WHITE & CASE

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Re Primacom Holding GmbH: To Scheme or Not to Scheme – That Was The Question…

Clarification on the jurisdiction of the English courts to sanction schemes of arrangement for overseas companies

Providing further evidence that schemes of arrangement ("**schemes**") are an increasingly useful tool in the restructuring of overseas companies, on 20 January 2012, the High Court sanctioned a scheme proposed by PrimaCom Holding GmbH ("**PrimaCom**"), a German incorporated company, with its centre of main interests (or **"COMI"**) in Germany and whose affected creditors were domiciled outside the UK.

The decision is in line with the recent judgment of Briggs J in *Re Rodenstock [2011] EWHC 1104 (Ch)* which confirmed that the English courts have jurisdiction to sanction schemes for foreign-incorporated companies. Further, this case also addressed one of the issues left unresolved in Rodenstock, namely whether the English courts have jurisdiction to sanction a scheme where a majority of the scheme creditors are domiciled outside the UK. Had the answer to this crucial question been negative, the viability of schemes for overseas companies going forward would have been severely limited.

This client bulletin analyses the reasoning behind the decision and its potential impact.

Background

PrimaCom is the holding company of a group which provides basic and digital cable television, high speed internet and telephony products in Germany. Following a restructuring which completed early last year, the group encountered further financial difficulties in late 2011 which culminated in PrimaCom launching a scheme in December 2011.

A scheme is a formal statutory procedure commenced under the Companies Act 2006 pursuant to which a company may propose a compromise or arrangement with some or all of its creditors. The proposed compromise or arrangement must be approved by a majority in number representing 75% in value of each class of creditors at scheme meetings convened by the company, and will only become effective once sanctioned subsequently by the court at a fairness hearing.

Schemes have been used frequently since the onset of the economic downturn, in particular as they offer the ability to cramdown dissident or 'holdout' creditors. Click here to read our recent client bulletin setting out further background information on schemes and their use in financial restructurings (Insight: Schemes of Arrangement - Current Hot Topics and Market Trends). This has proven to be invaluable in situations where underlying finance documentation or local law has included unanimous consent requirements or where there would otherwise be significant value leakage to dissident creditors.

For more information please contact:

Christian Pilkington
Partner, London
+ 44 20 7532 1208
cpilkington@whitecase.com

Tom Schorling
Partner, Frankfurt
+ 49 69 29994 1525
tschorling@whitecase.com

Michael Mount
Associate, London
+ 44 20 7532 1485
mmount@whitecase.com

Philipp Jentzmik
Associate, Frankfurt
+ 49 69 29994 1620
pjentzmik@whitecase.com

Benjamin Prior
Trainee, London
+ 44 20 7532 1340
bprior@whitecase.com

PrimaCom held its scheme creditors' meetings on 17 January 2012 where the proposed scheme received the overwhelming support of each class of scheme creditors.

Two key issues which Hildyard J addressed in his judgment at the fairness hearing were whether (i) in practice the scheme would be effective in the jurisdiction where PrimaCom had its centre of main interests (i.e. Germany) in order to bind the dissident creditor, and (ii) the court had jurisdiction to sanction the scheme notwithstanding the fact that all of the affected creditors were domiciled outside the UK.

(i) Effectiveness

The question of whether a UK scheme would be effective overseas was brought into focus as a result of the decision of the German Higher Regional Court not to recognise the scheme relating to Equitable Life in 2010 (*Oberlandesgericht Celle* (ref: 8U46/09)). The rationale for the German Court's decision in that case was, firstly, that schemes are not recognised under the EC Regulation on Insolvency Proceedings 1346/2000 as they are not confined solely to insolvent companies and, secondly, a scheme does not constitute a 'judgment' which could be given automatic effect under Council Regulation 44/2001 on Jurisdiction and the Recognition of Enforcement of Judgments in Civil and Commercial Matters (the "**Judgments Regulation**") as it lacks the requisite 'dispute element' due to the majority support of the scheme from creditors.

