ICAEW
REPRESENTATION 95/20

LAW COMMISSION CONSULTATION ON CONSUMER SALES CONTRACTS: TRANSFER OF OWNERSHIP

Issued 28 October 2020

ICAEW welcomes the opportunity to comment on the consultation *Consumer Sales Contracts: Transfer of Ownership* published by the Law Commission on 27 July 2020 a copy of which is available from this link.

We support the aim of protecting consumers who pay upfront in cash and lose substantial amounts of money when sellers become insolvent. But we believe the proposed reforms are more extensive than required to address this concern, are unlikely to provide a complete solution in practice, and would have adverse consequences. We do not believe that the other reasons given for the proposal are sufficiently compelling to justify this.

This response is made by the Business Law Department of ICAEW and reflects views of its Insolvency Committee, which is comprised of office taking insolvency practitioners licensed by ICAEW.

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KEY POINTS

1. We are not convinced that the problems identified in the consultation or the injustices arising in respect of cash pre-payments are of such significance that the proposed legislation is required. If legislation is pursued, we doubt that it will provide a complete solution as regards pre-paying consumers. We have specific concerns that proposals intended to compensate a small (albeit important) minority of consumers will push this cost elsewhere and that the consequences have not been fully assessed.
2. The proposal follows from the consultation on protecting consumers who prepay for goods in cash, and so are not otherwise protected on insolvency of the retailer (eg, through credit and debit card refund regimes). We would support focused and proportionate measures to address this concern, but the current proposal impacts all consumer sales of goods contracts and does not appear to take account of all the potential costs and other possible adverse impacts, so we are not convinced that it is proportionate. We consider alternative approaches at the end of this response
3. As regards consumers who pre-pay in cash, the evidence we provide on insolvency suggests that the proposed changes would not be a complete solution but would increase costs of insolvency and so reduce amounts available to other creditors. These other creditors include the taxpayer (ie, all consumers), small suppliers (who may be individuals) and finance providers who help businesses function (to the benefit of consumers and wider society). Government will need to consider whether this price is worth paying (we do not think it is).
4. Apart from seeking to protect these consumers, the proposals appear to be motivated by an over-riding desire to clarify and modernise the law driven in large part by the move to online retail. We do not believe this is sufficient reason to pursue proposals that could have adverse consequences in practice. The concrete examples given of lost cash pre-payments largely involve physical, rather than on-line, transactions and should be given limited weight in assessing changes in law applying to on on-line transactions.
5. The proposals only apply to contracts governed by the laws of England and Wales [*3.8 of the consultation*]. We query whether it is choice of law and/or location of the seller that is most pertinent. For instance, would it not be problematic where a consumer becomes the owner (under English law) of goods in possession of an insolvent seller in, say, China?
6. In assessing whether to pursue this proposal, Government should consider the relative quantity of goods subject to foreign law contracts, relevant trends (eg increasing on-line sales by companies such as Amazon) and whether the proposal would result in English law being a less attractive choice for parties (in those cases where there is free choice under other legislation impacting contract law).
7. If the proposed changes in law make it more difficult for suppliers to protect themselves through right of retention provisions or the like, demands for up-front payment from retailers may well increase and credit availability may be reduced. Government has already increased credit risk of suppliers by giving HMRC preference over floating charge holders and should consider the cumulative impact of changes law on enterprise.
8. Where we mention likely views of consumers, we are reflecting the views of those involved in preparing this response as consumers rather than providing ‘expert evidence’ of ICAEW.
9. In view of the above comments, we are not responding to many of the specific questions raised which assume the proposed legislation will be adopted but have commented on the key issues that we think need further consideration.

ISSUES ARISING

Clarity of law

10. IPs support law being clear so that they can carry out their functions in the most efficient way and provide maximum returns to creditors. If the law is unclear IPs may need to seek legal

advice and the risk of legal disputes may increase, which can add significantly to costs and reduce and/or delay returns to creditors.

