



COMPANY LAW MEMO 2010

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EC consults on European Company (SE) legislation

See CLM ¶88+

As part of its **review of the practical application** and effectiveness of the legislation governing European Companies (SEs), the European Commission has published a consultation paper **seeking views on** how the legislation works. The intended benefit of a European Company is that administrative and management savings can be made if a pan-European business is registered in just one member state. However, whilst European Companies have proved to be quite popular in some member states, they have not in others. The European Commission is aiming to increase the use of European Companies and is consulting to determine whether changes to the existing legislation are needed.

The deadline for responses is 23 May 2010. Copies of the consultation paper and further information are available from:

http://ec.europa.eu/internal_market/company/se/index_en.htm.

Companies House announce new fee

See CLM ¶1493, ¶1509

Companies House is introducing a new fee payable for the registration of **Form SH19 (644 & 649)** following a reduction of share capital. This form is used to register a reduction of share capital by court order or under the solvency statement procedure. The fee will be payable to Companies House on all such forms delivered to it on or after 6 April 2010. The fee will be £10 (or £50 if the same-day service is used) and should be attached to the form.

BIS evaluation of the new Companies Act

See CLM ¶2317+, ¶3628, ¶3695+, ¶3777+, ¶3907+, ¶4252

BIS has started a **post-implementation** evaluation of the Companies Act 2006. Due to the scale of the new Act, only certain provisions have been selected for evaluation including the business review required in the directors' reports of large and medium-sized companies, electronic communications, directors' duties, annual general meetings and directors' addresses. The purpose of the evaluation is to assess the main outcomes of the new Act and the consequences of the regulatory changes for companies, shareholders and other stakeholders.

BIS proposes changes to requirements for registering charges at Companies House

See CLM ¶3979+, ¶4636+

BIS has published a **consultation** paper seeking views on various amendments to the current scheme of registering charges at Companies House to simplify the process and bring it into line with changes in commercial procedure. Currently, certain types of charges must be registered at Companies House within 21 days of their creation. The **proposals** put forward by BIS include:

- » a scheme of registration which applies the same rules to all UK companies (slightly different rules apply to companies registered in Scotland, as compared to companies registered in the rest of the UK, because of the differences in the underlying property law in Scotland);



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- » all charges created by UK companies to be registerable, unless they are:
 - a Lloyd's trust deed (other than a Lloyd's deposit trust deed or a Lloyd's security and trust deed);
 - existing on property acquired; or
 - otherwise specifically excluded;
- » introducing a requirement that only the company that created the charge can register it;
- » modifying the particulars required to be registered and removing the requirement for the charge document to be delivered to Companies House; and
- » removing the requirement for companies to maintain their own register of charges.

The consultation paper also includes a number of **questions**, including:

- » whether the same rules should apply to all UK companies;
- » whether the 21-day time limit for registration should be abolished;
- » what the advantages of electronic registration would be;
- » how often respondents access information about company charges, both at Companies House and companies' own registers; and
- » whether there would be any consequences if the register at Companies House did not include charges over particular assets for which there is a different public register (for example the Land Register).

Responses are requested by 18 June 2010. The consultation paper can be downloaded from the BIS website:

<http://www.bis.gov.uk/Consultations/registration-of-charges?cat=open>.

Responses received on the ASB's proposals for the future of UK GAAP

See *CLM* ¶4211+

The ASB has published the responses received to its recent proposals for the future **financial reporting requirements** for UK entities (see *CLM 2009 Newsletter Issue 5*). It received over 150 responses with a wide range of views on the significant points within the ASB's proposals. The ASB intends to take some time to consider the responses before undertaking further public consultations on the best way forward for UK GAAP later this year.

The responses are available from the ASB website:

http://www.frc.org.uk/asb/technical/projects/responses_policy.cfm.

Guidance for auditors on company accounts that have been tagged for XBRL purposes

See *CLM* ¶4290+

The APB has published guidance for auditors who are auditing company accounts that have been tagged for XBRL purposes (APB Bulletin 2010/1). The use of XBRL is a developing area, which will increase dramatically in the very near future. For instance, XBRL tagging of statutory financial statements will be required for company tax returns filed on or after 1 April 2011 (see *CLM 2009 Newsletter Issue 5*).

The APB recognises that there may be a demand for **non-audit services** to be performed by audit firms **in relation to XBRL tagging**. It gives guidance on the application of the APB's Ethical Standards for Auditors to XBRL-related non-audit services that auditors may be asked to perform. The guidance also confirms that currently ISAs (UK and Ireland) do not impose a requirement on auditors to check XBRL tagging of the financial statements as part of the audit. However, this may well change at some stage in the future as the use of XBRL becomes more commonplace.



