# insolvency newsletter

ISSUE 9 – JUNE 2006

# Contents




Editor: John Davies, Head of Business Law
e-mail: daviesj@accaglobal.com

# 1. Technical Update

## CROSS-BORDER INSOLVENCY REGULATIONS

The above regulations (SI 2006/1030), came into effect on 4 April 2006. The regulations give effect, in Great Britain, to the UNCITRAL (United Nations Commission on International Trade Law) Model Law on cross-border insolvency.

The adoption of the Model Law aims to ensure a co-operative approach in insolvencies where the same debtor has assets or creditors in more than one jurisdiction. This is likely to happen more and more with the growth of the single market and new business formats such as the European Company. They apply to both individual and corporate insolvencies.

The detailed provisions are set out in Schedule 1 to the Regulations. The schedule contains a slightly modified version of the Model Law, adapted to achieve consistency where appropriate with existing legislation. There are strong parallels between the Model Law and the existing European Insolvency Regulation – it contains the same definitions of establishment and main proceeding – although there are some technical differences. Where any provision of the Model Law conflicts with a provision of the Regulation, the latter will prevail. But the Model Law will prevail if there is any conflict between it and British insolvency law.

The regulations are to apply, inter alia, when assistance is sought in Great Britain by a foreign court in connection with a foreign proceeding or where assistance is sought in a foreign court in connection with a proceeding under British insolvency law. In interpreting the Model Law as set out in the Schedule, the regulations provide that the courts can have regard to other documents including the Guide to the Enactment to the Model Law which is published by UNCITRAL.

Chapter IV of the Model Law provides for the British courts and British insolvency office holders to co-operate with foreign courts or foreign representatives in the areas covered by the Model Law. In particular, article 28 states that a British office-holder shall, 'to the extent consistent with his other duties under British law, co-operate to the maximum extent possible with foreign courts or foreign representatives.' The British office-holder is also entitled, in the exercise of his functions, to communicate directly with foreign courts or foreign representatives.

Chapter V provides for the co-ordination of a British insolvency proceeding and a foreign proceeding concerning the same debtor and facilitates co-ordination between two or more foreign proceedings concerning the same debtor.

## ADMINISTRATION ORDERS

### (i) Exit routes from administration – Moving from administration to dissolution

Paragraph 84 of Schedule B1 of the Insolvency Act 1986 (as amended) states that if the administrator of a company thinks that the company has no property which might permit a distribution to its creditors, he shall send a notice to that effect to the Registrar of Companies who shall register it, upon which event the appointment of the administrator of the company shall cease to have effect.

ACCA has been asked if this route is available in cases where the only payment made out of the assets is to the Administrator for expenses and remuneration?

The query was taken up with the Insolvency Service. The Insolvency Service has pointed out that this situation begs the question why the company entered Administration in the first place, i.e. if none of the statutory purposes could be achieved? If none of the purposes could be achieved the Service would expect there to be a paragraph 79(2) application (for an order providing that the appointment of the administrator of the company cease to have effect from a specified

time) as the administrator would probably think that the purpose of the administration could not be achieved or that the company should not have entered administration.

The Insolvency Service believes that paragraph 84 would only be an exit route where there has been some sort of distribution and there is then no property left to distribute.

**(ii) Pre-pack administrations**

"Pre-pack" administrations are becoming increasingly popular as an insolvency procedure and have also been receiving a lot of attention from commentators.

From a regulatory point of view, pre-pack administrations are not straightforward in that they do not, it seems, meet the purpose for which the legislation was intended in that the rescue of the company as a going concern (Schedule B1, paragraph 3(1)(a)) has typically been discarded as an objective prior to the company going into administration. Yet the procedure does in most cases conform to the letter of the law.

The second objective under paragraph 3(1), viz achieving a better result for creditors as a whole than would be likely if the company were wound up (without first) being in administration) can only be pursued if rescue of the company as a going concern is not reasonably and practicably achievable and the second objective would achieve a better result for the company's creditors as a whole.

The third objective, realising the property in order to make a distribution to one or more secured or preferential creditors is commonly the objective of pre-pack administrations. This objective can only be pursued if the administrator thinks that it is not reasonably practicable to achieve either of the other two objectives and he does not unnecessarily harm the interests of the company as a whole.

