THE APCOA SCHEMES OF ARRANGEMENT

This article gives an overview of the recent litigation relating to the use by Apcoa, the pan-European car parking operator, of English law schemes of arrangement to restructure its debts.

Key points arising from the Apcoa scheme litigation

In an important judgment on creditor schemes of arrangement (a scheme), the English High Court has, amongst other things, ruled that:

(a) whilst it is possible to invoke an English court’s scheme jurisdiction by amending the governing law of a company’s underlying finance documentation from its originally stated foreign law (German law in this case) to English law, this is not a device that the English court will accept in all circumstances, in particular where English law would otherwise be completely “alien” to the original arrangements made between the contracting parties. The decision has therefore limited what some had previously hailed (on the back of the court’s original judgment on this matter in relation to the “amend and extend” schemes which were a precursor to the substantive Apcoa restructuring schemes) as an unfettered “gateway” for a foreign company to avail itself of an English scheme where the governing law of its underlying finance documentation could be changed to English law by less than 75% in value of its creditors;

(b) an arrangement entered into between some (but not all) of a company’s creditors whereby they agreed to turnover recoveries from that company to certain other creditors did not, of itself, constitute those creditors who were not party to such turnover arrangements in a separate class for scheme voting purposes. This may have important ramifications for the future restructuring of capital structures where a unitranche facility has been used and the unitranche intercreditor arrangements are solely between creditors as opposed to being structured as a three way agreement between the company, its senior creditors and its junior creditors; and

(c) there is significant uncertainty as to whether a scheme can be sanctioned which purports to impose new obligations on creditors (in this case the new obligation concerned the requirement on creditors to indemnify fronting banks in the context of a new bank guarantee facility).

The case (which is subject to an appeal to be heard by the Court of Appeal in early December) is important as, unlike most recent scheme hearings, the convening and sanction hearing for the Apcoa schemes were contested and the objections from the minority creditors focused on a number of key issues, including the constitution of classes, the ability of an English court to sanction a scheme in respect of a foreign company and what constitutes an “arrangement” for the purposes of a court’s scheme jurisdiction. We analyse the main elements of the case below as well as setting out, for reference at the end of this article, some background on creditor schemes of arrangement and their application to foreign companies.

An overview of creditor schemes of arrangements

A scheme is a procedure under English law by which a company can propose a statutory compromise or arrangement with some or all of its creditors. Further detail on scheme procedure is set out under “Background to Schemes of Arrangement” below.

The key feature of a scheme is that it enables a company to implement such a compromise or arrangement without requiring the consent of every creditor that may otherwise be needed under the existing contractual arrangements between that company and its creditors. Moreover as a scheme is not an insolvency process (its legislative underpinning is the Companies Act 2006).
rather than the provisions of the Insolvency Act 1986), the directors of the company can stay in office and therefore remain in control of the company’s affairs. Moreover, assuming there is a commercial agreement on the terms of a restructuring with sufficient creditors, a scheme can be implemented within six to eight weeks.

These features, combined with an established line of (largely unopposed) first instance cases whereby the English courts have held that schemes can be used by foreign companies so long as they have “sufficient connection” with England (established by virtue of having English law governed finance documentation and English law jurisdiction clauses or their “centre of main interests” in England) and the fact that most other jurisdictions have no similar pre-insolvency restructuring procedure, mean that English law schemes have been used, with increasing frequency, to implement cross-border financial restructurings. In recent years schemes have been used to restructure the debts of companies incorporated in Spain, Germany, Vietnam, the Netherlands, France, the United States, Kuwait and Luxembourg. An analysis of the recent case law on how the English court’s approach to schemes of foreign companies has developed is set out below under “Schemes and Foreign Companies – a Detailed Legal Analysis”.

