WHITE & CASE

Insight: Financial Restructuring & Insolvency

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Apcoa Parking: Availability of UK Scheme of Arrangement to foreign corporates extended

One of the recent hot topics in the European restructuring market has been whether the UK Courts would sanction a scheme of arrangement in relation to a foreign company, with no previous connection to the UK whatsoever, where the sole basis for establishing jurisdiction to undertake the scheme would be amending the governing law and jurisdiction clauses of the company's principal finance documents to English law. This question was answered on 14 April 2014 when the High Court of Justice (the **"Court"**) approved a scheme of arrangement (the **"Scheme"**) in relation to nine companies of the German based Apcoa Parking group **("Apcoa")**. Apcoa has no connection to, or assets in, the UK at all and its indebtedness was governed by a facilities agreement (the **"Facilities Agreement"**) which was subject to German law and the exclusive jurisdiction of the courts of Frankfurt/Main. However, by majority lender vote in accordance with the terms of the Facilities Agreement, the governing law and jurisdiction clauses were amended to English law for the sole purpose of establishing jurisdiction of the Court to proceed with a UK scheme.

Key Points

- Apcoa had no other basis on which to establish jurisdiction to conduct the Scheme;
- The Court accepted jurisdiction on the basis of the amended governing law and jurisdiction clauses and sanctioned the Scheme and thus opened a new avenue to establish jurisdiction;
- The Scheme enabled Apcoa to change material terms of the Facilities Agreement which would otherwise have been subject to unanimous consent and thus overcame minority lender opposition;
- Apcoa successfully executed the Scheme with respect to its group which included German, Austrian, Belgian, Norwegian and Danish companies and thus reaffirmed and extended widespread geographical availability of a UK scheme of arrangement; and
- The case confirmed that there is currently no other tool in the European restructuring market that allows for more efficient and flexible corporate restructurings than a UK scheme of arrangement.

The Background

Apcoa is a German 'parking solutions' company with operations in the UK, Austria, Denmark, Germany, Norway and Belgium. The group is financed, *inter alia*, through a Facilities Agreement, comprising a senior revolving credit facility of £33.83 million, a senior term loan of €595 million and second lien debt amounting to €65 million. The debt under the terms of the Facilities Agreement was due to mature on 25 April 2014, and the group's ongoing restructuring was not due to be completed by this time. The group sought to implement the Scheme to extend the maturity date initially to 25 July 2014 with the option to further extend the debt by three months with the consent of a qualified majority of creditors. Without the Scheme such amendment would have required unanimous consent of all of the creditors.

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

Laura Prater
Partner, London
+ 44 20 7532 1306
lprater@whitecase.com

Boris Docekal
Associate, London
+ 44 20 7532 1000
bdocekal@whitecase.com

David Plch
Partner, Prague
+ 420 255 771 298
dplch@whitecase.com

Leila Roeder
Partner, Frankfurt
+ 49 69 29994 1568
lroeder@whitecase.com

The Scheme

A scheme of arrangement is a Court supervised process which aims to implement an agreement without the need to obtain the consent of all of the parties. Strict procedures need to be complied with, including the need for an initial convening court hearing (the **"Convening Hearing"**), a vote of the creditors in a meeting and a sanction court hearing (the **"Sanction Hearing"**). At the Convening Hearing, the Court will consider whether creditors should be separated into classes and whether there is any obvious impediment to the approval of the scheme of arrangement. The Sanction Hearing is where the court's approval is sought for the scheme of arrangement to become effective. To achieve the statutory threshold, Apcoa needed the support of 75% in value and a majority in number of the creditors present and voting at the meeting.

Jurisdiction – the Scheme

The Court has jurisdiction to sanction a scheme in relation to a *"company"* which is defined as *"any company liable to be wound up under the Insolvency Act 1986."* Sections 220 and 221 (1) of the Insolvency Act 1986 give the Court the power to wind up a foreign company. The Court can therefore sanction a scheme in relation to a foreign company where there is a *"sufficient connection"* to the English jurisdiction to justify the Court sanctioning a scheme. Two methods are often used to establish sufficient connection:

1. Centre of Main Interests **("COMI")**: there is an established process for shifting COMI of financial holding companies to the UK, and a COMI within the jurisdiction has been held to amount to a sufficient connection; or

2. Governing Law and Jurisdiction Clauses: in recent years, a number of debt restructurings of non-UK incorporated companies have been accomplished where the scheme of arrangement was based on English governing law of the underlying finance documents (*Re Rodenstock* [2012] BCC 459; *Re PrimaCom* (No. 2) [2013] BCC 219; and *Re Nef Telecom BV* [2012] EWHC 2944 (Ch)).

The Change of Governing Law and Jurisdiction

Apcoa sought to establish jurisdiction through its governing law and jurisdiction clauses. However, unlike Rodenstock and the other cases noted above, the governing law and jurisdiction clauses of their Facilities Agreement were not that of England/ English law.

Therefore, in accordance with the amendment provision in the Facilities Agreement the governing law and jurisdiction clauses were changed from German law to English law. This change was effected by the consent of the majority lenders – 66.6% of creditors were required to vote in favour of this change and 86% of creditors voted in favour (with 5.5% voting against the change). Importantly, the Court also received expert evidence from local German expert – Professor Paulus – to the effect that the change of governing law and jurisdiction clauses, and the Scheme itself, would be likely to be recognised in the countries where the group companies were incorporated.

The Decision

The Court determined that, through the amendment of the governing law and jurisdiction clauses, there was a sufficient connection with the UK, and the Scheme was sanctioned. Consent was sought from 83 of the 93 creditors (with the other 10 abstaining). Creditors' votes by value in support of the Scheme reached between 86.89% and 100% of the relevant outstanding indebtedness.

The Court did highlight that it is important that the creditors were fully informed as to the alteration of the finance documents, and if the creditors were not aware that the purpose of the change to the governing law and jurisdiction clauses was so that a scheme of arrangement could be implemented, then the Court may not have granted jurisdiction. In Apcoa, evidence of telephone calls purporting to fully inform the creditors was enough to satisfy the Court that the creditors were fully informed.

Conclusion

Even prior to the Apcoa decision, the use of schemes of arrangement to effect the restructurings of overseas companies was becoming increasingly widespread. However, the decision in Apcoa has established a relatively simple route for foreign companies to establish jurisdiction of the Court even where it has no connection to the UK whatsoever and, therefore, has potentially expanded the ambit of schemes significantly. The net effect of Apcoa is that a foreign company does not necessarily have to move its jurisdiction of incorporation or COMI to the UK, and can now effect a scheme of arrangement where its only connection to the UK results from a change of governing law and jurisdiction under its finance documents. The decision may also affect holders of the bond market more acutely, where the standard documentation usually allows a change of jurisdiction by approval of holders of just 50%+1 of the bond principal. Going forward, the decision has made the UK an even more accessible jurisdiction to restructure foreign companies and confirmed the scheme of arrangement's position as the international corporate rescue tool of choice for distressed companies.