

Cross Border Restructuring and Insolvency Update

April 2012

The European Commission's Consultation on the future of European Insolvency Law

On 30 March 2012, the European Commission published its Consultation on the future of European Insolvency Law, which seeks feedback on the operation of Regulation (EC) No 1346/2000 on insolvency proceedings.

In view of the current economic climate, the Commission aims to review the effectiveness of insolvency proceedings within the European Union, and examine the impact the changes in the global economy have had since the Insolvency Regulation came into effect.

The revision links in with the EU's current political priorities to promote the economic recovery and sustainable growth, a higher investment rate and preservation of employment. The European Commission has stated that Insolvencies are an important issue for the European economy. About fifty percent of enterprises do not survive the first five years of their life. In 2010, a total of 220,000 businesses went into liquidation in the EU, and this trend has since continued. Given these figures, it is crucial that insolvencies in Europe are governed by modern laws and efficient procedures.

The Commission is most interested in opinions on whether:

a). EU member states should create simplified insolvency procedures for use in the restructuring of smaller businesses;

- b). Whether the debtor's centre of main interest "COMI" should determine which state has principal jurisdiction over the debtor's insolvency or if another criteria should apply;
- c). It is appropriate to widen the scope of the Insolvency Regulation to encompass mechanisms for restructuring the debts of distressed companies or individuals, which take effect before a company or individual enters a formal insolvency process; and
- d). The Insolvency Regulation should make specific provision for the insolvency proceedings opened over the parent company in a group.

Furthermore, the Commission is investigating the merits of introducing a register of all insolvency proceedings opened within the EU. The deadline for responses is 21 June 2012.

Case Report - Re Phoenix Kapitaldienst GmbH [2012] EWCA 62 (Ch)

In a recent case it was decided that English Courts had an inherent common law jurisdiction to recognise and assist an administrator appointed overseas.

The case concerned the administrator of a German company, who sought the recovery of the original amounts invested and repayment of profits from certain investors resident in England. The directors of the company had been prosecuted for their involvement in a "Ponzi" scheme. Money from investors was used to cover existing overheads and pay fictitious profits to other investors.

The administrator could not avail himself of the Cross-Border Insolvency Regulations 2006, as the relevant events pre-dated those provisions. The German administrator therefore obtained recognition from the Registrar under common law enabling him to exercise powers under the Insolvency Act 1986. He then issued an application under s.423 of the Act against the investors and claimed back, amongst other things, the fictitious profits they had received.

The investors challenged the Registrar's decision to grant recognition and argued that the Court had no common law power to assist a foreign officeholder to establish and exercise rights, which he did not already have under his domestic insolvency regime.

The appeal by the investors was dismissed, confirming that there is power to use the common law to recognise and assist an officeholder appointed overseas. This assistance includes doing whatever the English Court could have done in the case of a domestic insolvency. The Court held further that insolvency proceedings (including setting aside antecedent transactions) are collective proceedings for the enforcement (not establishment) of rights for the benefit of all creditors. Furthermore, it was held that proceedings to set aside antecedent transactions are central to the purpose of the insolvency process.

This case is being appealed, however, to the Court of Appeal and it remains to be seen whether the ruling of the Registrar and the High Court will be followed.

Updates from around the World

Portugal

The Wall Street Journal has reported that the dependence of the Portuguese banking system on the European Central Bank rose to a record high in March, as banks took advantage of easier borrowing conditions. Bank of Portugal said domestic banks' use of the European Central Bank's various credit facilities rose to €56.32 billion from €47.55 billion in February.

Portuguese banks have relied heavily on ECB money since they lost access to financing in wholesale markets in 2010. Seven central banks in the euro zone, including Portugal's, received approval from the ECB in February this year to expand the type of assets banks can pledge to secure loans. For Portugal, that includes residential mortgages and other unsecured consumer loans, which could include assets like credit-card debt.

Serbia

Agrobanka AD (a Serbian bank) was placed in Receivership three months ago following a major loss last year. The minority shareholders are demanding another audit before the lender is overhauled. A new shareholders' meeting to pick the auditor will be held by the end of April. The bank, in which the Serbian government holds a 20 percent stake, had an unaudited 2011 loss of 29.7 billion dinar (\$348 million). Serbia's central bank fired Agrobank's management on 29 December 2011 and placed it in Receivership after inspectors discovered its capital didn't match the risk it had assumed. Saving this bank, whose name indicates the main focus is agriculture, will stop the ripple effects in the economy, the banking industry, and the capital market.

UK

Thomas Cook is close to striking a £1.2bn refinancing deal that will give the troubled travel group two more years' breathing space to turn round its business, *The Guardian* has reported. Britain's oldest tour operator (which has an annual turnover of £9bn and 30,000 employees) found itself in difficulties and was on the brink of collapse last December. A consortium of 17 banks, including Barclays and The Royal Bank of Scotland, is expected to approve an extension of loans until 2015. As a result stringent conditions and higher interest rates are likely to be imposed; nevertheless Thomas Cook regards the deal as good news.

Germany

Q-Cells SE, once the world's largest producer of PV solar panels, has gone into administration. The company has struggled as the German Government has reduced solar subsidies and the industry fights overcapacity due mainly to an increase in Chinese produced PV solar panels.

Q-Cells had been trying to organise a deal to swap debt for equity in the company. But the company said that a recent domestic court ruling, which blocked a similar restructuring plan, convinced it that it could not go ahead with its rescue plan.

The company's administrator will examine possibilities under the new German insolvency regime which came into effect on 1 March 2012. The new law is aimed at facilitating the restructuring of companies and enhancing creditor involvement.

UK/Spain

Game, the UK's largest high street seller of computer games, went into administration no less than one week after the UK's Entertainment Retailers Association announced that computer games was the largest entertainment sector surpassing DVD's and film. Game's failure was largely due to the main suppliers of video games becoming nervous about the handling of their latest titles.

PWC, the administrators, immediately closed 277 stores and made over 2,000 staff redundant. OpCapita, who specialise in turning around stricken companies, agreed to purchase the remainder of the business for £1 taking on its £85m debt. OpCapita has since announced the group's Spanish and Portuguese operations would be bought out of administration with a view to selling them on.



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