors, IPs must disclose their charge out rates and time costs.

Effective time management for IPs and their staff is becoming increasingly difficult as expectations change as to how quickly / easily it is to get in touch with organisations, whilst the work / life balance is altering throughout the business world.

INSOL International
GROUP THIRTY-SIX

AlixPartners LLP
Allen & Overy LLP
Alvarez & Marsal
Baker McKenzie
BDO
Brown Rudnick LLP
Clayton Utz
Cleary Gottlieb Steen & Hamilton LLP
Clifford Chance
Conyers
Davis Polk & Wardwell LLP
De Brauw Blackstone Westbroek
Deloitte
Dentons
DLA Piper
EY
Freshfields Bruckhaus Deringer LLP
FTI Consulting
Goodmans LLP
Grant Thornton
Greenberg Traurig LLP
Hogan Lovells
Huron Consulting Group
Jones Day
King & Wood Mallesons
Kirkland & Ellis LLP
KPMG LLP
Linklaters LLP
Morgan, Lewis & Bockius LLP
Norton Rose Fulbright
Pepper Hamilton LLP
Pinheiro Neto Advogados
PwC
Rajah & Tann Asia
RBS
RSM
Shearman & Sterling LLP
Skadden, Arps, Slate, Meagher & Flom LLP
South Square
Weil, Gotshal & Manges LLP
White & Case LLP

INSOL International™

6-7 Queen Street, London, EC4N 1SP
Tel: +44 (0)20 7248 3333 Fax: +44 (0)20 7248 3384

www.insol.org