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Schemes of Arrangement: Another step forward

On 14 April 2014 the English Court sanctioned schemes of arrangement for the APCOA Group, including several foreign companies within that Group. The decision is the latest in a line of cases which illustrate the willingness of the English Court to accept jurisdiction over foreign companies. For the first time jurisdiction was established on the basis of a Facilities Agreement whose governing law and jurisdiction clauses had been changed to English law and the English courts by majority lender consent. Philip Hertz, partner in the restructuring and insolvency group: *"This is another seminal case for schemes of arrangement in the cross border arena. Schemes continue to be one of the most flexible tools in the restructuring arsenal – both at home and abroad."*

Background

The APCOA Group – a leading European car park operator owned by its German parent APCOA Parking Holdings GmbH – successfully obtained the sanction of schemes of arrangement pursuant to Part 26 of the English Companies Act 2006 on 14 April 2014. There were in total nine schemes in respect of Group companies based in the UK, Germany, Austria, Belgium, Denmark and Norway. Each company was a borrower and a guarantor under a EUR 660m and GBP 33.83m Facilities Agreement dated 23 April 2007 which was originally due to mature on 25 April 2014. On that date, the full amount of the facilities, as well as amounts drawn under other facilities, would have become immediately due and payable. Whilst the Group had been seeking to agree a substantive restructuring with its key stakeholders, it required further time – beyond 25 April 2014 – to agree and implement such restructuring.

Under the terms of the Facilities Agreement, an extension to the maturity date under the Facilities Agreement required unanimous consent from lenders. Whilst the extension was supported by the overwhelming majority of lenders, it did not prove possible to secure the 100% consent needed. Without such an extension to the maturity date, there was a high likelihood that the German parent company would commence German insolvency proceedings and that such proceedings would precipitate insolvency filings in the Group's other principal jurisdictions.

Scheme content

The purpose of the Schemes was simple - to extend the maturity date from 25 April 2014 to allow sufficient time to conclude negotiations and implement a deal between the Group and its lenders.

Key issues

- Change of governing law and jurisdiction clause to English law and the English courts accepted as a basis to establish sufficient connection to the jurisdiction
- Priority lenders and second lien lenders vote in one class despite different ranking

Scheme requirements

In order to implement an English scheme of arrangement it is necessary - in addition to obtaining sufficient creditor support (see inset below) - to demonstrate to the English Court that it has jurisdiction to sanction the proposed scheme and that it is fair for it to do so.

International element

It is well established in existing case law that the English Court has jurisdiction to sanction a scheme for foreign companies if it is satisfied that:

- those foreign companies have a sufficient connection with the English jurisdiction; and
- the Court's order will be recognised and given effect in the foreign jurisdictions concerned.

Sufficient connection

Sufficient connection can be established in a number of ways. Most recently, the English Court has found in a number of cases that, where a facilities agreement to be restructured by way of a scheme is governed by English law and subject to the jurisdiction of the English Court, sufficient connection is established by virtue of those factors alone.

Change in the governing law and jurisdiction clauses to pursue schemes of arrangement

The novelty of the APCOA case arose from the fact that the Facilities Agreement was not, at inception, subject to English law and the jurisdiction of the English Courts, the agreement having originally been governed by German law and subject to the jurisdiction of the German Courts. The consent of lenders under the Facilities Agreement was specifically sought to change the governing law and jurisdiction to English law as a gateway to the implementation of an English law scheme. Such amendments only required the consent of 66 2/3% of the lenders as a whole – much less than the consent required to implement a scheme of arrangement and significantly less than the consent required to extend the maturity date under the Facilities Agreement.

Mr. Justice Hildyard recognised that this element represented an important incremental development from the cases that had previously been before the Court and therefore carefully considered the issues arising.

Class composition

Priority lenders and second lien lenders voted in one class

Another novel issue in the case was in respect of the composition of classes for the purposes of voting on the proposed Schemes. The Facilities Agreement included a priority facility and, in respect of the parent company only, a second lien facility.