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The guidance is freely available to download from the APB website:
<http://www.frc.org.uk/apb/publications/pub2225.html>.

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European co-operation on exchange of audit papers

See CLM ¶4300

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The European Commission has adopted a decision recognising the adequacy of the **auditor supervisory bodies** in certain **third countries**, namely Canada, Japan and Switzerland. This will enable recognised supervisory bodies within EU member states to co-operate and exchange audit working papers, or other documents held by statutory auditors, with the recognised auditor supervisory bodies of these countries.

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Revenue and Customs proposes to simplify capital gains rules for group companies

See CLM ¶6433+

Revenue and Customs has published a consultation paper outlining its proposals to simplify the legislation on capital gains for group companies in the following areas:

- » capital losses following a change in ownership;
- » value shifting and depreciatory transactions; and
- » degrouping charges.

Degrouping charges apply if a company leaves its group with an asset acquired from another company within that group, within the prior 6 years, to reinstate any gain or loss for capital gains tax purposes which was deferred at the time the asset was transferred. Revenue and Customs' proposals to simplify the legislation in relation to these rules include (ss 171, 179 TCGA 1992):

- » instead of the chargeable gain (and liability for any tax payable) falling on the leaving company, the tax would be payable by the holding company;
- » where a company leaves the group as a result of a sale of shares, effect would be given to the degrouping charge by way of an increase in the consideration payable, or an increase in the costs allowable as a deduction, as appropriate;
- » where two or more share sales happen at the same time, and a degrouping charge arises, groups would be given the freedom to determine to which disposal the adjustment would apply;
- » enabling groups to claim a reduction in the degrouping charge where it is just and equitable to do so. For example, where a group retains dormant companies solely for the purpose of ensuring that a company does not leave the group within 6 years of acquiring an asset; and
- » clarifying the circumstances in which the degrouping charge will apply where two companies are within the same subgroup at the time when an asset is transferred between them, until immediately after they both leave the group.

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The consultation paper, which includes full details of the proposals and draft legislation to implement them, is available from the HM Treasury website:

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http://www.hm-treasury.gov.uk/d/consult_simplification_capitalgains.pdf.

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Comments are invited by 17 May 2010.





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City Code consultations

See CLM ¶6685+

The Takeover Panel has published a consultation paper on proposals to make a number of amendments to the City Code to improve the consistency of the requirements for **profit forecasts**, **asset valuations** and **merger benefits statements** (i.e. quantified statements about the expected financial benefits of a proposed takeover or merger) to be accompanied by a report from professional advisers, when published either before or during the course of an offer. The proposals include:

- » **relaxing the reporting requirements** in relation to profit forecasts and asset valuations given in connection with an offer, but which are in fact published in the “normal course” of a company’s business and which are neither used in the debate on the offer nor otherwise a material issue;
- » requiring reports to be provided when a **profit forecast** is made **for part of a business**;
- » **extending the exemptions** in relation to certain unaudited interim and preliminary results, which are not to be treated as profit forecasts, reported by companies traded on the AIM and PLUS markets; and
- » **extending the requirement relating to merger benefits statements**, to other quantified statements of the potential financial effects of a course of action which is put forward in the course of an offer (for example, cost savings to the offeree company) and an extension of the circumstances in which reports on such statements would be required.

Full details are available in the consultation document, which can be downloaded from the Takeover Panel’s website:

<http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/PCP201001.pdf>.

Comments are requested by 21 May 2010.

The Takeover Code Committee has also announced an **intention to consult** on whether certain City Code provisions and the timetable for determining the outcome of offers could usefully be improved. It intends to publish a consultation paper on these matters as soon as practicable.

Amendment to Rule 5.2 of the City Code

See CLM ¶6791

With effect from 8 March 2010, rule 5.2(c)(iii) of the City Code has been amended to widen the scope of the **exception to the rule against stakebuilding**. An acquisition is now permitted after a firm unconditional takeover offer has been announced and the first closing date has passed, whether or not the merger control regulations are relevant. This amendment broadens the application of the exception for cases where there was no realistic prospect of the offer being referred by the OFT to the Competition Commission and, therefore, avoids the filing of unnecessary merger notices with the OFT.

Further details and the revised Code are available from the Takeover Panel’s website:

<http://www.thetakeoverpanel.org.uk>.

