The City of London Law Society

Furniture Makers' Hall
12 Austin Friars
London
EC2N 2HE

enquiries@clls.org
www.clls.org

By email: chancellorspo@judiciary.uk

12 June 2025

The City of London Law Society Insolvency Law Committee: Response to the consultation on the Practice Statement for schemes of arrangement under Part 26 and restructuring plans under Part 26A of the Companies Act 2006 published on 9 May 2025

Introduction

We welcome the opportunity to provide feedback on the Draft Practice Statement.

The City of London Law Society (the ***CLLS***) represents approximately 17,000 City lawyers, through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 20 specialist committees. Links to lists of the individuals represented on the Insolvency Law Committee are set out at the end of this response.

We have also included at the end of this response the members of the working group who were involved in drafting it. Any member of the working group would be happy to discuss or expand on any of the comments made in this response. Alternatively, please feel free to contact Catherine Balmond (Freshfields LLP) whose details are set out below.

Overriding comments

The CLLS considers the revision to the Practice Statement now that the Restructuring Plan has been in use for five years very timely. Overall, the CLLS welcomes the clarity that the Draft Practice Statement will provide to parties in relation to the court's expectation when formulating and implementing a Restructuring Plan. We understand the resource and cost considerations of the court, and that interactions with the court need to be mindful of efficient judicial management.

We think it is right to focus on early engagement, efficiencies of court process, and the orderly conclusion of cases. The achievement of these objectives is essential to: (i) manage court time and cost efficiently, (ii) to ensure that the UK remains a jurisdiction of choice and the Restructuring Plan remains "best in class" for international and domestic restructurings; and (iii) provide a much needed cost effective mechanism for businesses to operate throughout a successful restructuring.

Issues of proceedings: the listing note

The Draft Practice Statement requires (para. 5) that a claim form seeking orders under Part 26 or Part 26A be issued in the name of the scheme or plan company before the date for any Court hearings is arranged with the Court. The requirement to file a claim form when reserving time with the Court is a departure from the current practice of informally reserving time while the parties are still in negotiations, hoping that either a fully consensual deal may be agreed upon (which would avoid the need for a scheme or a plan in its entirety) or a deal can be reached with the support of sufficient creditors to mean that it could potentially be implemented using a Scheme or a Restructuring Plan.

In most cases, before parties seek to reserve time, significant creditor engagement and development of the terms of the restructuring will have already taken place even if there is not yet an agreed term sheet. It is important to recognise why this practice has developed i.e. to address extensive waiting time for hearing dates and to give the financially distressed company more comfort on the likely timing of any restructuring (which often includes additional much needed liquidity). It is feared that making this change to the informal practice might come at a significant cost to distressed debtors**,** many of whom face as alternative a formal insolvency. From a wider perspective, it may also make restructuring in the UK less attractive prompting English companies and international groups to seek out other jurisdictions where a restructuring can be achieved in a more time and cost-efficient manner.

As a result, we have several concerns with the requirement to file a claim form to reserve Court time. In our view, this is unnecessary and may have a negative impact on efficiencies and serve to undermine the availability of a procedure that is effective where fully consensual deals are simply not feasible. Whilst the need to avoid reserving Court time unnecessarily (or releasing such time immediately upon becoming aware that it is not needed) is appreciated by all, there are some restructurings where it would simply be impossible for the business to continue operating during any material delay between the filing of a claim form and the hearing of that claim form.

- **Event of default / termination rights:** the filing of a claim form could (and in most well drafted documentation would be expected to) trigger an event of default under the debtor's contractual arrangements with finance or commercial counterparties (including landlords). Whilst triggering an event of default is – at some stage – inevitable, requiring a claim form to be issued at an earlier stage than is current practice will risk a party calling an event of default, terminating a contract and taking unilateral enforcement actions, thereby preventing a collective restructuring through a Restructuring Plan or Scheme. This would also be a risk in relation to any formal step that the debtor is required to take at an early stage that falls short of a claim form.

  The negotiations leading to a Restructuring Plan or Scheme rely upon stakeholder cooperation, and, absent a rare case management imposed stay such as in the Bluecrest Mercantile case ([2013] EWHC 1146) or a moratorium within administration or Part A1 of the Insolvency Act 1986, in particular key creditors agreeing not to take precipitous action (unlike, for example, a Chapter 11 filing which benefits from a worldwide automatic moratorium). Negotiations regarding a standstill or seeking waivers are often a useful bell weather in determining the creditor response to the restructuring proposals. In relation to complex restructurings lock up arrangements (themselves heavily negotiated) are designed to provide some comfort and allow a restructuring to take place on a stable footing. If the debtor were obliged to take the formal step of filing a claim form much earlier in the negotiations this could derail the restructuring altogether.

