An international multi-disciplinary approach to combatting fraud in insolvency

To further an international multi-disciplinary approach to combatting fraud in insolvency, the INSOL Europe Anti-Fraud Forum and the International Expert Centre for Bankruptcy Fraud are combining forces. Carmel King and Willem van Nielen give us the UK and Dutch perspective.

An international multidisciplinary approach to combatting fraud in insolvency is a practical necessity. Where cases are multi-jurisdictional, it is essential to use innovative approaches with input across several disciplines. The INSOL Europe Anti-Fraud Forum ("AFF") was established with this as one of its aims. This working group currently has 69 members spanning 22 jurisdictions, all of whom specialise in using insolvency processes to assist with the tracing and recovery of assets.

To further the multi-disciplinary approach, the AFF has combined forces with the International Expert Centre for Bankruptcy Fraud ("IBF"). In December 2019 an INSOL Europe and IBF co-labelled conference on International Bankruptcy Fraud will be held in Amsterdam. The IBF aims to create an international community of professionals who deal with insolvency fraud, such as bankruptcy trustees, forensic accountants, criminal defense lawyers, law enforcement officers, (supervisory) judges, lawyers from the Ministry of Justice, representatives of the tax authority and the police departments. The way these professionals will work together to combat fraud in insolvency will differ by country. In this article we aim to show some of these differences from a Dutch and UK perspective.

Dutch approach

As previously reported in *eurofenix* (Autumn 2017), in 2012 the Minister for Security and Justice of the Netherlands announced a multidisciplinary approach to combat bankruptcy fraud. This has led to a legislative program which came into force in 2016 and 2017, wherein the duty of the trustee is explicitly extended to investigate and report irregularities to the bankruptcy judge. The trustee is also obliged to report bankruptcy fraud to the public prosecutor when he or the supervisory bankruptcy judge find such action necessary. It is common practice that the public prosecutor also considers the financial interests of the disadvantaged party who has suffered damage caused by the fraudulent acts. As the trustee can represent these interests, it is our experience that both the trustee and the public prosecutor may combine forces where possible.

Additionally, when confronted with irregularities that lead to a conclusion of mismanagement (e.g. fraud) by the director, the trustee is given the authority to request the director's disqualification in civil proceedings. As soon as this request is approved by the court, the director's disqualification (for a maximum period of five years) will be published in a public register. Although this authority is not focused on his primary task to retrieve assets for the creditors, several Dutch trustees have initiated such proceedings. For these proceedings, these trustees have often obtained finance by the tax authority, whose interest it is to ´get rid´ of fraudulent directors.

Furthermore, the obligation to provide the bankruptcy trustee with all relevant information regarding the bankrupt company has been reinforced, and non-compliance may lead to detention. However, in practice the obligation to provide information relating to fraudulent acts may lead to self-incrimination. In that case such a person will try to avoid detention by invoking the right not to incriminate oneself (*nemo tenetur* principle) with reference to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR").

As described in *eurofenix* in Autumn 2014, the Supreme Court of the Netherlands has rendered two judgements that limit the possibilities to coerce the information duties to the trustee, based on the *nemo tenetur* principle. The Dutch judgements are based on earlier judgements of the European Court of Human Rights ("ECoHR") which has also an impact on the multidisciplinary approach to

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combat bankruptcy fraud in general and are relevant for all European Member States. According to these judgements of the ECoHR, if it cannot be ruled out that the information requested will be used in a criminal charge against this person and this information is obtained through methods of coercion, the Member States will have to have included a safeguard in their regulation that such information will not be used in criminal proceedings against this person (ECoHR 17 December 1996, no 19187/91 (Saunders/United Kingdom)). However, Article 6 ECHR is not violated regarding information that exists independently of the will of the person concerned.

As the Supreme Court of The Netherlands concludes that Dutch law does not include such a safeguard, it judged that the supervisory judge has to include such a safeguard in his order for remand in custody (to coerce the person concerned to comply with these information duties). As it is questionable if this safeguard meets the requirements of the ECHR, the Dutch legislator has recently drafted a Bill that includes a safeguard in Dutch law as required by the ECHR. This will certainly help the multidisciplinary approach to move on!

UK approach

In the UK, the insolvency practitioner is not usually a practicing solicitor. Accordingly, in circumstances where an application to Court is required, the IP requires the assistance of a solicitor and a barrister. This can arise for example in situations where certain parties fail in their duty to cooperate with the IP. Whilst the *nemo tenetur* principle is occasionally invoked, proceedings are not often contemplated by the prosecution authorities in tandem with civil procedures such as insolvency.

The Court can summon to appear before it any person whom it thinks capable of giving information concerning the company. This could ultimately result in the arrest of that person and the seizure of items in that person's possession. The IP will also as a minimum require the input of a solicitor and barrister when bringing claims of malpractice and fraud against target parties. Additional input may be required from a wide range of disciplines including forensic accountants, digital forensic experts, expert witnesses, investigators, valuation agents and property agents.

The IP can bring several different sorts of claim against directors or other parties found to have defrauded the company, for example wrongful trading and transactions in fraud of creditors. The IP will look at claims that have financial remedies in order that the task is consistent with the overarching duty of realising the assets of the company for the benefit of the creditors. We diverge slightly from the Dutch practice when it comes to director disqualification proceedings.

IPs are required to submit reports on the conduct of the company directors to the Secretary of State within three months of appointment. From there, the Insolvency Service investigates the director's conduct, often with the input of the IP. If it is in the public interest, the director can be disqualified for a period of between two and 15

years. Furthermore, certain actions undertaken by a disqualified director are criminal offences, for example, acting as a director during this period without leave of the Court.

The sorts of cases we see today are not often confined to one jurisdiction. The vast majority will involve related companies, individuals, assets or lines of investigation overseas. The UK (currently!) enjoys the degree of harmonisation across the EU that we have seen to date, as well as the Recast Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency. Readers will be familiar with all of these.

In practical terms, these cases can be time and resource consuming, requiring applications to local Courts for recognition, with problems around the availability of documentation and information and a lack of cooperation or active obstruction by directors. In situations such as this, it is necessary to think differently and dynamically in order to achieve results for the victims of the fraud.

I am fortunate in that my firm has a dedicated offshore network. We regularly take joint cross-border appointments, enabling seamless delivery on complex cases. Although by no means new, we are increasingly seeing company structures whereby the parent company is incorporated in an offshore jurisdiction, with subsidiaries around the globe. One way to preserve the value is to take the insolvency appointment of the parent without putting the subsidiaries under. We have taken this approach, on one occasion taking the appointment in Jersey and selling the Guinean subsidiaries. This strategy is also useful where fraud is a factor and the directors are uncooperative.

It is possible to take the appointment over the parent company in the offshore jurisdiction, then appoint directors throughout the structure to ensure board control, enabling the collection of records and other investigations. This protects creditors' interests and maximises returns, whilst keeping the subsidiaries out of the immediate insolvency process. Our experience has been that identifying appropriate nominee directors can be rather difficult, and accordingly this is a function we have taken in-house.

Conclusion

Our country overview shows different approaches in the UK and in the Netherlands. What is commonly shared between the jurisdictions is a desire to innovate and be dynamic in the fight against fraud. We look forward to examining this further at the IBF and INSOL Europe Joint Conference on Bankruptcy Fraud in Amsterdam on 6 and 7 December 2019. ■

WE LOOK FORWARD TO EXAMINING THIS FURTHER AT THE IBF AND INSOL EUROPE JOINT CONFERENCE ON BANKRUPTCY FRAUD IN AMSTERDAM ON 6 AND 7 DECEMBER 2019