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Publication of final sentencing guidelines for corporate manslaughter offences and health and safety offences causing death

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See CLM ¶7178, ¶7180

The definitive sentencing guideline for corporate manslaughter and health and safety offences causing death has been published by the Sentencing Guidelines Council. It **applies to** sentences passed on or after 15 February 2010 (whether or not the offence was committed before that date).

▶ Cases

As expected, the guideline stipulates that the **appropriate fine** for a corporate manslaughter offence should seldom be less than £500,000 and could be millions of pounds. For a health and safety offence which is shown to have caused death the appropriate fine should seldom be less than £100,000 and could be hundreds of thousands of pounds. The figure will then be adjusted to take into account factors which aggravate or increase the seriousness of the offence and any mitigating factors. By definition both offences are serious, but the guideline sets out factors likely to be regarded as aggravating or affecting the seriousness of the offence, including:

- » if the serious injury was foreseeable;
- » the company falling far short of the applicable standard;
- » if that kind of breach was common in the company;
- » the responsibility for the breach going high up in the company;
- » more than one death, or grave personal injury, occurring;
- » failure of the company to heed to warnings or advice; and
- » cost-cutting at the expense of safety.

It also gives examples of factors likely to afford mitigation, such as:

- » a prompt acceptance of responsibility;
- » a good health and safety record; and
- » genuine efforts to remedy the defect.

The court should consider the financial consequences of a fine, including the resources of the offending company and its ability to pay. For this purpose companies will be expected to provide the court with their published audited accounts for a 3-year period, including the year of the offence.

In relation to corporate manslaughter offences the guideline stipulates that a **publicity order** should be imposed in virtually all cases. This is to be seen as part of the penalty.

Copies of the definitive guideline can be freely downloaded from the Sentencing Guidelines Council's website at:

http://www.sentencing-guidelines.gov.uk/docs/guideline_on_corporate_manslaughter.pdf.

First corporate manslaughter trial delayed

See CLM ¶7179+

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The trial of the first **company prosecution** under the Corporate Manslaughter and Corporate Homicide Act 2007 (see *CLM 2010 Newsletter Issue 1*) has been delayed. It was due to take place in Bristol Crown Court from 23 February 2010, but has been adjourned due to the company's director requiring urgent and intensive medical treatment. The case is now expected to be heard in July.

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Insolvency Service consults on removing the requirement to file “no meeting” notices

▶ News

See *CLM* ¶8205, ¶8210, ¶8281

The Insolvency Service has published a consultation document in which it asks for comments on a proposal to **remove the requirement** for the official receiver to file a “no meeting” notice **at court** in certain cases.

▶ Cases

These “no meeting” notices must be filed at court (and given to creditors and contributories of the insolvent company) in cases where the official receiver is the liquidator and he decides not to summon meetings of the creditors or contributories for them to appoint a liquidator in his place (s 136(5) IA 1986). The official receiver’s decision whether or not to summon the meetings must be taken within 12 weeks of the winding up order. The Insolvency Service proposes to remove the requirement to file this notice at court in insolvency cases where the official receiver applies to the secretary of state to have someone appointed in his place within the 12-week period (s 137 IA 1986). It is proposed that the official receiver would still be required to send an initial statutory report to creditors (r 4.43 IR 1986), so that creditors are kept informed of the action taken.

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Comments and views on any consequences not already identified are requested by 31 May 2010. The consultation document can be freely downloaded from the Insolvency Service website:

http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/ORTrusteemarch10/ConsultationLetter.pdf.

Insolvency Service’s second report on compliance with guidelines for pre-packs

See *CLM* ¶8901

The Insolvency Service has continued to monitor **compliance with SIP 16** “Pre-packaged sales in administration” following the publication of its initial report (“Report on the First Six Months’ Operation of Statement of Insolvency Practice 16”) (see *CLM 2009 Newsletter Issue 4*). It has now published its second report (“Report on the Operation of Statement of Insolvency Practice 16: July - December 2009”).

During the **latter half of 2009** the Insolvency Service received SIP 16 information from insolvency practitioners relating to 497 companies in administration whose business or assets were sold through a pre-pack sale. Of these, 309 cases (62%) were compliant with the requirements, and spirit, of SIP 16. This shows a surprising and disappointing decline in compliance when compared to the first half of the year, despite the Insolvency Service issuing further guidance in October 2009 (see *CLM 2009 Newsletter Issue 6*). However, a significant improvement in the quality and timeliness of information being provided has been reported. It was also reported that it remains the case that directors’ misconduct reported by insolvency practitioners does not appear to be more prevalent in pre-pack sales as compared to other company administrations.

