

A weak vessel? Why the insolvency regime for partnerships and LLPs is failing to protect the salvage or diminish the number of wrecks

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Abstract

In the 19th century, during the passage of what would become the Bankruptcy Act 1883, the objects of a good bankruptcy law were stated to be 'the honest administration of bankrupt estates, with a view to the fair and speedy distribution of the assets', 'to improve the general tone of commercial morality, to promote honest trading, and to lessen the number of failures' - more pithily summarised as being 'to protect the salvage, and also to diminish the number of wrecks'.¹ However, in contrast to the continuing success of the 19th and early 20th century legislation governing solvent partnerships and LLPs,² and despite a similar statement of aims in the Cork Report a hundred years later,³ the laws governing insolvent partnerships and LLPs today fail to achieve these tasks, not least because of the under-theorisation of those laws. The root of the problem is that they are founded on legislation drafted for companies and individuals, and this is inappropriate, in theory and in practice, to partnerships and LLPs. The result is that partnership and LLP insolvency laws remain, as the law governing insolvent partnerships was noted to be in 1882, in a state "for which nobody has yet given an intelligible reason".⁴ They consequently require substantial and wide-ranging reform to improve their transparency, omit or adapt inappropriate concepts, clarify decisionmaking procedures, and remove partnership winding up and partner disqualification from their ambit.

1 Introduction

The Insolvent Partnerships Order 1994⁵ (IPO), which applies in England and Wales, is, as is widely acknowledged, a deeply flawed piece of legislation: the court in *Official Receiver v Hollens*⁶ described it as 'very far from straightforward even for those familiar with insolvency law and practice'. Other commentators have described it as 'an indigestible patchwork of provisions',⁷ 'a morass of referential drafting',⁸ 'hideously complicated',⁹ 'difficult to comprehend',¹⁰ and 'far from accessible' so that it was 'no wonder that the unrepresented bankrupt partners [in *Hollens*] were mystified by most of the proceedings'.¹¹ The insolvency provisions of the Limited Liability Partnerships Regulations 2001¹² (LLP

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¹ Joseph Chamberlain MP, President of the Board of Trade, HC Deb 19 March 1883, vol 277, cols 816-912.

² There are currently 413,000 partnerships (BEIS, 'Business population estimates for the UK and regions 2017: detailed tables', Table 3 <<https://www.gov.uk/government/statistics/business-population-estimates-2017>>), 45,000 limited partnerships and 60,000 LLPs (Companies House, 'Companies Register Activities 2016/2017, Table 1 <<https://www.gov.uk/government/publications/companies-register-activities-statistical-release-20162017/companies-register-activities-2016-2017>>).

³ Insolvency Law and Practice: Report of the Review Committee (Cmnd 8558, 1982) (Cork Report), para 198.

⁴ Sir Frederick Pollock, *Essays in jurisprudence and ethics* (Macmillan 1882) 100 p96.

⁵ SI 1994/2421.

⁶ [2007] EWHC 753 (Ch) [2007] Bus LR 1402 [29] (Blackburne J).

⁷ Roderick I'Anson Banks, *Lindley & Banks on Partnership* (20th edn, Sweet and Maxwell, 2017) para 27-01.

⁸ Mark Blackett-Ord and Sarah Haren, *Partnership Law* (5th edn, Bloomsbury 2015) para 22.2.

⁹ David Milman, *Personal Insolvency Law, Regulation and Policy* (Ashgate 2005) 110.

¹⁰ Elspeth Berry and Rebecca Parry, *The Law of Insolvent Partnerships and Limited Liability Partnerships* (2015 Wildy, Simmonds & Hill) para at para 1.1.

¹¹ Geoffrey Morse, *Partnership and LLP Law* (8th edn, OUP 2015) para 8.02.

¹² SI 2001/1090.

Regulations), which apply throughout the UK, are, if not equally deficient, substantially so. Given this, the question that must be asked is what value, if any, they add. In providing an answer, this article will distinguish between the value of those provisions designed to rescue the business as a going concern, and thus 'diminish the number of wrecks'; and those designed to facilitate the break up of the business, and thus 'protect the salvage'. It will argue that the rescue procedures - voluntary arrangements and administration (although administration is not solely a rescue procedure, rescue being only one of its three possible objectives¹³) - are worth retaining despite their flaws, because they have the potential to achieve a variety of valuable aims and because partnership law itself provides no alternatives. In contrast, the unnecessary complexity and cost of the break up procedures - liquidation and joint partner bankruptcy - prevent them succeeding in their potential aims, and they should cease to apply to partnerships because better alternatives exist.

The extent of the deficiencies is unsurprising when it is considered that the IPO and the LLP Regulations are based on laws designed not for partnerships or LLPs but for companies and individuals (principally the Insolvency Act 1986 (IA 1986), the Insolvency (England and Wales) Rules 2016¹⁴ (Insolvency Rules) and the Company Directors Disqualification Act 1986 (CDDA 1986)), and that these laws themselves suffer from substantial defects which have been discussed at length elsewhere.¹⁵ These defects include lack of fairness (both as between the business and its creditors, and as between creditors), accountability (including failure to deter management incompetence or misconduct, and to incentivise creditors to monitor management), cost effectiveness and efficiency; and an overall lack of clarity in the conceptual underpinnings and the values pursued, including the balance to be struck between efficiency and fairness, and between rescue and asset distribution. So an already shaky legislative foundation has been used for business vehicles which are very different from those for which it was intended, without any thought having been given to whether this is appropriate or necessary for partnerships or LLPs at all. This raises the fundamental question of why company procedures should be applied to partnerships or LLPs, given that these are very different vehicles. It is true that LLP members have limited liability¹⁶ and in that respect are akin to companies but, as this article will demonstrate, many of the underlying principles and much of the practical detail of the legislation are inappropriate to both partnerships and LLPs or unnecessary. This parallels the problem of small private companies having to 'suffer' regulation designed for large public companies;¹⁷ but the distinctions between partnerships or LLPs, and companies, or individuals, are even greater than those between private and public companies.

First, partnerships and LLPs are defined as two or more persons carrying on business together with a view of profit.¹⁸ Thus partners and LLP members both

¹³ IA 1986, Sch 2, para 3, applied without modification to both partnerships and LLPs by the IPO, art 6 and the LLP Regulations, art 5.

¹⁴ SI 2016/1024.

¹⁵ See, for example, Vanessa Finch and David Milman "Insolvency Law: Perspectives and Principles" (3rd edn, CUP 2017), pp369, 448-449, 508, 533, 576-577 and Ch 10, John Tribe, 'Crystal balls and insolvency: what does the future hold?' (2012) 23(12) ICCLR 405, Sandra Frisby, 'Insolvency Law and Insolvency Practice: Principles and Pragmatism Diverge?' (2011) 64 Current Legal Problems 349, John Armour, Audrey Hsu and Adrian Walters, 'Corporate Insolvency in the United Kingdom: The Impact of the Enterprise Act 2002' (2008) 5(2) ECFR 148, Vanessa Finch, 'The Recasting of Insolvency Law' (2005) 68(5) MLR 713, Adrian Walters, 'Personal Insolvency law after the Enterprise Act: an Appraisal' (2005) 5(1) JCLS 65, Justice, 'Insolvency law: An agenda for reform' (1994) Ch 7 and David Milman, 'Insolvency Act 1986: how not to legislate' (1986) 7(5) Comp Law 178.

¹⁶ Limited Liability Partnerships Act 2000, s1(4).

¹⁷ The Company Law Review Steering Group, 'Modern Company Law for a Competitive Economy' at x.

¹⁸ Partnership Act, s 1(1) and the Limited Liability Partnerships Act 2000, s 2(1).

own and manage the business and their roles therefore differ fundamentally from those of company directors or members as enshrined in law (although not necessarily in practice in instances where a small company is owned and run by the same person or few people). This is reflected in their different decisionmaking processes, based on one vote per person in a single tier of decisionmaking, and significant problems are caused by the failure of the insolvency legislation to recognise this difference, as discussed below. (Ironically, Scottish partnerships, which do have separate personality,¹⁹ are dealt with under (Scottish) bankruptcy legislation (see further below).

Second, unlike companies or individuals, partnerships are not entities but aggregates. Unfortunately, although '[a]n English partnership does not have separate legal personality....insolvency law treats it to some extent as if it did'²⁰ and the application to a partnership of terminology and concepts designed for an entity is therefore often confusing or indeed meaningless, which causes substantial problems.

Third, partners, unlike company members, are personally liable for the debts of the business.²¹ This necessitates a very different approach to matters such as the priority of debts and sanctions in the event of wrongdoing. It also means that an individual partner's finances and solvency cannot be viewed in isolation from those of his co-partners, and yet the IPO often does exactly that, because of its foundation on legislation designed for companies or individuals. This again parallels corporate problems, because insolvency law fails to enable assets and liabilities of an 'enterprise group' – two or more legal entities linked together by some form of control or ownership²² – to be consolidated while respecting the rights of separate creditors,²³ and thus 'singularly fail[s] to accommodate... the management of enterprise groups'.²⁴

These significant differences lead to manifold practical and legal problems, which are discussed below. However, as this article will demonstrate, they also mean that the theories developed to underpin insolvency law do not fit well with the realities of partnerships or even LLPs, because those theories have been developed for companies (and, to the limited extent that they consider individuals,²⁵ have focused on consumers rather than entrepreneurs²⁶), and partnership- or LLP-specific theories have not been developed. The result is that partnership and LLP insolvency legislation is under-theorised.

This article will therefore first examine the company insolvency theories and their implications for partnership and LLP insolvency law. It will then analyse the defects in the legislation which result from the failure to recognise the significant differences between partnerships and LLPs as compared to companies, and from the consequent under-theorisation of the legislation. Some of these defects

¹⁹ Partnership Act 1890, s4(2).

²⁰ Hamish Anderson, 'Insolvency Focus' (1994) 91(18) LSGaz 7 December 1994.

²¹ Partnership Act, s9

²² UNCITRAL Working Group V (Insolvency Law), 'Legislative Guide on Insolvency Law (2010) A/CN.9/WG.V/WP.92 para 2.