**Background to the Apcoa schemes**

**Events leading to Apcoa’s restructuring**

Apcoa, which is headquartered in Germany, is one of Europe’s leading car park operators, with businesses in 12 jurisdictions. Apcoa was acquired by private equity investor Eurazeo in April 2007 in a highly leveraged transaction using circa EUR 700mn of debt with an April 2014 maturity. The facilities made available as part of the acquisition were as follows (i) a senior term facility (the **Term Facility**) and an RCF facility (the **RCF**), (ii) a bank guarantee facility (the **Bank Guarantee Facility** and (iii) a second lien facility (the **Second Lien Facility**) which was subordinated (pursuant to a German law intercreditor agreement (the **ICA**)) to the senior facilities referred to in (i) and (ii). Significantly, the group’s debt documentation was governed by German law and was subject to the exclusive jurisdiction of the courts of Frankfurt/Main².

As early as October 2009, the group began to experience difficulties in meetings its covenants and the sponsor was required to inject further equity as part of a covenant amendment process agreed with the group’s banks in 2010. Following an aborted sales process in 2012, restructuring discussions began in late 2013 as it became clear that, without a further significant equity injection, it would not be possible to refinance the group’s debt given its 10x leverage. At the same time a number of distressed investors, led by US hedge fund Centerbridge, began purchasing the group’s debt. Restructuring proposals were put forward which envisaged the group’s debt being halved through a debt for equity swap.

As part of these discussions, in November 2013 a EUR 34mn super senior facility agreement was entered into by one of the German entities in the Apcoa group with Centerbridge and certain other lenders (the **New Money Lenders**) in order to provide liquidity after the group’s cash pooling facilities were withdrawn. Not all of the existing lenders agreed to the super senior status of the New Money Lenders however so, instead of taking security from Apcoa and documenting a contractually super senior position agreed with all lenders (which would have required all lender consent to amendments to the German law governed ICA), the New Money Lenders relied on a turnover agreement entered into with those existing lenders who consented to their debt being primed (the **Consenting Lenders**). Under these arrangements (the **Turnover Arrangements**) the Consenting Lenders agreed to turnover proceeds received from Apcoa to the New Money Lenders in order to achieve de facto super seniority for the new money (with the exception of the claims of certain dissenting lenders, consisting of FMS Wertmanagement (**FMS**) and hedge fund Litespeed (the **Dissenting Lenders**), who did not sign up to the Turnover Arrangements and accordingly were not entitled to receive any turnover proceeds.

---

² There were certain clauses relating to the calculation of interest that were expressed to be governed by English law / subject to English court jurisdiction as opposed to German law / the courts of Frankfurt/Main but the rest of the facility documentation was governed by German law.
whose rights per the existing ICA were therefore unaffected by the Turnover Arrangements\(^3\)). The structure of the Turnover Arrangements became a key issue in the determination of how the classes for voting on the Restructuring Schemes (as defined below) should be constituted, the central contention of the Dissenting Lenders being that the Turnover Arrangements created differences of legal rights between the Consenting Lenders (who, pursuant to the Turnover Arrangements, had relinquished their priority rights to the New Money Lenders) and the Dissenting Lenders (who had not).

The Extension Schemes – extending the scheme “gateway” for foreign companies

The discussions relating to the restructuring proposals became prolonged and, as a result, there was a need to extend the maturity of the group’s debt beyond April 2014 in order to enable these discussions to continue and for a restructuring to be implemented. A formal extension to debt maturities was necessary in this case as the directors of the German holding company would be, as a matter of German law, under a duty to file for insolvency proceedings within 21 days of their actual knowledge of the company’s insolvency (whether on a cash-flow or balance sheet basis).

Any extension to the group’s debt documents required all lender consent and the Dissenting Lenders refused to grant their consent to this extension. As a result, schemes of arrangements were proposed for the nine borrowing entities in the group (consisting of companies incorporated in England, Germany, Belgium, Austria, Denmark and Norway) for the sole purpose of extending the maturity date from 25 April 2014 to an ultimate longstop date of 25 October 2014 (the Extension Schemes).