Looking at **2009 as a whole**, approximately one third of all administrations involved a pre-pack sale and 76% of all pre-pack sales were to parties connected with the company in administration. Although, the Insolvency Service suspects that the figures may be somewhat distorted as currently there is no statutory requirement for insolvency practitioners to comply with SIP 16 and there is no statutory definition of what constitutes a pre-pack sale.

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No recommendations to amend SIP 16 (as was suggested in the initial report) have yet been made. However, the Government has announced that in the near future it will consult on a range of **new measures to boost confidence in pre-pack administrations**. Some of the options put forward in the consultation are expected to include:

- » introducing a statutory requirement to comply with SIP 16, with penalties for non-compliance;
- » automatic scrutiny of directors' and administrators' actions by the official receiver following a pre-pack administration;
- » provision to ensure that the insolvency practitioner advising on a pre-pack sale cannot be appointed as the administrator to implement it; and
- » requiring court or creditor sanction for pre-pack sales involving connected parties.

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New Edition

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Be on top of the latest changes with VAT Memo 2010-2011

VAT Memo 2010-2011, to be published in April, has been fully revised and updated for the Budget 2010 announcements, and will include commentary on the following:

- restitution of the VAT rate to 17.5% (effective January 2010)
- new place of supply rules for cross-border services (effective January 2010)
- TOMS changes ((effective January 2010)
- new tribunal and appeals system (effective April 2009).

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Relief from unfair prejudice awarded against company in administration

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See CLM ¶2105+

Re Woven Rugs Ltd (in administration), Sharafi and another v Woven Rugs Ltd (in administration) and others [2010] EWHC 230 (Ch)

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The High Court has awarded **relief from unfair prejudice** against a company and one of its shareholders despite the fact that at the time of the hearing the **company was in administration**.

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The petitioners, Messrs S, owned 40% of the shares in WR Ltd. The remaining 60% of the shares were held together by the respondents, AMC Ltd and Mr M. The parties' intention was for WR Ltd to be used for the sole purpose of acquiring, holding and leasing premises from which they each conducted their business. WR Ltd bought a property partly with funds lent to it by Messrs S and AMC Ltd (received by them as compensation for surrendering their interests in a previous property) and partly with a loan from the bank. Mr M subsequently caused WR Ltd to enter into a new loan agreement to raise additional funds without reference to or the knowledge of Messrs S. The additional sums raised were used to repay the existing loan to the bank and to repay part of the debt due to AMC Ltd. A further payment was made to AMC Ltd, again without the knowledge of Messrs S. No payment was made to Messrs S in respect of the debt due to them. Mr M had also failed to hold AGMs and to provide accounts.

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Messrs S applied for relief from unfair prejudice in respect of alleged unfairly prejudicial conduct of WR Ltd's affairs by AMC Ltd, which acted for the most part by Mr M. The High Court found that:

- » the **refinancing** was detrimental to WR Ltd and Messrs S. It had the purpose and effect of preferring AMC Ltd's interests (and hence Mr M's interests) over those of WR Ltd and Messrs S;
- » the further payment made to AMC Ltd was a **misappropriation of funds** without any benefit to WR Ltd; and
- » the **failure to hold AGMs and to provide accounts** was not only in breach of statutory obligations, it was an attempt by Mr M to conceal his wrongful acts.

Mr M was in breach of his duties as a director of WR Ltd and in breach of the arrangements on which he, AMC Ltd and Messrs S had agreed to use the company. This was unfairly prejudicial to Messrs S as shareholders of WR Ltd. The court ordered AMC Ltd and Mr M to jointly and severally buy Messrs S's shares, to be valued at a date before the refinancing and misappropriation took place. This was not a penalty even though WR Ltd was in administration at the time of the order and Messrs S's shares were effectively worthless. WR Ltd was in administration as a result of the unfairly prejudicial conduct and this was no bar to relief being granted. The buy out order was the means by which Messrs S would be compensated for the damage caused by the wrongful conduct. The court also ordered the repayment of the debt due to Messrs S.

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Balancing exercise required where shareholders both allege unfairly prejudicial conduct by the other

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See CLM ¶2113, ¶2115, ¶2124

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Boughtwood v Oak Investment Partners XII, Limited Partnership [2010] EWCA Civ 23



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The Court of Appeal has dismissed the appeal of the **respondent** (a director and shareholder of a company which was set up as a joint venture and operated as a quasi-partnership) who,



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on a finding of unfair prejudice, was **ordered to sell his shares in the company to the petitioning shareholder**. The High Court had found that the director had acted improperly in (amongst other things) failing to adhere to his agreed management role (see *CLM 2009 Newsletter Issue 2*). The respondent had not questioned the judge's findings of fact, but requested a reconsideration of the order so that it be the other way around (namely, the petitioning shareholder selling its shares to him instead). His appeal was based on the arguments that:

- » the company's business was originally his;
- » he had invented the technology which was being represented by the company; and
- » the petitioning shareholder was purely a commercial investor.