11. Complex issues can arise under current law but, in the ordinary course, we do not believe that interpretation of the law on transfer of title in consumer transactions is a major concern for IPs.

12. Much of the paper focuses on the complexity and uncertainties of the Sales of Goods Act 1979 (SGA). But SGA only applies to transfer of title where the contract does not cover the point.

13. We are not providing formal evidence on contract provisions used in the market, but we have looked at a few from leading retailers and they all provide either that a contract is not formed until dispatch (or delivery) or that title passes on delivery (or dispatch). We would not be surprised if this were to be representative of general market practice; it seems a natural result. Indeed, the paper notes that ownership is 'unlikely to transfer until the goods have been dispatched' [*3.36*].

14. The paper suggests that lack of clarity in the law leaves room for interpretation, particularly for Insolvency Practitioners (**IPs**).

> While the courts might construe the law to benefit a consumer, in practice it is usually the insolvency practitioner who is interpreting the rules. As insolvency practitioners owe duties to all creditors they may be inclined to err on the side of caution and instruct shop or warehouse staff not to release such property to prepaying consumers (p/8)

IPs do owe duties to all creditors and we would not consider them to be 'erring' when they perform their statutory duties. An IP might err if they include in the insolvent estate goods that belong to a third party (eg, a consumer) (*as noted in 2.47 of the consultation*). To do so could expose the IP/estate to potential claims and additional costs. In difficult cases, IPs would typically seek legal advice.

15. In practice, we do not believe that it is generally difficult for IPs to establish who owns the relevant goods Naturally, there will be exceptions and even occasional mistakes. There is insufficient information given about the case cited above (of a ring awaiting inscription) for us to comment on that, and we would, in any case, be wary of reaching general conclusions on the basis of isolated examples. Indeed, we think that the weight attributed to the few concrete examples cited in the proposal needs to be better evaluated in general.

16. The paper suggests that the new regime might lead to minor familiarisation and training costs for IPs [*5.7*]. Familiarisation costs for IPs might not be high because IPs need to be familiar with a very wide range of laws and regulations, whether or not they are clear or simple.

17. Training costs, however, are more difficult to assess. The proposal is likely to lead to checks being required that are not needed currently (eg, where title passes on delivery). IPs can have personal liability and will take very seriously the prospect of dealing in goods that do not belong to the insolvent estate.

18. Additional costs will inevitably arise where consumers seek to exercise their new rights, whether directly or through consumer groups. IPs are likely to face considerably more queries or claims from consumers which will take time to deal with. For a solvent business, this is part of the commercial equation, but creditors of an insolvent business may not welcome the diversion of resources that would be involved. There is also a risk that consumers will not understand the possible practical shortcomings of the legal rights they have been given, with potential for misunderstanding, dispute and damage to perception of the insolvency regime.

19. We do not believe that consumers generally read primary law to understand their rights. They will generally rely on others to explain in simple terms and seek legal advice in high value cases or where there is a dispute.

20. Any legislation on consumer contracts will eventually need to be interpreted and developed by the courts and will itself become more complex in that sense. The summary of the Sales

of Goods Act (**SGA)** in the consultation is very readable and could perhaps be adapted to form an explanation of the principles of current law for those who need it.

21. We do not believe that the proposed legislation is self-explanatory. The Commission's consultation document provides additional commentary and without further explanation it seems unlikely that consumers would, for instance, know what constitutes a 'unique identifier', how to agree that goods are to be used to 'fulfil the contract' or whether they have a 'conditional sales contract' (which has a somewhat convoluted and far from plain English definition in CRA).
22. We do not think 'modernisation' justifies making substantive changes in law in this context. So, for example, we do not find the terms 'seller' and 'buyer' in SGA problematic or believe that 'trader' is more user friendly than 'seller' (indeed The Law Commission frequently refers to 'retailer' rather than 'trader' in the consultation document, as do we here).
23. The paper suggests that simplification will help retail staff understand the position, but, in para 5.8 states that 'we do not consider that retail staff would be required to understand or be trained on the changes'. We agree that staff will not typically be expected to explain the legal position to consumers.

