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Apcoa's cross-border, contested, Schemes of Arrangement sanctioned by the English High Court

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IN APRIL 2014, THE PAN-EUROPEAN CAR park operator, Apcoa, obtained the sanction of the High Court in England to a set of schemes of Arrangement under Part 26 of the Companies Act[1]. With the group's finances under pressure, this step was taken purely in order to extend the term of its loan facilities. In September, Apcoa, by its German holding company and eight operating subsidiaries registered variously in Germany, Austria, Belgium, Denmark, the United Kingdom and Norway, returned to the High Court in London with separate applications for a further set of inter-conditional schemes, intended to facilitate the restructuring of the group's finance facilities. Judgment was given by Hildyard J in the High Court. He gave detailed reasons for his decision to allow the companies to call meetings of creditors and for his subsequent decision (at the sanctions hearing in October) to make orders sanctioning the schemes[2]. Before the first set of schemes, Apcoa's senior lenders had agreed to a change in the governing law of the group's facilities from German law to English law for the specific purpose of creating 'a sufficient connection' with the English jurisdiction, allowing the English court to take jurisdiction and sanction the schemes.

BACKGROUND

Apcoa had about 5,000 employees and was unable to repay its existing debt facilities totalling about €764m. The group's existing senior finance agreement (the existing SFA) had been put in place in 2007. In November 2013, a super senior facility was agreed to provide cash flow during the restructuring. In order to achieve super priority for this facility, in the absence of the consent of all senior lenders, a series of turnover agreements were put in place under which the consenting lenders would pass their receipts under the existing SFA to the super senior lenders, pending full repayment of the super senior facility. In addition, there was a lock up agreement entered into in August 2014 under which the consenting lenders agreed to vote in favour of the schemes and not to enforce their debts in the meantime.

Apcoa had negotiated a restructuring and refinancing of its facilities conditional upon the schemes being sanctioned under a tight timetable. The refinancing would allow Apcoa to repay a significant part of its existing debt and hive the remainder up to holding company level, taking it off the balance sheet of the operating subsidiaries. This was to be achieved by the issue of new debt to be owed at operating company level; the grant of a new bank guarantee facility and the issue of further new debt at the holding company level. In addition, a new bank would provide a new facility for working capital and a loan to effect repayment of the existing super senior debt facility. The Court noted that the directors of the scheme companies considered that, without the restructuring, the directors faced personal risk (particularly in Germany). The Court accepted that the only real alternative to the schemes were formal insolvency procedures with the associated destruction of value for the creditors.

As noted above, Apcoa had changed the governing law clause in the existing SFA, with the consent of the majority of its senior lenders, from German law to English law for the specific purpose of establishing a 'sufficient connection' with the English jurisdiction in order to obtain the English court's sanction to the schemes. All except two of the scheme creditors consented to the change in the governing law and were aware of the purpose of the change. The main dissenting creditor, FMS, opposed the application for the schemes at every stage, a fact which made the applications unusual.

Following a contested first hearing in September, the Court made orders for the convening of meetings of scheme creditors based on the classes identified by Apcoa. The class meetings resulted in the approval of the schemes by large majorities of scheme creditors by number and value, substantially in excess of the requisite statutory majorities[3].

THE SANCTION HEARING

The sanction hearing took place at the end of October and lasted four days, a reflection of the difficult issues raised. The largest creditor of the group, Centrebridge, took part in the sanction hearing to support the applications. FMS also took part, but to oppose the sanction. FMS argued that Centrebridge was the 'real mastermind' and the 'driving force' of the schemes in pursuit of its own interests as a distressed debt specialist with its 'loan to own' strategy. On the other hand, Centrebridge depicted FMS as a 'hold out' creditor seeking to use its leverage for purely selfish motives contrary

to the interests of the creditors as a whole. The details of the proposed restructuring are complicated, as was the Court's judgment, which runs to about 50 pages. This article seeks to summarise the key points decided by the Court, including guidance in relation to future scheme applications.

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It was crucial to the Court's judgment that it saw no reason to doubt the directors' evidence that the restructuring was necessary to avert the imminent collapse of the group into formal insolvency. The Court noted there was a 100% turnout at the creditors' meetings and that the figures showed 'impressive support' for the schemes. The Court also took note of evidence of other scheme creditors (all senior lenders) as to their reasons for voting in favour of the schemes which the Court took to be both 'commercial and sensible'. In essence, those reasons boiled down to the schemes offering the best hope of survival of the business of the group and repayment of a significant part the lenders' debts over the next few years, as opposed to the very heavy losses the creditors would suffer on formal insolvency.

THE TEST FOR IDENTIFYING CLASSES

The judgment contains a review of the law relating to the test for identifying classes of creditors for the purpose of holding meetings to approve schemes of arrangement. FMS contended that' by not entering into turnover and lockup agreements, its legal rights were so different from the other lenders in relation to the scheme companies that it (along with one other dissenting creditor) must be taken to constitute a different class of creditors, entitled to a separate class meeting.

