TRAVERS SMITH

Finance Monthly

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Welcome to the monthly finance bulletin from our banking and corporate recovery department. This issue contains our usual overview of some recent market developments and trends in the finance sector, including a spotlight on Guarantee survival and *Triodos*. Please get in touch if it raises any issues that you would like to discuss.

Jeremy Walsh, Head of Banking and Corporate Recovery Department

EU Banking Union

The agreement on 13 December of seventeen Eurozone members and seven other EU members to cede supervision to the European Central Bank (ECB) is without doubt the most important news this month. Two hundred or so banks (those with assets of more than €30 billion or 20% of their home countries' economic output) will be centrally supervised. This, however, leaves 6,000 banks outside central supervision, many of them German savings banks. Three EU members will also remain outside the banking union – the UK, Sweden and the Czech Republic – and these countries will, absent an internal approving majority, be able to block technical rules proposed by the European Banking Authority (EBA), notwithstanding majority approval by the twenty-four EU members to be supervised by the ECB. Achieving the mechanics of central supervision across the twenty-four EU members is targeted for March 2014. This is a massive task in itself and if the European Banking Union is to permanently address the various crises experienced over the last few years, the members must move towards resolving the even more difficult issues of agreeing a common means to address the problems of distressed banks and the formation of an EU deposit protection scheme. The EBA double majority rule applicable to the three EU members (including, of course, the UK) sitting outside the banking union represents a major achievement for the governments of these countries, but unless a further two EU members join the three non-participants, this concession will be revisited.

EU Insolvency Regulation

On 12 December, the European Commission published its proposals with respect to the revision of the EU Insolvency Regulation, which came into force on 31 May 2002. The existing regulation principally determines, in circumstances where a debtor has assets or creditors in more than one member state, which court has jurisdiction for opening the main insolvency proceedings. This is currently resolved (such that those proceedings are recognised throughout the EU) by deciding where the debtor has its centre of main interests (COMI). Five main shortcomings in the existing Regulation have been identified by the Commission:

1. the Regulation does not address pre-insolvency proceedings or "hybrid" proceedings which leave existing management in place;
2. the existing COMI rules permit forum shopping by "abusive COMI-relocation";
3. the Regulation permits secondary proceedings to be instigated where the debtor has an establishment and where assets are located, but such secondary proceedings are limited to winding up proceedings and this impedes successful restructuring;
4. the absence of mandatory publication of the institution of new insolvency proceedings, or any kind of European Insolvency Register, presents difficulties; and
5. the Regulation does not satisfactorily address multinational group insolvencies.

The proposed amendments to the Regulation purport to address each of these issues. The implications of the proposals warrant careful and further scrutiny, but at least two address issues which have potentially significant consequences for UK insolvency and restructuring practitioners. First, the proposals relating to pre-insolvency or hybrid proceedings could clearly encompass UK Schemes of Arrangement. If insolvency proceedings are expanded to include Schemes of Arrangement, then the jurisdictional competence of English courts to sanction Schemes of Arrangement will be determined by COMI, rather than the Insolvency Act 1986, which currently allows the English Courts to accept

Spotlight on…Guarantee survival and *Triodos*

Any variation to a facility agreement which is the subject of a guarantee is, absent the consent of the guarantor, likely to lead to the release of that guarantee. The inclusion in a guarantee of reasonably specific protective wording designed to preserve a guarantee in the event of variation has often proved to constitute a curious exception to the traditional English law approach of requiring persons to be bound by their written agreements.

The Court of Appeal in *Triodos Bank N.V. v Dobbs [2005]* concluded that a clause in a guarantee permitting the bank to "agree to any amendment, variation, waiver or release in respect of an obligation of the [borrower] under the loan agreement" was inadequate to accommodate the survival of the guarantee where the original loan agreements were re-documented in materially different terms.

