TRAVERS SMITH

Finance Monthly

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Welcome to the monthly finance bulletin from our finance and restructuring group. This issue contains our usual overview of some recent market developments and trends in the finance sector, including a spotlight on the proposed nullification of non-assignment clauses. Please get in touch if it raises any issues that you would like to discuss.

Matthew Ayre, Head of Finance

Graham, SIP 16 and the Big Stick

The Small Business, Enterprise and Employment Bill addresses a wide and disparate legislative landscape. Ranging from the nullification of non-assignment clauses (see Spotlight article) to Pubs Code and Childcare, the Bill, which may well hit the statute books before May, also includes the big stick reserve powers to prohibit pre-packs if the SIP 16/Graham recommendations "do not have the desired effect". Teresa Graham's recommendations were published in June 2014 and are largely accommodated in a revised draft SIP 16 which was subject to a consultation process closing on 2 February. The new SIP 16 is expected to come into effect by the end of March. It focuses on greater transparency, probity as to valuation, the provision of more information to creditors which include considered alternatives to a pre-pack and, in particular, a more imaginative approach to marketing, including the use of wider media to publicise any sale. One significant proposal was the appointment of an independent review panel of approximately 30 business people to closely examine pre-pack proposals where, as is often the case, the sales are to connected parties. The closing date for applications for appointment to the panel was 12 January 2015, and it is believed that over 50 applications have been entertained.

Symbiotic Challengers

The alternative approaches originally offered by peer to peer and crowdfunding platforms – a web conduit by-passing traditional lenders and affording direct access between investors and companies - appear to be somewhat debased by banks either investing in such platforms (Goldman Sachs and Societe Generale are reported to be interested in Aztec money, an invoice discounting platform) or setting up partnerships with platforms (Santander and RBS have done so in the UK) or simply purchasing assets (banks have purchased loans from Lending Club).

Encouraging Challengers

Developing access to non-bank lending sources for SMEs has proved to be a recurrent theme over the last few months. New proposals introducing a withholding tax exemption for unlisted private placements were announced in the Autumn statement and draft legislation is currently the subject of a consultation exercise which closes on 27 February. The measures are designed to facilitate the provision of funds by insurers, pension funds and fund managers under private placement arrangements constituting unlisted debt instruments. Under current UK tax laws, a withholding tax arises under such arrangements (if UK-sourced and having a term exceeding one year). As the debt is unlisted, the tax exemption for quoted Eurobonds does not apply, nor the normal loan agreement Bank exemption under section 879 of the Income Tax Act 2007. The only arrangement currently offering relief from withholding tax and gross up depends on double taxation treaty relief. The new proposals introduce a further exemption in the case of unlisted private placements from £10m-£300m, with maturities equalling or exceeding a three year term. Practitioners have welcomed, but expressed reservations about, the current proposals – one of the perceived difficulties is with the number of conditions attached to the investor (a UK regulated, or equivalently authorised, financial institution resident in a qualifying territory). Additional concerns are that the issuer must be a trading company rather than an SPV issuer and that the minimum and maximum aggregate amount of securities may prove unduly inflexible.

Recharacterising absolute assignments

If a company goes into administration or liquidation, a floating charge ranks behind fixed charges and also behind certain employee claims and the expenses of an administrator or liquidator. In addition, a proportion of the recoveries under a floating charge (the "prescribed part") is also distributable to unsecured creditors. The prescribed part is 50% of the first £10,000 of recoveries, then 20% of any excess over that figure up to a maximum amount of £600,000. The Financial Law Committee of the City of London Law Society has concluded, against the fact that administrators' fees and disbursements are rarely paid in full, that one possible way of improving administrators' access to funding would be to provide more guidance on where the line is to be drawn which divides

Spotlight on… the proposed nullification of non-assignment clauses

A previous Spotlight article has noted that the assignment of a debt by a creditor to a third party, when followed by the service of a written notice of assignment on the relevant debtor, fundamentally alters the rights of the debtor and the way in which it must perform its contractual obligations, regardless of whether the debtor consents to the assignment or acknowledges the written notice. The debtor has to pay to the third party assignee and if in error it pays to the original creditor, it must pay again to the assignee. Following receipt of the notice, it cannot agree modifications or relaxations with the original creditor – it must deal exclusivity with the assignee. Finally, the debtor cannot set-off debts owed to it by the original creditor if these arise following receipt of notice. Faced with these consequences, a debtor receiving notice of assignment may have cause to regret its failure to include a non-assignment clause in the relevant contract with his creditor – the House of Lords concluded in 1994 that such a clause will successfully render any assignment ineffective against the debtor.

