Tick Tock: What Fees Are On The Clock? Increased Scrutiny Of Insolvency Practitioners’ Fees In England And Wales

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The UK Government announced plans in parliament on 3 March 2015 requiring insolvency practitioners to provide an upfront estimate of their fees for creditor approval, where they are charging on a time-cost basis. The new rules are expected to be in force from October 2015 for English and Welsh regimes (although they will not apply to members’ voluntary liquidations).

There has been a theme running through some of our recent UK blog posts on the topic of insolvency practitioners’ fees (see and). Part of the increased scrutiny stems from the Government’s aim of increasing creditor confidence in the insolvency regime and ultimately engagement by creditors.

The new pre-approved fee estimate is intended to act as a cap on fees, with insolvency practitioners only being able to take further fees if creditors approve. R3 – The Association of Business Recovery Professionals – has welcomed the move (read more). It is noted that this is a move away from the Government’s original proposals to abolish time costs where there is no secured creditor or creditor committee, after lobbying from R3, so could be seen as a relatively ‘light touch’ in comparison.

In practice, it remains to be seen how the fee estimating will work. Often the amount of work an insolvency appointment will generate will be unknown at the outset, especially if the pre-planning phase has (of necessity) been relatively short and there is an incomplete understanding in the early phases of the issues an insolvency practitioner will have to deal with during the life of a matter. There will need to be a balance therefore in providing a reasoned and realistic estimate and providing sufficient scope for dealing with contingencies.

The fee estimate will also need to include an estimate of the expenses an insolvency practitioner will or is likely to incur. Note also that, even if proposing to charge on a fixed fee or percentage of asset realisations basis, insolvency practitioners will still need to provide an estimate of expected expenses (although no creditor approval is required to that estimate).

So what happens if, despite best efforts in proving a realistic estimate upfront, the costs increase beyond what was anticipated? Well, given that the estimate is intended to act as a cap, the draft regulations laid before parliament propose regular and continued reporting to and approval from creditors before any additional fees can be taken. In progress reports, the IP will need to include a statement setting out whether the remuneration anticipated to be charged is likely to exceed the fee estimate and the reasons for that excess. Any request for approval will have to include a statement specifying: (1) the reasons why the estimate has been or is likely to be exceeded; (2) the additional work the office holder has carried out; (3) the hourly rates to be charged for each part of that additional work; (4) the time that additional work has taken or will take; (5) whether it is anticipated that a further approval of fees will be required; and (6) why it will be necessary to seek further approval.

The aim of the new estimating process is, however, to provide greater transparency for creditors and trust in the insolvency system. The provision of more detailed information upfront about what the insolvency practitioner will be doing and the time to be spent in doing it should hopefully achieve this, and the Government notes that it should also enable insolvency practitioners to demonstrate "…" For further information see the .

In Australia, a similar (although non-legislative) regime has been in play for some time (through the Australian Restructuring Insolvency and Turnaround Association Code of Professional Practice and APES 330) without significant issues in practice. According to Amanda Banton, head of the Squire Patton Boggs Sydney based Restructuring and Insolvency Team, "It remains to be seen whether the new legislation in England and Wales will emulate this position or whether instead the new regime will cause any practical issues in England and Wales.

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