

Cross Border Restructuring and Insolvency Update

February 2012

The English courts' inherent common law jurisdiction

New case on the English Courts' inherent common law jurisdiction to recognise and assist a foreign Administrator

*Phoenix Kapitaldienst*¹ ("the Company") was a Germany company, which, up until liquidation, was engaged in investment activities. The Company was involved in an alleged world-wide fraud in the form of a "Ponzi" scheme, which had led to some 240 sets of legal proceedings against investors in over 20 jurisdictions. The German Administrator sought to challenge various transactions in the English courts, alleging the transactions were fraudulent.

The circumstances of the case meant that EC Regulation 1346/2000 on Insolvency Proceedings did not apply because the Company was an investment undertaking. In addition, the UNICTRAL Model Law could not be invoked because of the date it was incorporated into English Law. The only recourse available to the Administrator was under common law principles and the English court had to decide whether it had inherent jurisdiction to permit the powers of the Insolvency Act 1986 to be applied to the foreign Administrator.

At first instance, the court granted the German Administrator recognition under the common law, and authority to exercise the powers under the Insolvency Act 1986, which was appealed by the investors.

On appeal, the court held that there is a power to use English common law to recognise and assist an Administrator appointed overseas, because of the 'underlying principal of universality': that there should be a single insolvency process

¹ In the matter of Phoenix Kapitaldienst GmbH sub nom Frank Schmitt v Henning Deichmann & 14 Ors (2012) [2012] EWHC 62 (Ch)

whereby an English court will recognise and assist a foreign insolvency representative empowered under his local law. Such assistance includes doing whatever the English court could have done in the case of a domestic insolvency, even proceedings to challenge transactions on the basis they were fraudulent, as these are central to the purpose of insolvency. The Administrator was therefore able to use the powers under the Insolvency Act 1986 to challenge the transactions.

The US courts limit forum shopping & action to avoid 'stays'

The US court consider attempts to avoid stays in the US

In *Nortel Networks*² the Pension Protection Fund (PPF) failed in its appeal to the U.S. Court of Appeals for the Third Circuit over the issue of a Warning Notice (WN) against Nortel's U.S. Companies.

Nortel Networks UK Limited went into Administration in January 2009 with an estimated deficit in the Nortel Networks UK Pension Plan of £2.1 billion. This deficit triggered a review by the PPF and it issued a WN against Nortel's U.S. companies. The U.S. Bankruptcy Court, on application from Nortel, issued a decision in March 2010 that the WN breached the automatic stay imposed by U.S. Chapter 11 insolvency law.

² *Re Nortel Networks v Trustee of Nortel Networks UK Pension Plan; Board of the Pension Protection Fund (No.11-1895)*

The PPF appealed against the decision, claiming the benefit of the 'police power exception'. This allows "a governmental unit to bring or continue actions against a debtor to prevent or stop violations of law affecting matters of public health, safety, or welfare". The court refused the appeal on the grounds that the Trustee of the PPF was a private party and, that while the PPF had been created by the government, it was a privately funded body. The court stated that the Pensions Regulator was a 'governmental unit' but that it was not a party to the proceedings.

The judgment was critical of the continued proceedings and urged the parties to seek resolution through the ongoing mediation aimed at distributing Nortel's assets.

Updates from around the world

Ireland

Contempt of court proceedings have been initiated by the Irish Bank Resolution Corporation ("IBRC") against Sean Quinn, his son and his nephew in the latest of a series of court proceedings between IRBC and the business tycoon. The IRBC have alleged that the Quinn family members have breached an injunction preventing them from moving certain assets. If found in contempt, they could have their property seized, or even be committed to prison. Sean Quinn, who was declared bankrupt in the Republic of Ireland in January 2012, his wife and the couple's five children are involved in a epic case with the IBRC, which claims they own in excess of £2.8 billion.

Spain

Recent data has shown that Spain's jobless claims shot up 4% in January from December to 4.59 million, a sign that the eurozone's fourth-largest economy is still shedding jobs at a record rate. The Spanish government is drawing up ambitious labour reforms, but the country's trade unions have raised a number of concerns about the plans which are due out in coming weeks. The latest data showed that only 7.3% of all new contracts signed in January were permanent, indicating that employers prefer temporary workers, who are much cheaper and easier to fire, prompting fears that further job losses are in store.

Germany

The UK-based engineering group Langley Holdings has bought Manroland's entire sheetfed production facility, as well as more than 40 international sales operations following the German press-maker's insolvency two months ago.

According to the Manroland Administrator, 824 jobs in Offenbach will be secured by the deal, with the remaining 947 posts eliminated. Meanwhile, Manroland's web arm, including Manroland Australasia, has been taken over by Possehl Group, saving 1,510 jobs.

Scotland / England

The Scottish football club, Rangers FC, has gone into Administration as a result of an estimated £50 million tax bill, which goes back several years. Rangers were closely followed by Portsmouth FC, which has gone into Administration for the second time after famously being the first club to enter into Administration two years ago. The football industry has suffered a spectre of financial meltdown in recent years, with many clubs looking at insolvency options to tackle increasing debt.



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