The Court of Appeal distinguished between a true variation of an existing obligation and the conclusion of a different obligation, notwithstanding its description as a variation or rescheduling, and concluded that in order to benefit from the protective wording, any variation had to be within the "purview" of the original agreement. The *Triodos* decision has resulted in the orthodoxy that notwithstanding the inclusion of the most specific protective language relating to the preservation of guarantees on a variation, the written consent of guarantors to variations should be obtained. This was thought to remain the case even where, as in *Triodos*, the guarantor is a director of the borrower and is aware of the revisions to the underlying loan agreement. In *Close Brothers Limited v Ridsdale [2012]*, however, the High Court held that a guarantee benefiting from protective clauses and given to secure a facility agreement which was amended three times survived the amendment exercise. In that case, the distinguishing features included the fact that the guarantors had signed the development facility agreements and this evidenced their consent; the amend and extend process was not unexpected in property development financing and remained within the purview of the original agreement; and whilst there had been a material change, the resulting facility agreement was on better terms than could have been obtained under a new agreement. In another recent case, *National Merchant Buying Society v Bellamy and others [2012]*, the High Court reaffirmed the proposition that where an all monies continuing guarantee is given other than by reference to or in the context of a specific underlying credit agreement, a variation of the underlying credit agreement would not discharge the guarantee.

jurisdiction on the basis of a jurisdictional connection which can be satisfied simply where facility documents are governed by English law and subject to the exclusive jurisdiction of the English courts. Secondly, the proposals seek to reduce the incidence of "forum shopping" by establishing a presumption that the COMI of a company and the place of its registered office are the same and requiring the relevant court to scrutinise whether the COMI is, in fact, within its jurisdiction. The existing Regulation also establishes the same rebuttable presumption with respect to the location of the registered office and so the proposals do not appear to be entirely radical, although a successful rebuttal under the proposed regulation may require the English courts to focus more closely on the connection between the alternative COMI and the management and supervision of the company than has, until now, been the case.

LMA FATCA

On 3 December, the Loan Market Association (LMA) published a second set of FATCA riders aimed at secondary debt trading documents preoccupied with funded and risk participations and standard terms and conditions for par/distressed debt trades. These allocated risk to FATCA non-compliant payment recipients. On 6 December, the LMA also published a third set of riders intended for use following the FATCA grandfathering date of 1 January 2013, one of which addresses the possibility of FATCA being identified as a lender risk. Strong and persistent rumours subsist to the effect that the IRS is to extend the grandfathering regime beyond 1 January 2013 which, depending on the nature of the extension, may impact on the immediate utility of the new LMA riders.

In the courts

Lazari GP Limited and another v Jervis and others [2012] EWHC 1466 (Ch)
An interesting development in the *Luminar* line of cases (see *Spotlight* from April and October issues). Since *Luminar,* it has become common for tenants who are liable to pay rent quarterly in advance to time their entry into administration until shortly after a quarter day. The moratorium triggered by the administration prevents creditors from taking legal proceedings or exercising their security or proprietary rights against the company or its assets. Disgruntled landlords may take some comfort from the decision in *Lazari*, in which the landlord of a tenant in administration was given permission to forfeit the tenant's lease. The administrators had sold the insolvent tenant's business in a pre-pack sale, the conditions of which included the buyer's acknowledgement and acceptance of the risk that the grant of a licence to occupy the various leased properties may breach the terms of the leases. The landlord did not consent to the buyer's occupation as it did not consider the buyer to be of sufficient covenant and sought to exercise its proprietary rights by seeking possession.
The court decided in favour of the landlord, as the purpose of the administration was already substantially achieved by the business sale, and the administrators (having refused consent to the landlord's request to forfeit the lease) could not identify any adverse consequence that would result from the forfeiture of the lease. Though this decision is encouraging, indicating that the court will consider the proprietary rights of certain creditors in particular circumstances, it may be that the landlord would not have been granted permission if the administrators were able to establish that the purpose of the administration would have been prejudiced by the forfeiture.

Recent transactions

We have recently advised:

- ICG on the management buy-out and refinancing of ATPI, an international travel and events management company. The senior facilities were provided by a club of lenders, including Lloyds TSB Bank plc, ING Bank N.V., HSBC Bank plc, The Royal Bank of Scotland plc, The Governor and Company of the Bank of Ireland and Investec Bank plc; and
- Ferd, a Norwegian industrial and financial group, and Ratos, a listed Norwegian private equity conglomerate, on the financing for their successful joint bid for Aibel, a leading Norwegian supplier of services relating to oil, gas and renewable energy.

The Department extends the best wishes of the Season to all our readers and wishes all a Happy New Year.

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