Issues arising from ownership without possession

24. The consultation refers to reasonable expectations of consumers who have paid for goods *[2.50]*, but we doubt consumers will typically think through the implications of owning goods before they possess them. Consumers typically buy goods to use or consume and it is somewhat difficult to see why they would want title in other circumstances (unless they want to resell, ie, for speculative purposes). Rather we think that consumers expect to have some recourse when a seller does not perform its obligations.
25. As noted earlier, we see nothing unusual or unnatural in parties agreeing that title to goods transfers on delivery or dispatch and doubt that this would surprise many consumers, even if they haven't read or understood the terms applying to their transactions. Although the outcomes under current law in insolvency will be, or at least seem, 'unfair' to those adversely impacted, insolvency nearly always produces results that seem unfair to some. We do not think the Commission has made a cogent case that its proposal is 'less obviously unfair to consumers on an insolvency than the position under current law', at least in terms of likely practical outcomes of the law.[*3.36*]
26. It is proposed that the law on risk in the Consumer Rights Act (**CRA**) (by which risk generally passes on delivery) will be unchanged *[3.9]*. While it appears that retailers are currently bearing the risk of goods until delivery irrespective of when title passes, the proposal means that title will transfer earlier in more cases so that the implications of a gap between transfer of title and risk becomes more significant, so the implications for businesses might require further consideration (eg, insurance).
27. As the proposal notes, giving consumers title to goods does not solve all the problems identified.
28. If the retailer becomes insolvent, the specific ring sent by the retailer for inscription may remain uninscribed (*3.17*) or curtain unadjusted. The consumer may be better off having the goods as they are, but in some low value cases might not (it could just give rise to a problem of disposal).
29. The proposal means that consumers will own goods made to order when the rules provide (eg, they have been labelled, sent for dispatch or otherwise identified). So, they could own goods located anywhere in the country (or, indeed, the world, so long as English law applies to the contract). The proposal highlights some of the implications of this, but we do not think these issues can be left open. Legislation may be needed to clarify (so further complicating the law).
30. This is a crucial issue in the insolvency context, because the seller may no longer be functioning as a business, for instance, it may have lost all of its staff, any right to occupy or

grant access to premises, may have no money, or access to money or, therefore, ability to pay suppliers.

31. Even if it could deliver goods to consumers having title to them, any costs involved would reduce money available to pay other creditors (including consumers not having title to goods).

32. In para 3.117 of the consultation, the Law Commission says that it does not think that the proposal 'will materially increase the cost and complexity of administration' and implies that this is because the rules will be 'clear and simple'. Current law may be complex in some circumstances, but it has not generally been problematic for IPs in this context. By contrast, the proposals can be expected to increase complexity. We believe the expert comments made to the Law Commission by R3 Scottish Technical Committee *(3.115*) and others should be heeded in this respect.

33. The Law Commission focuses on the complexity of SGA, but it is unclear what proportion of consumer transactions are, in fact, potentially exposed to these complexities. The Commission acknowledges that, where contracts are not formed until delivery, the proposal will have no impact at all *[5.15].* If the contracts provide for title to transfer on delivery, the IP then knows that all goods in its warehouses or shops belong to the estate. It is not difficult. By contrast, under the Law Commission's proposal, the position would depend on how goods have been marked or set aside etc., so making it necessary for the IP to consider both the factual circumstances relating to the goods and the law (which is along the lines of SGA, even if simplified to some degree, and therefore, according to the Law Commission itself, not particularly straightforward).

34. Unless insolvency law is changed so that an IP would be required to deliver goods to a consumer holding title to the goods, it is difficult to see why an IP would incur costs to do so in many cases. Similarly, absent some mandatory requirement, it is not apparent why an IP would facilitate arrangements for a consumer to collect goods from premises of the insolvent business (even if it is in a position to do so) or how long such obligations would last.

