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 the EC Insolvency Regulation. Please get in touch if it raises any issues that you would like to discuss.
Jeremy Walsh, Head of Banking and Corporate Recovery Department

"Big Four Only" Clauses – developments

The Competition Commission (CC) published its final report on auditor appointments on 16 October. So far as the finance sector is concerned, the most significant issue is that provisions in facility agreements restricting auditor choice to lists or categories will, with effect from 1 October 2014, be prohibited. The CC strictures as to agreement provisions extend beyond the FTSE 350 companies which are the principal preoccupation of the report to any companies required to have accounts audited under Part 16 of the Companies Act 2006. The CC is, however, in response to LMA objections, to permit parties to require that auditors meet "objectively justified" criteria. In order to be "objectively justified", the criteria applied may not accommodate reputation or international recognition, but may focus on criteria required by reference to skill, expertise in a particular area and appropriate relevant geographical reach. The CC has recommended that the LMA "appropriately" amends its template documents, but has also made it clear that clauses simply requiring lender consent to any change to an existing auditor will not be prohibited.

The CC has withdrawn from the proposal provisionally made in July that FTSE 350 companies put their statutory audit engagement out to tender every five years. The final recommendation is for tender exercises to be conducted every ten years.

A formal order will be produced by the CC within the next six to nine months and will apply to agreements and arrangements with effect from 1 October 2014.

SIP 16 and Pre-Packs

Following consultation in 2010, the government proposed legislation to control the use of pre-packs in June 2011. The proposals included a new three day advance notice period in cases where the proposed sale was to connected parties to allow unsecured creditors to put forward a higher offer and the introduction of a new obligation on administrators to confirm that the sale price represented the best available. The draft legislation was abandoned following industry lobbying in January 2012 and was followed by a review which has culminated in the publication, on 1 October 2013, of amendments to SIP 16.

The amendments to SIP 16 do not require any form of advance notice to be served on unsecured creditors, but do require a SIP 16 statement to be provided to creditors within seven calendar days from the date of the pre-pack transaction. That statement must include a detailed narrative explanation and justification of the pre-pack to creditors which conforms to the information disclosure requirements set out in an expanded Annex to SIP 16. In particular, SIP 16 will require confirmation by the administrator that the sale price represents the best price that could reasonably be obtained in the circumstances. The amended SIP 16 comes into force on 1 November 2013, at which date the "Dear IP 42 (2009) Guidance", which addresses similar issues but in a slightly different way, will be withdrawn.

Solvency II – Further delays

Solvency I, introduced in the 1970s, was a harmonisation initiative which focussed on the capital adequacy of insurers, but generated different regimes across Europe. Solvency II is a more ambitious project to be adopted across all 28 EU members and three of the EEA countries. It imposes not only a uniform capital adequacy regime, but also introduces risk management standards including market consistent balance sheets; risk based capital; own risk and solvency assessment; senior management accountability; and supervisory assessment. It applies to all insurance firms with a gross premium income exceeding €5m or gross technical provisions in excess of €25m. Until Michel Barnier's announcement on October 2, the Solvency II implementation date was 1 January 2014. The recent statement acknowledges difficulties with respect to agreement on the Omnibus II Directive which was proposed in January 2011 by the European Commission and postpones the implementation date of Solvency II by

Spotlight on…the EC Insolvency Regulation

The EC Insolvency Regulation provided that the applicable law and appropriate jurisdiction for insolvency proceedings affecting a company in an EU member state was to be determined by the centre of main interests (COMI) of that company. The Regulation, introduced into UK law in May 2002, was subject to mandatory review process, pursuant to which the EU Commission identified, at the end of last year, five main shortcomings. In brief summary, these related to Scope (with the possibility of expansion of the Regulation to address restructuring , pre-insolvency, debtor-in-possession and other "hybrid" proceedings); COMI (where in order to reduce the manipulation of COMI location, the importance of the whereabouts of central administration and the actual management and supervision of the relevant company is to be emphasised); knowledge of proceedings (to be addressed by the establishment of internet based registers setting out information about insolvency proceedings); secondary proceedings as an obstruction to the efficient administration of main proceedings (proposed to be addressed by enhancing the right of challenge in main proceedings and imposing co-ordination and cooperation measures between courts); and finally the difficulties presented by multi-national insolvencies (to be addressed by similar co-ordination measures, whilst retaining the independent application of the COMI test to each group company).

UK preoccupations with the possible expansion of the COMI principle to Schemes of Arrangement (where UK jurisdiction is currently founded on the principle of "sufficient connection" -usually satisfied by the governing law of relevant facility agreements)is considered by many practitioners to be unlikely to prove problematical. Such concerns may be overshadowed by two radical proposals set out in a draft report recently prepared by the European Parliament and designed to address the fourth and fifth shortcomings referred to above. The first is that only main proceedings initiated by a court order in an EU Member state should preclude the institution of proceedings in another state. If implemented, this would significantly deplete the worth of a UK out of court administration in a cross border context. UK concerns are only heightened by an observation in the Parliament's explanatory statement which questions whether insolvency proceedings should ever be capable of initiation without court involvement. The second EC Parliamentary proposal is that the difficulties presented by multi-national group insolvencies might be addressed by a central "co-ordination plan" formulated by a central co-ordinator appointed in the state where the most "crucial" business of the group is performed. Whilst such a plan would not be mandatory, insolvency officials in other jurisdictions would need to justify non-compliance.

two years to 1 January 2016, with a 31 January 2015 date for transposing the rules into national law. The Omnibus II Directive is intended to accommodate the Lisbon Treaty and introduces a number of powers and responsibilities for the European Insurance and Occupational Pensions Authority. The originally proposed implementation date for the Solvency II Directive was 1 November 2012 and the latest announcement constitutes the second significant delay.

