



**Insolvency
Practitioners
Association**

Comments on Cm 7459 "Financial stability and depositor protection: special resolution regime" dated July 2008

We commented 22 April 2008 on the January consultation document (Cm 7308). One of our comments we would repeat here, because we think that its importance has been enhanced by the new document.

We suggested that the proposed "bank insolvency" procedure should be called instead "bank liquidation" because it is in fact a liquidation (as is recognised by calling the officeholder a "bank liquidator", whose responsibility once depositors have been dealt with is to wind the bank up). The proposed introduction of a special "bank administration" procedure (to deal with the affairs of the residual bank when there has been a partial transfer to a bridge bank) increases the need for the name change. "Insolvency" is a general term, which in a company context includes both administration and liquidation (among other procedures). To use the term "insolvency" for a liquidation, in opposition to the term "administration" rather than inclusive of it, will inevitably cause confusion.

We comment below first on those parts of Chapters 2 to 5, and the specific questions posed therein, where we feel we have expertise to contribute; and then on the draft Clauses contained in Annex A. Where a detailed comment on draft Clauses covers the point raised in a question, we refer to that comment.

Chapter 2: SRR Objectives, Roles and Governance

We have no comment on questions 2.1 to 2.5, apart from any specific comment we may have made on the related draft Clauses in Annex A. Our answers to the two following questions are as follows:

2.6) Do you agree that the SRR objectives should be supplemented by a code of practice?

Yes.

2.7) Do you agree with the proposed areas to be covered in a code of practice?

See our comment below on draft Clauses 5 and 6 contained in Annex A.

Chapter 3: SRR Tools: Stabilisation Powers and Compensation

We agree with the reasons given in paragraph 3.6 (Box 3.1) for rejection of the alternative general model of a special insolvency regime for banks.

3.1) What are your views on the breadth of the property transfer powers in clauses 14 to 23? Are there particular powers that are lacking?

These powers seem reasonably comprehensive. See, however, our comments below on partial transfers. We have no comment on question 3.2. We have the following comments on the proposals for the use of a bridge bank:

BRIDGE BANK

3.3) Do you consider that a company limited by shares, with the Bank of England as the sole or controlling shareholder, would be the most appropriate governance structure?

For the reasons given in paragraph 3.25, we agree that it would be the most appropriate governance structure. In particular, we concur with the point made at the end of that paragraph that it would "facilitate an onward sale of the bridge bank to a purchaser in due course". As made clear at the end of paragraph 3.32, this could involve the sale of the shares in the bridge bank to the selected purchaser; and indeed that is the way in which the use of a company limited by shares can facilitate a sale.

3.4) Do you agree that the lifespan of the bridge bank should be limited? What do you think is an appropriate length of time?

3.5) Do you think that the extension of the bridge bank's lifetime should be subject to certain conditions? If so, what?

We assume that the first part of question 3.4 does not mean literally what it says. The bridge bank is intended to be a "Companies Act company limited by shares" (paragraph 3.24). It is of course possible for such a company to have a prescribed term to its existence. (If this is in its Articles, it may then be wound up voluntarily by an ordinary resolution: Insolvency Act 1986 s 84(1)(a).) But as a vehicle for the transfer of a bank to a private sector purchaser by means of the sale of its shares to that purchaser, such a company would be worse than useless.

We assume rather that what is meant is that the Bank of England as controlling shareholder would be under an obligation to take further steps if, after a certain period, the shares in the bridge bank company had not been sold, nor had the undertaking been sold out of the company. In paragraph 3.33 it is suggested that, where a private sector solution cannot be achieved, "the bridge bank could be wound up in an orderly manner which maintains financial stability"; or that "the Government could take the bridge bank into temporary public ownership". Winding up would also be appropriate where the undertaking had been sold out of the bridge bank.

We agree that it is desirable that a limit should be put upon the time during which the Bank of England can hold the shares in the bridge bank company without either winding it up or its being taken into temporary public ownership. We concur in the view that twelve months would be a reasonable period.

We agree that it should be possible to extend the period; but, because such an extension would always be exceptional, we doubt whether conditions can be laid down in advance either to apply before such an extension may be granted or to control such an extension. There would be too great a risk that a case could occur where an extension was appropriate but the preordained conditions were not. We consider that an appropriate mechanism for the extension would be that the court could extend it on the application of the Bank of England, in a manner analogous to the procedure set out for the extension of an administration in paragraphs 76(2)(a) and 77 of Schedule B1 to the Insolvency Act 1986.

