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The art of the possible: the APCOA restructuring

The English Court has sanctioned schemes of arrangement in respect of the APCOA Group – a European car park operator headquartered in Germany. It is the second round of schemes for the Group in the year. The latest schemes facilitate a full scale restructuring, although final implementation was concluded consensually with all key lenders.

The restructuring essentially involved the rescheduling of €660m of APCOA's senior debt. Lenders agreed that approximately 55% of such debt would be structurally subordinated by way of a hive-up to a new holding company for the Group which would ultimately be owned by lenders. This resulted in a significant deleveraging of the operating group, enabling a more sustainable debt structure going forward. Outstanding bridging finance (€34m) was repaid in full whereas outstanding second lien debt (€65m) was exchanged for 7% cash or warrants at the option of the holder.

APCOA - the long road

Philip Hertz (co-head of the English Restructuring practice) who, together with Stefan Sax (head of the German Restructuring practice), advised the Group on their innovative restructuring, comments "*the restructuring has been a long and eventful process but in the end it was overwhelmingly supported by creditors. It is really an important milestone in the development of schemes in an international context*".

As creditor support for the restructuring was not unanimous, schemes of arrangement were needed to facilitate its implementation.

The extension schemes

A summary of the issues arising in respect of the first round of schemes is set out in our previous briefing dated 15 April 2014 entitled "Schemes of Arrangement: Another Step Forward".

The first schemes only sought to extend the maturity date in the facilities agreements governing the debts, thereby giving the Group breathing space to complete a substantive restructuring. The key issue for determination at that stage was whether the English Court had the power to approve the schemes given that the key connection to the jurisdiction was that the governing law and jurisdiction clauses in the senior facilities agreement were English law and the English courts (having been changed shortly beforehand from German law and the German courts with the consent of 66% of lenders). The Court approved the extension schemes on the basis that:

- independent foreign law expert opinions confirmed that the changes made to the facilities agreement would be valid and the schemes recognised and enforced in the relevant jurisdictions;
- lenders were aware that the purpose of the change to the facilities agreement was to facilitate English schemes of arrangement;
- the schemes were unopposed (they were supported by nearly 87% by value of lenders);
- the lenders were sophisticated with the benefit of independent advice; and
- the schemes were limited in nature, seeking only an extension to the maturity date in the relevant facilities agreements.

Key issues

- APCOA restructuring scheme – approved
- Modifications to scheme required before sanction granted
- Reinforces English Court's importance on international restructuring stage
- Provides excellent general guidance on class and fairness issues

The restructuring schemes

The purpose of the second round of schemes was to implement the substantive restructuring. However, the restructuring schemes faced vigorous formal opposition from one lender who held approximately 7% of the senior debt. The lender argued that the restructuring terms did not reflect that it was in a different position to other senior lenders. The key difference it highlighted was that, unlike other senior lenders, it had not agreed to turnover certain amounts received by it to the providers of the €34m bridging finance (the turnover arrangements).

The opposing lender raised many legal and technical challenges including whether:

- it was in a different class to other senior lenders;
- the votes of lenders who were also bridging finance providers should be discounted due to their collateral interest (such interest being the fact that, in the restructuring, the bridging facility, would be repaid in full);
- there was a sufficient connection with the jurisdiction; and
- certain obligations in the schemes constituted "new obligations" which could not be forced upon it by way of a scheme.

Class issues

The Court determined that the opposing lender did not fall into a separate class from other senior lenders. It found that:

- the turnover arrangements were substantively between the lenders "behind the curtain" (rather than between the lenders and the APCOA companies);
- the lenders' rights as against the APCOA companies in respect of the turnover arrangements were without any real substance (and therefore did not give rise to a separate class);
- given that the turnover arrangements had been terminated prior to the commencement of the scheme proceedings, any difference in rights between the lenders and the APCOA companies had been removed in any event; and
- even though the turnover arrangements may have been terminated in order to avoid separate classes, this had not been an objectionable manipulation of the classes.

The Court's view was unaffected by the fact that, prior to the termination of the turnover arrangements, the parties to those arrangements had entered into a lock up agreement obliging them to support the restructuring.

Collateral interests

The Court refused to find that senior lenders who were also bridging finance providers had a collateral interest. This was due to the relatively small size of the bridging facility but also due to the evidence from senior lenders confirming that their motivation for approving the scheme was not primarily based on the repayment of the bridging finance but on the impact of the restructuring as a whole.

Cross border issues

Turning to consider cross border issues, the Court noted that the schemes tested the boundaries of its jurisdiction. Whilst the Court determined that there was a sufficient connection to the jurisdiction to proceed, it noted that it would be wary of accepting jurisdiction if the choice of law had been entirely alien to the parties' previous arrangements or if the change had no discernible rationale. This was not the situation in the present case because:

- at the time that approval for the change of law was sought, lenders were advised that the change would be a gateway to the implementation of English schemes;
- the original facilities agreement had identified and selected English law for certain limited purposes;
- two of the APCOA companies subject to the scheme were incorporated in England and Wales and a number of lenders managed from London offices;
- the intercreditor agreement provided that the exclusive place of performance for all rights and obligations under the finance documents was London; and
- none of the lenders had objected to the choice of law or the jurisdiction in respect of the extension schemes.

In addition, it was noted that the restructuring schemes offered a means of facilitating the restructuring necessary to avoid insolvency in the interest of all creditors. Given these factors, the Court determined that the same faith and credit should be accorded to the new choice of law and jurisdiction as if it had been the original choice.

It is worth noting that, whilst the opposing creditor had acquiesced in the extension schemes based on the change of law and jurisdiction, the Court determined that this did not preclude it from challenging the

restructuring schemes. The test of sufficiency of connection would be affected by the nature and terms of <u>each</u> scheme and therefore could be tested in respect of each scheme.

New obligations

The facilities agreement contained a guarantee facility pursuant to which a bank would issue guarantees on behalf of the Group to third parties. The lenders under the guarantee facility were then obliged to indemnify the issuer of the guarantee in the event that any demand was made under it.

The restructuring schemes included an obligation on the guarantee lenders to provide the indemnity (i) over a longer period of time; and (ii) notwithstanding a change in the identity of the issuer bank. Furthermore, as the guarantees issued thereunder expired, new guarantees could be issued to different third parties (albeit that the aggregate potential liability of the guarantee lenders remained the same as prior to the restructuring).

The opposing lender argued that this arrangement imposed a new liability on it as a guarantee facility lender and argued that it was not within the scope of the scheme legislation to bind creditors to new obligations. APCOA argued that the arrangement was a simple rollover of the existing facility. Due to a lack of authority on this question, the Court said that it would not sanction the scheme whilst it retained this obligation. Accordingly the schemes were amended to provide that only lenders willing to participate in the ongoing guarantee facility would be obliged to do so.

Conclusion

From the perspective of developing the scope of schemes, this first instance decision provides some excellent guidance, particularly with regards to the use of schemes in an international context and the consideration of the legal rights of creditors versus their interests.

Stefan Sax, says "*Arguably, the most innovative aspect of the scheme related to the change of the governing law in order to establish jurisdiction - it had simply never been tested before. Although it was a pioneering step in this case, it will not be appropriate in all cases*".

Philip Hertz concludes "*APCOA represents a really ground breaking development in international restructurings. It demonstrates that while solutions may not always be obvious at the outset – being willing to push the boundaries can make what may first appear to be impossible a reality*."

Clifford Chance restructuring teams in London and Frankfurt acted on behalf of the APCOA Group in relation to the restructuring.

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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*Linda Widyati & Partners in association with Clifford Chance.