

INSOLVENCY BITESIZE

European Insolvency Regulation – a new dawn?

The new European Insolvency Regulation is finally with us. Of course, it's not really entirely new. It's a recast of the original Regulation which has helped change how cross border restructurings and insolvencies are carried out. But, within its 92 Articles (almost twice the length of the original), there are some novel concepts – notably, concerning groups.

The recast stops short of creating a single group insolvency process - a leap too far. Instead, there is a renewed focus on improving the cooperation, coordination and communication between insolvent group members. The 'big reveal' is perhaps the new "group coordination proceeding". But, we remain to be convinced that it will become a favoured tool in the box, instead leaving us to ask – "what's that for again?" Participation is optional, so there may be a failure to launch from the outset. Even if they do get off the ground, members who join in need not stick with the group coordination plan. Solvent group members are out-of-scope and only those members subject to an EU insolvency proceeding covered by the Regulation can take part. That would exclude any group company carrying out a UK scheme of arrangement or a US chapter 11 proceeding, for example. Still, no doubt we will all be keenly watching to see how they fare in practice.

In the meantime, we can let the many recent insolvency reforms become embedded over the summer – they need a period of testing off the page, exposed to real world conditions.

If you have any comments on this edition of Insolvency Bitesize, please get in touch.

UK changes consequential on the recast Regulation: The recast Regulation requires several consequential changes to be made to the Insolvency Rules, including to make it clear that a CVA nominee must examine whether there is jurisdiction to open proceedings. They must state their reasons in their comments on the CVA proposal.

Out-of-court administration appointments are already required to include a statement as to whether the Regulation applies and, if so, to give reasons. Additional rules are also introduced to set out the prescribed content (in addition to that required by the recast Regulation) of any application or court order made in the UK for "group coordination proceedings".

Commission publishes new standard forms: The recast Regulation provides for the creation of several standard forms for use across all Member States. The Commission has now published these, In particular:

- a request for access to certain information relating to 'consumer' debtors in national insolvency registers where access to such information is subject to conditions. Use of this form is mandatory;
- notice informing known foreign creditors of the opening of proceedings. Use of this form is mandatory;
- lodgement of claims by foreign creditors. The standard form may be used instead of any prescriptive rules in the local law of the Member State in which proceedings have been opened. Use of this form is optional;
- objection to inclusion in group coordination proceedings or to the person proposed as coordinator. Use of this form is optional.

E-filing delays: Precisely how the new requirement for e-filing with the court and the new Insolvency Rules 2016 work together remains a little untidy. Revisions to the e-filing Practice Direction 51O were delayed because of the General Election and at the time of writing had not yet been published. Despite the wording of the new rules, the revised PD is expected to ensure that there will be no need to file multiple copies at court of a notice of appointment of administrator. The PD will also need to give greater certainty on how the rules on out-of-hours appointments by QFC holders and the requirements of e-filing are supposed to work together.

The future of pre-packs: The recent Insolvency Service's 2016 Annual Review of Insolvency Practitioner Regulation highlighted the steep fall in administrations and the use of pre-packs over recent years. Pre-packs now make up only around 1 in every 5 administrations (it was around 1 in 4 back in 2010) and, of these, only around half involve sales to connected parties (it was over 70% in 2010). The Pre-Pack Pool's 2016 Annual Review further reveals that even where there is a connected party pre-pack, only 28% of buyers made a submission to the Pool for review in its first 14 months (that translates into just 53 submissions out of 188 eligible pre-packs) – far below initial expectations. Data from the IP Complaints Gateway indicates that there were just 3 complaints last year relating to SIP16 pre-pack reports, which is less than 1% of total complaints. This does not mean to say, however, that pre-packs are no longer controversial, as investigations by the Pensions Regulator into the Bernard Matthews pre-pack reveal. When deciding whether to exercise before 2020 its backstop powers to further regulate, or ban, connected party pre-packs, the Government will need to balance the dwindling insolvency filings, decreasing use of pre-packs, fewer connected party transactions and low numbers of complaints against a background of the poor take-up of the Pre-Pack Pool and general (continued) market criticisms. When Brexit is thrown into the mix, the outcome remains uncertain.

Intention to appoint must be settled: If a company is in financial difficulty and is looking to find a solution to its problems, e.g. by proposing a CVA, the Court of Appeal has held that it can't simply file a notice of intention to appoint an administrator to obtain the benefit of an interim moratorium in case such solution is unsuccessful. The directors must have a settled, not conditional, intention to appoint an administrator or the court can remove the notice from the file. Administration can't simply be an option should the alternatives fail. Running administration as a parallel conditional process is not something permitted by the language of Schedule B1 nor the underlying legislative policy.

Importance of local procedural rules: While the insolvency law of the EU member state where main insolvency proceedings are opened will apply to determine whether a transaction may be voided, the person benefitting from the transaction will have a defence if they can show the transaction is governed by another member state law which does not allow for challenge. However, the ECJ recently confirmed that such defence must be brought in the form and within the time-limits provided by the procedural rules of the

member state where insolvency proceedings are taking place. It also confirmed that a person seeking to rely on the defence will need to show that any conditions needed for a successful challenge under the other member state law have not actually been met.

Supreme Court guidance: The complex Lehman "Waterfall I" ruling, concerning a surplus of approximately £8bn currently held by the administrators of Lehman Brothers International (Europe), clearly has significant financial consequences for the various LBIE stakeholders. But, it also has wider legal implications, providing important guidance in relation to a range of issues including the approach taken by the courts when interpreting legislation and contracts, the role of the judiciary in the future development of English insolvency law, the exercise of insolvency set-off and the validity of contractual subordination arrangements. Please click [here](#) to read our client alert.



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