The Court of Appeal dismissed his appeal. It found that the High Court judge had been correct in carrying out the balancing exercise required where both parties alleged unfairly prejudicial conduct by the other. In this case the director had overstepped the limits of his management role. His conduct was underhanded, unconstitutional, damaging to the company's group and its business, and destroyed any continuing element of trust and confidence that might still have existed between him and the petitioning shareholder. Although the petitioning shareholder was itself in breach of its disclosure obligations to the director as a quasi-partner, the director had suffered no prejudice as a result. In addition, the director had been paid by the petitioning shareholder (and other investors) for giving up some of his shares in the company. Overall, it found that the judge's conclusion that to meet the overall justice of the case it should order the director to sell his shares in the company to the petitioning shareholder was inevitable and unchallengeable.

Comment: The director also appealed against certain instructions given by the High Court to the valuer when determining the price of the director's shares. His **appeal** on this point was **allowed in part** because the High Court judge had effectively tied the valuer's hands on a matter that was for the expertise of the valuer, which the court ought not to have done.

Is there a difference in the way a court should deal with solvent and insolvent schemes of arrangement?

See *CLM ¶6523*

The Scottish Lion Insurance Company Ltd v Goodrich Corporation and others [2010] CSIH 6

There is no requirement in the legislation for the **court** to differentiate between a solvent scheme and an insolvent scheme when exercising its **discretion as to whether or not to sanction a scheme**.

SLIC Ltd was a solvent insurance company, which had issued many occurrence insurance policies (whereby claims can be made after the relative policy has expired). It had not issued any new policies since 1994 and was in "run-off". Its shareholders put forward a scheme of arrangement to enable the period of run-off to be brought to an end and SLIC Ltd wound up. To this end SLIC Ltd applied to court for a meeting of the creditors to be called and, if the creditors voted in favour of the scheme, that it be sanctioned by the court. As ordered by the court, two creditors' meetings were held, at which it was reported that at least 75% in value of the creditors present and voting had voted in favour of the scheme. GC, a creditor of SLIC Ltd, had voted against the scheme, under which its occurrence insurance policies would be compulsorily terminated. It challenged the decision of the chairman that the requisite majority had voted in favour of the scheme contending that the way in which the chairman had evaluated claims for voting purposes was not fair and reasonable. The Court initially dismissed SLIC Ltd's application, in favour of GC. SLIC Ltd reclaimed (appealed). The question for the Court of Session was whether the court could sanction a solvent scheme of arrangement (i.e. one in which the company was not insolvent, nor at risk of becoming insolvent should it fail to make a compromise or arrangement with its creditors) in the face of opposition from dissenting creditors.

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The Court of Session held that it can. A company's **solvency** is only one factor for the court to take into account when exercising its discretion. In addition, the **existence of a problem** (i.e. an adverse situation facing both the company and the shareholders, or creditors, as the case may be) that needs to be resolved is not a pre-condition to the sanctioning of a scheme, whether solvent or otherwise. The existence of a problem is also only one factor for the court to take into account when exercising its discretion.

Comment: This is a Scottish decision but it is based on the same provision in the new Companies Act as applies in England and Wales (s 899 CA 2006).

Co-operation between member states under the EC Insolvency Regulation

See *CLM* ¶7366+

Re MG Probud Gdynia sp. Zo.o. [2010] EC Case C-444/07

After main insolvency proceedings have been opened in one member state, the competent authorities of a second member state (in which no secondary proceedings have been opened) are required under the EC Insolvency Regulation to recognise and enforce all **judgments relating to the main insolvency proceedings**. Therefore, the competent authorities of the second member state cannot order enforcement measures relating to the assets of the insolvent company, which are situated in the second member state, when the law of the first member state does not permit this. This is subject to the two grounds for refusal, namely if it would result in a limitation of personal freedom or postal secrecy or if the effects would be manifestly contrary to that member state's public policy.

