Linklaters

October 2015

INSOLVENCY BITESIZE

As we settle down into autumn, all of us in the insolvency industry are getting to grips with the array of insolvency law changes which came into force at the start of this month. We do so in the knowledge that more is yet to come (including in the shape of revised Insolvency Rules some time next year). Prominent among the changes are the new restrictions on terminating essential supplies which we consider below. Also in this edition, we highlight: the reforms finally due to come into force for pre-packs next month, the Government's view on what improvements might be made in the wake of the City Link collapse, the continued push towards EU insolvency law harmonisation and the latest developments in schemes of arrangement. We hope you enjoy our third edition of Insolvency Bitesize and, as always, if you have any feedback, please get in touch.

Action on essential suppliers and insolvency: The recent reforms on protecting essential supplies in insolvency are, in general, an improvement. But, they do give rise to difficulties of their own. It may not always be clear whether the contract for supply was entered into on or after 1 October such that the restrictions on termination apply - energy supplies made under a pre-1 October framework agreement, for example. In addition, suppliers will still be able to raise charges as long as the right to do so is not triggered by the entry into administration or voluntary arrangement itself. In the guidance to the continuity of supply reforms published alongside the new changes, the Government has made clear that it expects IPs to contact essential suppliers at the earliest possible time and as soon as reasonably practicable in order to notify them of the insolvency. Opening lines of communication with essential suppliers – irrespective of when the supply contract was entered into – will enable both sides to plan more efficiently and, it is hoped, avoid unnecessary loss or expense.

New SIP16 and the pre-pack pool: From 1 November, a new SIP16 on administration pre-pack sales will apply with an enhanced focus on the quality of information provided. In particular, the new SIP now provides for a set of marketing essentials, deviation from which the administrator will need to explain in the SIP16 report to creditors.

For the diary

Oct 29	Q3 2015 insolvency statistics published
Nov	New SIP16 on pre-pack administrations to apply Pre-pack pool expected to become operational
Dec 2	Linklaters Restructuring and Insolvency Annual Champagne Reception
	2016
Jan 29	Q4 2015 insolvency statistics published
Apr?	New Insolvency Rules published (to come into force in October)?

The pre-pack pool is now expected to become operational, alongside the new SIP16. Applications to the pool – which are not obligatory – will be made by connected party purchasers online. We understand that the website is currently being tested. If asked, a pool member will opine on the deal but has no power to stop a sale going ahead. It is thought that the pool will operate a 48 hour turnaround with a pool member spending up to half a day looking at the deal - their opinion will be anonymous, non-binding and without liability. The new SIP16 will require the administrator to inform creditors whether the connected party approached the pool and, if so, to confirm that the administrator has requested a copy of the pool's opinion. If a copy is provided to the administrator, the opinion must be included within the SIP16 statement.

Ability to assign officeholder actions: Administrators and liquidators will now be able to assign their 'officeholder' causes of action and/or the proceeds – i.e. fraudulent and wrongful trading claims (now available to administrators) and claims for any transaction at an undervalue, preference and extortionate credit transaction. The proceeds of any such claim, or assignment, will not be caught by pre-existing floating charges. While we do not envisage fraudulent trading claims being assigned given the evidential burden in bringing such claims, IPs will need to consider how best to extract value from any other potential officeholder claims.

It remains to be seen if a market will develop for the purchase of such claims and how frequently purchasers will include, for example, directors themselves or even D&O insurers. Careful thought will need to be given as to the terms of any assignment. Parties will need to be clear, for example, as to how much continued assistance IPs will be expected to give to an assignee in bringing a claim and consider whether there could be timing implications for the closure of the insolvency process.

Government issues non-committal response to City Link collapse report: Responding to a report prepared by BIS into the collapse of City Link in December 2014, the Government has rejected calls to extend the current employee preference to all workers (including the self-employed). The Government does not think that a sufficient case has been made to change the long-established order of priority which would impact on other unsecured creditors (including, for example, small suppliers). Responding to the BIS report's concerns about clarifying collective redundancy obligations, the Government points out that it is still considering responses to its Call for Evidence (also published in March) on collective redundancy consultation obligations for employers facing insolvency and therefore it does not give any indication of what it might do in this regard.

EU harmonisation of insolvency law – a step nearer?: After reviewing Member State compliance with its 2014 non-binding Recommendation aimed at harmonising national insolvency laws and at facilitating out-of-court restructurings, the Commission has concluded that while providing a useful focus for those Member States undertaking reforms in the area of insolvency, it has not succeeded in having the desired impact in facilitating rescue because of its only partial implementation in a significant number of Member States, including those having launched reforms. At the same time, in its *Action plan on building a capital markets union* (a follow-up to its Green paper issued earlier this year), the Commission indicates that it will seek to foster convergence of insolvency proceedings by drafting legislation on business insolvency, addressing the most important barriers to the free flow of capital and building on national regimes that work well. It expects to produce a draft legislative proposal by Q4 2016. It is not yet clear what form this harmonisation will take – whether through a targeted high-level principles approximation and minimum standards, a dedicated “29th” EU insolvency regime existing in parallel to national insolvency regimes or even full harmonisation (this is probably unlikely given the practical and other difficulties).

Van Gansewinkel scheme of arrangement: The financial restructuring of the Van Gansewinkel Groep of mainly Dutch and Belgian incorporated companies was recently implemented via English law schemes of arrangement. At the sanction hearing, Snowden J held that a "one-way" English governing law and submission to jurisdiction clause, which bound only the borrowers, was not sufficient to give the English court jurisdiction under the EC Judgments Regulation to sanction the schemes. Instead, the decision to assume jurisdiction was made on the basis that sufficient VGG scheme creditors were domiciled in England to justify allowing the schemes to proceed. Our client alert summarises the key points of Snowden J's judgment, outlines the English court's approach to taking jurisdiction when schemes are proposed by foreign companies, and sets out the practical and procedural implications of the judgment.

Contacts

For further information please contact:

Tony Bugg
Partner
Global Head, Restructuring & Insolvency Group
(+44) 20 7456 4470
tony.bugg@linklaters.com

Richard Bussell
Partner
Restructuring & Insolvency Group
(+44) 20 7456 4672
richard.bussell@linklaters.com

Richard Hodgson
Partner
Restructuring & Insolvency Group
(+44) 20 7456 3797
richard.hodgson@linklaters.com

Rebecca Jarvis
Partner
Restructuring & Insolvency Group
(+44) 20 7456 4466
rebecca.jarvis@linklaters.com

Euan Clarke
Partner
Dispute Resolution Practice
(+44) 20 7456 4267
euan.clarke@linklaters.com

Authors: Richard Hodgson, Paul Sidle