35. The proposal raises the prospect of goods being stuck at the insolvent business (or its suppliers) for an indefinite time and it is unclear what duties an IP would have to safeguard or dispose of the goods. In principle, you would expect uncollected goods to be disposed of or it will be impossible to completely wind-down an estate.

36. The Commission's paper (*5.28*) says:

> an IP would have to determine whether a contract is in place (as is the case under the current law) and, if so, whether goods have been identified for fulfilment of the consumer's contract. We anticipate that the assessment of whether ownership has transferred would likely involve a desk-based exercise, including a review of the retailer's records and discussions with employees in the retailer's shops and warehouses as to the status of goods they are holding. For example, whether any goods have been labelled with a consumer's name and address and whether that labelling was intended to be permanent. The list of events and circumstances upon which ownership of goods transfers in the draft Bill are intended to be clearer and easier to understand than the current law.

As noted above, we do not believe that clarity in the law is an issue for IPs at present. Where the position is determined by labelling of goods or their physical positioning (for instance, ready for dispatch to an identified consumer), we do not see how that could be a desk-based exercise (absent remote cameras). It might be an exercise that an IP would rely upon shop staff to conduct, but an IP is ultimately responsible for these issues and that would be a question of judgment in the circumstances. Also, there may be no staff left.

37. In some (perhaps few) cases, the increased costs, or uncertainties involved, might deter IPs from taking appointments, so that the Official Receiver would need to be appointed.

Whether or not goods have been paid for

38. The proposal applies to all consumer sales, regardless of whether the goods have been paid for in cash (or otherwise), so going beyond the genesis of the proposal which was concerned with protecting cash deposits etc.

39. Where consumers have not paid in advance, we do not understand what harm the Commission believes is being addressed. The result of the proposal is that consumers will own goods they have not paid for and do not possess, regardless of whether the consumer or trader want this position.

40. The proposal refers to rights of retention and lien for amounts unpaid [*3.64*]. A right to retain will be of limited value unless coupled with power of sale, and we are not clear whether retailers are intended to have this right where title has already transferred to the consumer. The paper considers the position higher up the chain where the supplier has a retention of title right against the retailer [*3.120*] but refers to contract terms commonly used in practice today which enable a retailer to deal with the goods free of retention of title rights. Practices may change if this proposal is taken forward and clarity will be required as to whether a consumer acquires absolute title to goods by virtue of the legislation irrespective of possible third party rights (referring to current law under SGA is not particularly helpful in this context).

41. In practice, we agree that retailers will seek to reduce any credit exposure they may have to consumers, so that one effect of the proposal may be that retailers will insist on payment in full at an earlier date than might currently be the case. We are not sure that this is in the interests of consumers. If it were to result in more cash advance payments, that would probably be counterproductive because consumers might still not, ultimately, receive the goods they paid for.

42. While the retailer may have the right to claim unpaid purchase price from the consumer, the expense of pursuing small claims will often be prohibitive. In the ordinary course, retailers might just regard defaulting consumers as a cost of business and pass the costs onto other consumers. In the case of insolvency, the costs of trying to recover consumer debts would be borne by creditors and IPs may well conclude in many cases that it would be counterproductive to pursue individual consumers. Those consumers then get something for nothing while others lose out.

43. Where the consumer has paid in full for goods not received and the seller is solvent, the consumer would have the usual remedies (eg, to require delivery or sue for damages for breach) and we are not clear that transferring title to the consumer would assist much or what the point would be.

44. As regards cases where the goods have been paid for and the seller is insolvent, we refer to practicalities concerning possession above, and refund mechanisms and possible alternatives below.

Whether refund is adequate remedy for failure to deliver

45. The Commission suggests that trends of on-line shopping and retailer insolvency make it 'important that the transfer of ownership rules are clear and provide appropriate protection to the prepaying consumer'.*[5.5]* But the concrete examples it gives of harm (eg, rings sent for engraving, sofas, display kitchens) largely arise out of physical store transactions and the most poignant cases involve cash pre-payments (which are declining, as physical retailer insolvencies increase).