²³ Henry Peter, 'Insolvency in a Group of Companies, Substantive and Procedural Consolidation: When and How?', Ch 17 in Henry Peter, Nicolas Jeandin and Jason Kilborn (eds), *The Challenges of Insolvency Law Reform in the 21st Century* (2006, Schulthess) and Stephen J Taylor, 'Practical Difficulties in Handling Group Insolvencies', Ch 22 in Peter et al, *ibid*.

²⁴ Roy Goode, *Principles of Corporate Insolvency Law* (4th edn, Sweet and Maxwell 2011) para 1-28.

²⁵ For example, Milman 2005 n9.

²⁶ See, for example, Johanna Niemi, Iain Ramsay and William C Whitford, *Consumer Credit, Debt and Bankruptcy: Comparative and International Perspectives* (2009, Hart) and Joseph Spooner, 'Seeking Shelter in Personal Insolvency Law: Recession, Eviction and Bankruptcy's Social Safety Net' (2017) 44(3) J Law & Soc 374.

pervade the legislation while others are specific to particular procedures, but for each this article will assess what, if any, improvements could be made to render the legislation effective. Next, it will consider what properly theorised and justified partnership and LLP insolvency laws would look like, and how they could be achieved in practice. Finally, a conclusion will be drawn as to how policymakers and the legislature should respond in order to ensure that partnerships and LLPs are provided with the necessary legislative support while unnecessary and often counterproductive regulation is removed.

2) Applying company insolvency theories to partnerships and LLPs

As this section will demonstrate, it is difficult to apply company insolvency theories to partnerships or even LLPs; and to the extent that they can be applied, they dictate different outcomes, in the form of different insolvency laws to those currently enacted. In particular, although they may justify the availability of procedures designed to preserve the business as going concern, they do not justify the detail of those procedures and, further, may render redundant the procedures for the break-up of a business which cannot be rescued and the application of the disqualification regime. A detailed account of these theories is beyond the scope of this article, and in the interests of brevity the following discussion draws substantially on both Finch's summary of the theories, and that of Keay and Walton.²⁷

One of the most influential company insolvency law theories is that of creditors' wealth maximisation, which suggests that insolvency law should ensure that the return to creditors is maximised.²⁸ However, in the context of insolvent partnerships, this theory is essentially irrelevant because the automatic availability to partnership creditors of partners' personal assets implements the theory of creditors' wealth maximisation without any need to invoke insolvency law at all. To some extent, the personal liability imposed by partnership law (although not LLP law) also implements the hypothetical creditors' bargain version of this theory, whereby creditors are to be put in the position that they would have bargained for with the debtor had they done so before entering into the transaction with him;²⁹ although it can be argued that where a firm is insolvent despite the personal liability of its partners, insolvency procedures may be needed to protect creditors generally against ad hoc recovery by particular creditors from partnership or personal assets.

Alternative theories which reflect the fact that there are other stakeholders in the business, such as employees and those who benefit from goods or services supplied by the firm or from the spending power of its employees, are also problematic.³⁰ This is because they can only with difficulty be adapted to reflect the fact that partners and LLP members themselves (and thus their families) are significant stakeholders because of their capital contributions and, in the case of partners, personal liability, and their role as managers and workers in the business. Thus,

²⁷ Vanessa Finch, 'The Measures of Insolvency Law' (1997) 17(2) OJLS 227, 230-234 (substantially reproduced in Vanessa Finch and David Milman, *Corporate Insolvency Law: Principles and Practice* (3rd edn, CUP 2017) pp28-41) and Andrew Keay and Peter Walton, *Insolvency Law: Corporate and Personal* (4th edn, Jordans, 2017) 24-30.

²⁸ Thomas E Jackson, 'Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain' (1982) 91(5) Yale LJ 857 and Goode n24 para 2-15; see further Finch n27 230-234 and Keay and Peter Walton n27 25-36.

²⁹ Jackson n28, Thomas E Jackson and Robert E Scott, 'On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditor's Bargain' (1989) 75(2) Va L Rev 155 and Rizwaan Jameel Mokal, *Corporate Insolvency Law: Theory and Application* (OUP 2005), Ch 2; see further Finch 1997 n27, 230-234 and Keay and Walton n27, 25-26.

³⁰ Karen Gross, *Taking Community Interests into Account in Bankruptcy: An Essay* (1994) 72(3) Wash ULQ 1031 and Donald Korobkin, 'Rehabilitating Values: a Jurisprudence of Bankruptcy' (1991) 91 Colum L Rev 717.

neither the contractarian approach which examines the bargain which a range of stakeholders would reach pre-insolvency,³¹ nor the communitarian theory which suggests the redistribution of assets according to the interests of these stakeholders,³² are appropriate to determine the content of insolvency law on the breaking up of partnerships or LLPs. Nonetheless, they do support the availability of rescue procedures, as do critiques of the creditor wealth maximisation theory. These value preserving the business as a going concern rather than breaking it up for creditors, in order to protect other stakeholders given that debts are intended to be repaid from income not capital and it is not normally the assets alone that produce income but the business as a whole, including its personnel and network of relationships.³³ The forum theory, which suggests that the aim of insolvency law is simply to provide a forum for the airing of all interests,³⁴ also has less application to partnerships or LLPs, in which management and ownership are already combined, and in particular to partnerships given partners' personal liability. The ethical theory, which takes into account the situations of the debtor and the creditor, and the moral worthiness of the debt,³⁵ is also much less relevant given partners' personal liability and the risk to partners' and LLP members' capital and livelihoods. The ethical theory has also been criticised more generally as lacking both legal certainty and justification as to why ethics should determine the content of insolvency law when they do not underpin other areas of law.³⁶

A multiple values approach combining several rationales³⁷ - for example the Cork Report's statement of aims³⁸ - is the most attractive, although the relative weighting of these values can be problematic and will differ for partnerships or LLPs as compare to companies or individuals. These aims include early diagnosis and treatment of insolvency; protection of the insolvent, creditors and other stakeholders; prevention of conflicts between creditors; efficient realisation and honest and fair distribution of the assets; protection of viable businesses; ascertaining the causes of the insolvency, with punishment where justified - in other words, protecting the salvage and diminishing the number of wrecks. They also include, as the Cork Report³⁹ acknowledged in the insolvency context, and the DTI⁴⁰ and the Company Law Review Steering Group⁴¹ (CLRSG) concluded in the wider corporate context, commanding universal respect and observance and achieving a system that is 'simple and easily understood', 'free from anomalies and inconsistencies' and 'capable of being administered efficiently and economically'. Unfortunately, as this article will demonstrate, the laws governing insolvent partnerships and LLPs fail to achieve these aims.

In assessing the success of the IPO and the LLP Regulations in fulfilling these multiple aims, it is unfortunately not possible to consider the take-up levels of any of the insolvency procedures by partnerships or LLPs because, predictably, figures are not available for them. Bankruptcy statistics do not distinguish between the joint bankruptcy of partners and other bankruptcies, statistics on partnership and LLP winding up are included within the company statistics, as are

³¹ Donald Korobkin, 'Contractarianism and the Normative Foundations of Bankruptcy Law' (1993) 71 Texas L Rev 541; see further Finch 1997 n27, 234-236.

³² Elizabeth Warren, 'Bankruptcy Policy' (1987) 54(3) U Chi L Rev 775 and Gross n30; see further Finch 1997 n27 239-238 and Keay and Walton n27 27-28.

³³ Finch 1997 n27 231-234.

³⁴ Korobkin 1991 n30 772.

³⁵ Philip Shuchman, 'An Attempt at a "Philosophy of Bankruptcy"' (1973) 21 UCLA L Rev 403; see further Finch 1997 n27 230-234 and Keay and Walton n27 29-30.

³⁶ Finch 1997 n27 239-240.

³⁷ Finch 1997 n27 240 and Keay and Walton n27 28-29.

³⁸ n3 para 198.

³⁹ n3 para 198.

⁴⁰ DTI, 'Modern Company Law for a Competitive Economy: Consultation Paper' (March 1998).

⁴¹ n17 at xi and paras 1.15-1.22.

statistics on LLP voluntary arrangements (LLPVAs) and LLP administrations, and no statistics at all are kept on partnership voluntary arrangements (PVAs) or partnership administrations.

3 Pervasive problems

a) The legislation lacks transparency and thus accessibility

The insolvency legislation applicable to partnerships and LLPs is so lacking in transparency - in the sense of being comprehensible to businesses and their professional advisors - that the likelihood of it being used at all, and thus of it achieving any of its aims, is seriously compromised. To the extent that it is used at all, the lack of transparency will increase inefficiency and cost, and hamper the protection of viable businesses and the achievement of fairness to creditors, partners or LLP members, and other stakeholders. This is particularly ironic given the aims of the Cork Report and the CLRSG discussed above.

Difficulties are caused, first, by the form of the legislation. It is not clear why the legislature chose to apply IA 1986⁴² by order to insolvent partnerships, rather than to include a codified partnership chapter within IA 1986, or provide a fully standalone option; or why, when LLPs were introduced, it chose to apply IA 1986 to them similarly through the LLP Regulations.⁴³

Although the IPO sets out in full those provisions of IA 1986 and CDDA 1986 which it specifically modifies, it does not set out the many provisions which it applies without modification (other than generic modifications of terminology) and it is therefore necessary to constantly cross refer to IA 1986 or CDDA 1986, as well as to the Insolvency Rules. Further, the two IPO winding up procedures which involve partner bankruptcy concurrently with partnership winding up require cross-references to be made both to the corporate winding up provisions of IA 1986 on which partnership (and corporate partner) winding up are based, and to the bankruptcy provisions on which individual partner bankruptcy is based.

Extensive internal cross-referencing within the IPO is also required: as the court in *Official Receiver v Hollens*⁴⁴ noted,

'Understanding how the scheme works is not assisted by its mode of presentation, namely a series of articles each applying and, by reference to separate Schedules, modifying various provisions of the 1986 Act. The process of understanding is made more difficult by the fact that some of the articles provide for modifications to the 1986 Act by reference to modifications introduced by other articles so that it requires much cross-referencing and, at a practical level, much thumbing through the pages of the 1994 Order to establish just what the schedule of modifications is which is to apply to the particular insolvency proceedings.'