The terms of the intercreditor arrangements provided that the priority facility ranked senior to the second lien facility. It is well established that creditors whose rights are so dissimilar as to make it impossible for them to consult together with a view to their common interest are required to vote in separate classes. Therefore, it has typically been considered that creditors who rank differently ought to vote in separate classes.

In the APCOA case, it was proposed, and the Court accepted that, lenders under the priority facility and the second lien facility should vote together in the same class for the following reasons:

- the maturity date for all lenders was 25 April 2014;
- the maturity date for both facilities would be extended to the same date;
- German insolvency law (the likely alternative to the proposed scheme for the parent company) would not recognise the different ranking as between the priority lenders and the second lien lenders. In other words, they would all be treated alike in German insolvency proceedings; and
- the difference in the fees and margin payable to the priority lenders and second lien lenders was not so great as to prevent the priority lenders and the second lien lenders from voting together.

The sanction hearing

The English Court sanctioned the Schemes. The decision represents another step forward in the use of schemes, not just for companies which are incorporated or otherwise have their centre of main interests in England and Wales, but also for foreign companies who are parties to a contract whose governing law and jurisdiction clauses can be changed to English law and the English jurisdiction. Mr. Justice Hildyard considered that the present case was in line with the natural progression of existing case law in this area and he could see no reason to depart from the current position. However, he sounded a clear note of caution. In particular he noted that in deciding to sanction these particular Schemes, he had drawn significant comfort from the following factors:

- the schemes were unopposed, indeed in excess of 50% of creditors appeared by counsel in support of the Schemes;
- the Schemes had been strongly supported at the meetings convened for this purpose. 100% of creditors

present and voting at the meetings had voted in favour of the Schemes and such vote represented between 80% and 100% of all lenders under the Facilities Agreement;

- the lenders were a sophisticated group who had been independently and properly advised;
- the proposed schemes were very simple and only sought the extension of the maturity date under the Facilities Agreement;
- the independent expert opinions obtained in each relevant foreign jurisdiction confirmed that the change in the governing law and jurisdiction clauses had been properly effected and the proposed Schemes would be recognised and given effect; and
- at the time the consent of the lenders was sought for the change in the governing law and jurisdiction clauses, lenders had been advised that such change would be a gateway to the implementation of an English law scheme of arrangement.

What is a scheme of arrangement?

A creditors' scheme of arrangement is a statutory contract or arrangement between a company and its creditors (or any class of them) made pursuant to the Companies Act 2006. It is not an insolvency proceeding but can be implemented in conjunction with formal insolvency proceedings, such as administration or liquidation or on a standalone basis. The scheme becomes legally binding on the company and such creditors (or any class of them) if:

- a majority in number representing not less than three-fourths in value of creditors (or any class of them) present and voting in person or by proxy at meetings summoned pursuant to an order of the court, vote in favour of the scheme;
- the scheme is sanctioned by a further order of the court after the creditors' meetings; and
- an office copy of the order sanctioning the scheme is delivered to the Registrar of Companies for registration.

If the requisite majorities set out above are obtained, the scheme will bind all the relevant company's creditors as at the date of the scheme (or the relevant class or classes of them) whether they were notified of the scheme and/or whether they voted in favour of the scheme or not. Notwithstanding this, the court will need to be satisfied that every effort has been made to contact all creditors.

A scheme provides a useful mechanism for: (i) overcoming the impossibility or impracticality of obtaining the individual consent of every creditor to be bound to a proposed course of action; and (ii) for preventing, in appropriate circumstances, a minority of creditors from frustrating what is otherwise in the interests of a company's creditors generally (where, for example, the alternative is an insolvency process which may destroy value). It can be used for implementing almost any compromise or arrangement a company or its creditors and members may agree amongst themselves (i.e. debt-to-equity swap, moratorium or amendments to existing agreements).

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