The Department for Business Innovation and Skills, however, has proposed the passage of regulations pursuant to the Small Business, Enterprise and Employment Bill (which may well become legislation before the general election in May) which will prohibit non-assignment clauses on the grounds that opportunities to access invoice-based finance would thereby be enhanced. The Financial Law Committee ("**FLC**") of the City of London Law Society has opposed the proposals, noting that this recent incursion into the principle of freedom of contract extends beyond contracts to which consumers or small businesses are party to those involving multi-national companies. The FLC notes that the prohibition ignores justifiable reasons for including non-assignment clauses in contracts, such as to ensure compliance with money-laundering and sanctions laws, and the wholly defensible position of a debtor concerned to minimise the possibility of any increased financial obligations and/or the unilateral removal of set-off rights exercisable against its creditors.

The proposals may eventually be restricted to benefit small businesses prejudiced by unequal bargaining power. The question remains, however, as to whether it is reasonable to impose statutory control on rational and habitually agreed contractual restrictions between commercial parties in order to afford additional finance raising opportunities to one of those parties. Where the commercial parties are of equal bargaining power, the proposals appear excessively intrusive.

fixed and floating charges. The FLC focuses on the treatment of debt factoring, where an *absolute* assignment of debts is made in favour of debt factors. In such circumstances, there is rarely any other property of any other significant value which is caught by a floating charge and therefore no access is afforded to a "prescribed part". The FLC proposes a simple amendment to the Companies Act 2006 which would ensure that in future, a general (absolute) assignment of book debts would be required to be registered at Companies House as a floating security and treated for priority purposes as a floating charge.

Love's Labours not Lost

In order to be enforceable, a guarantee need not be a deed, but must be in writing and signed by the guarantor, or a person authorised by the guarantor (Section 4, Statute of Frauds 1677). In *Ramsay v Love [2015] EWHC 65(Ch)*, the chef Gordon Ramsay was held to be bound by a personal guarantee of lease obligations even where his signature had been applied by an electronic signature machine wielded by his father-in-law, Gary Love. As a matter of law, a guarantee to which an electronic signature is applied is perfectly valid if the application was authorised by the person giving the guarantee and this point was accepted by the litigants. The hearing was therefore principally preoccupied with questions of authority, which were found in favour of Gary Love. Greater difficulties may have been encountered if the relevant instrument needed to be executed as a deed, such as a document transferring an interest in land, or a lease, or a power of attorney. Whilst a signature created electronically might suffice in technical terms, a deed signed by an individual must be signed (a) by the individual in the presence of a witness or (b) at the direction of that individual in his presence and the presence of two witnesses. Problems are likely to arise in satisfying the witness requirement attendant upon the execution of a deed by wholly electronic means. If the relevant instrument had needed to be executed as a deed, Mr Ramsay, as well as his machine, would have had to be present.

In the courts

Northsea Base Investment Ltd & Ors Re: The Insolvency Act 1986 [2015] EWHC 121 (Ch)

Administrators were appointed to each of eight companies all incorporated in Cyprus, with their registered offices in Cyprus and ultimately owned by family trusts based in Nevis. Six of the eight companies were single ship owning companies and the remaining two were intermediate holding companies. The administrators, who were appointed out of court, sought a court declaration that the centre of main interests (COMI) of each company was England and Wales within the meaning of the EC Regulation on Insolvency Proceedings (the "Regulation"). The declaration was sought on the basis that each of the vessels owned by the six ship owing companies were in international waters and likely to be of interest in other jurisdictions. The High Court concluded, perhaps counterintuitively, that the COMI of each company was England and Wales. Under the Regulation, the COMI of a person must correspond to the place where that person conducts the administration of its interests on a regular basis, but Article 3 of the Regulation presumes, in the case of a company, that the place of its registered office is the COMI of that company in the absence of proof to the contrary. The High Court referred to the CJEU decisions *In re Eurofood IFSC Limited* and *Interedil Srl v Fallimento Interedil Srl*, which made it clear that in determining the COMI of a company the presumption in favour of the registered office can only be rebutted by objective factors ascertainable by third parties which determine that a company's actual centre of management and supervision and the management of its interests is located in a particular Member State.

The key determining factor pointing to a COMI in England and Wales was that the operation and management of each of the six single ship owning companies was devolved to Marine Cross, a shipping agent incorporated in England and Wales and with its registered office in London. All payments to trade creditors of the six ship owning companies went through Marine Cross and whilst the ship charterparties concluded by those companies were drawn up through a company with interests both in the UK and India, external enquiries raised of the Anglo - Indian entity were invariably addressed to Marine Cross in London. Bunker payments for the vessels were made via Marine Cross, which also effected payments under the loan agreements concluded with the two intermediate holding companies of the group which included clauses appointing Marine Cross as agent for service of process. Notwithstanding that none of the directors of the eight companies were based in England, board meetings were not held in England, and the registered office of each of the eight Cypriot companies was in Cyprus, the High Court concluded that the only active director was subject to the directions of the settlors of the Nevis family trusts who were based in London and closely linked to Marine Cross. The High Court therefore determined that the COMI of all eight companies was, notwithstanding a number of factors indicating otherwise, in England and Wales.

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