

Highlights

- Senior Lenders which had chosen to be subordinated via a Turnover Agreement still voted in the same class as, and ultimately crammed down, Senior Lenders which had retained priority.
- The existence of the Turnover Agreement had created a different waterfall in practice, but ultimately the rights of Senior Lenders as against the borrower remained the same. A single class was therefore appropriate.
- A Majority Lender vote, changing the Facility Agreement governing law and jurisdiction, of itself created the "sufficient connection" for a Scheme of Arrangement to be sanctioned.
- Doubt was cast as to whether it is possible for a Scheme to impose a "new obligation" on a dissenting Lender by rolling them into a guarantee facility with a new Issuing Bank.

Turnover Agreement

- The main focus of the challenge was the use of c€50m advanced into this restructuring to repay a "rescue" financing in November 2013 (the "2013 Facility").
- The 2013 Facility was labelled "super senior", but there had not been the necessary 100% agreement from Lenders to amend the Intercreditor waterfall to include it at that level. Instead it was advanced as unsecured, but with consenting lenders agreeing via a separate Turnover Agreement to turnover realisations from their Senior 1st lien holds to repay it.
- Through this route the 2013 Facility was effectively super senior to consenting Senior 1st lien Lenders (who held c94% of the debt), but not the dissenting remainder
- That minority argued that these waterfall rights created a class issue, and that they should have a separate vote. The consenting Senior 1st lien Lenders were already committed to rank behind the 2013 Facility. The dissenting Lenders were not. That gave them differing interests and, they argued, differing rights in relation to the borrowers and the proposal.

Jurisdiction

- 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.
- The same approach had been adopted in sanctioning the first Apcoa Schemes in April 2014, and is not new this time around, but the approach has now survived a contested application making for a stronger precedent.

Waterfalls and Classes

- In practice the Turnover Agreement meant that on insolvency of the Group some 1st lien Lenders were subordinated, and others were not. That effect was achieved in a side agreement between Lenders, and not in an arrangement to which the borrower was party however, so all 1st lien Lenders technically had the same rights at borrower level, and accordingly they could be treated as a single class.
- The Court further rejected arguments that the resulting votes were not representative of the class, and/or that the borrowers had manipulated class treatment by amending the Turnover Agreement late in the day.
- The case illustrates that insolvency ranking is not always an absolute factor in determining classes. Lenders should not always assume that they cannot be crammed down by a more junior or more senior lender, and thought may be needed as to the nature and structure of rights, particularly in uni-tranche or A/B structures where not all elements of the waterfall necessarily exist at a borrower level.

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, and an additional c€50m subsequently made available as new money in November 2013. EBITDA reported as €64m for FY13.
- Original 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 nine borrowers which proposed Schemes 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 nine was in England.
- Governing law and jurisdiction of the facilities had been changed to English in March 2014 to allow Schemes to be used to extend the maturity of 26 April 2014. Those Schemes were sanctioned ultimately unopposed due in part to the looming threat of German insolvency in the alternative.
- 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.
- An appeal from the original High Court decision was due to be heard in the Court of Appeal on 9/10 December 2014, but the challenge withdrawn a few days earlier paving the way for the restructuring to complete. Whilst there have been other contested financial restructuring Schemes, they have so far all been at first instance level only.

Hogan Lovells' recent scheme experience

Hogan Lovells acting for the Agent and Security Trustee on the APCOA schemes and also:

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

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 contact



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