Financial Services (Banking Reform) Bill

The Bill, which primarily aims to implement the ring-fencing recommendations in the Vickers report, has been subject to amendment at the House of Lords Committee stage to include, inter alia, reforms to the FSMA "approved persons regime"; the introduction of criminal sanctions for reckless misconduct by senior management of a bank; the introduction of a bail-in tool enabling authorities to impose losses on a failing bank's creditors without the need for the bank to enter insolvency proceedings; and the introduction of a special administration regime for payment and settlement system operators. The final day of the Committee stage was 23 October and the report stage (which will entail further line by line examination of the Bill) is yet to be scheduled. Whilst the Vickers reforms, as enshrined by the Bill, are intended to be in force by 2019, Paul Tucker, the outgoing Deputy Governor of the Bank of England has stated his conviction (in his last appearance before MPs at a Treasury Select Committee on 8 October) that the reforms will be superseded before then by EU resolution regimes to be enshrined in the Bank Recovery and Resolution Directive.

In the courts

Bluecrest Mercantile NV and another v Vietnam Shipbuilding Industry Group and others [2013] EWHC 1146 (Comm)

The High Court has decided, in the context of a scheme of arrangement procedure, that the court has jurisdiction to stay proceedings brought by dissentient creditors under rule 3.1 (2) (f) of Part 3 of the Civil Procedure Rules. In *Bluecrest* , the court so exercised its case management powers to grant a two month stay of creditors' proceedings up to the date of the first scheme hearing, although the court made it clear that its jurisdiction to stay proceedings should only be exercised in limited circumstances. On the facts, the scheme had a reasonable prospect of success as the required number of creditors had consented to support the scheme and the underlying restructuring of the Vietnamese company was at an advanced stage. There was also a risk that, absent a stay, the debtor company might have been faced by a number of other claims from lenders seeking to enforce debt claims against it. Schemes of arrangement, being proceedings instituted under the Companies Act 2006, do not benefit from the kind of moratorium regimes which characterise many insolvency proceedings, but in this case the judicious use of the Civil Procedure Rules achieved a comparable effect.

Doosan Babcock Ltd v Comercializadora de Equipos y Materiales Mabe Limitada [2013] EWHC 3010 (TCC)

Predictable tensions arise where an on demand performance bond is called or proposed to be called by an employer in circumstances where the contractor alleges no fault under the underlying contracts. An autonomous on demand performance bond is a powerful instrument in the hands of an employer. The courts have habitually refused to provide injunctive relief, save where there is evidence of fraud, although there is authority to suggest that an injunction will be available where there is a strong case that the employer is not entitled to make demand.

In this case, the contractor, *Doosan Babcock* (DB) contracted to supply two boilers to the employer under a FIDIC contract. DB arranged the issue of two performance bonds which were expressed to expire on the issue of a "taking over certificate". The employer declined to issue taking over certificates, notwithstanding its use of the boilers. The FIDIC contract expressly provided that if the boilers were used, they were to be deemed to be taken over. DB feared that a call would be made under the performance bonds and applied for an interim injunction, which was granted. The decision emphasises that where a claimant makes a "strong case" that under the terms of the underlying contract, there is no entitlement to make the demand, injunctive relief is available without the necessity to establish fraudulent conduct.

Transaction News

We have advised:

Peel Land and Property on the £266 million refinancing of its core corporate loan facility. The facility was provided by a club of lenders made up of Barclays, HSBC, Lloyds, RBS and Santander.

Department News

Senior associate Sam Foskett will shortly begin a four month secondment with the wholesale finance team at Shawbrook Bank.

Matthew Ayre
matthew.ayre@traverssmith.com
+44 (0)20 7295 3304

Ben Davis
ben.davis@traverssmith.com
+44 (0)20 7295 3339

Andrew Gregson
andrew.gregson@traverssmith.com
+44 (0)20 7295 3206

Danny Peel
daniel.peel@traverssmith.com
+44 (0)20 7295 3441

Charles Bischoff
charles.bischoff@traverssmith.com
+44 (0)20 7295 3378

Andrew Eaton
andrew.eaton@traverssmith.com
+44 (0)20 7295 3427

Peter Hughes
peter.hughes@traverssmith.com
+44 (0)20 7295 3377

Jeremy Walsh
jeremy.walsh@traverssmith.com
+44 (0)20 7295 3217

Travers Smith LLP
10 Snow Hill
London EC1A 2AL
T: +44 (0)20 7295 3000
F: +44 (0)20 7295 3500
www.traverssmith.com