

Cross Border Restructuring and Insolvency Update

March 2012

The EU Late Payment Directive

The directive provides new rules on late payment in commercial transactions and this came into force in March 2011. The UK, which was one of the first EU countries to introduce a statutory right to interest for late payment, will have until March 2013 to implement the directive. It is thought that the new rules may be introduced this year.

Under the new rules, a creditor will automatically be entitled to interest for late payment without the necessity of sending a reminder.

Commercial debts will have to be paid within 30 days if no contractual period is stipulated. The new rules will allow businesses to agree on a longer period to pay invoices; the period for payment fixed in a contract shall not exceed 60 days, unless otherwise expressly agreed in the contract and provided it is not unfair to the creditor.

The EU's minimum statutory rate of interest for late payment will be increased to 8 percentage points above base rate, but this is currently the rate offered by the UK's late payment legislation.

The rules will still provide for compensation for internal debt recovery costs. Crucially, however, the creditor will now be entitled to recover expenses incurred due to the debtor's late payment, such as those incurred in instructing solicitors or employing a debt collection agency.

It is reported that the coalition Government is looking to amend the UK's late payment legislation to reflect the new EU Directive sometime this year - a year earlier than the deadline.

High Court takes a wider view when considering the Court's discretionary powers under the Cross-Border Insolvency Regulations 2006

In the recent case of *Akers and McDonald v Deutsche Bank AG (Re Chesterfield United Inc and Partridge Management Group SA)* [2012] EWHC 244 (Ch) the High Court considered its general discretionary power under *The Cross-Border Insolvency Regulations 2006 (SI 2006/1030)* ("CBIR 2006") to provide the same help to foreign insolvency office holders as is available to English office holders under UK law. Interestingly, the court departed from preceding decisions in relation to these discretionary powers and took a wider view.

The CBIR 2006 gives effect to the UNCITRAL Model Law and sets out when a country's national Court must recognise insolvency proceedings. Once recognised, the Court may provide assistance to the foreign insolvency office holder. The Court held that this power (contained in Article 21(1)(g) of Schedule 1 to the CBIR 2006) was not to be interpreted narrowly by reference to the specific categories of discretionary assistance listed in the remainder of Article 21(1).

Instead, the Court could make an order under section 236 of the Insolvency Act 1986 that required Deutsche Bank AG to make extensive disclosure to the Liquidators of two British Virgin Island companies. This order did not need to be limited by the "minimum standard" set for the Court's powers to order disclosure set out in Article 21(1)(d).

This case is of significance as the view taken by the High Court departs from the earlier case of *Re Bernard L Madoff Investment Securities LLC* [2010] EWHC 1299 (Ch)

where a much narrower analysis of the Court's power to order disclosure was taken.

The Courts' increasing willingness to invoke its powers under the UK domestic insolvency legislation in relation to its discretion under CBIR 2006, may be reflective of a continual shift towards the ability to treat foreign insolvency office holders as if they are domestic ones (in all but the most technical sense).

Updates from around the world

Bahrain/USA

It has been revealed that the Bahrani investment firm, Arcapita Bank, filed for U.S. bankruptcy protection on 19 March 2012 in a bid to reorganise the company. With major investments such as U.S. apparel retailer J. Jill and British rail company Freightliner, Arcapita sought Chapter 11 protection after failing to refinance a \$1.1 billion loan due on 28 March 2012.

A number of factors have contributed to Arcapita's difficulties, which have been exacerbated by the global financial crisis and the ongoing eurozone financial crisis. It has been said that Arcapita filed for protection whilst working on a turnaround plan.

Germany

The High Court in England has sanctioned a scheme of arrangement for a German company in circumstances where none of the scheme creditors were domiciled in the UK.

The judgments in *Primacom Holding GmbH and others v Credit Agricole and others* [2011] EWHC 3746 (Ch) and *Primacom Holding GmbH and others v Credit Agricole and others* [2012] EWHC 164 (Ch) discuss issues of voting class composition and the extent to which the Judgments Regulation (Regulation 44/2001) impacts on the Court's scheme jurisdiction.

Despite the fact that the scheme creditors were not domiciled in the UK, the Court held that the company had a sufficient connection with England and Wales to establish the Court's jurisdiction because the scheme debts were all governed by English law and also ranked by an English law inter-creditor agreement.

It must be noted that the reason the Court had jurisdiction to sanction the scheme were fact specific, and related in part to the underlying lending documents which each contained an exclusive jurisdiction clause in favour of the English courts.

Greece

Greece was able to meet March's debt repayments of more than €14.5bn following successful debt restructuring.

All of the bodies involved in Greece's second bailout of €130bn approved the release of funds. The International Monetary Fund released €28bn towards Greece's second bailout of €130bn. This tranche of money was rubberstamped after private investors voted in favour of a debt swap, which saw Greece win a 53.5% reduction in its debt burden to private creditors. Greece is also being supported from money paid by the EU and this is due to be released in stages from the European Financial Stability Facility.

USA

Nearly three-and-a-half years after its failure in September 2008, Lehman Brothers has exited from bankruptcy protection.

Previously the company needed the Court's permission to sell any of its assets, but now the company is free to sell its remaining assets and distribute the proceeds to creditors. From April Lehman Brothers will start to distribute roughly \$65bn to creditors. It is thought that the cost of exiting the bankruptcy is more than \$1.5 billion in terms of fees and expenses.



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