PARTIAL TRANSFERS

We agree that it is appropriate that there should be powers to split a failing bank where the sound parts of its business are severable from those that cause problems. We agree that an appropriate means to do this would be to transfer parts of the business out to a "newco", leaving the rest in the "residual company". We do not, however, find the thinking on this set out in paragraphs 3.34 to 3.58 wholly coherent. Our reasons for saying this are as follows:

Paragraph 3.49, note 7 to paragraph 3.34, and note 10 to paragraph 3.44 make it clear that the part that is transferred is "either the "good" or "bad" assets". In other words, the split has two possible aims. Either:

A. The sound parts are transferred out, by sale to a private sector purchaser or by transfer to a bridge bank, and the residual bank retains the problems (see paragraphs 3.37, 3.39, and 3.44(1)); or

B. The bank is sanitised by having what causes its problems transferred to a bridge bank (a sale to a private purchaser would be most unlikely) leaving a sound residual bank (see paragraphs 3.36 and 3.44(2)).

To have this choice of techniques is reasonable. Whether what is transferred out is sound or unsound will probably depend on the proportion that it bears to the whole. But the possibility of this choice is inconsistent with the statement in paragraph 3.54 that (except in the rare situation where both the "newco" and the "residual company" were solvent entities) the residual company would be insolvent. In a split as in **(B)** above, on the contrary, the bridge bank with the "bad assets" would be insolvent and the residual company with the "good assets" would be solvent. It is admittedly suggested in paragraph 3.50 that the split would need to be structured so as to render the bridge bank solvent: but if that were done in a split as in **(B)** above the risk could be that one failing bank would be split into two failing banks.

The rest of Chapter 3 ignores the technique of transferring out the bad parts. It proceeds on the assumption that it will always be the sound part that is transferred out, so that where a bridge bank is used it will always be the bridge bank that is expected to be solvent and the residual bank that is likely to be insolvent. The term "bridge bank" is used as synonymous with the solvent part and the term "residual company" as synonymous with the insolvent part. In our comments we have conformed to that usage, but would point out that where the technique of transferring out the bad parts is used the use of the terms must be reversed. For instance, if the bad part has been transferred out to a bridge bank, but the solvent residual bank needs continuing cooperation from the bridge bank, it would be the bridge bank that could fall to be dealt with by the special bank administration procedure.

We have no specific comment on questions 3.6 to 3.10.

Paragraph 3.58 contains the first reference to the proposed special bank administration procedure. It is described (correctly) as "a modified form of insolvency", and it is made clear that it "is distinct from the bank insolvency procedure set out in chapter 4". This reinforces our point that the "bank insolvency procedure" should be renamed. If the bank administration procedure is a form of insolvency, distinct from the procedure by which a bank with compensatable depositors would be wound up, it makes no sense to call the latter "bank insolvency procedure".

Residual Company Creditor Compensation

We do not accept the contention set out in paragraphs 3.63 and 3.64 that, where a bank is split by partial transfer into a solvent and an insolvent entity, the creditors in the latter will receive fair compensation if it is given a contingent interest in the net proceeds of sale of the former. Dividend prospects in the insolvent entity are likely to be derisory. Its creditors should be entitled to compensation calculated at least to restore their dividend to what it should have been had the whole bank been wound up, with creditors treated *pari passu*. It is clearly possible that the net proceeds of the solvent entity will be inadequate for the purpose. This would work injustice. But we agree that where it is more than adequate no ceiling should be imposed, since no one other than the creditors of the insolvent entity can be entitled.

Our answer to question 3.14 is consequently as follows:

3.14) Do you think that the bank resolution fund is an appropriate means for compensating creditors left on the residual company?

Only if it is adequate to restore their dividend.

Preserving Set-off and netting Arrangements

Arrangements such as those referred to in paragraphs 3.67 to 3.76 are those made between solvent parties. In the normal winding up of a company set-off is wider rather than narrower. Consequently any restriction is likely to alter the position of the insolvent entity by more than accepting all such arrangements would. Where this damages dividend prospects of creditors of the insolvent entity, compensation should reflect this.

We have no further specific comments on questions 3.15 to 3.20.