The Court found that the turnover agreements (by which consenting lenders agreed to turn over sums received from the companies to the super senior lenders which provided emergency funding) were between the lenders themselves, with the scheme companies only nominal parties, such that the creditors' legal rights in relation to the companies were not altered by the turnover agreements. The Court found that the lockup agreement (by which the consenting lenders agreed to vote in favour of the scheme and not to enforce their debts in the meantime) did not affect the lenders' legal rights in relation to the companies as such. It did affect their enjoyment of their rights but not in a way sufficient to create separate classes.

If FMS had been found to be in a separate class that would have given it a power of veto over the schemes. However, the Court did not agree that FMS's legal rights, as compared to the other senior lenders, were such as to put it into a different class. On that point, the Court said that FMS's legal rights were 'sufficiently similar to the other creditors to require them to vote in the same class' on the basis that:

> '... the advantage of avoiding insolvency and being able to share in a larger cake would sufficiently outweigh the wish to have a larger share than others in a much smaller cake.'

Taking the comparator as formal insolvency proceedings (as the Court did), FMS's overall realisation would have been much lower than under the schemes. However, it would have been better off than other senior lenders, having maintained its priority by not entering into the turnover agreements. It should be noted that FMS did not accept that liquidation or other formal insolvency proceedings was the correct comparator.

FMS's CHALLENGE

Apart from objecting to the constitution of the classes of creditors for voting purposes, FMS opposed the scheme companies' application for sanction on a number of other grounds including the following.

The schemes imposed 'new obligations'; specifically to indemnify the issuer of new guarantees in respect of the Apcoa group's future trading

On this point Apcoa argued that the new obligations were really only the exchange of one set of obligations for another. The Court heard submissions on Australian[4] and New Zealand[5] case law which have similar provisions to Part 26 of the Companies Act. The Court had misgivings about this issue but in the end did not have to decide the point, as the scheme companies proposed amendments to the scheme to enable creditors to elect whether or not to enter into the new obligations.

The votes at the class meetings of the lenders under the existing SFA were unrepresentative and not binding on the whole class

The Court dealt with this point in detail but came to the conclusion that, given the alternative of liquidation, it was reasonable to expect the senior lenders to 'unite in common cause' and that the unrepresentative vote point was another way of seeking to rerun the class point.

There was a deliberate manipulation of the classes by Apcoa

The Court regarded this point as dealt with under the decision on voting classes and the Court's view was not changed.

NOTES

1) See the author's article in *The In-House Lawyer*, September 2014 (issue 223, page 46).
2) *In the matters of Apcoa Parking Holdings GMBH & ors* [2014].
3) Section 899(1), Companies Act 2006.
4) *Opes Prime Stockbroking Ltd* [2009] (considered by Patten LJ in *Lehman Brothers International (Europe)* [2010]) and *Lift Capital Partners Pty Ltd* [2009].
5) *Bank of Tokyo Mitsubishi UFJ Ltd v Solid Energy New Zealand* [2013].

The Court did not regard the termination of the turnover agreement so as to avoid argument about class rights as deliberate manipulation.

There was insufficient connection with the English jurisdiction as the changes in the governing law of the finance facilities had no real commercial purpose other than to persuade the English court to take jurisdiction

The Court referred to the line of cases starting with *Re Rodenstock GmbH* [2011], in which the English Court sanctioned creditors' schemes in relation to overseas companies where the rights of creditors were governed by English law. However, the Court noted that the Apcoa schemes 'tested the boundaries of a jurisdiction which is potentially exorbitant.'

FMS argued that the 'sufficient connection' test was failed because the changing of the governing law was not carried out to accomplish any substantive commercial change in the economic relationship between the parties but purely to create a connection with England. FMS argued further that the reason for using the schemes was to bind the very minority who had not consented to the change of governing law and submitted that for the English court to take jurisdiction in this case was a 'step too far'. The Court decided that FMS's objection to the schemes was not sufficient to cause it to decline to sanction the schemes:

> '... which would frustrate the realistic possibility of a group reconstruction manifestly in the interests of all creditors and certainly clearly and consistently supported by a strikingly high proportion of them.'

The Court found in *Apcoa* that there was a sufficient connection with England, while accepting some of FMS's arguments that, in exercising its jurisdiction, the onus is on the court to make an order which will be given recognition elsewhere. The Court accepted it has to be 'especially wary' if, for example:

- the new choice of law appears 'entirely alien' to the previous arrangements and/or with which the parties had no previous connection; or
- if the change in law has no discernible rationale or purpose other than the advantage of those in favour at the expense of the dissentients; or
- generally where in its discretion the court considers that, given the countries in which the parties are, the extent of the alteration of rights for which sanction is sought would be considered a 'step too far'.

