EDITORIAL

Enterprise Act 2002

Digby Jones, Director General, CBI, London

Great changes have recently taken place in the United Kingdom with regard to corporate insolvency law, which broadly reflect the growing emphasis on corporate rescue rather than the tried and perhaps not-so-trusted insolvency procedures such as administrative receiverships, which were often seen as the preserve of primary lenders, often banks. Digby Jones, Director General of the United Kingdom's CBI, comments on the changes brought about by the Enterprise Act 2002.

The Enterprise Act, which also makes significant reforms to UK competition and consumer law, seeks to modernise the UK's bankruptcy and insolvency laws.

Reforms of these disparate areas of the law were lumped together by the Government in this legislation as part of its declared objective to improve the enterprise culture in the UK, and to put the UK on a comparable footing with the United States. However, that statement has a somewhat hollow ring to it in the world post-Enron and WorldCom and other corporate scandals. Nevertheless the Government declared that the Enterprise Act was one of its cornerstone measures for this Parliament, on a par with its decision in the previous Parliament after the General Election in 1997 to give freedom to the Bank of England to set interest rates.

The CBI was broadly supportive of most of the proposed reforms to insolvency and bankruptcy law, including the severe curtailing of administrative receiverships in favour of a revamped new and streamlined administration procedure. The CBI was actively involved in the extensive consultation programme instigated by the DTI. Several of the original proposals for administrations were not considered desirable in principle or workable in practice, and the CBI lobbied the Government along with Opposition MPs and Peers to get them improved, upon which we had a significant degree of success.

For example in the new administration procedure, we sought to retain some of the best features of administrative receiverships, particularly speed of action and the minimisation of cost at the entry point and court involvement. As readers know, it is particularly important to retain the ability to move quickly to sell the business of a failed company and preserve viable businesses and jobs in the hands of new management. Compared with the Government's original proposals, court hearings and bureaucratic demands upon insolvency practitioners are being kept to a minimum.

One of the CBI's main successes was to get the primary period for the conduct of an administration extended from the Government's original proposed three months to twelve months, before needing a creditor vote or court order for a further extension of time. We were very clear about the need for the Administrator to get his difficult job done well and thoroughly without having to keep his eye constantly on the procedural clock. The Government were very intransigent on this point, and only conceded the point at the very end of the Parliamentary process to get the Bill passed. We were also successful in getting the period for the Administrator to circulate his proposals for the business, and the prospects for a rescue of the whole or parts of it extended from 28 days to 2 months. In our view, it was more important that the proposals should be informed and considered than unnecessarily quick. The new general duty for an Administrator to proceed as quickly and efficiently as is practically possible gives a sufficient impetus to expedition of the process.

The CBI strongly supported the abolition of Crown preference for unpaid tax and VAT, and the provisions to create a pool out of floating charge realisations for the benefit of unsecured creditors under newly created debentures and floating charges. We are anxious to see how these new provisions will work in practice, and would welcome feedback about the experiences of practitioners.

On the abolition of administrative receivership generally, there is some concern that this may affect the terms of lending by banks to companies, particularly SMEs, perhaps increasing rates charged, and driving banks to require companies to enter into invoice discounting, factoring and similar arrangements. This is something we will be monitoring.

There has been widespread criticism of the way in which the Bill was "negotiated" and the language in which it was cast (which was wholly inconsistent with the statute, the Insolvency Act 1986, which it was amending). Even so, we remain of the view that the changes made by the Act are generally to be welcomed.

Whilst readers of this journal will be primarily interested in corporate recovery they might be interested to know that, whilst there was support amongst CBI members for reducing the period of bankruptcy from 3 years and giving entrepreneurs the chance in appropriate cases to start in business again, the CBI strongly lobbied that there should be an absolute minimum period of bankruptcy of one year. The Government was keen to reduce what it considered, wrongly in our view, to be the stigma of bankruptcy amongst entrepreneurs, and wanted to give flexibility to the Official Receiver to facilitate the discharge of bankrupts after only a few months in appropriate cases, and without conducting a formal examination of their affairs. However, the CBI remained firmly of the view that there should, nevertheless, be a minimum period of bankruptcy of not less than a year. All bankrupts, however innocent, will have caused someone, including other businesses, some loss. In addition, with the high level of consumer debt, and the same procedures applying to consumer as well as business bankruptcies, banks and consumer finance groups were particularly concerned that consumers were being sent the wrong signals, and encouraged into default and bankruptcy in expectation of a speedy discharge and the avoidance of their debts.

I was very pleased to be invited to write this Editorial, and I wish the Journal all success.