Creditors with Security

An additional reason for providing that a secured liability and the asset on which it is secured should be moved together or not at all is that, at least where a security is specific, the secured creditor would probably retain rights against the asset even if it no longer belonged to the entity which owed the debt. So the secured creditor would be likely to remain protected in any event; but moving asset and liability together would protect others involved. Our answers to questions 3.21 and 3.22 are as follows:

3.21) Do you agree that a safeguard to protect all security interests could make a partial transfer particularly difficult?

Yes.

3.22) Which security interests should not be covered by this safeguard?

It is difficult to see what should not be included, apart from the instance given of a floating charge -- where the secured creditor would be less likely to be protected by continuing rights as outlined above.

Special Bank Administration Procedure

Again this is a procedure which would only be applicable where a failing bank had been split by a partial transfer into a solvent and an insolvent entity. It is designed to handle the insolvent entity where the solvent entity is in some way dependent on it. We consider it would be a useful tool.

Paragraph 3.83 typifies the confusion over the use of the word "insolvency" that arises from calling the procedure for winding a bank up under a bank liquidator "bank insolvency" rather than "bank liquidation".

Our answers to questions 3.23 and 3.24 are as follows:

3.23) Do you consider that where part of a failing bank's business is transferred to a bridge bank, a special bank administration procedure may be required to deal with the residual company?

We agree.

3.24) Do you think that the special bank administration procedure should be confined to the residual company where a partial transfer is effected to a bridge bank or should it also apply, with any necessary modifications, where a partial transfer is effected to a private sector institution?

We consider that it should apply only as long as the split is reflected in a bridge bank and a residual bank.

Overview and Objectives

We are in general agreement with these sections, and our answers to questions 3.25 and 3.26 are as follows:

3.25) Do you agree that the special bank administration procedure should have specific objectives?

Yes.

3.26) Do you agree with the objectives and their priorities as proposed above? In particular do you agree that the objective of supporting the bridge bank should take priority?

Yes.

Grounds for Commencement

Our answers to questions 3.27 and 3.28 are as follows:

3.27) Should the grounds for commencing or applying for special bank administration be linked to the partial transfer of assets and liabilities to a bridge bank?

Yes.

3.28) Should any other grounds be included in the legislation?

No.

Appointment of a special Bank Administrator

Under the administration procedure set out in Schedule B1 to the Insolvency Act, appointment of an administrator is usually out of court; but it is still possible for appointment to be by court order. This contrasts with the parallels set out in paragraph 3.97. We cannot see that there would be any real disadvantage in appointment being by the Bank of England; and since only the Bank of England could appoint, it may not be necessary to retain the power of the court to appoint at all. Our answers to questions 3.29 and 3.30 are as follows:

3.29) Should the special bank administration procedure be commenced by an order of the court or initiated automatically by the direct appointment of a special bank administrator by the Bank of England?

We consider it should be initiated automatically by the direct appointment of a special bank administrator by the Bank of England.

3.30) Should the special bank administrator be an officer of the court, or in the interest of promoting the objectives of the SRR should he or she be subject to overall direction by the Bank of England, with the court ruling on any disputes arising in the resolution?

He or she should be subject to overall direction by the Bank of England, with the court ruling on any disputes arising in the resolution.

Moratorium

We find paragraph 3.104 puzzling. In the first place, we are not clear why the special bank administrator should require the leave of the Bank of England to permit legal processes that an ordinary administrator can permit without any such sanction. As long as the statutory objectives referred to in paragraphs 3.88 to 3.91 are properly drafted, we consider that the special bank administrator should be trusted to give such permission only in pursuit of those objectives; and that a requirement for the sanction of the Bank of England might cause delay which could actually prejudice achievement of the objectives. In the second place, since no winding-up order can be made while there is an administrator in post, we cannot see what the effect of requiring the consent of the Bank of England for the making of such an order is supposed to be.

Our answer to question 3.31 is as follows:

3.31) Are the moratorium provisions outlined above sufficient for the purposes of the special bank administration procedure? If not, what additional measures would be required?

As set out above, we consider that the requirements proposed for the consent of the Bank of England are unnecessary. Otherwise, we consider that the provisions outlined are sufficient.