To add to the confusion, there is no consistency across the seven different partnership insolvency procedures⁴⁵ as to whether and how a particular provision of IA 1986 is specifically modified, applied without modification (other than terminology), or not applied at all. This is particularly confusing where the same winding up provisions are applied differently to partnerships and corporate partners, and where the same bankruptcy provisions are applied differently to partners jointly and partners concurrently with partnership winding up.

⁴² IA 1986, s420.

⁴³ LLP Regulations, Reg 5 and Sch 3.

⁴⁴ n6 para 29.

⁴⁵ Voluntary arrangements, administration, winding up by creditors or partners and with or without concurrent partner insolvency petitions, and joint partner bankruptcy.

Further, although the LLP Regulations modify IA 1986 and CDDA 1986 much less radically than does the IPO, they are even less transparent because they do not set out modified sections in full, but only list inserted or deleted words, and the numbers of omitted sections, so constant cross references have to be made.

A second source of difficulty, which again begs the question why the IPO and the insolvency provisions of the LLP Regulations were adopted in preference to separate codified chapters in IA 1986 or fully standalone options, is the separation and subordination of the insolvent partnership and LLP legislation to IA 1986 and CDDA 1986. This means that when that primary legislation is amended – for example by the Small Business and Employment Act 2015 (SBEEA) – it is rarely made clear how and when, or indeed if, such amendments apply to partnerships or LLPs. Thus, where the IPO or the LLP Regulations apply the primary legislation without modification, changes to that primary legislation automatically apply to partnerships or LLPs without any consideration having been given to whether those changes are appropriate. Equally, where the IPO sets out a modified provision of the primary legislation, changes to the underlying primary legislation will (presumably) not apply, again without any consideration as to whether this is appropriate. And although the LLP Regulations merely explain modifications, there is no guarantee that the modification as applied to the new primary provision will make sense. Thus, firms face a lack of clarity long after the primary provisions for companies or individuals have been enacted, and risk being subject to a nonsensical mix of original and updated IA 1986 and CDDA 1986 provisions. For example, when the Enterprise and Regulatory Reform Act 2013 (ERRA) reformed the IA 1986 bankruptcy provisions, to allow debtors to initiate their bankruptcy by applying to an adjudicator rather than the court, it failed to clarify whether these reforms apply to partnerships. Although it might have been assumed that, in the absence of an express legislative carve-out, reforms to debtor-initiated bankruptcy would apply to the two IPO procedures which involve partner-initiated partner bankruptcy (joint bankruptcy, and individual bankruptcy concurrently with partnership winding up on a partners' petition), the Insolvency Service has confirmed that neither will become subject to the new adjudication regime.⁴⁶

A related problem is that where the IPO or the LLP Regulations apply whole Parts or ranges of sections of the primary legislation, it is not clear whether this automatically applies any new section inserted into such Parts or ranges in the primary legislation (or removes any section deleted). For example, although Art 16 IPO applies ss6–10 CDDA 1986 to partnerships, it was enacted prior to the insertion by the Enterprise Act 2002 of ss9A–9E⁴⁷ and by the SBEEA of ss8ZA–8ZE⁴⁸ and so it remained unclear until the enactment of amendments to the IPO in 2017,⁴⁹ whether partners could be disqualified in these circumstances.⁵⁰ Even then, although the IPO was amended to expressly include modified versions of ss8ZA–8ZE, the amendments only confirm obliquely, by re-enacting the reference to ss6–10, that ss9A–9E apply (unmodified) to partnerships.

As a result, partnership and LLP insolvency legislation lacks transparency, simplicity or clarity, and thus lacks accessibility.⁵¹

b) Company terminology and concepts are not transposed effectively

⁴⁶ Confirmed by the Insolvency Service in a letter to the author dated 12 September 2014.

⁴⁷ Disqualification for competition infringements.

⁴⁸ Disqualification of persons who exercise influence over a disqualified person.

⁴⁹ Insolvency (Miscellaneous Amendments) Regulations 2017, SI 2017/1119.

⁵⁰ Berry and Parry n10 para 10.1.6.

⁵¹ See further Elspeth Deards [Elspeth Berry], 'Partnerships: when the view is no longer of profit' (1995) 4(2) Nott LJ 165.

The lack of legislative transparency is exacerbated by the pervasive failure throughout the IPO and, to a lesser extent, the LLP Regulations, to appropriately adapt IA 1986 and CDDA 1986 terminology and concepts to partnerships and LLPs, with the result that it is often unclear how (or indeed if) particular provisions apply. This impedes the potential effectiveness of the insolvency procedures and their ability to protect viability businesses and achieve fairness for all concerned. It creates substantive difficulties for firms, their creditors, and their insolvency practitioner (IP) in determining if, when, and how the insolvency procedures can be invoked, how the partners or members, creditors, or IPs should proceed and, ultimately, what the results will be for all concerned.

For example, although the IPO defines a member of a partnership as including both partners (i.e. persons carrying on business in common with each other with a view of profit⁵²) and persons held out as partners (i.e. persons who represent themselves or allow themselves to be represented as a partner and who are consequently personally liable to third parties who have relied on the representation⁵³) (together referred to in this article as 'partners' in order to avoid confusion with LLP members),⁵⁴ it does not define the term 'director'. Art 3 IPO provides that expressions appropriate to companies are to be construed as references to the corresponding persons appropriate to a partnership, which presumably includes partners since they carry on the business⁵⁵ and have the right (in default of contrary agreement) to manage it,⁵⁶ but it is unclear whether it includes persons held out as partners since, by definition, they are not partners and are thus unlikely to have a management role analogous to directors (including shadow⁵⁷ or de facto directors⁵⁸). It is therefore impossible for those held out as partners to be certain of their responsibilities and liabilities in an insolvency.

A related problem is caused by the IPO's definition of an 'officer' of a partnership not only as a 'member' of it (defined as above) but also as any person who has management or control of its business.⁵⁹ Thus it can include those who are neither partners nor held out as such, and this extension of the burdens imposed by IA 1986 beyond those persons normally encompassed by partnership law is both unnecessary and, given that the definition of an officer of an LLP is restricted to LLP members,⁶⁰ unfair.

Similarly, it is impossible for those who might be regarded as LLP members for the purposes of insolvency legislation to accurately predict or ascertain their rights, duties and liabilities in an insolvency, because the LLP Regulations do not define 'members'. It might be assumed that the term includes anyone registered as a member, but the Supreme Court in *Clyde & Co LLP and another v Bates van Winkelhof* held that registered 'members' who are in fact employees cannot in law be members,⁶¹ while recent tax changes have resulted in some registered members being treated as employees for tax purposes,⁶² and in *Polegoshko and*

⁵² Partnership Act, s1.

⁵³ Partnership Act, s14.

⁵⁴ IPO, Art 2.

⁵⁵ Partnership Act, s1.

⁵⁶ Partnership Act, s24(5).

⁵⁷ Insolvency Act, s252.

⁵⁸ *Re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180, 183 and *Holland v Commissioners for HMRC and another* [2010] UKSC 51, [2010] 1 WLR 2793.

⁵⁹ IPO, art 2.

⁶⁰ LLP Regulations, Reg 4(1)(g).

⁶¹ [2014] UKSC 32, [2014] 1 WLR 2047.

⁶² Finance Act 2014, s 74 and Sch 17, Pt I.

*others v Ibragimov and others*⁶³ the court ordered rectification of the register of LLP members on the grounds that it did not reflect the reality of the ownership of the LLP.

The term 'contributory' is also problematic. In relation to partnerships, it is both redundant and a source of confusion. It is redundant because the 'corresponding persons' provision in Art 3 IPO means that contributories are likely to be the same as those who would, in any event, incur personal liability to partnership creditors as a matter of partnership law.⁶⁴ It is confusing because this is not clearly stated, and indeed both of the IA 1986 definitions (for unregistered companies, which is how partnerships are treated for the purposes of winding up under the IPO, and for registered companies) are applied.⁶⁵ Further, although the IPO provides that a partner against whom an insolvency order has been made concurrently with a winding up petition against the partnership is not to be treated as a contributory unless the contrary intention appears,⁶⁶ it is not clear what would indicate 'contrary intention' in these circumstances or what the impact of this would be since the effect of partnership law is that a partner's personal assets are automatically available to the partnership creditors. This unnecessary confusion could be avoided by stating in the IPO that references to contributories are omitted.

The term contributory is also problematic in relation to LLPs. Sections 74 and 79 of IA 1986 are modified so that a contributory is defined as every present or past LLP member who is liable to contribute to its assets on winding-up, and they are liable to do so if they have so agreed.⁶⁷ However, it would be unusual for an LLP member to enter into such an agreement and, furthermore, a past member will only be liable if the obligations arising from such an agreement survive his departure from the LLP.⁶⁸ It is therefore entirely possible that there will be no contributories to a particular LLP;⁶⁹ and the scope for unnecessary concern on the part of LLP members, and confusion on the part of the IP or creditors would be reduced, if the LLP Regulations instead defined a contributory as a current or former LLP member who has agreed to make a contribution on winding up or any other contribution which remains unpaid.

c) Internal decisionmaking procedures are uncertain

A third pervasive problem throughout both the IPO and the LLP Regulations is that although the insolvency procedures adopted from IA 1986 variously require the partners, the LLP, or the LLP members, to take decisions about whether to invoke a procedure in the first place, and how and when to exercise the choices to be made subsequently, the IPO and the LLP Regulations frequently fail to specify how such decisions are to be taken. This again reduces the potential efficiency of the procedures and thus their ability to protect viable businesses or achieve fairness for creditors, partners or LLP members, and other stakeholders.

⁶³ [2015] EWHC 1669 (Ch), [2015] All ER (D) 273 (Jun).

