

Cross Border Restructuring and Insolvency Update

December 2011

Can you pursue legal proceedings against a company in administration?

Australia ruling sees law changed to mirror that in the UK

Whilst the court has discretion to grant leave to bring proceedings against a company in administration, the traditional approach of the Australian courts has been that leave should only rarely be granted. However, the recent case of *Larkden Pty Limited v Lloyd Energy Systems Pty Limited*¹ has now made it easier for a party to pursue legal proceedings against a company in administration. The Supreme Court of New South Wales held that the decision to grant leave would now be determined by the circumstances of each case. The court in this case lifted the stay in the proceedings, being persuaded by the fact that the proceedings were of minimal distraction to the administrator and minimal prejudice to other unsecured creditors.

This decision is in line with the UK as laid down in *Re Atlantic Computer Systems plc*²; leave should only be granted in exceptional circumstances, and the court should take account of all of the circumstances of each case whilst weighing up the relevant prejudice for the parties. In *Atlantic Computers*, a finance company applied for leave to repossess goods. Leave was granted as *Atlantic Computers* were still using the goods and should therefore pay for them.

¹ [2011] NSWSC 268

² [1992] 2 W.L.R. 367

ECJ clarifies criteria for bringing territorial insolvency proceedings

The latest case from the ECJ

The recent ECJ case of *Zaza Retail*¹ has ruled on the criteria for bringing territorial proceedings under Art 3(2) of the EC Regulation 1346/2000. The Regulation allows a creditor to commence insolvency proceedings in a state where the debtor company does not have its Centre of Main Interest ("COMI").

The case concerned attempts by Belgian authorities to bring proceedings in Belgium as they lacked standing to bring the proceedings in the company's COMI (the Netherlands). The question arose as to the authorities' entitlement to bring territorial proceedings given they were not creditors of the company themselves, but were acting in the interests of the Belgian public who were.

The ECJ held that the Belgian authorities could not bring proceedings in Belgium. Firstly, they were not a creditor of the company. A party is only a "creditor" if owed money by the debtor. Representative action would require a more direct link between the Belgian authorities and the creditors than just general "public interest".

Secondly, the barrier to the Belgian authorities commencing proceedings in the debtor's COMI must have been objective and not peculiar to them. In this case any actual creditor could have instigated proceedings in the Netherlands; it was the "public interest" standing of the Belgian authorities which was not recognised.

¹ (Area of Freedom, Security and Justice) Case C-112/10 [2011] EUCJ

Updates from around the world

Spain

Amendments to Spanish Insolvency Law will come into effect on 1 January 2012. The main changes include new measures on the enforceability of refinance agreements, the introduction of an additional time period before the insolvency proceedings with the objective to negotiate an agreement of the creditors in advance, and measures to expedite the insolvency process and reduce costs.

United Arab Emirates

A draft bankruptcy law designed to support companies in financial difficulties is reaching its final stages before enactment. The legislation will overhaul how the law deals with businesses and individuals with debt burdens they cannot pay. It is expected to map out a process for the restructuring of debt and set out rules to enable businesses struggling financially to access bank loans.

Germany

Manroland AG, the German printing press-maker, has filed for insolvency, making it the country's biggest corporate failure since retailer Arcandor AG collapsed two years ago. The failure is blamed on a failed merger bid and a lack of financial support. 6,500 employees are set to lose their jobs.

Italy

New austerity measures are being introduced by newly elected Prime Minister Mario Monti. The austerity package includes €20 billion of budget tightening and aims to raise an additional €10 billion from a property tax, levies on luxury items like yachts, a raise in value added tax, a crack down on tax evasion and increasing the pension age.

UK

The UK has opted out of an EU Regulation that creates a new debt recovery regime within the EU. The Regulation would allow a creditor in one EU state to freeze a sum of money in the account of a debtor in another EU state. The UK criticised the Regulation in its current form for not containing enough safeguards and being open to abuse by creditors.

Merry Christmas and a happy New Year!



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