If steps have been taken to dispose of the company's assets prior to its going into administration, the first objective cannot be achieved. Many, if not all, pre-packs will fail to meet the second objective as the same result could be achieved through a liquidation.

It is important for the insolvency practitioner to consider carefully the purpose of the administration and to record those considerations contemporaneously. If the third objective is relied upon, then the insolvency practitioner should be able to show creditors that he has had the company's assets independently valued and that he has taken reasonable steps to market the company.

There is also a possible self review threat for a member who has been intimately involved in the sale of the company's assets as an advising member and is later appointed as administrator; can such a person reasonably review the sale of the business in which he was involved?

Members are reminded of the provisions of rule 2.67(1)(c) which provide that only the costs and expenses of the appointer rank as expenses payable in the administration. This topic is covered in Dear IP Chapter 1, article 7.

Members are also reminded that this is an area which has not been explored by the courts and so the legal position has not been definitively established.

## STATISTICS

The official statistics for insolvencies in England and Wales in the first quarter 2006 show a total of 3.439 corporate liquidations and 23,351 personal insolvencies, of which 15,389 were insolvencies and 7,961 were IVAs. The quarterly figure for IVAs showed an increase of 142% over the equivalent period in 2005. Personal insolvencies as a whole were up by 73% over the same period.

# 2. Regulatory Update

## CLOSING ISA ACCOUNTS WHERE BANKRUPTCY ORDER ANNULLED

Members' attention is drawn to Dear IP Chapter 22 regarding the release of the trustee where the bankruptcy order has been annulled.

Section 299(4) provides that the court determines the timing of the trustee's release.

The Insolvency Rules 1986 provide that the court may determine the date of the trustee's release by reference to the filing of the final account. In cases where the timing of the release determined by the court is dependent upon the date the final account is filed in court, IP banking would find it useful if insolvency practitioners would confirm the date the account was filed in court when submitting a copy of the account to IP Banking.

However, without such and order, the filing of the account does not by itself release the trustee.

IP Banking reminds practitioners that the date of the trustee's release has bonding implications and requests that practitioners ensure that appropriate court orders have been obtained in those cases where bankruptcy orders have been annulled.

IP Banking will be returning final accounts to practitioners where the annulment order does not provide for the trustee's release who may consider applying to the court for an amended order. Where the date of the trustee's release is the only issue outstanding, the Insolvency Service will not charge the banking fee which may fall due during the time it takes to resolve the issue.

## BANKRUPTCIES UNDER SECTION 283A

Members are reminded that in bankruptcy cases to which the trasitional rules relating to section 283A applies, the period of three years in which the trustee had to deal with the sole or principal residence of the bankrupt, his/her spouse or former spouse comes to an end on 31 March 2007. Accordingly, the trustee must by 31 March 2007 have either realised the bankrupt's interest, applied for an order for sale, applied for a section 313 charging order or agreed with the bankrupt that he owes a specific liability to his estate with or without interest from the date of the agreement in consideration of which the interest ceased to form part of the estate.

Members should also consider the possibility that any cases currently with the Official Receiver which need to be dealt with by the 31 March 2007 may yet be distributed to practitioners on the Protracted Realisations Unit rota. If this does occur there will be a limited period of time in which to comply with the provisions of section 283A.

# 3. Legislation

## COMPANY LAW REFORM BILL

The Bill, first introduced in the House of Lords in November 2005, began its passage through the Commons on 6 June. The Bill has a number of implications for insolvency practitioners.

First and foremost the Bill will add a new clause to Chapter 8 of Part 4 of the Insolvency Act 1986 to reflect the decision in Leyland Daf. The new clause provides that where the assets of a company in liquidation in England and Wales are insufficient to meet the expenses of the procedure, the expenses have priority over the claims of floating charge holders and may be paid out of assets covered by such charges. A parallel change will be made to the Insolvency (Northern Ireland) Order 1989.

Second, the Bill will codify directors' duties. This will involve, for the most part, setting out in statute law the long-standing common law principles governing this area. But the codification will have some additional implications, as follows:

while directors will have the ultimate entitlement to make decisions which they consider are likely 'to promote the success of the company in the interests of its members as a whole', they are to be required to 'have regard', in the decision-making process, to a number of specified factors, including the likely consequences of any decision they make in the long term (as well as the short term), and the need to act fairly as between members of the company.

directors will be subjected to an objective (as well as a subjective) test of skill, viz the care, skill and diligence that would be exercised by a reasonably diligent person with the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to that company.