⁶⁴ I.e. general partners (Partnership Act, s 9) and those liable as such under s14 of the Partnership Act, former general partners to the extent of debts or obligations incurred while they were partners (Partnership Act, s 17) and limited partners (except in a PFLP) to the extent of any withdrawn capital (Limited Partnerships Act, s 4(2)); see further Berry and Parry n10 para 1.4.6.

⁶⁵ IA 1986, s 226, as applied by the IPO, arts 7, 8 and 9, and s 221(5), as modified by the IPO Sch 6, para 4, and IA 1986, s79 as applied by IA 1986, s 221(5) as modified by the IPO, Sch 3, Pt I, para 3/Sch 4, Pt I, para 3/Sch 5, para 2/Sch 6, para 4.

⁶⁶ IA 1986, s221(2), as modified by the IPO, Sch 4, Part 1, para 3 and Sch 6, para 4.

⁶⁷ IA 1986, ss 74 and 79, as modified by the LLP Regulations, Sch 3.

⁶⁸ John Whittaker and John Machell, *The Law of Limited Liability Partnerships* (4th edn, 2016 Bloomsbury) 31.21.

⁶⁹ Berry and Parry n10 para 1.4.6.

Where the legislation requires decisions to be taken by 'the members' of a partnership or LLP, or by 'the LLP', decisionmaking by a single partner or LLP member is evidently precluded,⁷⁰ but it is unclear whether unanimity is required or whether a majority (and what sort) is sufficient. Partnership and LLP law both provide that, subject to contrary agreement, 'ordinary matters' are decided by a majority but unanimity is required in order to admit a new partner or member or change the nature of the firm's business.⁷¹ In so far as this distinguishes between day-to-day decisions and decisions that affect the firm more fundamentally, it could be argued that a decision to invoke insolvency proceedings in the first place is more likely to constitute the latter,⁷² but subsequent decisions are often administrative and ordinary, and ascribing a different meaning to the same term in different contexts would be confusing.

Majority decisionmaking derives support from the fact that many of the corresponding decisions in company insolvency - for which the provisions were designed - are taken by the directors,⁷³ who normally act by majority, while those taken by shareholders only require a majority (and often only a simple majority).⁷⁴ The IPO itself enables a single partner to petition for winding up;⁷⁵ and the Partnership Act similarly enables a single partner automatically to dissolve the partnership in the absence of contrary agreement,⁷⁶ or to apply procedures for judicial dissolution,⁷⁷ in both cases usually leading to winding up. The LLP Regulations envisage majority decisionmaking in respect of one insolvency-related decision, the sale of the LLP's business or property, which they expressly state may proceed despite a member not voting in favour of the LLP's decision.⁷⁸ Whittaker and Machell⁷⁹ argue that the common law rule applicable to decisionmaking by corporate bodies⁸⁰ applies to LLPs, which are corporate bodies,⁸¹ by virtue of the provision in Reg 7 that the mutual rights and duties of the LLP and its members are determined by the Regulations 'subject to the provisions of the general law and to the terms of any [LLP] agreement'. This rule would dictate that, in the absence of contrary agreement, a majority is sufficient, although it does not assist where the decision is required to be taken by the LLP members rather than the LLP.

However, para 105 of Sch B1 to IA 1986, which allows directors to act by majority in relation to administration, is explicitly excluded from the application of Sch B1 to partnerships and LLPs,⁸² and in *Patley Wood Farm LLP v Brake and another*⁸³ the court considered the fact that Parliament had chosen to make express provision for majority action by directors but not for partners supported the view that a majority would not suffice. This judgment and the legislative

⁷⁰ By way of exception, a partners' winding up petition may be brought by 'any partner', subject to the fulfillment of certain criteria (IA 1986, s 221A(1) and (2), as inserted by the IPO, Sch 5, para 2).

⁷¹ Partnership Act, s 24 and the LLP Regulations, Reg 7.

⁷² Morse n11 para 5.23, *Lindley & Banks* n7 paras 27-155 and notes 674 and 741, and Blackett-Ord and Haren n8 para 22.75.

⁷³ For example the proposal of a CVA (IA 1986, s 1).

⁷⁴ Insolvency Rules, rule 2.36 provides that unless there is contrary provision in a company's articles, a resolution is to be regarded as passed if voted for by a simple majority of those members voting.

⁷⁵ IA 1986, s221A as modified by IPO Sch 5, para 2, and IA 1986 ss124 and 264 as modified by IPO Sch 6, para 2.

⁷⁶ Partnership Act, ss 26 and 32.

⁷⁷ Partnership Act, s35.

⁷⁸ IA 1986, s 111(2) as modified by the LLP Regulations, Sch 3.

⁷⁹ Whittaker and Machell n68 paras 17.12 and 17.15. See also Berry and Parry n10 para 7.3.1.

⁸⁰ *Merchants of the Staple of England v Governors of the Bank of England* (1887) 21 QBD 160 (CA) 165 (Wills J). See also *The York Tramways Company Limited v Willows* (1881-82) LR 8 QBD 685 (CA) 698 (Brett LJ) and *Attorney General v Davy* (1741) 2 Atkyns 212, 26 ER 531.

⁸¹ Limited Liability Partnerships Act 2000, s1(2).

⁸² IPO, Sch 2, para 39 and the LLP Regulations, Sch 3.

⁸³ [2016] EWHC 1688 (Ch), [2017] 1 WLR 343.

provisions on which it turned apply only to administration. However, it is not clear why, as a matter of principle, a different approach should be taken to administration, and it may be that unanimity is required in all cases where the legislation refers to decisionmaking by 'the partners' or by 'the LLP' (which is the term used in the LLP Regulations in relation to the decision to enter administration). This then raises the question of whether the choice of the term 'the LLP' or 'the LLP members', used variously in the LLP Regulations in relation to decisionmaking, is intended to reflect a distinction between decisions requiring unanimity and those only requiring a majority, or whether the legislators simply overlooked the fact that LLPs do not have two tiers of decision-makers analogous to company directors and shareholders.

Decisions required to be taken by a specified proportion of partners, LLP members, or contributories, by reference to their value or voting rights, raise equivalent difficulties. Rule 2.35 of the Insolvency Rules states that the value of a member for the purpose of voting is to be determined by reference to the number of votes conferred on him by the company's articles; and Art 3 IPO provides that expressions appropriate to companies are to be construed in relation to a partnership as references to the corresponding partnership documents, while Reg 5(2)(e) of the LLP Regulations provides that references to the articles of a company shall include reference to the LLP agreement. Thus, if a partnership or LLP agreement lays down the voting entitlement of each partner or LLP member, this will determine their 'value' for the purposes of Rule 2.35. However, unlike companies, neither partnerships nor LLPs are legally required to have an agreement and, since neither can register any agreement which they do have, disputes frequently arise as to the content of the agreement. Further, any agreement is unlikely to give voting rights to those merely held out to third parties as partners – who are included in the definition of partner for IPO purposes – unless they are also salaried partners or similar, and thus regarded for internal partnership purposes as partners. Equally, although contributories may include former partners or LLP members, it is unlikely that any agreement will make provision for their voting rights. In the absence of agreement, it may be that the default provisions under s24 of the Partnership Act or Reg 7 of the LLP Regulations for one vote per partner or LLP member apply.⁸⁴ Alternatively, the reference to their 'value' may be taken as referring to their relative capital contributions, but this would be problematic because there is no legal requirement to contribute capital and, in the event of disagreement as to the amounts actually contributed, the default provisions in s24 or Reg 7 provide that partners or members share equally in the capital of the firm,⁸⁵ which could result in them being taken to have interests of equal value for voting purposes.

The incoherence of the existing framework means that the safest approach is for all decisions to be taken unanimously, but this is not always practicable. If there is an agreement which specifies the manner in which decisions under the insolvency legislation are to be taken, a court may uphold this – but it may instead prefer a particular interpretation of the insolvency legislation. Partners and LLP members therefore face uncertainty and the risk of their decisions being challenged. A more reliable solution would be for the IPO and the LLP Regulations to be amended to specify that a simple majority is sufficient but, consistently with partnership and LLP law, to specify also that this is subject to contrary agreement by the partners or members.

4 Problems with particular insolvency procedures

⁸⁴ Berry and Parry n10 para 3.7.

⁸⁵ Partnership Act, 24(1), and LLP Regulations, Reg 7(1).

In addition to the problems which, as discussed above, pervade the IPO and the LLP Regulations, there are further defects specific to particular insolvency procedures. These will now be examined.

a) Rescue procedures are less effective than they should be

Difficulties arise in relation to both of the IA 1986 rescue procedures as they apply to partnerships - PVAs and partnership administration (insofar as administration is a rescue procedure⁸⁶) - because the provisions for companies have been applied without the modifications necessary to reflect the ways in which partnerships differ from companies. First, a PVA only applies to partnership assets and not to the separate assets of partners, and there is no formal procedure for linking a PVA with a partner's own individual or company voluntary arrangement (IVA or CVA). This is a significant flaw because partners are jointly and severally liable for the debts of the partnership.⁸⁷ It would be preferable for formally linked voluntary arrangements for partners to be available as this would improve the viability and efficiency of a PVA by enabling partners' assets to be taken into account, so reducing costs and increasing both creditor protection and the likelihood of the business surviving. This would clearly be possible within the scheme of the IPO, and indeed it already allows for multiple winding up proceedings or bankruptcies to be linked.

Second, an application for partnership administration may be granted by the court only on the ground that the partnership is unable to pay its debts⁸⁸ and not, unlike a company or LLP, also on the ground that it is likely to become unable to pay its debts. This is contrary to one of the aims set out in the Cork Report, the early diagnosis and treatment of insolvency.⁸⁹ Although pre-emptive action could be argued to be less important for partnership creditors than for company or LLP creditors, since partnership creditors also have recourse to partners' personal assets,⁹⁰ it is correspondingly more important for partners themselves than for company or LLP members that when the business is in imminent danger of being unable to pay its debts, it can access assistance as soon as possible. The interests of employees, suppliers and other stakeholders also require the IPO to be amended to offer partnerships the earliest opportunity to enter administration.