MG PG carried on business in the building sector. Its registered office is in Poland and it carried out construction work in Germany through a branch. Insolvency proceedings were opened against MG PG in Poland in June 2005. 2 days later, the German court ordered the attachment of MG PG's assets held by banks and of various contractual claims of it against German parties in respect of unpaid wages and unpaid social security contributions. An appeal against the order of the German court was dismissed on the basis that insolvency proceedings had been opened in Poland, so there was reason to fear that MG PG would collect the sums payable and transfer the amounts to Poland in order to prevent the German authorities from having access to them. Furthermore, the court held that the insolvency proceedings in Poland did not prevent the attachment order in Germany.

The Polish court sought a **preliminary ruling** from the ECJ questioning whether the attachment was lawful, as Polish law (the law applicable to the insolvency proceedings) would not allow such attachment after MG PG had been declared insolvent. Essentially, it asked:

- » whether a member state court was entitled to attach funds held in a bank account of a company following a declaration of that company's insolvency in another member state; and
- » whether a court in one member state, in which secondary proceedings have not been opened, can refuse to recognise and enforce judgments concerning the opening and course of insolvency proceedings opened in another member state.

The ECJ answered both questions in the negative. The main proceedings opened in Poland encompassed all of MG PG's assets and Polish law governed the insolvency proceedings and the treatment of those assets. As Polish law does not permit enforcement proceedings relating to assets in an insolvency to be brought against the insolvent company after insolvency proceedings have been opened, the German court could not validly order, pursuant to German law, enforcement measures relating to MG PG's assets situated in Germany. Only the opening of secondary proceedings would be capable of restricting the universal effect of the main insolvency proceedings.

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US receivership not a “foreign proceeding” within the Cross-Border Insolvency Regulations

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See CLM ¶7377

Re Stanford International Bank Ltd [2010] EWCA Civ 137

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The Court of Appeal has upheld the High Court decision in *Re Stanford International Bank Ltd* [2009] EWHC 1441 (Ch), in which a **receivership** imposed by the court in the US was not considered to be a “**foreign proceeding**” within the Cross-Border Insolvency Regulations (which implement the UNCITRAL Model Law in the UK).

▶ Legislation

It was alleged that SIB Ltd was involved in a fraudulent “Ponzi” scheme, which had collapsed in 2009. Its registered office was in Antigua and Barbuda. Various insolvency proceedings followed in Antigua and Barbuda, the US and England including:

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- » the US authorities appointing a receiver of SIB Ltd’s assets wherever situate;
- » the Antiguan court ordering the compulsory winding up of SIB Ltd and appointing liquidators;
- » a restraint order made by the Central Criminal Court (in England) on the application of the Serious Fraud Office in respect of SIB Ltd’s assets in the UK;
- » an application being brought in the High Court (in England) by the Antiguan liquidators for recognition of the Antiguan liquidation as main proceedings under the UNCITRAL Model Law (and for those of SIB Ltd’s assets situate in England to be distributed to them in their capacity as liquidators); and
- » an application being brought in the High Court (in England) by the US receiver for recognition of the US receivership as main proceedings under the UNCITRAL Model Law.

The recognition applications were heard together. In summary, the High Court allowed the application of the Antiguan liquidators, but dismissed that of the US receiver. The US receiver and the Serious Fraud Office appealed against that decision.

The Court of Appeal found that the High Court had been correct in finding that the US receivership did not possess the **necessary characteristics** to satisfy the **definition of a foreign proceeding**, namely:

- » a collective proceeding;
- » pursuant to a law relating to insolvency;
- » in which there is control or supervision of the assets or affairs of the debtor by a foreign court; and
- » for the purpose of reorganisation or liquidation.

The US receiver was not appointed under a law relating to insolvency, but under a law which enabled the US court to grant equitable relief for the benefit of investors (rather than creditors). The US receivership was not collective in the relevant sense. Nor was it for the purpose of reorganisation or liquidation; it was for the protection of investors and the assets of SIB Ltd.

In addition, the Court of Appeal endorsed the test applied in *Re Eurofood IFSC Ltd* (C-341/04) in relation to **determining a company’s centre of main interests (COMI)**. Namely, that the presumption that a company’s COMI is the country in which its registered office is situated unless it can be proved otherwise, can only be rebutted by objective factors: the COMI should be the place from which the company administers its interests on a regular basis and which is ascertainable by third parties. The Court of Appeal found that this was the correct test to apply under the UNCITRAL Model Law as well as under the EC Insolvency Regulation.

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CASES cont...