In the light of the above, the Court summarised its reasons for sanctioning the Apcoa schemes. They were seen to be fair and they were approved at properly constituted class meetings. Moreover, the change of governing law was understood by all scheme creditors and was intended to enable schemes to be sanctioned. Regarding the motives of the largest creditor, Centrebridge, the Court said that, even if it had motives other than the rescue of the group (as FMS alleged), it would not have been able to promote the schemes without the assistance of others who had no such agenda. The Court gave reasons for deciding the change to English law was not 'alien' or 'indiscriminate' including:

- the approval to the change of law by a 'super majority' of creditors including some with nothing to gain by the detailed changes involved;
- when approval to the change of law was sought, all lenders were advised that this would be a gateway to a scheme under English law;
- the original finance facilities selected English law for certain limited purposes;
- two scheme companies were incorporated in England and a number of creditors were managed from offices in London;
- the agent and security trustees were both English companies ;
- a key finance document, although subject to German law, provided for London to be the place of performance;
- none of the creditors objected to the choice of English law for the purposes of Apcoa's first set of schemes.

The restructuring would not be effective in Germany and would involve breach of contact under German law

The Court heard expert witnesses as to German law; Belgian law; Danish law; Norwegian law and Austrian law and was satisfied that those jurisdictions would recognise and give effect to the schemes under English law. The Court noted that it was the unanimous view of the experts on the local laws of each of the jurisdictions of the scheme companies that:

a) Regulation (EC) No 593/2008 on the law applicable to contractual obligations (the Rome 1 Regulation) enables a change of governing law and (provided Article 23 of the Brussels Convention applies) also a change of jurisdiction clause;

b) there was nothing in Apcoa's existing finance facilities to exclude or preclude those changes, and

c) having been approved by a 'super majority' of lenders, both the change of law from German law to English law and the change of jurisdiction from the courts of Frankfurt/Main to the English courts would be recognised in each of the relevant jurisdictions.

It was noted that the EC Regulation on Insolvency Proceedings does not apply to schemes (or at least those proposed outside a formal insolvency process). The Court also noted that the Judgments Regulation 44/2001 did not limit the original jurisdiction of the English court, even though the case was a commercial or civil matter. That was because no defendant is 'sued' in a scheme of arrangement and therefore Article 2 is not engaged, or, because of the application of Article 23 by reason of exclusive English jurisdiction clauses for the benefit of the relevant lenders, as in the case of *Re Vietnam Shipbuilding Industry Group* [2013]. In summary, the schemes could be recognised and enforced in the relevant EU states.

On the question of whether the scheme would involve breach of contract of the existing intercreditor agreement, which continued to be governed by German law (as to change it required unanimous consent) the Court decided that based on the evidence of the experts on German law this would be unlikely. FMS objected to provisions

in the schemes preventing scheme creditors from taking action in other jurisdictions to challenge the restructuring. The Court was sympathetic to FMS on that point and the scheme companies agreed to amend the schemes to remove the provisions thus leaving the way open for FMS to challenge the restructuring in the German courts.

CONCLUSION AND COMMENT

The Court made the orders sanctioning the schemes subject to the possibility of the Court of Appeal reversing the decision, but without giving leave to appeal. The Court of Appeal did in fact grant leave to FMS and a date was fixed for the hearing, but it is understood that the appeal did not proceed. As noted above, FMS managed to negotiate the removal of provisions in the scheme preventing scheme creditors from taking action in foreign courts and it remains to be seen whether FMS will proceed with a challenge to the schemes in the German courts.

In conclusion, among the points for future scheme applications are the following:

1) The continuing willingness of the English court to take jurisdiction in relation to overseas companies provided that they can show a sufficient connection with the jurisdiction and that the schemes are reasonably likely to be recognised in the jurisdiction of the scheme company's incorporation.

2) The use of lockup and turnover agreements in restructuring would seem not to result in the creation of separate classes of dissentient lenders.

3) New obligations cannot be imposed by schemes, although 'amend and extend' schemes, such as the first set of Apcoa schemes are unlikely to fall foul of this rule.

4) A scheme prohibiting legal actions in other jurisdictions by dissentient creditors is unlikely to be sanctioned by the court.

5) In relation to the court's jurisdiction it remains unclear what would constitute 'a step too far' in relation to schemes sought by overseas companies.

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'FMS argued that the 'sufficient connection' test was failed because the changing of the governing law was not carried out to accomplish any substantive commercial change in the economic relationship between the parties.'

Bank of Tokyo Mitsubishi UFJ Ltd v Solid Energy New Zealand
[2013] NZHC 3458

In the matters of Apcoa Parking Holdings GMBH & ors
[2014] EWHC 3849 (Ch)

Lehman Brothers International (Europe)
[2010] BCC272

Lift Capital Partners Pty Ltd
[2009] FCA 1523

Opes Prime Stockbroking Ltd
[2009] FCAFC 125

Re Rodenstock GmbH
[2011] EWHC 1104 (Ch)

Re Vietnam Shipbuilding Industry Group
[2013] EWHC 2476 (Ch)