A third problem for partnerships, which could prevent administration succeeding in protecting the business as a going concern or protecting its creditors, is that the moratorium which applies during administration has two significant gaps. First, although the moratorium prevents judicial dissolution of the partnership⁹¹ and thus consequent winding up under the Partnership Act, a dissenting partner can still sabotage an administration if the partnership is 'at will' (i.e. if the partners have not agreed a fixed duration) simply by giving notice of his departure to the other partners,⁹² which triggers dissolution and, potentially, winding up under the Partnership Act. This is because giving such notice is unlikely to constitute a 'legal process' which would be prohibited by the moratorium,⁹³ or to constitute a 'management power...which could be exercised so as to interfere with the exercise of the administrator's powers' which would be prohibited as an interference with the administrator's functions unless he

⁸⁶ IA 1986, Sch 2, para 3, applied without modification to both partnerships and LLPs by the IPO, art 6 and the LLP Regulations, art 5.

⁸⁷ Partnership Act, s9 and Civil Liability (Contribution) Act 1978, s3.

⁸⁸ IA 1986, Sch B1, para 11 as modified by the IPO, Sch 2, para 5.

⁸⁹ n3 para 198.

⁹⁰ Deards [Berry] n51.

⁹¹ IA 1986, Sch B1, para 42 as modified by the IPO, Sch 2, para 17.

⁹² Partnership Act, s 26.

⁹³ IA 1986, Sch B1, para 43 as modified by the IPO Sch 2, para 18, and para 44.

consented.⁹⁴ Of course, from the partnership law perspective this is not problematic at all, because it is an established tenet of partnership law that a partner should be able to leave the partnership and realise his share of its assets at any time unless the partners have agreed to the contrary.⁹⁵ However, a clear statement in the IPO is needed to highlight the fact that partnership law prevails over the application of company insolvency law in this respect. A second gap in the moratorium is that although it protects the partnership assets, partners' personal liability means that their private assets may still be subject to proceedings by partnership creditors. This results from the failure of the legislature to acknowledge one of the defining differences between companies and partnerships (although not LLPs) - namely limited liability. It could be filled by individual partners utilising IVAs and corporate partners utilising CVAs or company administration, if a formal procedure for linking these procedures with partnership administration were to be included in the IPO. As noted above in relation to the equivalent gap in relation to PVAs, the addition of such a procedure would be consistent with the existing IPO procedures for linking insolvency procedures.

b) Partner bankruptcy provisions lack clarity

Unfortunately, the procedures which might be expected to 'protect the salvage' on the break-up of a business - bankruptcy and liquidation - are even more flawed than the rescue procedures.

Starting first with bankruptcy, it has already been noted that individual insolvency is under-theorised compared to company insolvency and that the minimal literature focuses on consumers rather than entrepreneurs.⁹⁶ The result is that partnership bankruptcy is under-theorised. Insofar as bankruptcy law is generally intended both to provide a cost efficient mechanism for the recovery of debts and to rehabilitate the debtor,⁹⁷ its administrative costs are relatively high in general,⁹⁸ and the rehabilitative potential of the two partnership bankruptcy procedures in particular - joint bankruptcy of all partners, and partner bankruptcy concurrently with partnership winding up - is automatically reduced because the IPO does not apply IA 1986 provisions on debt relief for bankrupts.⁹⁹ In contrast, in Scotland both a partnership and its partners (although not LLPs or their members) can apply for debt relief because both partnerships and individual partners are dealt with under the personal insolvency legislation (discussed further below).¹⁰⁰

A further problem is that there is an inherent tension between the aim of consolidating proceedings so that the entirety of the property owned by the partners, whether personal property or partnership property, is administered jointly, and the need to separate the partnership estate and individual partner estates to accommodate the different priorities to achieve overall fairness in the

⁹⁴ IA 1986, Sch B1, para 64. See further Elspeth Berry, 'Limited partners behaving badly: insolvency procedures and other options for general partners when limited partner default' (2009) 24(11) BJBFL 660.

⁹⁵ Partnership Act, ss26 and 32; see further *Lindley & Banks* n7 paras 9.01-9.05.

⁹⁶ See the sources noted at n13.

⁹⁷ Milman 2005 n9 3-5.

⁹⁸ Milman 2005 n9 140-141.

⁹⁹ IA 1986, Part VIIA 1986, which makes provision for debt relief orders is not applied by the IPO, Arts 8, 10 or 11.

¹⁰⁰ Laura Borland, 'Partnership insolvency: Scotland vs England and Wales' *The Gazette*, 16 June 2015 www.thegazette.co.uk/insolvency/content/100114 accessed 5 March 2018 and the Accountant in Bankruptcy, *The Debt Arrangement Scheme (DAS) Debtor Information Booklet Business DAS* paras 1.1-1.2 <<https://www.dasscotland.gov.uk/sites/default/files/publications/DAS%20debtor%20booklet%20-%20Business.pdf>> accessed 5 March 2018.

payment of joint and separate debts.¹⁰¹ This has resulted in legislation which lacks clarity and accessibility and poses potentially serious difficulties in identifying the bankruptcy estate for the purposes of getting it in and distributing it correctly. The modified provisions of IA 1986 contained in the IPO refer separately to the property/estates of partners and those of the partnership;¹⁰² for example, once joint bankruptcy orders are made, a trustee is appointed of the partners' estates and of the partnership.¹⁰³ However, the IA 1986 sections which are applied without modification refer only to the debtor's property/estate. Since the debtors are the partners, not the partnership, the partnership property/estate will not be covered by those unmodified sections unless the partners are treated as owning their shares of the partnership property.¹⁰⁴ In a partnership winding up with concurrent partner bankruptcy this cannot be the case since partnership property is dealt with by the partnership winding up, but in a joint bankruptcy the position is less clear. The IPO's own definition of a partner's estate, which is the same for both procedures is confused. It provides that a partner's separate estate includes all property vested in him but excludes any property which he holds in trust for another.¹⁰⁵ This seemingly excludes partnership property since it is owned by the partners as trustees for themselves beneficially,¹⁰⁶ a partner having no entitlement to any specific assets but merely an interest in partnership property which can only be realised through an action for a partnership account.¹⁰⁷ However, the same provision also excludes business and household property insofar as they are not partnership property,¹⁰⁸ and the latter qualification is redundant if the partner's estate excludes partnership property in any event. The fact that the joint bankruptcy provisions in the IPO do not separately define the partnership estate might indicate that the partners' separate estates are intended to include it, but the concurrent bankruptcy and winding up provisions also fail to separately define it even though that procedure requires it to be dealt with separately through partnership winding up. In any event, both sets of provisions also refer to 'partnership property' and this is defined in the IPO (albeit by reference to the definition in ss20-21 of the Partnership Act which itself lacks clarity and has consistently given rise to disputes¹⁰⁹). A possible solution would be to insert an additional provision in relation to joint bankruptcy only, stating clearly that the partners' separate estates do not include the partnership estate but that it will be got in by the same trustee and according to the same bankruptcy provisions. This would enable differentiation when distributing the estates and provide consistency with the same provisions applicable to concurrent bankruptcy, while at the same time ensuring that no property is missed.

A further example of the legislative mess and resulting practical problems caused by the failure to properly transpose the provisions designed for individual bankruptcy to joint partner bankruptcy, is provided by the grounds for annulment of bankruptcy orders. Three of the IA 1986 grounds are applied by the IPO to

¹⁰¹ IA 1986, so 328–328D, as modified by the IPO, Sch 7, para 21. See further Johan J Henning, 'the dual priorities rule and the Insolvent Partnerships Order of 1994' (2010) 31(5) Comp Law 131.

¹⁰² For example, IA 1986, s 290(3) as modified by the IPO, Sch 7, para 9.

¹⁰³ IA s293 as modified by IPO, Sch 7, para 11.

¹⁰⁴ For example, IA 1986, s 286 on the appointment of an interim receiver in order to protect the bankrupt's property.

¹⁰⁵ IA 1986, s 283 as modified by the IPO, Sch 4, Pt II, para 28 and Sch 7, para 7.

¹⁰⁶ Partnership Act, s 20. Land can only be 'owned' by a partnership through the mechanism of between two and four partners holding it on trust for all the partners (Law of Property Act 1925 and s 34, the Trustees Act 1925, s 34).

¹⁰⁷ *Popat v Shonchhatra* [1997] 1 WLR 1367 (CA) 1372 (Nourse LJ). See further Morse n11 paras 6.03-6.11.

¹⁰⁸ IA 1986, s 283(2) as modified by the IPO, Sch 7, para 7.

¹⁰⁹ For example, *Miles v Clarke* [1953] 1 All ER 779 (Ch), *Robinson v Ashton* (1875) 20 Eq 25 and *Waterer v Waterer* (1873) LR 15 Eq 402 (Ch).

joint bankruptcy¹¹⁰ but the fourth, annulment because of the existence of an IVA, is not.¹¹¹ It is not clear whether this was omitted intentionally – a possibility supported by the fact that the IPO also makes no provision for annulment where a PVA is in place - or whether the omission of both is an error – a possibility supported by the fact that such omissions would seem to defeat the aim of the insolvency legislation to facilitate voluntary arrangements. The latter argument might persuade a court to annul a joint bankruptcy order where an IVA or PVA is in place, but it is clearly unsatisfactory that partners, creditors and IPs cannot be certain which procedure will prevail.

c) Winding up provisions also lack clarity

Of all the insolvency procedures based on IA 1986, the IPO suffers from its most pronounced problems in relation to winding up, to the extent that its provisions are largely unusable and thus unable to effectively 'protect the salvage'. Thus, any improvements in efficiency or fairness which it might potentially provide are unlikely to materialise. Complications start with the provision of four routes to partnership winding up by the court under the IPO, according to whether the petition is presented by the partners or the creditors, and whether concurrent petitions are also presented against the partners. These complications are then exacerbated because each route is governed by a different IPO Article which, misleadingly, purports to identify which sections of IA 1986 apply to the particular route, and whether these are modified, but does not actually do so. In fact, these Articles must be consulted in tandem with s221 of IA 1986 as modified by and contained in the applicable IPO Schedule, since s221 identifies further IA 1986 provisions which are applied or excluded - not always consistently with what appears in the relevant Article. To further complicate the legislative structure, as the court noted in *Official Receiver v Hollens*¹¹² quoted above, while a different Schedule applies to each of the winding up procedures, some of the modified provisions contained in the Schedules applicable to creditors' petitions are also applied to partners' petitions. The result is that the task merely of identifying the relevant provisions in any winding up scenario is unduly difficult and time consuming.