Third, new provisions are introduced regarding the liabilities of directors. A new clause 449 in the Bill says that a director is liable to compensate his company for any loss it suffers as a result of any untrue or misleading statement included (or omission made) in a directors' report, directors' remuneration report or summary financial statement. However, he will only be liable if he knew the statement to be untrue or misleading or was reckless as to whether it was so, or if he knew the omission to be dishonest concealment of an untrue fact. A comparable provision is applied to information included in half-yearly accounts and interim management reports published by directors of listed companies under obligations being brought in under the Transparency Directive.

Fourth, auditors and their corporate clients will be able to agree between themselves to enter into liability limitation agreements. These agreements, where validly entered into, will limit the liability of the auditor to the client in respect of default or negligence during the period covered by the agreement.

## INSOLVENCY FEES - GB

The Insolvency Proceedings (Fees) (Amendment) Regulations 2006 (SI 2006/561) came into effect on 1 April 2006. They amend some of the fees prescribed in the 2004 fees regulations.

The regulations make the following changes:

The deposit payable on the presentation of a winding up petition goes up from £620 to £655.

The deposit payable on presentation of a bankruptcy petition by the debtor goes up from £310 to £325

The deposit payable on presentation of a bankruptcy petition in other circumstances goes up from £370 to £390

The deposit payable where the official receiver acts as nominee in IVAs goes down from £335 to £315.

The fee payable to the Secretary of state for the registration of an IVA goes down from £35 to £15.

**NORTHERN IRELAND REGULATIONS**

The Insolvency (Northern Ireland) Order 2005, The Insolvency (Deposits) Order (Northern Ireland) 2006 S.R. 2006 No 55 and The Insolvency (Amendment) Rules (Northern Ireland) 2006 S.R. 2006 No. 47 all came into effect on 27 March 2006.

The Department of Enterprise, Trade and Investment's Dear IP 20 (www.detini.gov.uk) sets out the main provisions (summarised below). The legislation can be found at http://www.opsi.gov.uk/legislation/northernireland/ni.legislation.htm.

The Insolvency (Northern Ireland) Order 2005 came into operation on 27 March 2006.

The fee payable for registering an individual voluntary arrangement with the departments is still £35.

In bankruptcies a flat rate Official Receiver's Administration fee (Fee B1) of £925 and a Department's Administration fee (fee B2) of 17% on chargeable receipts. For Fee B2 the first £2,000 of chargeable receipts is ignored and the maximum fee which can be taken is £100,000. No fee is taken on any part of the total receipts which exceeds the bankruptcy ceiling.

Chargeable receipts are sums paid into the ISA less any money subsequently paid out to secured creditors in respect of their securities or in respect of carrying on the business of the company or bankrupt.

The bankruptcy ceiling is the total of all debts which have to be paid out under the Rules, any interest payable by virtue of Article 300(4) of the 1989 Order and the expenses of the bankruptcy as spent on carrying on the business of the bankruptcy and Fee B2 itself.

Two fees are chargeable in the case of companies being wound up by the court. A flat rate Official Receiver's Administration Fee (Fee W1) of £1,495 and a Department's Administration fee (fee W2) of 17% on chargeable receipts. The first £2,000 of chargeable receipts is ignored and the maximum fee which can be taken is £100,000.

The Department's Administration Fee will be charged on Bank of Ireland interest credited to both company accounts and bankruptcy estate accounts.

Income tax at 20% will be deducted annually from interest received in the case of bankruptcy estate accounts. The fee taken on the amount of tax paid will then be refunded to the estate. In the case of companies insolvency practitioners should after paying corporation tax notify the Insolvency Service what element of that payment represents tax in respect of Bank of Ireland interest and the Insolvency Service will then credit the company account with the fee taken on this amount.

Members are referred to the Dear IP for changes that have taken place for cases begun under the 1989 Order prior to 27 March 2006.