Following the reasoning of Briggs J in *Re Rodenstock*, Hildyard J held that the *Oberlandesgericht Celle* case could be distinguished on the basis that, amongst other things, that case had involved the compromise of German law-governed claims whereas the *Re PrimaCom* case involved claims arising under contracts governed exclusively by English law. As a result, even if the order (sanctioning the scheme) was not a judgment for the purposes of the Judgments Regulation, the amendments effected by the scheme would be legally effective in Germany because the German courts would, pursuant to private international law rules, apply English law to the question of whether the creditors' rights against PrimaCom had been varied by the scheme. As such, Hildyard J considered there to be a reasonable, if not better, prospect of the German courts recognising and giving effect to the scheme

(ii) Jurisdiction to Sanction the Scheme: Domicile of Creditors

At the fairness hearing in relation to the scheme of PrimaCom, Hildyard J was required to consider whether the Judgments Regulation fettered his jurisdiction to sanction the scheme proposed by PrimaCom. This resulted from an extract of the judgment of Briggs J in *Re Rodenstock* where he focussed on the "conundrum" posed by Article 2 of the Judgments Regulation which requires that a defendant be "sued" in the member state in which they are domiciled in order to attain jurisdiction. Briggs J considered this provision ill-equipped to deal with schemes (which are not aimed at specific defendants), and noted a potential lacuna where a scheme is caught within the scope of the Judgments Regulation but where there is no clear basis for the allocation of a member state's international jurisdiction.

On the facts of *Re Rodenstock*, Briggs J concluded that as over 50% (by value) of the scheme creditors were domiciled in England, the English court would have jurisdiction notwithstanding the conundrum. He went on to say that he would "leave to another day a case in which a scheme is sought to be sanctioned in England where all the affected members or creditors are domiciled in member states other than the UK." PrimaCom was such a case, as evidence was put before the court confirming that none of the scheme creditors was incorporated in the UK.

At the fairness hearing in relation to PrimaCom, Hildyard J paid particular focus to the "conundrum" found in Article 2 of the Judgments Regulation described above, but nevertheless held that the Court had jurisdiction to sanction the scheme on one or more of the following basis:

1 As a scheme was not a conventional form of adversarial proceedings, there was no 'Defendant' in the matter and, therefore, Article 2 of the Judgments Regulation did not apply to the question of recognition under the Judgments Regulation;

2 Scheme creditors had agreed that the English courts should have jurisdiction by submitting to the exclusive jurisdiction of the English courts under each of the key finance documents (and so fell within Article 23 of the Judgments Regulation for the scheme to be recognised);

3. Further, Scheme creditors had impliedly submitted to the jurisdiction of the English courts through their appearance at the directions hearing to consider the convening of the scheme creditors meetings (and so fell within Article 24 of the Judgments Regulation for the scheme to be recognised); and/or

4 By analogy with Article 4 of the Judgments Regulation (which addresses another potential lacuna in relation to recognition, namely where defendants are not domiciled in a member state), each member state could continue to apply its own private international law in order to recognise the scheme.

In summary, in sanctioning the scheme, Hildyard J found that the Judgments Regulation was not an obstacle to the English Court having jurisdiction to sanction the scheme of PrimaCom, notwithstanding that all of its creditors were domiciled overseas. He expressed his preference for the first of the above routes as the basis for jurisdiction, observing that a scheme is "simply not within the purview of Article 2" and that it would be a "stretch" to consider any of the parties to be 'Defendants'. He also found routes 2 and 3 to be viable methods for the recognition of schemes overseas, whilst leaving open whether route 4 could be used as an alternative base of recognition.

White & Case LLP
5 Old Broad Street
London EC2N 1DW
Tel: + 44 20 7532 1000
Fax: + 44 20 7532 1001

Conclusion

PrimaCom joins a growing list of foreign companies (including Wind Hellas, Gallery Media, Rodenstock, Tele Columbus, La Seda and Metrovacesa) which have taken advantage of schemes to effect their restructurings since the onset of the economic downturn.

If the Court in PrimaCom had ruled that it did not have jurisdiction to sanction a scheme where a majority or all of the affected creditors were domiciled outside of the UK, the result would have been that schemes would be unavailable as a restructuring tool for most large, cross-border restructurings of overseas entities.

The decision in PrimaCom, however, emphasises the wide ambit of the Court to allow jurisdiction for schemes of overseas entities so that they will likely continue to be the predominant process of choice for complex restructurings going forward.

PrimaCom Holding GmbH was represented by White & Case and David Allison of 3-4 South Square Chambers at the High Court