This complicated legislative structure causes complications in the substantive law. For example, the IPO applies to partners' petitions certain modified provisions¹¹³ in Schs 3 and 4 on creditors' petitions, which conflicts with the statements in most of those provisions that they apply to petitions under Art 7 or Art 8 - i.e. creditors' petitions. The unfortunate result is that it is not entirely clear which is intended to prevail. If the modified sections do not apply to partners' petitions, then either no versions of these sections apply, with the result that there are no provisions on a number of important issues such as the functions of the official receiver, or the unmodified IA 1986 sections must apply despite not providing for the concurrent petitions procedure.¹¹⁴ The better interpretation, which supported by the current editor of *Lindley & Banks*,¹¹⁵ is that the modified sections do apply to partners' petitions, even where they are stated only to apply to creditors' petitions. Certainly, this is the only interpretation which enables the relevant provisions to apply in a way which is adapted to partnership procedures. Legislative clarification is, however, needed in order to enable partners, creditors and IPs to comply with the appropriate provisions.

¹¹⁰ The court may annul a joint bankruptcy order if it appears that the order ought not to have been made, or that the bankruptcy debts and expenses have been paid or secured, or if a criminal bankruptcy order has been made against a partner (IA 1986, s 282 applied by the IPO, art 11).

¹¹¹ IA 1986, so 261 and 263D.

¹¹² n6.

¹¹³ IA 1986, s 221 as modified by the IPO Sch 5, para 2/Sch 6, para 4.

¹¹⁴ Berry and Parry n10 para 6.4.

¹¹⁵ *Lindley & Banks* n7 at paras 27-67 footnote 311 and 27-68 footnote 330.

A second substantive problem is that although any partner may petition for the winding up of a partnership with concurrent petitions against the partners,¹¹⁶ leave of the court is required for a petition without concurrent petitions if the partnership consists of less than eight partners.¹¹⁷ This is arbitrary and unnecessarily restrictive; regardless of the number of partners, any one of them should be able to petition without applying for leave of the court to do so, as LLP members can.¹¹⁸ If there is a rationale for requiring leave in these particular circumstances – and it is not clear what this rationale would be – then at least the partners should be permitted to agree in advance that a particular majority (or all) of them may petition without obtaining leave. This would be consistent with the right of any partner (in the absence of contrary agreement) to dissolve and wind up the partnership under the Partnership Act.¹¹⁹ A further problem in relation to leave is that it may apparently only be granted by the court if the partner has served on the partnership a written demand relating to a joint debt paid by the partner, has not been reimbursed, and has obtained judgment against the partnership and taken steps to enforce it.¹²⁰ The use of the word 'and' must be a mistake, the correct word being 'or'¹²¹ and thus it being sufficient if the partner has either an unpaid demand or an unsatisfied judgment, which is the position in the underlying IA 1986 provisions for an unregistered company.¹²² However, pending legislative or judicial clarification, a partner cannot be certain when and how he can petition.

Another substantive problem is that a partnership is deemed unable to pay its debts,¹²³ which is one of the grounds for a petition for the winding up of a partnership if execution issued on a judgment against any 'person authorised to be sued as nominal defendant on behalf of the company' is returned unsatisfied.¹²⁴ However, it is not clear whether and how the concept of a such a person can apply to a partnership, since it has no intervening separate legal personality and is required by the Civil Procedure Rules 1998 to be sued in its own name unless it has no name or it is 'inappropriate' to use it.¹²⁵

There are also a number of omissions from the winding up provisions which significantly reduce its clarity and usability, such as the IPO's failure to set out the priorities for the distribution of assets where the partnership is wound up without concurrent petitions.¹²⁶ Although the priorities can be established, with some difficulty, by referring to IA 1986 and the Insolvency Rules alongside the IPO, this approach is hardly conducive to transparency and accessibility. Similarly, the government's new approach to insolvency forms, which is to set out the required content in the Insolvency Rules rather than prescribing a statutory form (although templates for certain forms are provided), casts doubt on whether those forms set out in the IPO remain valid, and yet fails to address the absence

¹¹⁶ IA 1986, s 221A(1) as inserted by the IPO, Sch 5, para 2 and so 124, 264 and 272 as modified by the IPO, Sch 6, para 2.

¹¹⁷ IA 1986, s 221A(1) and (2), as inserted by the IPO, Sch 5, para 2.

¹¹⁸ Even company shareholders can petition without leave if a special resolution has been passed (IA 1986, s 122(a)).

¹¹⁹ Partnership Act, ss 26 and 32.

¹²⁰ IA 1986, s 221A(2), as inserted by the IPO, Sch 5, para 2.

¹²¹ Blackett-Ord and Haren n8 para 22.56.

¹²² IA 1986, so 222-224.

¹²³ IA 1986, s 221(7) as modified by the IPO, Sch 3, Pt I, para 3/Sch 5, para 2 and IA 1986 s 221(8) as modified by the IPO, Sch 4 Pt I, para 3/Sch 6, para 4.

¹²⁴ IA 1986, s 224(1)(a) applied without modification by s 221(5) IA 1986 as modified by the IPO, Sch 3, Pt I, para 3/Sch 5, para 2). IA 1986, s 224 is not applied to winding up with concurrent petitions (IPO, art 8(1) and art 10(1)).

¹²⁵ SI 1998/3132, PD 7A, paras 5A.1-5A.3; see also Berry and Parry n10 para 6.5.4.

¹²⁶ Deards [Berry] n51.

of dedicated forms for a petition against a partnership without concurrent petitions (with the exception of a petition presented by a responsible IP)¹²⁷ or for a petition against an LLP. This is because neither the required content nor templates have been provided for either partnerships or LLPs. The IPO provides that '[t]he forms shall be used with such variations, if any, as the circumstances may require',¹²⁸ but Forms 5 and Form 11 expressly state that they are for petitions against the partnership 'presented in conjunction with petitions against members' and include a section for specifying the partners against whom petitions are being presented, so considerable 'variations' are required. The Insolvency Service Guidance suggests that both partnerships and LLPs can be wound up in the same way as a company, and in both cases the links in the Guidance are to the company winding up form (Comp 1); the only acknowledgement that adaptations are required is the statement that applicants to wind up a partnership will need to ask the court to wind it up as an unregistered company.¹²⁹ However, use of Comp 1 would require even greater 'variation' for partnerships; it omits the geographic eligibility criteria specified in the IPO, does not include the correct grounds for a petition against a partnership, and refers to the date of incorporation and the registered office, which partnerships do not have, and to share capital, which neither partnerships nor LLPs have. Even where the required deletion is obvious, the replacement text is not. For example, the reference to the passing of a special resolution to wind up the company needs to be deleted but, as discussed above, it is not clear what decisionmaking procedure should be substituted. Given that a new form was introduced in 2017, it is surprising that it was still not made easily adaptable for partnerships and LLPs or indeed that separate forms were not provided. The courts have previously held that the use of an incorrect form will invalidate the proceedings even where the correct form is difficult, if not impossible, to identify,¹³⁰ and although this approach may be relaxed in the light of the new policy on forms, it remains imperative that either the IPO and the LLP Regulations are amended to set out the content of the forms or dedicated templates are provided.

5 Problems with disqualification

Consistently with the aims set out in the Cork Report,¹³¹ CDDA 1986 was originally designed to disqualify company directors from managing another company where their behaviour indicated unfitness to do so. It was not designed to disqualify partners or LLP members, or to disqualify anyone from managing an LLP and, unsurprisingly, a number of problems arise from the attempt to extend its scope through the IPO and the LLP Regulations.

The first problem is to identify when the power to disqualify a partner arises. Although Art 16 IPO provides that CDDA 1986 applies where a partnership is 'wound up as an unregistered company under Part V', the modified version of s6 CDDA 1986,¹³² which enables 'the court' to disqualify an officer of an 'insolvent' partnership on grounds of unfitness, provides that a partnership becomes 'insolvent' not only if it is wound up but also if it enters administration, and accordingly defines 'the court' not only as that in which the partnership is being or has been wound up but also, where an administrator has been appointed, as any court which has jurisdiction to wind it up. As the court in *Re Carewatch*

¹²⁷ IA 1986, s 221A, as modified by the IPO, Sch 3, Pt I, para 3 specifies Form 3 in Sch 9.

¹²⁸ IPO, Art 17(2).

¹²⁹ Insolvency Service, 'Guidance: How to wind up an insolvent partnership' <<https://www.gov.uk/government/publications/how-to-wind-up-an-insolvent-partnership/how-to-wind-up-an-insolvent-partnership>> accessed 5 March 2018.

¹³⁰ *Kaupthing Capital Partners II Master LP Inc* [2010] EWHC 836 (Ch), [2011] BCC 338.

¹³¹ n3 para 198.

¹³² IPO, Sch 8.

(North Yorkshire and East Riding of Yorkshire) and Re CDDA 1986 1986, Secretary of State for Trade and Industry v Hamilton and another noted, either Art 16 or s6 must contain a drafting error.¹³³ The court held that the mistake lay in the unduly narrow choice of words in Art 16, and that the relevant parts of s6 should be ignored only if there were strong indications to this effect, which there were not. Furthermore, the purpose of the IPO was to apply the equivalent of the statutory regimes for companies, and that was not restricted to directors whose companies had gone into liquidation. The court concluded that fairness and coherence in the law required that partners be subject to the same sanctions as directors, regardless of whether insolvency was established through winding up or administration. Support for this approach may also be derived from the modified s8, which enables the court to disqualify an officer of an insolvent partnership on the grounds of expediency in the public interest but does not require the partnership to have been wound up. However, given that *Carewatch* is an unreported first instance decision, this is scarcely enough to make the position clear.