The novel point raised by the Extension Schemes was that, as flagged above, the group’s debt documentation was, when originally entered into, governed by German law and did not benefit from a jurisdiction clause selecting England as the relevant jurisdiction for disputes arising out of the debt documentation. As a result of this, there was, prima facie, no “sufficient connection” with England so as to invoke the English court’s jurisdiction to sanction the Extension Schemes.

However, in this case, the governing law and jurisdiction clauses were, prior to the Extension Schemes being proposed, amended pursuant to the terms of the underlying debt documentation by the requisite majority of creditors (two thirds in this case\(^4\)) such that English law replaced German law as the governing law and the courts of England replaced the courts of Frankfurt/Main as the courts with jurisdiction. In sanctioning the Extension Schemes the court ruled that, by means of the amendment of the governing law and jurisdiction clauses, there was “sufficient connection” with England so as to enable the court to sanction the schemes. The following matters were crucial to this ruling:

(a) the fact that the creditors had been informed that the purpose of changing the governing law and jurisdiction clauses was as a precursor to proposing English law schemes of arrangement; and

(b) the submission of expert evidence from the relevant overseas jurisdictions that not only would the Extension Schemes be recognised in the jurisdiction of incorporation of each of the scheme companies but also that the change in the governing law and jurisdiction clauses would also be recognised and given effect to\(^5\).

---

\(^3\) FMS was the only Dissenting Lender represented at the Restructuring Scheme convening and sanction hearings but was supported by Litespeed in the submissions it made.

\(^4\) It should be noted that the LMA English law governed documentation includes the governing law clause as one of the “protected” clauses requiring all Lender consent. One key point for lenders under non-English law governed documentation to consider as a result of the Apcoa scheme litigation is whether the governing law clause should be included as an all lender consent matter.

\(^5\) Paragraph 2 of Article 3 of the Rome 1 Regulation specifically enables parties to a contract which deals with obligations in civil and commercial matters to change its governing law.
It should be noted that, whilst there were “rumblings of discontent” expressed in some correspondence from creditors and their lawyers, the scheme companies’ submissions at the convening hearing and the sanction hearing for the Extension Schemes were unopposed.

The significance of the court’s ruling on the Extension Schemes was profound as it raised the prospect that, put simply, any company in the world which was able to contractually amend the governing law of its finance documents to English law with less than 75% of its creditors and produce independent external evidence that this (and any subsequent scheme) would be recognised in its home jurisdiction could avail itself of an English scheme to “cram down” dissenting or apathetic creditors.

The Restructuring Schemes

Following the implementation of the Extension Schemes, a commercial agreement on the terms of Apcoa’s financial restructuring was finally reached with most of the group’s creditors. The restructuring involves a reduction of more than EUR 440mn of the group’s debt from its operating companies’ balance sheets, a further six year extension of the group’s remaining debt and the provision of circa EUR 90mn of new money (provided, in part, to repay the monies advanced by the New Money Lenders).

Whilst over 95% of the group’s creditors signed up to a lock up agreement, the Dissenting Lenders did not agree to the arrangements and therefore the group proposed schemes of arrangement in order to ensure the commercial agreement could be implemented in a way which was binding on all creditors (the Restructuring Schemes). The directors of the scheme companies were of the opinion that if the Restructuring Schemes failed they would have no alternative but to file for insolvency.

Unlike the Extension Schemes, both the convening hearing and the sanction hearing for the Restructuring Schemes were the subject of formal opposition from the Dissenting Lenders. The judgment which was handed down on 19 November 2014 was effectively a composite ruling on matters relating to both the convening hearing (principally the issue of class constitution) and the sanction hearing (principally the fairness of the Restructuring Schemes).

Main issues subject to the Apcoa scheme litigation

Sufficiency of connection?