46. Where consumers do not receive goods paid for, we believe that they would generally be satisfied with refund of money paid in compensation (albeit that might not compensate for speculative losses or sentimental value attached to some goods).

47. It appears from the Commission's analysis that where goods have been purchased using credit card or debit card, consumers will generally benefit from s75 or charge back protection, including where failure to deliver arises from insolvency of the seller. We therefore query whether the risk of harm justifies the proposal in this context.

48. The main risk of harm arises where consumers pay deposits (or the full price) for goods and are not protected by s75, chargeback or other mechanisms (eg, sector insurance) and, again, we think that alternative approaches should be considered in that respect.

Profiting from insolvency

49. While Government should consider how best to allocate losses in the cases of insolvency (and, therefore, whether and how to protect consumers who pre-pay in cash), we do not believe that a class of 'winners' in insolvency should be created.
50. We suggest that further consideration is required as to whether this proposal might unjustly enrich consumers in certain circumstances.
51. We have noted one potential windfall situation above - that a consumer may receive goods and title to them without having paid the full purchase price and may not be pursued for the unpaid price. Government may wish to consider whether there are other ways in which consumers might unfairly benefit from the proposals. For instance, would it be possible for consumers to resell goods to which they have title (but not possession) and also claim the goods in possession of the IP? Could an administrator release goods to a consumer without knowing whether the consumer has already made a charge-back or similar claim (that goods have not been delivered)?
52. If there is potential for some consumers to profit from the regime, social media means that any opportunity can rapidly become common knowledge and increase the costs of doing business or insolvency costs).

Formation of contracts

53. We do not know what motivates those retailers who provide that a contract of sale arises only when the goods are dispatched (or delivered). It may (or may not) be that they are seeking to mitigate/avoid the impact of some provisions of CRA. While Government should naturally consider this possibility it is unclear why it would legislate for change unless material harm results.
54. It is important that legislation enables legitimate transactions to take place in efficient ways that meet the needs of both consumers and business and allows for innovation. We do not know if CRA currently achieves this, but we are concerned that mandating transfer of title before delivery will reduce flexibility and might not be what either the consumer or business would want in every case.
55. Some of the standard contracts we looked at contained provisions on transfer of title but were not governed by English law. It may be that they are intended to work under a variety of laws. Government should consider whether the proposal might lead practice in the UK to diverge from that of other jurisdictions. Of course, much UK consumer law derives from EU law so that this issue is particularly pertinent now we have left the EU.

Alternative ways to protect consumers

56. The Law Commission originally consulted on consumer pre-payments in the wake of catalogue and Christmas Club insolvencies where trading bodies were effectively operating as unregulated banks and we naturally supported (and continue to support) measures to prevent this happening again. However, this proposal does not concern those cases.
57. As noted in the paper, various options were considered to protect other consumers who prepay for goods in cash, including giving consumer cash deposits (or full payments) priority on insolvency or requiring them to be held on trust. Both these alternatives would have had the relative merit of addressing the identified harm in a targeted way and could have been expected to meet the objective.
58. We understand that government has decided not to pursue these options and we have our own reservations about them. However, that does not mean that this proposal should be pursued. Indeed, it may be that the problem is insoluble in a cost-efficient way.
59. One step government could take to alleviate the concern (to a small degree) would be to reverse the provisions in the Finance Act that will reintroduce preference for HMRC tax debts. This reduces the amount available to consumers and other unsecured creditors (as well as inhibiting finance that might help businesses avoid insolvency altogether).

60. Alternatively, it might ringfence the amount it raises from that measure to form a compensation fund for relevant consumers who are otherwise unprotected.

61. Some of the alternatives might have been applied proportionately, ie, to higher value transactions only, so reducing the practical impact of the increased costs on insolvencies and impact on other creditors. It does not seem that the impact of the current proposal could easily be mitigated in this way.