We hope the suggestion in the first sentence of paragraph 3.108 that powers and actions of the special bank administrator would require the sanction of the Bank of England goes no further than providing that the Bank of England should fulfil the functions of the initial creditors' meeting and of the creditors' committee. Provided the statutory objectives are clear enough, an insolvency practitioner should be trusted to exercise powers in their pursuit. Sometimes this may involve moving very fast, and there is a risk that excessive control over particular decisions could actually jeopardise achievement of the objectives. On the other hand, the restrictions proposed in paragraph 3.109 make sense.

We are not so clear about giving the special bank administrator the powers of a liquidator set out in paragraph 3.110. As we understand it, the object of the special bank administration is to ensure that, after the split of the bank, the solvent part can continue to enjoy support from the rest to the extent that could have been expected before the split (see paragraphs 3.57 and 3.58). Since the company before the split would not have enjoyed these powers of a liquidator, we cannot see that they are required to achieve the objectives of the special bank administration. Our answers to questions 3.32 and 3.33 are accordingly as follows:

3.32) Do you think that the existing powers of an administrator would be sufficient for the purposes of special bank administration?

Yes.

3.33) Should the special bank administrator be given any additional powers, including some or all of the powers of a liquidator outlined above? If so, what extra powers to you consider would be appropriate?

We do not consider that the special bank administrator should need any additional powers.

Role of the Bank of England

We are in general agreement with paragraphs 3.112 to 3.115. But it follows from what we have said above in comment on paragraph 3.108 that we think great care must be taken to limit the scope of the actions which are to be subject to the Bank of England's sanction (as suggested, for instance, in the penultimate bullet point in paragraph 3.115).

3.34) Do you agree that the Bank of England should have a key role to play in the special bank administration procedure to facilitate the successful resolution of a bridge bank and to assist in the winding up of the residual company in the interests of its creditors generally?

Yes.

Position of Creditors

Given the objectives of the special bank administration, the modifications to the role and rights of creditors in paragraphs 3.116 to 3.119 are probably the minimum necessary. Set-off on the other hand, dealt with in paragraph 3.120, is a very complex issue indeed. Because of the split of the original bank, creditors may be affected severally where set-off affects their own claims, and will certainly be affected collectively to the extent that the effect of the split on set-off has affected the size of the insolvent estate. The criterion must be so far as possible to compensate creditors for any shortfall from what they should have obtained in a winding up of the whole, ignoring the split. Our replies to questions 3.35 to 3.39 are as follows:

3.35) Should the Bank of England rather than an initial meeting of creditors be responsible for considering and agreeing to, with or without modification, the special bank administrator's proposals?

Yes.

3.36) Should the Bank of England rather than creditors fulfil the functions of a creditors' committee?

Yes.

3.37) Should the rights of creditors to challenge the conduct of the procedure be subject to restrictions to ensure that the principal objectives are not jeopardised?

Yes.

3.38) Do you agree that there should not be any substantial change to the ordinary statutory order of priority of creditors in the special bank administration procedure?

Yes.

3.39) Should any special provisions relating to statutory set-off be introduced within a special bank administration procedure?

Set-off must be looked at based on the position before the split of the bank, and any adverse effects of the split on creditors be eliminated so far as possible.

End of the Procedure

The two bullet points in paragraph 3.121 set out the circumstances in which the special bank administration is no longer needed for its particular objectives. We consider that there should be a requirement on the Bank of England to notify the special bank administrator when any of those circumstances have come about; and it should then be the duty of the special bank administrator to proceed as though the procedure were an ordinary administration, and close it at the appropriate time and in the appropriate manner. We do not see why he should require the permission of the Bank of England to do so. We are mindful of the analogy of the bank insolvency procedure, where, when the claims of depositors have been dealt with, the bank liquidator is to conduct it as an ordinary liquidation.

3.40) Do you agree that the procedure should only be terminated where the Bank of England provides consent?

No. Once its special objectives have been achieved, or are no longer capable of achievement, the administrator should deal with it as an ordinary administration, without any need of sanction from the Bank of England.

3.41) Do you think that provisions should be made for a variety of ways to bring the procedure to a close, including conversion to ordinary insolvency procedures?

We think that at that stage it should be treated so far as possible as an ordinary administration, so yes.

TEMPORARY PUBLIC SECTOR OWNERSHIP

We have no specific comment on this section, or on question 3.42.