FMS did not challenge the validity of the change of the governing law of the underlying finance documentation per se but argued that the changes which had been made, as a precursor to the Extension Schemes, to the governing law and jurisdiction clauses had no real substantive commercial purpose other than to invoke the English court’s scheme jurisdiction and, as a result, constituted naked “forum shopping” which the English court should not countenance (i.e. there was an insufficient connection with the English jurisdiction in this case). In particular, in contrast to the previous cases on this point where all the creditors had, when they originally signed (or become party to) the relevant finance documents, accepted English law as the governing law of their arrangements from the outset, in this case the Dissenting Lenders had been placed in a position (i.e. subject to an English law scheme “cram down”) which they would otherwise not have been subject in accordance with their original ‘bargain’ of entering into German law governed documents. To enable a feature of English law (a scheme) to bind lenders, who did not voluntarily choose English law to govern their original ‘bargain’ and who had not consented to the change from German to English law in the first place, to a restructuring arrangement implemented by way of an English scheme was “a step too far”.

Whilst the court commented on the well-made and powerful submissions put forward on the Dissenting Lenders’ behalf in this respect, the court found that there was a sufficient connection in this case but indicated that where the issue of sufficient connection to England was being assessed by reference to the governing law of the finance documents, and the governing law had
been changed so as to invoke the jurisdiction of an English court, the court should be particularly cautious of sanctioning any scheme in that context if any of the following (non-exhaustive) criteria were applicable:

(a) the change to English law is entirely “alien” to the parties’ previous arrangements and/or the parties had no previous connection with England;

(b) the change to English law has no discernible rationale or purpose other than to advantage those in favour of the scheme at the expense of the dissentients;

(c) more generally, if in its discretion the court considers that, in the places in which the parties are, the extent of the alteration of rights between the parties for which sanction is sought would be considered a “step too far”.

In this case the court found that the parties were experienced business persons and the effect of the change of law was not arbitrary or unfair. To the contrary, the right to change the governing law without all lender consent was enshrined in the original documentation and, as experienced and professionally advised commercial entities, the parties were aware (or should have been aware) of the possible consequences under the Rome 1 Regulation should the governing law of the underlying documentation be changed.

In reaching its conclusion in this case that the change to English law was not “alien” to the parties or such that its impact and possible consequences could not reasonably have been foreseen, the court cited the following factors:

(a) the fact that when the request for the amendment to change the governing law from German to English law was made, the reason for so doing (i.e. so at to create a jurisdictional “gateway” for the implementation of a scheme) was made clear to all lenders;

(b) certain of the clauses relating to the calculation of interest in the original finance documents had been chosen to be governed by English law from the outset;

(c) none of the lenders had formally objected to the change to English law and the English courts’ jurisdiction as part of the Extension Schemes;

(d) two of the Apcoa entities to be schemed were incorporated in England; and

(e) a number of the lenders were managed from offices in London and the agent and security agent under the finance documents were both English companies.

On the facts of this case, therefore, the court found that there was a sufficient connection with the English jurisdiction so as to invoke the English court’s scheme jurisdiction.

Constitution of classes

The Restructuring Schemes were based on classes constituted of (i) lenders in respect of the Term Facility and the RCF (including the Dissenting Lenders), (ii) lenders in respect of the Bank Guarantee Facility (including the Dissenting Lenders) (iii) lenders in respect of the Second Lien Facility and (iv) the New Money Lenders.

6 Note that in respect of the Extension Schemes, the lenders under the senior facilities (the Term Facility, the RCF and the Bank Guarantee Facility) and the lenders in respect of the Second Lien Facility were constituted in the same class on the basis that, with respect to what was being proposed as part of those schemes (i.e. the extension of the maturity date of each of the facilities only) their rights were, notwithstanding the subordination of the Second Lien Lenders, not so dissimilar as to make it impossible for them to consult together in relation to that proposal.
The Dissenting Lenders argued that they were in a different class from other lenders because they had not agreed or been party to the Turnover Arrangements entered into in connection with the super senior new money that had been made available in November 2013 and, as a result, on an insolvency their rights against the relevant scheme companies (which remained “undiluted” by the Turnover Arrangements) would be so different from the Consenting Lenders (who had agreed to their claims being primed by the claims of the New Money Lenders) that they could not consult together with a view to their common interests and should therefore constitute a separate class.

