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ALERT MEMORANDUM

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Schemes of Arrangement for Foreign Companies – Limits to the Jurisdiction Question?

Speed read

- Since 2012 the English courts have been able to take jurisdiction to implement a scheme of arrangement for a foreign company even where the only connection to England is that the principal finance documents are governed by English law[1].

- In the recent Apcoa decision, an English court has ruled that it could take jurisdiction for a scheme even where the governing law of the principal documents was originally German, but was amended to be English specifically so as to be able to conduct a scheme of arrangement.

- But, in an indication that we are reaching the limits of the expansive approach to jurisdiction that has characterised the last 5 years, the court indicated that it would be wary to take jurisdiction if:

    - the new choice of law appeared to be ***entirely alien to the parties' previous arrangements*** and/or with which the parties ***had no previous connection***;

    - the new choice of law has ***no discernible rationale or purpose other than to advantage those in favour*** of the proposed restructuring;

    - the new choice of law would be considered '***a step too far' in the places where the relevant parties are based***.

Facts

The Apcoa group is a pan-European car park operator. By late 2013 it had become clear that the group's financial performance was not going to be sufficient to sustain the debt burden that it carried (some €764m by the time of the scheme). The maturity date for the existing facilities was approaching in late 2014 and a refinancing in full would not be commercially possible. So a scheme of arrangement to re-set the capital structure was proposed, with the support of the vast majority of the group's creditors (86.9%).

[1] See *Re Rodenstock [2012] BCC 459* and *Re PrimaCom (No.2) [2013] BCC 219.* Note that in addition to a 'sufficient connection' the court will need to be satisfied that a scheme will achieve its purpose in any other relevant jurisdictions where the subject group operates. To satisfy the court, expert opinions on recognition and legal effectiveness of the schemes in the relevant jurisdictions are normally provided. If the 'home jurisdiction' has a similar procedure the English court may not take jurisdiction for a scheme, and often parallel processes are run in a number of jurisdictions.

At each stage of the court process the scheme had been opposed by a single creditor, and vociferously so. The convening hearing for the scheme (which would normally last less than an hour) took nearly 3 days. The sanction hearing lasted 4 days. Never has a scheme been so vigorously contested.

A key element of the dissenting creditor's argument was that the English court did not have jurisdiction to sanction a scheme of arrangement for a foreign company where the 'sufficient connection' constituted by having English law governed documents was only achieved by way of an amendment to those documents.

In Apcoa's case, the key finance documents were all originally governed by German law, and subject to the exclusive jurisdiction of the German courts. But these provisions could (under German law) be amended with the support of a super majority of the lenders, and that amendment would be binding on all the lenders whether they supported it or not.

The dissenting creditor asked the court to distinguish between the Rodenstock type situation (where all lenders had at the outset agreed on English law and jurisdiction) from this situation (where the choice of English law and jurisdiction was being imposed on all the lenders by the majority).

Decision

The court held that the English governing law and jurisdiction clauses did provide a sufficient connection with England, allowing the court to take jurisdiction. But the judge sounded a note of caution by suggesting that he would be wary of taking jurisdiction if any of the following criteria applied:

- if the new choice of law appeared to be entirely alien to the parties' previous arrangements and/or involved a jurisdiction with which the parties had no previous connection;

- if the new choice of law has no discernible rationale or purpose other than to advantage those in favour of the proposed restructuring; or

- if the new choice of law would be considered 'a step too far' in the places where the relevant parties are based.

The judge was comfortable that none of these applied to the Apcoa case, and in reaching that conclusion he relied on the following factors:

1. The change in governing law had been ***approved by a super majority of the lenders***, including lenders who had nothing to gain.

2. When the approval to change the governing law was sought by the companies all ***the lenders were advised that the change would have the effect of enabling a scheme of arrangement*** to be implemented.

3. The ***original credit agreement did in fact select English law*** as the governing law for some provisions (certain parts of the interest provisions).

4. Two of the ***scheme companies were incorporated in England***.

5. The ***agent and security agent were both English companies***.

Implications

- Simply flipping foreign law documents to English law may not be enough to convince an English court that it should take jurisdiction to sanction a scheme for a foreign company.

- In cases where the governing law needs to be changed to provide a sufficient connection with England, the additional criteria that need to be satisfied are rather vague, particularly the requirement to prove that a change to the governing law and jurisdiction clauses is not 'a step too far' in the home jurisdiction. That subjective test leaves open the possibility of expensive and lengthy disputes between local law experts, and may jeopardise the scheme's reputation for a smooth and efficient way of implementing a quasi-consensual restructuring.

- The criteria listed by the court in this case were given as examples rather than a comprehensive list. This judgment could pave the way for this concept to be developed further in future cases.

- Although not an issue in this case, it is worth noting that most syndicated facility agreements and many bonds do not make changes to the governing law or jurisdiction provisions 'reserved matters' requiring all lender approval. It may be that creditors signing up to foreign-law governed finance deals in the future will seek to make them reserved matters requiring the consent of all lenders (or at least a super majority) before amendments can be made.

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