COMPENSATION ARRANGEMENTS

The point is recognized in paragraph 3.134 that compensation due to an insolvent entity will be enjoyed by its creditors rather than by its owners. We have already commented on the calculation and adequacy of compensation, and on the concept of the bank resolution fund, in what we have said above on paragraphs 3.63, 3.64, and 3.67 to 3.76; and in our answer to question 3.14. We would reiterate that we do not consider that the bank resolution fund as proposed would always provide adequate compensation. We consider therefore that a compensation scheme order might be needed even in some cases where a bank resolution fund was in place. We note that this appears to be provided for in Clause 25 in the case of a transfer to a bridge bank; but not in Clause 26 in the case of a transfer into temporary public sector ownership. We have more detailed comment on Clauses 25 and 26 below.

We have no further comment on this section, or on questions 3.43 to 3.45. We give, however, the following answers to questions 3.46 to 3.50:

3.46) Do you agree mechanisms for compensation and appointing an independent valuer in the circumstances set out above?

Yes, but we think that it should be possible to have a compensation scheme order, and therefore an independent valuer, in the case of a transfer into temporary public sector ownership, even if there is a bank resolution fund in place.

3.47) Do you agree with the proposals to confer specific powers on an independent valuer, and the nature of the powers described above and provided for in draft clause 28?

Yes.

3.48) Do you agree with the principles of valuation set out in draft clause 30?

Yes.

3.49) Do you agree that the Treasury should have power to provide for the reconsideration of the independent valuer's determination and appeals from the valuer to a court or tribunal?

Yes.

3.50) Do you agree that alternative compensation arrangements are needed for a private sector purchaser tool, that would not involve an independent valuer?

Yes, provided that the arrangements referred to in paragraph 3.147 for a challenge to the price at which the transfer was made were sufficiently robust.

INDUSTRY CONTRIBUTION TO THE COST OF RESOLUTION

Objective 3 as set out in Clause 4 is of course the protection of depositors. It is clear at several points in the document that it is expected that protection will normally be afforded by their being transferred to or left in a solvent entity. In the bank insolvency procedure this is specifically reflected in Clause 42 (3). No depositor compensation will then be payable, but there may be other creditors left in an insolvent entity, and worse off than they would have been in a winding up of the whole bank with all creditors paid *pari passu* (referred to below as "a normal winding up"). To the extent that such other creditors have suffered a shortfall from what they could have expected in a normal winding up, after taking into account compensation otherwise obtainable, the making up of the shortfall should be regarded as a cost of the resolution. Because the FSCS will have been exonerated from payment of depositor compensation, it is reasonable for that cost to be among those to be borne by the FSCS within the limits outlined. Our answers to questions 3.51 and 3.52 are accordingly as follows:

3.51) Should any of the costs described above not be covered by the FSCS, under the Authorities proposals? Please explain why.

We see no reason why they should not all be covered.

3.52) Are there any additional costs of resolution which could be borne by the FSCS?

Yes, additional compensation to non-depositor creditors in the circumstances described above.

Chapter 4: SRR Tools: Bank Insolvency Procedure

We have indicated at the head of our comments why it would be preferable to call this procedure "the bank liquidation procedure"; and highlighted paragraphs 3.58 and 3.83 as points where, because of the proposed introduction of the special bank administration procedure, the use of the general term "insolvency" for what is in fact a liquidation can only cause confusion.

In addition to our comments on this Chapter, see throughout our comments below on the draft Clauses.

Entry into the Bank Insolvency Procedure

The reason for having a special procedure under a bank liquidator is depositor protection. Therefore the procedure is only available where there are eligible depositors. This is clear from Clause 39, but not expressly in paragraphs 4.8 to 4.15. Subject thereto, and to our detailed comments below on the Clauses concerned, our answer to question 4.1 is as follows:

4.1) Do you agree with the provisions for entry into the bank insolvency procedure, as set out in draft clauses 30 to 41, 60 and 62?

Yes.

Bank Liquidator -- Appointment and Objectives

We are in general agreement with paragraphs 4.16 to 4.18 on Appointment, and the related Clauses.