- **Publicity and announcements**: we are concerned that filing a claim form months in advance of the convening hearing will destabilise the company, parties affected by the plan, and others for example, employees who are critical to the ongoing operations and may be justifiably excluded from the compromise. The early filing may therefore be value destructive. The fact that the Court file may be subject to confidentiality restrictions will not assist in preventing the triggering of a default. Neither will it prevent broader destabilisation where the taking of a formal step in relation to a restructuring and/or the risk of triggering an event of default is likely to require the debtor company to make a public announcement if either its shares or its debt are listed on the markets.

- **Certainty of timing**: if a fully consensual solution fails and a Restructuring Plan is necessary, the debtor will in most circumstances need to move very quickly and against the backdrop of a very tight financial runway and liquidity constraints. It is therefore imperative for a debtor to know that when negotiations have failed, a court hearing can take place as soon as possible. With the current Court timetable the time between requesting a date and the hearing taking place can be months. Even when it becomes clear that there will not be a fully consensual solution, knowing the date of an informal court time booking can also be a useful tool in making all stakeholders focus instead on the achievement of a negotiated solution which has the support of sufficient stakeholders to be capable of being implemented pursuant to a Scheme or a Restructuring Plan.

The CLLS has given some thought on how to address the aims that the Draft Practice Statement has in a way that would avoid the adverse consequences that can result from the filing of a claim form.

One way forward would be to continue informally to allow counsel / instructing solicitors to reserve time with the court (under a project name) when it may not be practical to provide the details required for a claim form or indeed the listing note. We are not aware of cases where the informal approach has been the subject of abuse. It is of course in any event always at the discretion of the court listing office as to whether the allow such dates to be pencilled in. We had understood that this was a mutually advantageous position, creating more efficiency than a more rigid approach requiring parties to file many months in advance.

However, the claim form and listing notice (if thought necessary) could be filed together at a later stage in the process, for example at the time when the practice statement letter is sent to creditors. At that time, the company would need to address publicity, announcement obligations and similar matters. The company would be able to complete a listing notice in a meaningful way. The listing note could also serve to encourage "good behaviour" in the lead up to filing the claim form by requiring the applicant to set out the process to date, including the negotiations between parties in the lead up to the issue of claim form, any disclosure of information etc – so that the court can be satisfied that at the time of filing the claim form the parties have conducted appropriate negotiations and that opportunities to reach a consensual arrangement have been fully explored. What is appropriate engagement by the company with creditors/shareholders will of course depend on the circumstances of each case, acknowledging that engagement with financial institutions who are highly impacted by the proposed scheme or plan may need to look different to engagement with smaller suppliers, for example in the context of a SME restructuring plan or shareholders in the context of a solvent scheme. (As a general observation having one Practice Statement which appears largely driven by contested restructuring plans and/or schemes of arrangement for financially distressed companies, which also applies to solvent schemes of arrangement should be given careful consideration and we are aware that a Joint Working Party of the Company Law Committee of the City of London Law Society will be responding separately to the consultation.)

If the concern that the judiciary is seeking to address is to avoid situations where liquidity has been strategically reduced to fit a compressed court timetable, or that filings have been made at a late stage without adequate explanation, it may be that reliance on the existing procedure in civil commercial litigation of requiring a certificate of urgency, explaining the condensed timetable may be a simpler and more cost effective approach, rather than having as a default all claims launched months ahead.

It is unclear whether the introduction of a listing notice is a document which is envisaged to be for the court's eyes only rather than being public, with the information in the claim form (which is more limited) being the only public information. It may be that the listing notice is seen as an additional layer of formality. While the company will no doubt use its best endeavours to provide the information sought it may be limited, in what would be an early stage of the process, in its ability to provide the court with any meaningful time estimates. Additionally, the company may at the early stage at which the issuance of a claim form is currently proposed have little, if any, visibility of the nature and scope of any contested issues. The listing notice itself could, if publicly available itself be the cause for dispute, and add further to the cost and time of the restructuring process. However, if our suggestion of filing the listing note at the same time as the claim form and at the same time as the practice statement letter is sent to creditors, then the listing note could, similar to the practice statement letter, be shared with creditors. Any requirement to share such information should be carefully balanced to promote transparency while at the same time not constituting information overload making it harder for those less familiar with the process to meaningfully engage with it.