The next problem is to determine what a disqualified partner or LLP member, or indeed director, is disqualified from doing, since s1 CDDA 1986 provides for disqualification only as a company director and is applied to both partnerships and LLPs without modification. An LLP member who is disqualified under the CDDA 1986 as modified by the LLP Regulations can clearly also be disqualified from being an LLP member, because the LLP Regulations provide that references to a director include references to an LLP member. However, the Insolvency Service has gone further by stating that all disqualified persons, not just LLP members, are disqualified from acting as LLP members.¹³⁴ This accords with the aim of the CDDA 1986 to protect the public against the abuse of limited liability, and the more general aim of insolvency law to ascertain the causes of insolvency and impose sanctions the insolvent or its officers where this is merited. It therefore seems unlikely that a court would uphold a challenge by a director or partner to an order prohibiting him from acting as an LLP member. Nonetheless, it has been compellingly argued that only LLP members can be disqualified from acting as such,¹³⁵ because the LLP Regulations¹³⁶ do not modify CDDA 1986 itself, and interpreting the unmodified s1 as including acting as an LLP member when it clearly does not and when this would be to the detriment of the disqualified person would contravene the principles of legal certainty and legitimate expectation. Legislative clarification of s1 CDDA 1986 and both the IPO and the LLP Regulations on this point is therefore urgently required.

A similar question arises in relation to the possibility of disqualification from being a partner, because the IPO provides that references to a director are to be construed as including references to a partner. However, the courts have taken the view that disqualification from being a partner is not possible because disqualification is only 'from using limited liability as one of the tools of their trade'.¹³⁷ In *Re Verby Print for Advertising Ltd* the court noted that a disqualification order did not prevent a person from carrying on business but only of doing so with the privilege of limited liability, and he could therefore still trade

¹³³ (Unreported), 3 May 2005, Leeds County Court.

¹³⁴ Insolvency Service, *Effects of a Disqualification Order* (October 2015) p3 <www.gov.uk/government/publications/corporate-insolvency-effect-of-a-disqualification-order> accessed 5 March 2018. On this basis, the sanction for acting while disqualified, personal liability for the debts of the company (CDDA 1986, s 15), would presumably apply similarly to the debts of an LLP.

¹³⁵ Whittaker and Machell n68 para 37.2.

¹³⁶ LLP Regulations, Reg 4(2) and Sch 2.

¹³⁷ *Secretary of State for Trade and Industry v Ettinger, Re Swift 736 Ltd* [1993] BCC 312 (CA) 315 (Nicholls V-C). See further Berry and Parry n10 para 10.8.1.

in partnership,¹³⁸ while in *Re Westminster Property Management Ltd (No 2)* the court considered that the Court of Appeal in *Secretary of State for Trade & Industry v Collins, Re TLL Realisations Ltd*¹³⁹ had endorsed the position that disqualification did not prevent a person carrying on business as a partner.¹⁴⁰ Indeed, the sanction for breach of a disqualification order - personal liability for the debts of the business - would not impose a detriment on a partner given that he would be personally liable in any event. Accordingly, the Insolvency Service Guidance states explicitly that a disqualified person is not disqualified from carrying on business as a partner.¹⁴¹ Further, the modified version of s6 CDDA 1986 in the IPO¹⁴² only refers to unfitness 'to be concerned in the management of a company'. Finally, disqualification as a partner would be difficult to enforce given that there is no register of partnerships and that they can even be formed without the partners being aware of this.

6 Alternatives to the IPO and the LLP Regulations

The defects in the legislation, and the problems to which these gives rise, mean that the IPO and, to a lesser extent, the LLP Regulations, fail to protect creditors, firms, partners or LLP members, or other stakeholders, either by diminishing the number of businesses wrecked in the first place, or by protecting the subsequent salvage. This evident unfitness for purpose means that, as outlined above, there is a strong case for comprehensive reform of the IPO and the LLP Regulations. However, given that the government proposed the reform of the IPO as long ago as 2005¹⁴³ and nothing has come of this, and that the LLP Regulations have been amended constantly throughout their relatively short life without the insolvency issues identified above being addressed, more radical alternatives to the piecemeal reform of the existing legislation must now be considered.

a) Standalone insolvency statutes for partnerships and LLPs

One option is to replace the IPO and the LLP Regulations with self-contained insolvency statutes for partnerships and LLPs. Setting out all the relevant provisions in full in one piece of legislation would lead to greater clarity and thus efficiency, by saving partners, LLP members, and creditors, time and money. Further, it would reduce the likelihood of the legislation failing to address areas of difference between partnerships and LLPs as compared to companies or individuals. Finally, the act of drafting and enacting separate but parallel insolvency regimes for partnerships and LLPs could raise their profile so that they are not forgotten when future amendments to company and individual insolvency legislation are made. The substance of the legislation could also be improved by allowing partners and LLP members greater discretion than IA 1986 or CDDA 1986 would allow, to address as many issues as possible in their internal agreement (in particular on decisionmaking), with default provisions only in the absence of agreement. The case for this is stronger for partnerships because they are inherently more flexible and informal vehicles than companies, and are not generally subject to the burden of company law at all beyond the area of insolvency, but there is nonetheless also a case to be made for LLPs since they are considerably more flexible and informal in their governance than companies.

b) Integrating partnership and LLP insolvency into IA 1986 and CDDA 1986

¹³⁸ [1998] BCC 652 (Ch) 668. See also *Re Probe Data Systems Ltd (No 3)* [1991] BCC 428 (Ch) 434

¹³⁹ [2000] BCC 998 (CA).

¹⁴⁰ [2001] BCC 305 (Ch) 361.

¹⁴¹ Insolvency Service, *Effects of a Disqualification Order* n134 p4.

¹⁴² IPO, Sch 8.

¹⁴³ Select Committee on the Merits of Statutory Instruments, 7th report (2005), App 4.

Some of the advantages of the option of standalone partnership and LLP statutes just discussed might instead be achieved by the opposite approach, of integrating partnership and LLP insolvency provisions into separate codified chapters within IA 1986 and CDDA 1986. There is no evidence as to why this approach was not adopted in 1986 when the primary legislation and the Insolvent Partnerships Order 1986¹⁴⁴ were enacted, or subsequently when the IPO or the LLP Regulations were enacted. It seems likely that it simply reflects the failure to appreciate the significant differences between partnerships and LLPs as compared to companies, as well as the failure to anticipate the difficulties which would result from enacting secondary legislation which is not self-contained but extensively cross referenced.

In contrast to either of these approaches, Scottish partnerships (although not LLPs), which have separate legal personality, are fully integrated into personal insolvency law.¹⁴⁵ However, this approach does not allow partners the degree of discretion recommended above, and would be much more difficult for English partnerships because of the very differences which have made the adaptation of company and individual insolvency legislation to them so difficult.

c) Disapplying IA 1986 and/or CDDA 1986

A more radical alternative to either of the above options would be simply to repeal the IPO and the insolvency provisions of the LLP Regulations,¹⁴⁶ and thereby disapply IA 1986 and CDDA 1986 entirely. What of value would be lost? In relation to partnerships in particular, is it necessary to apply collective insolvency procedures at all?

Consider, first, the rescue procedures provided by IA 1986 to facilitate the continuation of the business as a going concern. The aims of a 'good modern insolvency law' according to the Cork Report include providing means for the preservation of 'viable commercial enterprises capable of making a useful contribution to the economic life of the country'¹⁴⁷ – in other words, minimising the number of wrecked businesses. The contractarian and communitarian theories discussed above also support the availability of rescue procedures, as do the critiques of the creditor maximisation theory. Further, rescue procedures are of considerable practical utility to partners in particular, because of their personal liability. Of course, rescue may be achieved informally; and even in the company context it has been observed that this can be quicker and cheaper than formal procedures, and avoids the constraints imposed by the insolvency legislation.¹⁴⁸ Thus, since neither the Partnership Act nor the LLP legislation provides mechanisms to assist a firm which finds itself in temporary financial difficulties, beyond the application to LLPs of the provisions of the Companies Act 2006 on compositions and arrangements,¹⁴⁹ it is desirable to continue to make the IA 1986 rescue procedures available to partnerships and LLPs. Admittedly, as

¹⁴⁴ SI 1986/2142.

¹⁴⁵ See further Borland n100 and Donna W McKenzie Skene, *Insolvency Law in Scotland* (T & T Clark, 1999) pp41-42, William W McBryde, *Bankruptcy* (2nd edn, W Green/Sweet & Maxwell, 1995), paras 4.20-4.24, 16.46-16.49, Accountant in Bankruptcy, *Notes for Guidance for Trustees under Protected Trust Deeds: Bankruptcy (Scotland) Act 1985 (as amended)* April 2015 paras 2.1.1-2.1.2 <https://www.aib.gov.uk/sites/default/files/notes_for_guidance_for_trustee_under_protected_trust_deed_-_april_2015_0.pdf> accessed 5 March 2018 and Business Debtline, Factsheet No.BDL14, *Trust Deeds* April 2015 p8 <<https://www.businessdebtline.org/S/factsheets/PDFs/BDL14%20BDL%20SCOT%20Trust%20deeds.pdf>> accessed 5 March 2018.

¹⁴⁶ LLP Regulations, Regs 4 and 5 and Schs 2 Pt II and 3.

¹⁴⁷ n3 para 198.

¹⁴⁸ Finch and Milman, n15 p270.

¹⁴⁹ Limited Liability Partnership (Application of Companies Act 2006) Regulations 2009, SI 2009/1804, Reg 45.

discussed above, administration is not solely a rescue procedure,¹⁵⁰ and its value to partners is somewhat diminished both because they (unlike LLP or company members) may not apply on the grounds that the partnership is *likely* to become unable to pay its debts, and because in a partnership at will any of them may defeat the rescue at any time by dissolving the partnership. However, these criticisms do not apply to LLPs and, even for partnerships, flawed rescue procedures are better than none. In any event, removing the rights of charge holders to appoint an administrator to realise their security would be likely to have a significant adverse impact on the availability of funding to partnerships and LLPs, and to be politically unacceptable. Nonetheless, the preservation of the rescue procedures could be in the form of the standalone or integrated options discussed above, rather than the IPO and LLP Regulations.