We consider some of the paragraphs on Objectives somewhat misleading in emphasis when compared with the draft Clauses. Paragraphs 4.19 and 4.20 make it look as though payment of compensation to depositors is primary, whereas Clause 42(3) makes it clear that the primary means of protection of depositors is transfer to a solvent institution (admittedly financed by the FSCS). The last sentence of paragraph 4.20 is particularly inconsistent with Clause 42(3). And the expectation expressed in paragraph 4.22 that work on both Objectives would commence immediately seems rather feeble as an expression of the express obligation placed on the bank liquidator in Clause 42(6). In both cases we prefer the wording of the draft Clauses, which we think better express the intention. Our answer to question 4.2 is as follows:

4.2) Do you agree with the provisions for the appointment and objectives of the bank liquidator, as set out in draft clauses 37, 42, 46 and 47?

Yes.

Bank Liquidator -- Powers and Responsibilities

As made clear below in our comments on Clause 66 we do not agree with the unprecedented requirement that a Scottish bank liquidator should use the Insolvency Services Account; particularly as no corresponding change is suggested for dealing with unclaimed dividends under Section 193 of the Insolvency Act. Apart from that, we are in general agreement with paragraphs 4.24 to 4.28 and with the related Clauses. Our answer to question 4.3 is accordingly as follows:

4.3) Do you agree with the provisions for the powers and responsibilities of the bank liquidator, as set out in draft clauses 47, 48, 61, 63 and 66?

Yes, except that we do not agree with requiring a Scottish bank liquidator to use the Insolvency Services Account.

Liquidation Committee

We agree with the proposed special constitution of the committee while depositor protection is ongoing, but think that thereafter the liquidation should be run as much like an ordinary liquidation as possible (a point made expressly in paragraph 4.32). Consequently, as made clear in our comment below on Clause 44(6), we do not agree with the provision compelling the committee to have an odd number of members. Our answer to question 4.4 is accordingly as follows:

4.4) Do you agree with the provisions for the liquidation committee, as set out in draft clauses 44 and 45?

Yes, except that we think that attempting to ensure that the committee has an odd number of members, after the depositors have been fully protected, should be left to the bank liquidator as in any other winding up.

End of the Procedure, and secondary Legislation

We agree with what is said in paragraphs 4.32 to 4.36, and in the related Clauses, and our answer to question 4.5 is as follows:

4.5) Do you agree with the provisions for the end of the bank insolvency procedure, as set out in draft clauses 50 to 58?

Yes.

Chapter 5: Building Societies and other Issues of Scope

We are in general agreement that Building Societies should be dealt with similarly to banks, but that the differences in their legal structure require separate, parallel procedures. Paragraphs 5.29 to 5.31 suggest that this would extend to a separate but parallel insolvency procedure for Building Societies (and indeed that such a procedure would deal more generally with their insolvency problems). But, as pointed out in our first comment below on the draft Clauses, on Clauses 2 and 34, the express exclusion of Building Societies from the definition of a bank in Part 1 is not reflected in Part 2; so that it would appear that the bank insolvency procedure as it stands could be used for a Building Society. We suggest that this is a mistake.

We have no specific comments on questions 5.1 to 5.8 on Building Societies. We agree on what is said on deposit takers, and in particular what is said in relation to banks which are part of larger corporate groups; and our answer to question 5.9 is as follows:

5.9) Do you agree that the Government should legislate to enable the Treasury to create, alter or nullify contracts between group companies, and introduce duties for group companies (where necessary) to cooperate with the use of those powers?

Yes.

COMMENTS on the DRAFT CLAUSES set out in ANNEX A

Clauses 2 and 34: We note that building societies are not included in Part 1, as they are expressly excluded from the definition of "bank" in Clause 2; although Chapter 5 indicates that analogous provision should be made to cover them; but that they are not so expressly excluded from the definition of "bank" in Clause 34, which suggests that they can be made subject to the bank insolvency procedure under Part 2. This does not seem to be consistent with paragraphs 5.29 to 5.31, which suggest a separate if parallel procedure.

Clauses 4(7), 9(3) and 10(4): We note that the term "public funds" as used in Clause 9(3) is defined, but not expressly as used in Clause 4(7). We wonder if this is an oversight.

Clauses 5 and 6: Code of practice: We note that Clause 5(1) provides that the code of practice should cover both the use of the stabilisation powers and the use of the bank insolvency procedure. We are not clear whether any of the matters on which by clause 5(2) the code must in particular provide guidance relate to the bank insolvency procedure. We consider that, so far as guidance on the bank insolvency procedure is concerned, the list of those who by Clause 6(1) must be consulted should be expanded to include some means of consulting the insolvency profession; possibly by adding the Joint Insolvency Committee to the list. The same would apply to any guidance to be given on the special bank administration procedure referred to in paragraphs 3.80 to 3.122.