The ambit of costs and expenses in an administration

See CLM ¶8746, ¶8752, ¶8927

Re Capitol Films Limited, Irish Reel Productions Ltd v Capitol Films Ltd [2010] EWHC 180 (Ch)

Where the court thinks it fit to do so, it can order that the **costs** of a person who has presented a **petition for the company's winding up** should be paid as an expense of the administration, where the winding up petition is dismissed on the making of the administration order. This is one of the purposes for which a person who has presented a winding up petition is permitted to attend the hearing of the administration application (r 2.12(1) IR 1986). Such an order can be made in relation to both the **costs** of that person **in attending the administration application hearing** and their costs of presenting the winding up petition which is dismissed at the same time (r 2.12(3) IR 1986).

In this case, a winding up petition had been presented against CF Ltd, in which IRP Ltd had become the petitioner by substitution. CF Ltd subsequently applied for an administration order. On making the administration order, the High Court also dismissed the winding up petition. The administration of CF Ltd on its own application was the last stage in a long process by which the company was subjected to an insolvency process in the interests of its creditors. An earlier stage in that process was the presentation of the winding up petition, which had been fiercely opposed by CF Ltd. Accordingly, the High Court found that it should exercise its discretion to allow IRP Ltd's costs of prosecuting the winding up petition (after it had been substituted as the petitioner) to be payable as an expense of the administration, in addition to its costs in attending the administration application hearing.

Pre-appointment expenses of administrators involved in pre-pack sales

See CLM ¶9026

Re Johnson Machine and Tool Co Ltd, Re Empire Surfacing Ltd [2010] EWHC 582 (Ch)

The High Court has considered further whether it is appropriate for the pre-appointment expenses of an administrator involved in a pre-pack sale to be treated as an expense of the administration. The court endorsed the guidance given in *Re Kayley Vending Limited* [2009] EWHC 904 (Ch) (see *CLM 2009 Newsletter Issue 3*).

In both cases, the **administrators** were **appointed by the court** but, as the existing management used companies (controlled by or connected to them) to purchase the existing business and assets from the administrators in pre-pack sales, the test required was whether the benefit of the advantage to creditors was outweighed by the advantage to the management. The court decided that in these cases it was and did not allow the administrators' pre-appointment expenses to be treated as an expense of the administration. In a case where the **existing directors** are the **purchasers**, it considered that it will rarely be possible to establish clearly that the balance of advantage is in the creditors' favour.

The High Court also commented that any **pre-appointment expenses** which are allowed as an expense of the administration should be **limited** to the costs incurred in bringing the administration application. They should not include the costs of any insolvency advice, nor the costs of considering and arranging any pre-pack sale (such as the negotiation of the terms of the pre-pack sale, arranging valuations of assets to be sold and considering whether to market the business). This narrows the guidance given in *Re Kayley Vending Limited* (above). Therefore it will be necessary for the creditors, company and/or the directors to agree to pay these separately.

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LEGISLATION

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Consolidation of the law of corporation tax

See CLM ¶1790+, ¶1805, ¶5291, ¶5361+, ¶7964, ¶8931, ¶9324

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Corporation Tax Act 2010

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The Corporation Tax Act came into force on 3 March 2010, the date when it received Royal Assent. Its purpose is to consolidate and rewrite primary corporation tax legislation in clearer, simpler language so that it is easier to use, but without changing its general effect. The Act does contain some minor changes in the law, which are intended to clarify existing provisions and bring the law into line with well established practice. Readers should check forthcoming updates for details of any specific changes.

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Publicity of corporate manslaughter offences

See CLM ¶7180

SI 2010/276

The court's **power to make publicity orders** (s 10 CMCHA 2007) came into force on 15 February 2010. The commencement of this power was initially delayed until supporting guidelines were available on how this entirely new punishment should be imposed. The Sentencing Guidelines Council's definitive guideline on corporate manslaughter and health and safety offences causing death has now been published (see the news page of *CLM 2010 Newsletter Issue 2*), which has paved the way for this power to come into force. The power **applies to** corporate manslaughter offences committed on or after 15 February 2010. It is not available for offences committed before that date, even if the court passes sentence after that date.

Change to fees payable on presenting a winding up petition

See CLM ¶7640

Draft Insolvency Proceedings (Fees) (Amendment) Order 2010

The Insolvency Service has announced upcoming changes to the amount that must be paid on presenting a petition for a company's winding up. For petitions presented on or after 6 April 2010 the **deposit**, which must be paid to the court at which the petition is presented, will **increase** from £715 to £1,000. There is no change to the deposit required for petitions presented before 6 April 2010 but where the winding up order is made after that date.

In addition, the amount payable to the Insolvency Service on the making of a winding order, known as the **case administration fee**, will **increase** from £2,160 to £2,235 in respect of all petitions presented, and winding up orders made, on or after 6 April 2010.

