TRAVERS SMITH

Finance Monthly

September 2010

Welcome to the monthly finance bulletin from our banking and corporate recovery department. This bulletin provides an overview of some recent market developments and trends in the finance sector. This issue also features a spotlight on the "football creditor rule". Please get in touch if it raises any issues that you would like to discuss.
Jeremy Walsh, Head of Banking Department

European High Yield & Leveraged Loan Report, Q2 2010, by AFME/EHYA

This report, released in August, confirmed the continuing difficulties in the credit market. In particular the report highlighted a decline of over 40% in European leveraged finance issuance from the revised first quarter total, mainly due to Europe's descent into crisis as sovereign debt concerns, particularly in eurozone countries such as Portugal, Ireland, Italy, Greece and Spain, spiralled out of control.

Draft regulations amending debt cap restrictions

There is to be a consultation on draft regulations which will extend the maximum amount for which a group may obtain deductions for financing expenses under the so-called "debt cap" rules. Arrangements which may be affected are non-lending loan relationships, alternative finance arrangements, manufactured interest, repos and certain structured finance arrangements.

First draft of the Insolvency Rules 2011 available

Hot on the heels of the 2010 revision, the Insolvency Service has published a first draft of the Insolvency Rules 2011 ("IR 2011"). The Insolvency Service has invited comments on the draft by the end of January 2011. The IR 2011 are intended to be a comprehensive re-draft of the rules, aiming to create consistency across all insolvency procedures, and they are scheduled to come into force on 6 April 2012.

Coalition Government launches consultation on insolvency arrangements for investment firms

On 16 September the Government set out proposals for a new special administration regime to strengthen the UK's ability to deal with any future failures of investment firms. The proposals are intended to ensure that the administration of an investment firm is conducted with due regard to clients, creditors and financial stability.

The regime will include new special administration objectives that will ensure that administrators focus on the return of client assets, engagement with market infrastructure bodies and the authorities, and maximising returns to creditors.

Responses are requested by 16 November 2010.

HMRC announces treaty relief "Syndicated Loan Scheme"

From 1 September 2010, HMRC discontinued the "one-to-one loan" part of the provisional treaty relief scheme ("PTRS") due to the double tax treaty passport scheme ("passport scheme") becoming effective on the same date. The remaining syndicated loans part of the PTRS will remain, renamed the "Syndicated Loan Scheme" ("SLS"). The SLS allows the syndicate manager (rather than each syndicate member) to apply for relief from UK withholding tax on UK source interest paid to syndicate members resident in countries which have double tax treaties with the UK providing for such relief. It applies only where the borrower and the lenders are unconnected and the transaction is on arm's length terms.

Spotlight on… the "football creditor rule"

HMRC has failed in its latest attempt to challenge a company voluntary arrangement ("CVA") proposed by a football club (in this case Portsmouth City Football Club Limited). HMRC's challenge included allegations that the CVA resulted in material irregularity and unfair prejudice on the basis that certain classes of creditors were paid in full whereas other creditors would only be able to recover 20% of their claims.

Special considerations apply to football clubs in financial difficulty. The "football creditor rule" falls within the body of rules operated by the Premier League and the Football League under which football clubs operate. It creates a class of preferential creditor (which includes other football clubs, players and the FA) which must be paid in full in order for the club to carry on playing in the league and to avoid other penalties. The rule may therefore alter the normal priorities on a restructuring, weakening the position of secured and other unsecured creditors.

In addition, where a football club enters administration all other "ordinary" creditors must be compromised, often by implementing a CVA approved by creditors. The sanction for not compromising these "ordinary" creditors in order to give priority to football creditors is a points deduction.

HMRC has argued in a number of football club cases that the football creditor rule contravenes fundamental principles of insolvency law (including that all unsecured creditors should receive equal treatment). This specific point was not considered by the court in the Portsmouth FC case and is the subject of separate proceedings commenced by HMRC against the football league. The outcome of that claim will be of particular interest given the ongoing speculation surrounding the financial position of football clubs generally.

Basel III

At its 12 September 2010 meeting, the oversight body of the Basel Committee on Banking Supervision announced a strengthening of capital requirements for banks in response to the credit crisis.

The Committee's reforms will increase the minimum common equity requirement from 2% to 4.5%. In addition, banks will be required to hold a capital conservation buffer of 2.5% to withstand future periods of stress, bringing the total common equity requirements to 7%. The agreement will be presented to the G20 for ratification in November. It is due to come into effect in 2013, but provides transitional arrangements to ensure that the banking sector can meet the higher capital standards through reasonable earnings retention and capital raising, while still supporting lending to the economy.

Many bank shares rose on the announcement of the new standards, possibly due to the removal of uncertainty regarding the new regime. The new capital requirements are well below the 10% level that was being pushed for by the UK and some other countries.

In the courts

Raiffeisen Zentralbank Osterreich AG v The Royal Bank of Scotland PLC
[2010] EWHC 1392 (Comm)

In this recent case the court confirmed the effectiveness of market-standard disclaimers in an information memorandum ("IM") provided to a syndicate bank. The claimant ("RZB") made a claim for misrepresentation against the defendant arranging bank ("RBS"), in relation to a loan forming part of a complex transaction with Enron entities (which was not fully recovered).

The judge found that RBS had not made the alleged implied representations on the basis of the standard disclaimer language in the IM and the sophisticated nature of the parties, nor had RZB understood such representations to have been made. The judge then went on to consider in detail the principles on misrepresentation generally, and the extent of defences to such a claim.

Although a claim may succeed where representations are intended to induce entry into a contract (rather than merely to provide information), the conclusion that market-standard disclaimers in information memoranda are effective will be welcomed by arranging banks.

Recent Transactions

We have recently been involved in the following transactions:

Pace plc

We advised Pace plc, the FTSE 250 technology developer, on the $450m investment grade debt financing for the acquisition of 2Wire, Inc.

Kings Park Capital

We are delighted to have advised on our first transaction for Kings Park Capital, in connection with raising bank facilities for its recent acquisition of Bridge Leisure Parks.

Practice development

Institute for Turnaround

Corporate recovery partner Keith Bordell, a Fellow of the Institute for Turnaround, attended their Annual General Meeting and conference in London on 8 September where speakers included representatives of the BVCA, HMRC, Better Capital and Wilkinson Sword.

International links

Partners recently met with Swedish firm Vinge, as we continue to strengthen ties with quality firms worldwide.

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