Clauses 25 and 26: We note that under Clause 25, if there is a transfer to a bridge bank, there will be a resolution fund order which may include a compensation scheme order and/or a third party compensation order. Under Clause 26, on the other hand, if there is a transfer to temporary public ownership, there will either be a compensation scheme order or a resolution fund order; and it does not appear that the latter may include the former, although either may include a third party compensation order. While we recognize the availability in any event under both Clauses of a third party compensation order, we consider that to give full flexibility it ought to be possible to include a compensation scheme order in a resolution fund order made under Clause 26.

Clauses 39(4) and 40(2): We do not understand why, if the court may not make a bank insolvency order unless it is satisfied "that Grounds B and C of section 39 apply", it is not required that the Secretary of State should be satisfied that Ground C applies before applying for such an order.

Clause 44(6): It is certainly desirable that a liquidation committee should have an odd number of members, and a liquidator will usually seek to achieve that result; but it is not clear why, when the procedure has effectively become an ordinary winding up, there should be a requirement for an odd number when there is no such requirement in any other winding up. The provision that the committee should cease to exist if it has an even number of members is likely to cause more problems than it solves.

Clause 47(4)(e) and (f): In winding up generally, there is a distinction between "the commencement of winding up" and the date when a company "goes into liquidation" only in a liquidation by the court which has not been preceded by a voluntary liquidation. Although Clause 41 is headed "Commencement", the text does not refer to the commencement of bank insolvency but only to when the order is to be "treated as having taken effect". If that is intended to be the definition of commencement, perhaps the point should be made expressly. We take it that Clause 33(2)(a) means that a bank enters bank insolvency on the date of the order, and that references in the Insolvency Act to "going into liquidation" are to be so interpreted.

Clause 47(4)(h): We consider this to be too generally worded. The intention is that it should pick up references to the company being wound up and apply them to the bank. But the provisions set out in the Table contain other references to "a company" which should not be interpreted as references to the bank. An example would be the reference in section 131(3)(d) to "a company which is, or within that year was, an officer of the company" where it is "the company" which must be interpreted as meaning the bank; but if "a company" were interpreted also as a reference to the bank the result would be nonsense. We think that subparagraph (h) should be amended to read "a reference to the company being wound up is a reference to the bank".

Clause 47: Table of applied Provisions: We have the following further comments on the particular provisions referred to:

Section 169: We are unclear why subsection (1) should be disapplied.

Section 190: We think it is for consideration whether the exemption from stamp duty should be expressly applied to the share transfer power and the property transfer powers under the procedure.

Clause 48: We note that these are the powers of an administrator which it was proposed should be added to those of a liquidator, since these are paragraphs 7, 12, and 13 of Schedule 1 to the Insolvency Act. It does not seem to us, however, that it could be suggested that a liquidator lacked those powers; and fear that expressly adding them may have the effect of excluding other powers of a liquidator which are not expressly given by the Insolvency Act.

Clause 66: We note the recognition in paragraph 4.28 that use of the ISA "would be a fairly significant change in Scotland". While we appreciate the justification given in paragraph 4.27 that a requirement to deposit funds with the Bank of England would "offer security in the event of a general crisis in the banking industry", we are not convinced that this justifies a change to the arrangements in Scotland for liquidations generally: arrangements which, so far as we are aware, have never caused problems such as those foreshadowed here. Moreover, we note that no such change is made by Clause 47 to the application of section 193 of the Insolvency Act. We consider that the normal banking arrangements for liquidations in Scotland should apply.

"Winding up" and "winding-up": Hyphenation is not consistently applied in the draft Clauses. The correct usage is that "winding up" is a noun ("voluntary winding up") and "winding-up" is an adjective ("winding-up order"). This corresponds to the pronunciation. In the following instances the draft clauses appear to be at fault:

In Clause 41(2)(a) "winding up order" should be "winding-up order".

The title to Clause 60 "Voluntary winding-up" should read "Voluntary winding up" (the text of the clause is correct).

In Clause 62(2) "winding up order" should be "winding-up order" (but "voluntary winding up" in the next subclause (2) is correct). The same applies in Clause 62(5)(b) (wrong) and (c) (correct).

Other instances appear to be correct.

Insolvency Practitioners Association
11 September 2008