The Insolvency (Deposits) Order (Northern Ireland) 2006 S.R. 2006 No. 55. Deposits payable after 27 March 2006 are £620 on a winding-up petition, £310 on a debtor's bankruptcy petition and £370 on a creditor's bankruptcy petition.

The Insolvency (Amendment) Rules (Northern Ireland) 2006. S,R. No 47 amend the Insolvency Rules (Northern Ireland) 1991 to set the level of remuneration insolvency practitioners are entitled to

where this has not been fixed by the liquidation/ creditors committee, or by a resolution of a meeting of creditors (or by the company in general meeting in the case of a members voluntary liquidation). Actual rates are in accordance with realisation and distribution scales in new Schedule 4 inserted into the 1991 Rules by Rule 107 of the 2006 Rules.

In cases where a company was wound up or a bankruptcy order made before 27 March 2006 the above new provisions will not apply and the operation of the legislative provisions under which remuneration was previously determined is preserved. Regulations 34, 35 and 37 of, and Table 1 in Schedule 1 to the Insolvency Regulations (NI) 1996 will continue to apply in such cases.

## CONSOLIDATION OF SECONDARY LEGISLATION

The Insolvency Service project to consolidate and modernise secondary legislation is now scheduled to come to fruition in April 2008. Following consultation with stakeholders and a formal invitation to submit views, a large number of changes are being proposed to the current Rules and other secondary legislation.

The changes being considered include giving office holders greater discretion to decide when it is appropriate to advertise insolvency events in local newspapers, raising the level of debt required to support bankruptcy and winding up petitions from £750 (a level unchanged from 1986) and facilitating the transmission of insolvency documents electronically.

# 4. Cases

## EFFECT OF LATE REGISTRATION OF CHARGE ON COMPANY PROPERTY

**Ali v Top Marques Car Rental Ltd (2 February 2006)**

Where a court order has been granted to extend the period allowed for the registration of a charge over company assets, but the same order has allowed specified parties to apply to set it aside, the subsequent registration of the charge and issue of a certificate by Companies House, within the time allowed for a set aside application to be made, will still be valid.

The High Court held that an order of the kind granted by the court carried with it an implied direction that the Registrar of Companies would not issue a registration certificate while the order was still capable of review. Under s395 of the Companies Act 1985, a charge, to be valid, needs to be registered with Companies house within 21 days. In the case in question, however, the claimant failed to register the charge in time and therefore applied to the court for an extension order under section 404(1).

The normal practice of the Registrar of Companies where it receives notice of an order made under section 404 is to register the charge but not to issue a certificate – a certificate being, under section 401(2), conclusive evidence that the requirements as to registration have been complied with'. In the case in question, the registrar mistakenly issued a certificate. By virtue of this, the charge was valid and his claim took priority over the unsecured creditors in the administration.

## DIRECTOR LIABLE FOR MISAPPROPRIATION OF COMPANY FUNDS

**Re Transocean Equipment manufacturing and Trading Ltd ([2006] BCC 184)**

A director who misappropriated funds from his company and allowed payments to be made out of its funds after it had been dissolved was negligent and in breach of his fiduciary duty to the company, and was liable to repay the funds in question to the company, ruled the Companies Court.

It was held that the director in question knew that the company had been dissolved but nevertheless allowed the funds to be paid out and took no steps to protect the company's assets. The payments were plainly not for the benefit of the company. The director was found liable and responsible for all the payments and the company was entitled to recover from the director the sums misappropriated and misapplied plus interest at 8%.

## DISTRESS IN WINDING UP

**Re Modern Jet Support Centre Ltd ([2006] BCC 174)**

In response to an application for directions by a liquidator, the Companies Court has held that 'execution', for the purposes of section 183 of the Insolvency Act 1986, did not extend to the process of levying distress against goods for unpaid tax under section 61 of the Taxes Management Act 1970. It was held that there was nothing in the policy of the insolvency Act 1986 which suggested that parliament had intended to give 'execution' in section 183 a different meaning to that which applied in its predecessor legislation.

**TECH-INS-009**

**ACCA**
29 Lincoln's Inn Fields London WC2A 3EE United Kingdom
tel: +44 (0)20 7059 5972 fax: +44 (0)20 7059 5730 www.accaglobal.com

**The Association of Chartered Certified Accountants**