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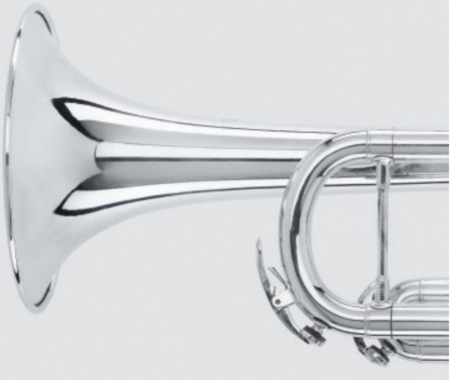

Finance Monthly

December 2011

Welcome to the monthly finance bulletin from our banking and corporate recovery department. This issue attaches an announcement about, and explains the thinking behind, our new Restructuring Group; contains our usual overview of some recent market developments and trends in the finance sector; and includes a spotlight on the Eurozone crisis and Loan Agreements. Please get in touch if it raises any issues that you would like to discuss.

Jeremy Walsh, Head of Banking and Corporate Recovery Department

Travers Smith's New Restructuring Group

Our new dedicated Restructuring Group is headed by partners in our Banking, Insolvency, Corporate and Tax departments who each have experience of the full life cycle of a business and the restructuring strategies available to enable the business to exit a distressed phase. Please see our attached brochure for contact details, an explanation of our approach and our initial consultation proposal.

MF Global (UK) Limited: a special type of administration

The Investment Bank Special Administration Regulations 2011 (SAR) were introduced on 8 February 2011 with the purpose of addressing acknowledged deficiencies in the application of normal UK insolvency procedures to the collapse of investment banks such as Lehman Brothers. The procedures are something of an experimental regime and are to be reviewed in about two years time, pursuant to a process under section 236 of the Banking Act. The regulations were invoked for the first time on 31 October 2011 when the FSA applied the new regime to MF Global (UK) Limited. The SAR in reality do no more than codify the best practice aims of orthodox administrations, but admit the ability of the FSA to intervene and prioritise one of more of the following three special objectives:

(1) to ensure the expedited return of assets and client money;

(2) to ensure prompt engagement with the FSA, HM Treasury and the Bank of England and other regulatory bodies; and

(3) to ensure the rescue of the Investment Bank or its winding-up in the best interests of creditors.

In addition to the intervention powers reserved to the FSA, the SAR also confer extra powers on the Special Administrator to (a) set deadlines for claim submissions with respect to client assets to achieve a timely return of those assets; (b) allow distributions from accounts on a pro rata basis amongst creditors rather than entertain complex tracing accounting and trust issues; and (c) facilitate the continuation of key services to the Investment Bank without which the return of client assets would be frustrated or delayed.

General Anti-Avoidance Rules

On 21 November 2011, Graham Aaronson QC published his report to HM Treasury recommending the introduction of general anti-avoidance rules (GAAR) in the UK targeting abnormal arrangements designed to achieve an abusive tax result. Responses to the report have been mixed, but exceptions for "reasonable tax planning" and the requirement that HMRC has the responsibility to prove the contrary, have been welcomed by the Institute of Directors and others, who nevertheless note the potentially narrow distinction between legitimate tax planning and abusive tax planning. This highlights the basis for much of the opposition to the proposals – that they espouse "principles based" legislation which precludes certainty and which has inauspicious precedents in Australia and Canada.

Whilst the current regime by no means precludes uncertainty, the new proposals betray an apparent reluctance to provide for a bespoke system of clearances which would, whilst ameliorating the uncertainty exacerbated by a "principles based" system, impose very substantial resource burdens on HMRC. Boards faced with difficult decisions - perhaps in rescue situations – may find the GAAR approach unhelpful.

Spotlight on… The Eurozone Crisis and Loan Agreements

As part of the wider process of encouraging banks to make contingency plans for previously unthinkable scenarios, the Loan Market Association has commissioned a briefing note on the implications for Loan Agreements following the departure of a Eurozone member. The principal question posed is whether a Eurozone borrower in a Departing state will still have to pay a Eurozone denominated deal in Euros. The plain answer is that much depends on the terms of the Loan Agreement, but if the Agreement is governed by English law; includes an exclusive submission to the Courts of England; includes a payment obligation in the single European currency and provides for a place of payment outside the Departing state then the English Courts are likely to require payment in Euro and hold that a payment made in a different currency is an Event of Default. The briefing note speculates as to the likely outcomes if any of the above criteria are missing.

