Ashfords Solicitors

Cross Border Restructuring & Insolvency

Cross Border Restructuring and Insolvency Update

January 2012

EC Insolvency Regulation restricts the operation of national laws

Further Guidance on COMI post *Interedil*

In *Rastelli Davide e C. Snc v Jean-Charles Hidoux*[1], main insolvency proceedings were opened in France for a French company. The Liquidator applied under French laws to join an Italian registered company to the main proceedings, as the two companies had intermingled assets.

Following conflicting decisions in the courts below, the French Supreme Court referred the case to the CJEU. The CJEU determined that; (1) a court of a member state that has opened main proceedings can, under a rule of national law, join to those proceedings a second company whose registered office is in another member state, but only where the second company has its COMI in the first member state, and (2) Following the cases of *Eurofood* and *Interedil*, COMI must be identified by reference to criteria that are both objective and ascertainable by third parties, but the fact that assets were intermingled was insufficient.

There are now two decisions from the CJEU that attach greater importance to the place where the company has its central administration. The registered office presumption is undoubtedly weaker.

Provisional Liquidators

UK case clarifies the test for the appointment of provisional liquidators

In the UK the appointment of a provisional liquidator under section 135 Insolvency Act 1986 is an interim measure between the presentation of a winding up petition and the winding up order. The primary reason for appointing a provisional liquidator is normally to ensure the preservation of the company's assets. In most cases, the appointment of a provisional liquidator causes the company to cease trading and is frequently terminal to it. In *Re A Company*[2] the power was described as the '*nuclear weapon of the Companies Court'*. Given the seriousness of the measure, the threshold for the test for appointment has always been high. The old test was that a creditor had to prove that there was a prima facie case that a winding up order would be made and the court had to be satisfied, in the circumstances of the case, that it was right that a provisional liquidator should be appointed.

[1] C-191/10, ECJ (1st Chamber) (15 December 2011)

[2] (no 0070707 of 1996) [1997] 2 BClC 139, 142

The first part of this test has now been changed by the Court of Appeal in *Rochdale Drinks Distributors Ltd* [3]. In order to appoint a provisional liquidator, a creditor must now demonstrate 'nothing less than he is *likely* to obtain a winding up order on the hearing of a petition.' The court also said that if a company chooses to oppose the application on the basis that there is a dispute as to the creditor's claim, it must prove that it has a good arguable case.

This decision is in contrast to a decision ten months earlier in the New Zealand High Court in NZ Mail Ltd v Exnzol Ltd[4]. In this case, the creditor was required to show a good prima facie case for liquidation and urgency, with real reasons for an interim appointment, such as jeopardy to the company's assets. However, the New Zealand High Court, in common with the Court of Appeal, also said that a without notice application for the appointment of an interim liquidator will not be successful unless 'special circumstances' can be shown, emphasising the need for evidential sufficiency.

Updates from around the world

Australia

New legislation has been proposed by the Australian government that is designed to make directors personally liable for the debts of phoenix companies that are created using a similar name to an already failed company.

[3] [2011] EWCA (Civ) 1116

[4] [2010] NZHC 1530

The UK has a similar provision in section 216 Insolvency Act 1986. A director of a company in insolvent liquidation is prohibited, subject to a few exceptions, from being a director of, or in any way concerned with the management or promotion of a limited company or a limited liability partnership with the same or similar name for a period of five years from the liquidation of the old company. If breached, the director faces imprisonment or a fine or both and/or is personally liable for the debts of the new company/limited liability partnership all the time s/he acts in breach of s.216. We wait to see if the Australian legislation will include similar provisions. The new legislation will also make directors personally liable for corporation tax debts and give the Australian Securities and Investments Commission the power to wind up companies.

Australia's national Personal Property Securities Register commences on 30 January 2012. On commencement of the PPS Register many security registers will be closed and existing registrations migrated to the PPS Register. This includes ASIC's Register of Company Charges. ASIC's final day for accepting and processing charge documents will be Friday 27 January 2012.

Scotland

A PKF report has predicted that an average of 25 Scottish businesses a week will be declared insolvent, equating to 1,300 throughout the year. The latest insolvency figures show that 361 companies in Scotland went bust in the third quarter of 2011, the highest ever recorded and a 46.2% increase compared with the third quarter of 2010. The report also predicted an increase in Scottish personal insolvencies. It predicts that 20,000 people will be declared insolvent in 2012 based on rising bankruptcy and trust deed figures over the first three quarters of 2011. It also said that affluent Scots would be affected.

Ireland & Northern Ireland

The High Court in Northern Ireland has annulled business tycoon Sean Quinn's bankruptcy secured in Northern Ireland in November. The Irish Bank Resolution Corporation ("IBRC"), Quinn's largest creditor, successfully argued that his COMI was in fact in the Republic of Ireland. Justice Deeny found that a lease provided by Mr Quinn for an office in an industrial estate in Northern Ireland was likely to have been drawn up to "*bolster*" his case for UK bankruptcy. On Monday 16 January 2012, Mr Quinn was declared bankrupt in the Republic of Ireland, where his bankruptcy could last up to 12 years, in contrast to the UK where the norm is 12 months.

The Irish Government has published new legislation reforming its personal insolvency laws. The legislation is designed to tackle a growing mortgage debt crisis and curb “bankruptcy tourism” to the UK. The reforms include a reduction of the bankruptcy discharge period from the current twelve years to three years and provisions enabling consumers on a case-by-case basis to write down mortgage debt while continuing to live in their homes.

USA

On 1 December 2011 the amended Bankruptcy Rule 2019 came into effect. The rule addresses disclosures required by co-operating creditors and equity holders. After an extensive public comment process, the rule has been amended to provide some clarification on the ambiguities of the former Rule 2019. The amendments include, among other things, broadening its scope by requiring disclosure from any entity, group or committee that consists of or represents multiple creditors or equity security holders that are (i) acting in concert to advance their common interests, and (ii) are not composed entirely of affiliates or insiders of one another.

India

The Companies Bill 2011 is making its way through India's legislative process. If passed, it will be the most comprehensive reform of India's company law since the Companies Act 1956. The Bill seeks to update the law in line with the best global practices by reforming the regulatory regime and introducing new concepts such as Corporate Social Responsibility, class action suits and a fixed term for independent directors.

Receive updates on legal developments by following us on twitter at:
www.twitter.com/Insolvencylegal

If you would like further information please contact:

David Pomeroy
T: +44 (0)117 3218055
M: +44 (0)7970 027661
d.pomeroy@ashfords.co.uk

Alan Bennett
T: +44 (0)1392 333974
M: +44 (0)7843 265353
a.bennett@ashfords.co.uk