What of the protection of the salvage from an insolvency, for creditors, partners and LLP members, or other stakeholders? The involvement of IA 1986 through joint bankruptcy could be argued to be unnecessary because business debtors require less assistance and protection than consumer debtors (although admittedly sole traders can equally access bankruptcy) and because personal liability enables creditors to achieve wealth maximisation, and possibly their hypothetical bargain, without recourse to insolvency law. Further, although the consolidation of proceedings is consistent with the aims set out in the Cork Report of efficiency and preventing conflicts between creditors and ensuring that they receive an equitable distribution, and with the hypothetical creditors' bargain theory because it prevents ad hoc recovery by creditors, there is a simpler option than the joint bankruptcy procedure to achieve this. The IPO amended IA 1986¹⁵¹ to enable a court to consolidate proceedings where a bankruptcy petition is presented against any partner, although it depends on his or her partner status being drawn to the court's attention. Supplementing this with a duty on parties to notify the court that the bankrupt is a partner would be preferable to retaining joint bankruptcy, because it would enable consolidation of proceedings while avoiding the problematic IPO provisions discussed above.

It is even more difficult to defend the application of IA 1986 winding up procedures to partnerships. A partnership may be wound up relatively informally under the Partnership Act by the partners themselves¹⁵² (or by a receiver appointed by them¹⁵³ or by the court on the application of a partner¹⁵⁴), and partnership property applied in satisfaction of the firm's debts and any surplus assets distributed to the partners.¹⁵⁵ The combination of partners' personal liability for partnership debts and informal proceedings under the Partnership Act can maximise the assets available to creditors and comply with their hypothetical bargain without the need for insolvency law to intervene, because informal winding up is likely to be considerably cheaper, quicker and easier than IA 1986 procedures since it need not involve the court or an IP - the costs of whom can substantially reduce the insolvent estate to the detriment of creditors and partners.¹⁵⁶ Even where a receiver is appointed, he need not be an IP and indeed may be a partner (although, unlike IPs under the IPO, a receiver only has authority to deal with the assets of the partnership, and not those of the

¹⁵⁰ See n13.

¹⁵¹ IA 1986, ss303(2A)-(2C) as inserted by IPO, Art 14; see further Stuart J Frith, 'Avoiding the Insolvent Partnerships Order: Part 1: Consolidating individual bankruptcies (1991) 4(2) *Insolv. Int* 9-11.

¹⁵² Partnership Act, s 38. A limited partnership's affairs are wound up by its general partners unless the court orders otherwise (Partnership Act, s 6(3)).

¹⁵³ *Berry and Parry* n?? 5.8.

¹⁵⁴ See, for example, *Taylor v Neate* (1888) 39 Ch D 538 and *Berry and Parry* n10 para 5.9.

¹⁵⁵ Partnership Act, s 39.

¹⁵⁶ Justice n15 para 1.16 and Milman 2005 n9 140. In *Patley Wood Farm LLP* n83 the court noted the 'substantial costs to be paid to insolvency practitioners' in the event of liquidation or administration.

partners¹⁵⁷). IA 1986 procedures reduce partners' control and thus their input (and that of their family) as stakeholders, and so are not supported by the contractarian or communitarian theories of insolvency law. Partners' personal liability also means that the sanctions available under IA 1986 can neither incentivise nor punish them, and do not add value for creditors. It has also been suggested that firms are inhibited from using the services of an 'insolvency' practitioner under the 'insolvency' legislation and so, if winding up is to be conducted at the most appropriate time to 'increase the salvage', the Partnership Act route is likely to be more effective.¹⁵⁸ If the IA 1986 winding up procedures ceased to apply to partnerships, creditors would still be able to use it to bankrupt or wind up partners,¹⁵⁹ which would result in the realisation and distribution of their share of the partnership property. The complications caused by the IPO in this respect (as discussed above) would not arise, and the court would still be able to consolidate proceedings by virtue of the provisions of IA 1986 inserted by the IPO (discussed above in relation to bankruptcy proceedings against individual partners;¹⁶⁰ parallel provisions apply to winding up proceedings against corporate partners).¹⁶¹ Although it might be objected that the Partnership Act winding up procedure fails to take into account stakeholders other than partners and creditors, and thus does not reflect the contractarian, communitarian or forum theories, the same is largely true of the IA 1986 winding up procedures since they similarly focus on the firm, the partners and the creditors. There is therefore a compelling argument for the repeal of the IPO provisions on winding up.

Different considerations apply, however, to the winding up of LLPs because, unless LLP members have agreed to contribute to the LLP's assets on a winding up, creditors can only force them to do so if the clawback¹⁶² or other sanctions in IA 1986 are invoked. Winding up under IA 1986 is therefore likely to maximise the assets available and thus promote efficiency and fairness to creditors.

Finally, as to disqualification, the CDDA 1986 regime is intended to protect the public¹⁶³ as well as shareholders, employees, and those who trade with the business,¹⁶⁴ and is thus consistent with one of the primary objectives of insolvency law according to the Cork Report, that of investigating the conduct of insolvents and their officers and applying penalties if appropriate.¹⁶⁵ It is also consistent with the aim stated in the 19th century¹⁶⁶ of improving commercial morality. It can diminish the number of wrecked businesses by both preventing and deterring the abuse of the privilege of trading with limited liability¹⁶⁷ by LLP members. However, partners have no limited liability to abuse and, since the contractarian and communitarian theories support debtor rehabilitation, there

¹⁵⁷ *Boehm v Goodall* [1911] 1 Ch 155 (Ch).

¹⁵⁸ Insolvency Service, *The Insolvency Act 1986: CVAs and Administration Orders: a Consultative Document*, October 1993.

¹⁵⁹ IPO, Art 19(5) confirms that the IPO does not affect this. See also *Schooler v Customs & Excise Commissioners* [1995] 2 BCLC 610 (CA).

¹⁶⁰ See **n147**.

¹⁶¹ IA 1986, s168(5A)-(5C) inserted by IPO, Art 14.

¹⁶² IA 1986, s 214A as modified by the LLP Regulations, Sch 3.

¹⁶³ See, for example, *Secretary of State for Trade and Industry v Bannister* [1996] 1 WLR 118 (CA) 124 (Morritt LJ) and *Re Blackspur Group plc (No 2)* [1998] 1 WLR 422 (CA) 426 (Lord Woolf MR).

¹⁶⁴ *R v Seager (Mornington Stafford)* [2009] EWCA Crim 1303, [2010] 1 WLR 815 [67] (Aikens LJ).

¹⁶⁵ n3 para 192

¹⁶⁶ Joseph Chamberlain MP, n1.

¹⁶⁷ See, for example, *Re Grayan Building Services Ltd* [1995] Ch 241 (CA) 253-254 (Hoffmann LJ), 257 (Henry LJ) and 258 (Neill LJ), although in *Re Polly Peck International plc (in administration) (No 3)*, *Secretary of State for Trade and Industry v Ellis and others (No 2)* [1993] BCC 890 (Ch) at 895 Lindsay J noted that CDDA 1986 itself did not require the behaviour justifying disqualification to be a consequence of the privilege trading with limited liability.

should be no further sanctions on partners. The IPO provisions applying CDDA 1986 should therefore be repealed.

7 Conclusion

The procedures applicable to insolvent partnerships under the IPO are fundamentally procedures for companies or individuals, and while their adaptation might seem a plausible approach for a business vehicle which is itself part way between a sole trader and a company,¹⁶⁸ partnerships are in fact so different that such adaptation is inherently problematic. Partnerships have evolved in a different, less regulated way to companies. They occupy a different niche in the business world, allowing those who are prepared to take the risk of unlimited liability to operate their business with the minimum of regulation. Increased regulation of the type introduced by the IPO legislation is justifiable only if that law is clearly drafted and has recognised merit, criteria which are much easier to monitor if the law is properly theorised. A multiple values approach as outlined above, which may be summarised as 'protecting the salvage and diminishing the number of wrecks', in principle justifies the intrusion of IA 1986 to provide rescue procedures, albeit that the IPO lacks clarity and is based on IA 1986 provisions which have been subject to criticism as noted above.¹⁶⁹ However, the provisions on winding up, joint bankruptcy and disqualification are neither clear, nor of evident merit given the availability of clearer and simpler alternative mechanisms. If the IPO or a successor to it is to become a usable piece of legislation, it must at the very least be improved qualitatively, both in substance by remedying its various errors, omissions and ambiguities, and in form by making it much clearer exactly which provisions apply to each procedure. This would ideally involve making it an entirely freestanding statute. More radically, the provisions of the IPO on winding up, joint bankruptcy and disqualification should be repealed since they are at best unnecessary and at worst harmful, given their expense and complexity. Partnerships can be wound up informally under the Partnership Act, the courts have the power to consolidate individual bankruptcy proceedings, and partner disqualification is simply unnecessary.

The adaptation of the IA 1986 and CDDA 1986 procedures to LLPs is simpler in practice, since it involves applying corporate procedures to a corporate body. Nonetheless, those statutes are specifically aimed at companies and company directors, and LLPs and their members have significant differences to them - and indeed significant similarities to partnerships and partners - which the adaptation of company procedures and, by implication, company theories, has largely ignored. The application and modification of IA 1986 to insolvent LLPs therefore requires substantial improvement in both substance and form, as discussed above. However, the more radical alternative of disapplying the IA 1986 winding up procedures and CDDA 1986 would be inappropriate for LLPs given the risk of the abuse of limited liability, and the consequent need to offer creditors the protection of formal winding up mechanisms and the disqualification of LLP members.

¹⁶⁸ Steven A Frieze, 'Action Against Partnerships' (1995) 8 *Insolvent Intell* 33 p35.

¹⁶⁹ See the sources noted at n15.