The standard form LMA leveraged loan agreement is used widely in the market and does not include a definition of the Euro. If the currency is defined to be the currency of the Departing State from time to time, then this affects the conclusions referred to above radically. If no currency definition is included, but the place of payment is in the Departing State, then the English courts may conclude that the parties' intention was that the currency of payment is the currency for the time being of the Departing State. The many imponderables contemplated by the briefing note include the manner of a State's departure – whether supported by EU legislation or not and whether exchange controls are imposed by the Departing State.

Even if the English courts give judgment for an accelerated sum in Euro, the remedies available to a bank judgment creditor may be frustrated if the assets of the judgment debtor are in the Departing State, where the courts may, by virtue of redenomination legislation, be unable to recognise a foreign judgment or enforce it against the borrower's assets. Even if the borrower was obliged or willing to pay in Euro, exchange controls passed in conjunction with redenomination legislation may prove a further frustration.

Any briefing on this subject must necessarily be speculative. So far as documenting new loan agreements in Euro is concerned, a careful definition of currency; the addition of each of the criteria referred to above; and the possible inclusion of redenomination events of default may at least help to establish a Euro payment obligation on redenomination, as a matter of English law.

In the courts

Bibby Financial Services Ltd and others v Magson and others
QBD, 14 October 2011
[2011] EWHC 2495(QB)

This is a case on delivery of deeds. Individuals who had executed deeds of guarantee and warranty, duly witnessed and handed over to the other side (in a pub), were found not to have delivered the deeds. The individuals contended, and the court accepted as a matter of fact, that they had signed as a gesture of good faith, expecting that clean versions incorporating manuscript notations and comments would subsequently be furnished for fresh signature. The court emphasised that for a document to be enforceable as a deed, it had to be delivered as a deed. Mere signature was insufficient and the issue was not whether the document had been physically delivered, but whether the person delivering the deed intended to be bound by it.

Rainy Sky S.A. & Ors v Kookmin Bank
SC, 2 November 2011
[2011] All ER (D) 19 (Nov)

The Supreme Court has decided that where language in a document has more than one potential meaning, it is generally appropriate to adopt the construction that is most consistent with business common sense. The Supreme Court rejected the approach of the Court of Appeal, which was reluctant to indulge in guesswork and whose approach was to give effect to literal meaning save where such extreme results would ensue as to suggest that the literal meaning could not have been intended. The key issue revolved around two consecutive paragraphs in a Korean shipbuilding refund guarantee and their interpretation against the background of the shipbuilder which was in a debt workout procedure under Korean law. The first paragraph entitled the purchasers to repayment of pre-delivery instalments upon their rejection of the vessel or the termination, cancellation or rescission of the contract. The second paragraph contained an undertaking of Kookmin Bank to pay all such sums due to the purchasers under the contract. The Bank argued that "such sums" referred only to the limited circumstance sums in the first paragraph, whilst the purchasers argued that "such sums" meant the pre-delivery instalments, however they became repayable. The Court of Appeal found in favour of the Bank, whilst the Supreme Court reversed the decision and found in favour of the purchasers. Of the two possible constructions of the second paragraph, the purchasers' construction was preferred, because the Bank's construction would have excluded the shipbuilder's insolvency as a trigger for the Bank's refund obligations - an offence to business common sense.

Recent transactions

We have recently advised:

- **McAleer & Rushe Group** on the restructuring of its UK and Irish real estate backed indebtedness now held by the National Asset Management Agency. This was the first restructuring of this nature conducted by NAMA;
- **The BrightHouse Group** on its senior multicurrency term and revolving facilities arranged by Lloyds TSB Bank Plc, Ares Capital Europe Limited and GE Corporate Finance Bank SAS; and
- **Bridgepoint Development Capital and Lloyds Development Capital** in connection with their investment in Evander, the UK's leading emergency response glazing and locks provider. Senior debt funding was provided by incumbent lender HSBC Bank plc.

Travers Smith News

The firm won the Private Equity Transactional Team of the Year award at the Private Equity News Awards in November

Seasons Greetings

The department sends all of you our best wishes for the Season and a happy and peaceful New Year.

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