Briefing

BURGES SALMON

Corporate Turnaround and Insolvency

Reform of the EC Regulation – an anti-English agenda?

We take a look at the reforms to the EC Insolvency Regulation in light of the European Parliament's 4 February vote on the committee of legal affairs' report on the proposed reforms.

The background

The EC Insolvency Regulation has been in place for well over a decade, and its application and idiosyncrasies are – to all intents and purposes – well established. The latest drafts of the amended Regulation have raised concerns, however, that the Commission is attempting to erode the application and efficacy of the English insolvency regimes by introducing changes seemingly aimed at English insolvency (and pre-insolvency) procedures in particular.

The issues

The flexibility and efficiency of the English insolvency (and pre-insolvency) procedures has made England a particularly attractive jurisdiction for those looking to shed their liabilities. There have been any number of reported cases of "forum shopping", in which companies or individuals attempt to manufacture a "centre of main interests" in England in order to take advantage of its more benign regime, and multiple cases where foreign companies whose COMI resides abroad have been able to establish a connection with the UK sufficient to justify the sanction of a Scheme of Arrangement.

However, the text of the amended Regulation contained in the European Parliament's committee on legal affairs' report – which can be found **here** - contained multiple amendments to the Commission's original proposals which had a decidedly anti-English slant. Particular proposals which cause concern are:

- The amendments only gave EU-wide recognition to insolvency proceedings opened by a court. This proposal (which was not approved by Parliament, but the subject remains open) risked significantly undermining the cross-European application of our out-of-court processes (including administrations, voluntary arrangements and voluntary liquidations).
- The proposal that a foreign insolvency practitioner would be able to request the restraint of secondary proceedings in another member state where their opening would hamper the "efficient administration" of the estate. This is a particular issue for UK pension schemes of overseas entities, where their only hope of obtaining PPF protection for members is to trigger secondary proceedings in England (see for example the Al Italia secondary proceedings instigated by this firm).
- The inclusion of pre-insolvency debt restructuring proceedings within the scope of the Regulation, which would mean that schemes of arrangement for overseas companies would only be possible where the company's COMI is located in England.
- The introduction of "group coordination" proceedings where IPs appointed to members of a larger group would be obliged to coordinate their regimes alongside the IPs of other group entities.
- The introduction of a three-month "look back" period for determining an entity's COMI.
- The establishment of a central register of European insolvency proceedings, and until that occurs an obligation to publish the fact of opening of proceedings in any other member state in which an entity has an establishment.

What does this mean in practice?

Some of the amendments proposed pose little more than an extra administrative burden on practitioners (such as group coordination proceedings). Some of the amendments are simply going to cause practical difficulties, in particular the three-month look-back test for establishing COMI. Other measures, however, seem more particularly aimed at English insolvency processes and – if enacted – would deny

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practitioners the full application of their Insolvency Act powers in other member states, or to request opening or restraint of secondary proceedings in other jurisdictions, and would preclude overseas entities from taking advantage of our debt restructuring mechanisms.

What next?

The Commission is being lobbied hard by interested UK bodies including R3 and the ILA. The Parliament voted through the proposal on 4 February, although thankfully taking out the amendment which required proceedings to be opened by a court. It will now pass the Regulation to the Council, Commission and national parliaments for three-way dialogue later this year. We will be following this process with great interest and will report further as and when the proposed reforms are firmed up.

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