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Procedure for bringing claims against insolvent companies' insurers simplified

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See CLM ¶8016

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Third Parties (Rights Against Insurers) Act 2010

A creditor's ability to bring a claim against an insolvent company's insurers, if the claim is a liability for which the company held **third party insurance**, will be simplified. The Third Parties (Rights Against Insurers) Bill received Royal Assent on 25 March 2010. It will come into force on a date to be confirmed by the secretary of state.

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A creditor is able to bring **proceedings against** a company's insurer where the company is insolvent, as the company's rights to claim against the insurer are transferred automatically to, and vested in, the creditor on the commencement of the company's liquidation. However, currently, the creditor must bring proceedings against the insolvent company to establish its liability before being able to pursue a claim against the company's insurer. Under the Third Parties (Rights Against Insurers) Act 2010 a new court procedure will be available to creditors which will enable them to seek declarations from the court as to the insolvent company's liability to them, and the insurer's potential liability under the policy of insurance, in one set of proceedings. This will undoubtedly save time and costs. In addition, creditors' ability to obtain **disclosure of relevant information** will be improved and clarified.

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Introduction of the new medical "fit note"

See CLM ¶9940

SI 2010/137

The Government has announced that its proposals to replace sick notes used by doctors with "fit notes" **will come into force on 6 April 2010**.

The **format and content** of a sick note will change so that, instead of simply stating whether a patient should or should not be in work, doctors will either indicate that a patient is not fit for work, or that they might be fit for work provided that adjustments are made to their working hours, workplace or duties, or subject to a phased return to work. In addition, the new medical statement gives doctors the option to give general details of the functional effect of the patient's condition. For example, where an individual has moderate lower back pain, a doctor may suggest that he/she will be unable to lift heavy objects and should be given the opportunity to change position or take breaks regularly. It should be noted that employers will not be required to make any recommended changes and that where such changes cannot be agreed the fit note should be treated as though the doctor has advised that the patient is "not fit for work" for benefit and sick pay purposes.

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FOCUS ON... INSOLVENCY LEGISLATION

Insolvency legislation consolidation and modernisation

See *CLM* ¶7362+

SI 2010/18

SI 2010/686

SI 2010/7334

The Insolvency Service's project on the consolidation and modernisation of insolvency legislation and Rules is taking a big step forward this spring (see *CLM 2009 Newsletter Issue 6*).

On **6 April 2010** several changes will be introduced:

- a. the Legislative Reform (Insolvency) (Miscellaneous Provisions) Order 2010 will come into force. This will:
 - » **implement the new procedures** for remote attendance at meetings and the ability for insolvency practitioners to post information during insolvency proceedings on websites;
 - » **remove unnecessary administrative burdens**, such as replacing the requirements for annual meetings to be held in CVL and MVL with requirements to provide progress reports, removing the requirement to report to court at various intervals during CVA and removing the requirement for the liquidator to obtain sanction for some acts; and
 - » **remove inconsistencies** between the Insolvency Act and the Rules by allowing things that have to be provided in writing to be in electronic form and replacing the use of affidavits with witness statements verified by statements of truth;
- b. the Insolvency (Amendment) Rules 2010 will come into force. These are intended to work with the Legislative Reform Order to implement the above changes. They also implement several other aspects to the modernisation project including:
 - » updating the language used throughout the Rules as follows:

Old words	New words
Fit (when used of decisions by the court)	Just
Leave (except in Rule 4.20)	Permission
Ex parte	Without notice to any other party
Sign	Authenticate
Signing	Authenticating
Signs	Authenticates
Signed	Authenticated
Signature	Authentication

- » **reducing** the occasions on which **documents** in insolvency proceedings will have to be **filed at** court or Companies House;
- » enabling creditors to **approve** the **pre-appointment fees and expenses** of an administrator retrospectively where a company enters administration;
- » giving creditors more options as to the basis on which they can **fix insolvency practitioners' remuneration**;
- » setting out standard minimum contents for all **Gazette notices**; and
- » giving the court a new power to order the **block transfer of cases** from one insolvency practitioner to another where the outgoing insolvency practitioner has been removed by the court, retired from practice, died or is otherwise unable or unwilling to continue in office;

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- c. the Insolvency (Amendment) (No 2) Rules 2010 will come into force, which make minor corrections and amendments to the Insolvency (Amendment) Rules 2010; and
- d. as a result of the above changes, certain **insolvency forms** used at Companies House will change.

For the most part, the **changes apply to** companies entering insolvency procedures on or after 6 April 2010. Readers should check forthcoming online updates for precise details of the changes.

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