APCOA Schemes

Expanding territorial boundaries

April 2014

Highlights

- An English Scheme was used to extend maturity, notwithstanding that relevant financing documents were originally German law, and COMI was not in England.
- Governing law and jurisdiction provisions were changed to English law with Majority Lender vote. This allowed the English Court jurisdiction for Scheme purposes, meaning maturity could be extended on a 75% vote rather than unanimity. It would not have been possible to "drag" non-consenting lenders on the original form of the documents outside an insolvency process.
- This is a further step in a line of cases showing the English Courts' willingness to sanction Schemes in relation to overseas companies. Whilst there have been a number of Schemes in cases where COMI is other than England, this is the first reported decision where the relevant financing documents were not originally governed by English law and jurisdiction either.

Legal Context

- The Scheme is very simple in its formulation, merely extending maturity. Its novelty is as to jurisdiction, where the Court needs to be satisfied that there is sufficient connection with England. There are number of cases where English law and jurisdiction finance documents have created that connection in the context of a Scheme in relation to those finance documents, but this is the first in which they were changed to create that connection.
- The decision will be perceived as opening the door for structures with little existing connection to England to create one by Majority Lender vote (and without moving COMI). The Scheme can then potentially be used to deliver matters otherwise requiring unanimity (e.g. imposing a write down, change pricing, or extend maturity) on a 75% vote.
- Caution is needed however. The Court considered alternatives available to the APCOA business, and that some form of German insolvency process was a real likelihood absent the Scheme. It should also be noted that 83 of the 93 lenders of record voted in favour, giving an approval level of 86% to 100% for each Scheme. The remainder abstained, leaving no votes against the Scheme and the sanction hearing uncontested.
- Note also that changes to the law and jurisdiction clause may be expressed as unanimous matters in post 2012 financing documentation, when it became included as an option in the LMA leveraged loan agreement (many English language financing documents are loosely based on LMA even if not English law).
- The first and second lien voted together as a single class, as the rights of both were considered to be affected in materially the same way.

Other notable schemes of overseas groups

Primacom – German private cable network operator in Germany, with German COMI and majority of creditors domiciled outside England. Scheme used to deliver debt/equity swap.

Metrovacesa – Spanish real estate group with assets in Spain, France and Germany. Scheme amended English law finance documents as part of a restructuring to re-tranche debt and implement a debt/equity swap.

NEF Telecom – Bulgarian telecoms provider. Scheme delivered unanimity for lender led enforcement and ownership.

Magyar Telecom – Dutch holding company of Invitel group, a telecommunication services provider in Hungary. COMI moved to England, with a Scheme used to amend New York law notes. Scheme subsequently recognised in the US under Chapter 15.

Factual Background

- The APCOA group operates over 1.3m parking spaces at c7400 locations, through 39 subsidiaries across 12 countries, employing 4500 employees.
- Borrowings of c€460m, £80m, and NOK750m under main facility, with an additional c€50m subsequently made available on a super senior basis. EBITDA was reported as €64m for FY13.
- Relevant facilities were German law and jurisdiction (Intercreditor was German law and jurisdiction, the Super Senior English, and the wider security package is subject to relevant local law).
- The 9 borrowers which proposed the Scheme are incorporated variously in England, Germany, Belgium, Austria, Denmark, and Norway. The Group is centrally managed from Germany, there was no assertion that COMI for any of the 9 was in England.
- Facilities matured on 25 April 2014, and agreement had not yet been reached for a wider restructuring between the 93 lenders of record.
- The German ESUG process and cram down mechanism could potentially have been available for the group but was considered to present greater difficulties for the Group at an operational level.

Hogan Lovells' recent scheme experience

IMO Car Wash

Advising the senior lenders on restructuring of debt facilities of pan European group IMO Car Wash through a UK Scheme of arrangement and pre-packaged administration

Magyar Telecom

Advising the bondholder trustee in relation to the financial restructuring of Dutch entity holding Hungarian telecom provider Magyar Telecom through a COMI shift and English scheme of arrangement ,with recognition obtained under Chapter 15 in the US

NEF Telecom

Advising the security agent in relation to the restructuring of c.€1.7bn facilities provided to Bulgarian telecom provider NEF Telecom, through English schemes of arrangement and enforcement of a Bulgarian share pledge

APCOA

Advising the agent and security trustee on the APCOA schemes, including changing governing law and jurisdiction to allow jurisdiction for an English law scheme of arrangement

Metrovacesa

Advising one of the creditors in relation to the restructuring of debt provided to Metrovacesa through (inter alia) an English scheme of arrangement

Select Service Partners (SSP)

Advising the senior co-ordination committee in relation to the restructuring of facilities of £1.1bn provided to the SSP Group through 11 schemes of arrangement

Key contacts

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