INSOLVENCY BITESIZE

In a year where the UK seeks to redefine its relationship with an EU facing a serious migration and possible existential crisis, wars in the Middle East show little sign of abating and the US readies itself for a fierce Presidential election campaign, this edition of Insolvency Bitesize is up against some stiff competition for your attention. But, don't be fooled: these are crucial times for insolvency professionals even if that may seem at odds with the dwindling numbers of actual insolvencies. The insolvency exemption from the Legal Aid Sentencing and Punishment of Offenders Act is to come to an end in April and there are obvious concerns about what impact this may have on recoveries, even taking into account new powers of IPs to assign officeholder actions. The introduction of a national living wage from April (£7.20 per hour for workers aged 25 and over) will likely impact a number of sectors (as many of your own briefings highlight). There will be new procedural rules to get to grips with - most likely in the autumn - which is around the same time that we can expect to see a draft minimum standards directive aimed at harmonising EU member state insolvency laws and facilitating out-of-court restructurings. There continue to be important case law decisions, most recently on directors' duties, schemes of arrangement and recognition and enforcement in cross border insolvency matters. Insolvency law never stands still and nor should it. The key to the success of English insolvency law has been its ability to adapt to new challenges. And there are plenty of those which lie in wait.

As ever, if you have any feedback on this edition of Insolvency Bitesize, please feel free to contact us.

Reform of EU directors duties? During the first quarter of 2016, the EU Commission is expected to produce a report for the European Parliament, the Council and the European Economic and Social Committee on the cross-border issues in the area of directors' liability and disqualifications. The report is required by the recast European Insolvency Regulation and is a further sign of the insolvency harmonisation agenda which has taken hold in Brussels.

For the diary

Q1	EU Commission report on directors' liability
Apr	Publication of Insolvency Rules 2016 expected (for October)
Apr 29	Q1 2016 insolvency statistics published
Jul	Q2 2016 insolvency statistics published

Wrongful trading shortcomings exposed… In a recent High Court case, the directors escaped a contribution order due to what appears to be a shortcoming in the wrongful trading provisions. In particular, while the court stressed that the directors had, from a certain point, been wrong to seek new investment and continue to trade to the disadvantage of some individual creditors, overall they had not caused any loss to the company or worsened the position of creditors as a whole. There had actually been a reduction in the net deficiency of company assets. This meant that the court had no grounds to exercise its discretion to make a wrongful trading contribution order. The court noted that this appeared to be as a result of the structure of the legislation on wrongful trading, but made clear that ultimately this was an issue only Parliament could properly fix.

…while role of expert professional advice underlined: In that same case, the court also noted that it will not look at the issue of whether directors have committed wrongful trading "*with the benefit of 20:20 hindsight*" – being wrong, does not equate to liability. The decision emphasises that a director must, however, have some evidential rational basis for believing certain events would (or would not) come about – mere hope that something might turn up clearly is never going to be enough. Importantly, the High Court underlined the benefit to the directors in seeking professional expert advice. It provided valuable contemporaneous evidence of the directors' conduct and decision making process to keep trading while pursuing a substantial amount of new money from a potential investor.

Birth of the standstill scheme of arrangement: The High Court recently sanctioned a scheme of arrangement (proposed by Metinvest B.V.) which was significant as it did not involve the restructuring or rescheduling of liabilities. Instead, it built on the

concept developed in *Apcoa* of using a scheme to give the debtor company a short "breathing space" during which to finalise a detailed debt restructuring plan. In *Apcoa* this was achieved by using a scheme to extend the maturities of facilities; in *Metinvest* a similar objective was achieved in a more direct manner, by using a scheme to impose a four month standstill on the relevant creditors. This development may also be significant when considered in the context of the European Commission's stated desire to encourage Member States to develop statutory mechanisms which would give a debtor company the protection of a moratorium, for an initial period of up to 4 months, while it worked on a pre-insolvency restructuring plan. The potential availability of the new "*Standstill Scheme*" would appear to tick this box. For more, please read our client alert.

Recognition and enforcement of foreign insolvency judgments: A recent Privy Council decision considered the enforceability in Gibraltar of a New York judgment granted on the basis of anti-avoidance provisions of the US Bankruptcy Code. The decision itself focussed on when an agreement to submit to the jurisdiction of the foreign court can be implied as a matter of fact or law. More generally, it is of interest because enforcement of foreign (non-EU) insolvency judgments is far from straightforward and is rather topical right now. In particular, UNCITRAL continues its work on developing a model law or model legislative provisions to provide for the recognition and enforcement of insolvency-related judgments. The issues involved are clearly complex and wide-ranging but will need to be understood so that, for example, appropriate recovery strategies can be put in place. The project will need to consider whether an enacting state should only recognise and enforce insolvency-related judgments of another enacting state. What exactly is an 'insolvency-related judgment'? What if it included directors' insolvency filing obligations? There is plenty to think about.

PPF approach to key insolvency issues: The Pension Protection Fund has published its refreshed General Guidance for Restructuring & Insolvency Professionals, which explains the PPF's approach to key insolvency areas. In order to ensure employers do not 'dump' schemes in the PPF, the PPF works closely with the Pensions Regulator to ensure any scheme that enters the PPF is the subject of an actual or inevitable employer insolvency. The guide sets out the criteria that should be incorporated in any proposals made in respect of an insolvent employer. The PPF is not obliged to consider a restructuring proposal, and to do so, the criteria must be met. The guide also provides information and a flowchart on the roles and responsibilities of IPs throughout the PPF assessment process. The PPF also recently published a new guidance note setting out its approach when asked by IPs to consider the merits of, or approve the instigation of, legal action and has also signalled its intention to greater scrutiny of pre-packs and IP fees.

Bail-in without borders? Article 55 of the 2014 Bank Recovery and Resolution Directive imposes rules on banks and most investment firms to insert contractual recognition of bail-in language into their non-EEA law governed contracts. It is extremely broad in scope. So much so, that in its response to the European Commission's Call for Evidence on the EU Regulatory Framework for Financial Services published on 1 February, the Bank of England states that Article 55 needs to be reassessed to ensure that it achieves its objective in providing loss absorption capacity in resolution, while being proportionate in its reach. In this guide, we explain more fully what Article 55 requires, some of the difficulties in its application to the loan market and offer practical guidance on the appropriate approach to be taken by firms.

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