Responsibilities of the applicant: matters of the convening hearing

The Draft Practice Statement requires the applicant *in advance* of the convening hearing to identify certain issues, including those related to classes, the court's statutory jurisdiction to sanction the plan, its international jurisdiction in respect of the plan or any other issue except those that pertain to the merits or fairness of the plan. It is unclear whether the change in wording is seeking to change the current practice, so as to introduce a formal list of issues. Currently, the applicant files a witness statement ahead of the convening hearing which – together with the convening hearing skeleton – will cover those issues of which the applicant is already aware and which ought to be drawn to the court's attention. We fear that if a formal issues list is introduced at an early stage, there is either overlap in the application for convening, witness statement (as to facts) and skeleton argument (as to law) or that the issues list will need to be submitted at such an early stage that it will require constant updating which may not be helpful for the court.

The re-wording of what is of now paragraph 13 (and used to be paragraph 8) is helpful to ensure that relevant material (which may include witness statements) is shared in good time ahead of the convening hearing. Thought will need to be given how to appropriately reword the current form of the CPR to make the requirements consistent. We would hope to see a practice develop to underscore this.

Consideration could be given to requiring the company to provide additional information where an order under section 901C(4) is sought at the convening hearing.

Further case management

The Draft Practice Statement sets out in paragraph 9 that the convening hearing judge should indicate whether it is desirable for them also to hear the sanction the scheme or plan and/or to deal with any other hearings prior to the sanction hearing. We welcome this statement. In addition there may be merit to not only assign the judge to any case management conferences (CMC) but also to assign the judge to any other applications in relation to the scheme or plan company that may arise, for example

an intervening winding up petition. Having one assigned judge to deal with the matter holistically will greatly benefit the efficiencies of the process and is also in line with international practice, such as in a Chapter 11 case.

The Draft Practice Statement states that where any issue has been drawn to the attention of the Court which is not suitable for determination at the convening hearing, the court may consider the issues at further (CMC. While the ability to call case management conferences is inherent in the court's jurisdiction and a useful way to keep proceedings focused and proportionate to cater for individual case requirements, we would not wish to see an expectation that a CMC be the norm in all cases. In certain, exceptional, situations it may be appropriate to have a CMC after filing of the claim form and *before* the convening hearing. Were a CMC process to become the norm, we consider that it would add considerable time and expense to a process that already requires two court hearings. This is particularly the case where it is sought to use the Restructuring Plan in the restructuring of SMEs. We would also expect that this aspect of the Draft Practice Statement would be limited to contested Restructuring Plans as reflected in the recent cases.

The Draft Practice Statement specifically permits the court to address the service of expert evidence, including the use of a single joint expert, and, where there is more than one expert, for meetings of experts. Valuation is clearly key to Restructuring Plans and often requires complex expert evidence. The CLLS is mindful of the court's role in ensuring a fair process and the jurisdictional requirements while at the same time not turning the Restructuring Plan into complex expert driven commercial litigation which companies in financial distress can ill afford. A CMC could be suitable to give directions in relation to expert questions, iron out differences and establish common grounds, especially where valuation issues may already arise at convening, e.g. for section 901C(4) cases. Consideration could be given as to whether the court wishes to prescribe the format of an expert report to introduce consistency and efficiency to the process.

Concluding remarks

We would welcome the opportunity to work with the judiciary to make minor adjustments to address our practical concerns in time for the release of the Practice Statement in July.

Point of contact

Should you have any queries or require any clarification in respect of our response, please feel free to contact our chairperson or any of the members of the working group set out below.

Catherine Balmond

Catherine Balmond
catherine.balmond@freshfields.com
Chair, City of London Law Society Insolvency Law Committee

Other working group members: Gabrielle Ruiz, Vice-Chair, CLLS Insolvency Committee (Clifford Chance), David Ereira OBE (Quinn Emanuel), Joe Bannister (DAC Beachcroft), Katharina Crinson (Freshfields) and Emma Riddle (CMS).

Other members of the Insolvency Law Committee are listed here:

https://clls.org/committees/insolvency.html