Pre-packs – back on the agenda

As numbers of Pre-packs are expected to fall to an all-time low, David Kerr explores where the issues may lie.

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NOISE levels around Pre-pack administrations may be lower than they have been in the past, but there are quiet rumblings in the insolvency world about this procedure, how it affects creditors, and the potential for legislative change.

The term 'Pre-packaged sale' refers to an arrangement under which the sale of all or part of a company's business or assets is negotiated with a purchaser prior to the appointment of an administrator, and where the administrator then effects the sale immediately on, or shortly after, his/her appointment.

The nature of an insolvency practitioner's position renders transparency in all dealings of primary importance and particularly so in these circumstances. Administration is a collective insolvency proceeding – creditors and other interested parties should have confidence that the insolvency practitioner has acted professionally and with objectivity, and failure to demonstrate this clearly may bring the insolvency practitioner and the profession into disrepute.

Therefore, insolvency practitioners have a duty to recognise the high level of interest the public and the business community have in Pre-packaged sales of businesses by administrators, and to assume there will be greater interest in and scrutiny of such sales where the directors and/or shareholders of the purchasing entity are the same as, or are connected parties of, the insolvent entity.

It is equally important that the insolvency practitioner acts and is seen to be acting in the interests of the company's creditors as a whole and is able to demonstrate this. Requirements in Statement of Insolvency Practice 16 include providing creditors with sufficient information to demonstrate that there has been due regard for creditors' interests – by way of a narrative explanation and justification of the transaction entered into, within a week of it taking place.

These measures were introduced in November 2015 when the Pre-pack pool opened its doors to applications from connected party purchasers, with the potential for independent pool members to provide an assurance to creditors about the Pre-pack deal…so far, so good. Take up in the period to December 2016 was 28 percent of eligible transactions – not a bad start, but there was an expectation that numbers would grow.

The problem is that they haven't. The application numbers have slowed, and at the present rate the total for 2017 could be lower than last year. What does that say about the 'success' of this process, which was one of the steps taken by the insolvency profession and business community to implement recommendations made by Teresa Graham in her report on Pre-packs? Does the scheme need to be made compulsory to be effective, do the pool's doors need to be opened to applications from practitioners, should other connected party transactions be included, or should perhaps pool members review all SIP16 statements to increase coverage?

A number of the above options have been considered by the Pre-pack pool oversight group, and some will be discussed by the Joint Insolvency Committee (on which CICM has a seat). A key question might be to what extent creditors pay attention to the SIP16 statements and pool opinions where they are provided, and to what extent are creditors' decisions on future trading with the new company influenced by a pool member's report. If there is no discernible difference in creditors' approach, then what will drive purchasers to pay for an opinion which is little read or considered?

The Government could outlaw connected party transactions, but would that really be in creditors' best interests? The need for transparency is well understood, but a connected party will often produce the best price and therefore better prospects for creditors. Perhaps a ban on transactions that haven't been to the pool is one option to consider, but what if the applicant receives a negative opinion? At the moment, the sale can still proceed.

A wider question is whether driving traffic to the pool is necessarily the most-worthy objective. A broader review of the pool and what it can and cannot achieve might be appropriate, and creditors should be consulted on that. In any event, any change to SIP16 would ordinarily be subject to a public consultation, and CICM would no doubt participate in the debate. Some individual CICM members may have strong views on the subject; now is the time to make them heard!