Briefing

BURGES SALMON

Corporate Turnaround and Insolvency

March 2015

Insolvency odds and ends - the Jackson exemption, fee reforms, EC Regulation and protection of essential supplies

This quarter has seen a wave of legislative and regulatory reform on the way. We review some of the more significant developments.

Insolvency exemption to the Jackson reforms extended indefinitely

Of primary interest to the industry will be the government **announcement** on 26 February 2015 that the exemption to the Jackson reforms prohibition on CFAs and ATE insurance would be extended indefinitely. The news follows intense lobbying by R3 and other interested bodies, voicing concerns over how IPs would otherwise be able to fund actions which both form part of their statutory functions and stand to increase realisations for unsecured creditors.

The government statement on the issue said that HMG would consider the "most appropriate way forward" and set out further details later in 2015. Given the importance of office holders' statutory powers within insolvency proceedings, we would urge readers to respond to any future requests for evidence on the issue.

Government announces proposals for reforms on IP fees - time costs still permissible for the time being

On 3 March an **announcement** was made by Jo Swinson that new rules are to be introduced to Parliament which - once passed - will have the effect of requiring IPs to provide an up-front fee estimate in cases where it is proposed that fees will be charged on a time cost basis (as is the case in most jobs of any significance). It is understood that the requirement will not apply to appointments taken by the Official Receiver, but will apply to the majority of insolvencies in private hands, both corporate and personal.

The backdrop to the reforms was last year's **consultation** in which one of the government's proposals was to do away with time-based fees altogether, replacing them with recoveries-based remuneration. R3 in particular has lobbied hard to avoid those reforms, in part through its input into the **Kempson report**. Although these proposals may seem intrusive, in reality it mirrors what firms are already doing when pitching to win insolvency work. What remains to be seen is how creditors will react to such estimates, and whether these reforms will bring an end to "low-balling" to win work, with IPs subsequently revising estimates once in office.

Text of revised Insolvency Regulation released

On 12 March the EU Council **announced** that an agreed text for the EC Insolvency Regulation had - after lengthy negotiation between the European Commission and Parliament - finally been released. It is likely that the text will be adopted in April or May, with the majority of the revised Regulation coming into force two years after its official publication. We have **previously reported** on the controversy surrounding some of the reforms to the Regulation. The headline areas of reform can now be summarised as follows:

- Pre-insolvency proceedings are to be included within the Regulation's ambit. for the UK this will mean that Annex A will be extended to include CVAs, but the UK does not intend to list schemes of arrangement.
- The list of "secondary" or "territorial" proceedings is to be widened and will no longer be confined to winding up processes. Administration and CVAs might, therefore, be able to be used in respect of purely territorial proceedings.
- There is to be increased scrutiny on corporate and personal COMI, although the potentially calamitous 3 months "look-back" period for COMI appears to have been omitted.
- There will however be a "look-back" in secondary proceedings in order to establish jurisdiction to open secondary proceedings. This will be achieved through the amendment of the term "establishment" to read "a place of operations where the debtor carries out or has carried out in the three months prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets".

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- The provisions we previously reported on concerning coordination of group insolvencies and undertakings from insolvency office-holders in order to avoid the need for domestic secondary proceedings have been adopted. However, the "group insolvency" proposal has been dropped, in favour of a voluntary protocol involving the appointment of a "group coordinator", whose recommendations are not – importantly - binding on domestic insolvency practitioners.

We will report further as and when we learn more.

Protection of essential supplies legislation published

The long-awaited secondary legislation protecting companies in administration and CVA from withdrawal of essential supplies (utilities and IT) has been **published**.

The Insolvency (Protection of Essential Supplies) Order 2015 was laid before Parliament on 9 February and seeks to prevent suppliers of essential services from using their commercial leverage in order to terminate those services or otherwise alter the terms of supply in order to obtain an unfair advantage for themselves.

What is now proposed is that such suppliers can ask the insolvency practitioner to guarantee charges incurred after the commencement of administration or a voluntary arrangement (being the only two types of insolvency proceedings covered by the Order). The only ways in which a service contract can now be terminated is through application to the court (on the grounds of hardship to the supplier) or non-payment of post-insolvency invoices within 28 days of their having fallen due.

The order has been drawn up in the aftermath of well-publicised cases such as the Peacocks administration, on which suppliers of utilities (in particular) took advantage of contractual termination provisions to place companies in administration onto "deemed supply" arrangements at much higher cost.

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