The court however held that as the Turnover Arrangements operated “behind the curtain” between the New Money Lenders and the Consenting Lenders and therefore they did not, as a matter of substance, alter the rights of the Consenting Lenders against the relevant companies as the Turnover Arrangements only became operational on receipt of recoveries by lenders generally and did not constitute substantively an agreement for subordination against the scheme companies which would justify a separate class being created for the Dissenting Lenders (who were not subject to the Turnover Arrangements). In the words of the judge the Turnover Arrangements did not “cut off or qualify the vindications of the Consenting Lenders’ rights against the Scheme Companies: what the Consenting Lenders had, they retained, and all that happened…is that the Consenting Lenders were committed to pass on …to the New Money Lenders the fruits of the vindications of their rights.”

The court also considered that, in assessing the overall fairness of the Restructuring Schemes, by reference to what the alternative would be if the Restructuring Schemes did not become effective (the likely insolvency of the group) there was more to unite the Dissenting Lenders and the Consenting lenders “in common cause” than to divide them given that, on the evidence available, an uncontrolled insolvency would have resulted in a materially worse outcome for all senior creditors. The judge put his conclusion on this matter as follows: “It…seems to me 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”.

Removal of rights and imposition of new liabilities

The group’s debt arrangements included guarantee facilities with back to back indemnities from the lending syndicate for the banks issuing the guarantees. As part of the Restructuring Schemes these arrangements were extended and new banks agreed to front the guarantee arrangements such that there was an obligation on senior creditors generally to indemnify these fronting banks for a period of up to 6 years. In addition, the back to back indemnity from the obligors in respect of the banks’ indemnity obligations to the fronting banks was subordinated to certain other senior debt claims. The Dissenting Lenders argued that a scheme cannot impose new liabilities or force existing creditors to become creditors of an additional liability or require creditors to effectively surrender their property (by virtue of new subordination arrangements) and, as such, the court had no jurisdiction to sanction the Restructuring Schemes (that jurisdiction being restricted to arrangements affecting existing rights and obligations between creditors and a debtor and not the imposition of new obligations).

Whilst ultimately not having to formally rule on this point (as the Restructuring Schemes were amended so that creditors had the option whether to provide the indemnity to the fronting banks), the court considered the imposition of new obligations (even if characterised as the exchange of one set of mutual rights and obligations for another) may not be properly regarded as a compromise or arrangement between the company and its creditors so as to constitute a scheme of arrangement over which the court had jurisdiction. The proponents of future schemes are therefore now on notice on this point and so schemes will have to be designed so as not to impose new obligations (albeit that the court expressly made clear that there was nothing objectionable in a scheme implementing an extension or rolling over of existing facilities involving no new contract or more extensive obligation).
Background to Schemes of Arrangement

Scheme procedure

At the heart of scheme procedure are two court hearings. The first court hearing (the convening hearing) is to obtain a court order to call the necessary meetings to vote on the proposed scheme(s) and then, following the convening of these meetings and assuming sufficient votes in favour of the scheme have been obtained, a second court hearing will be held at which the court will consider the fairness of the scheme (the sanction hearing).

The identification of “classes” of creditors (discussed further below) is a central feature of a scheme and one of the key functions of the convening hearing is to consider the proposed constitution of different classes of creditors as the court has no ability to correct incorrectly constituted classes at the subsequent sanction hearing. The convening hearing will also consider whether there is any other jurisdictional impediment to the implementation of the schemes being proposed. The convening hearing does not however consider the overall fairness of the scheme.

Voting on a scheme and identifying classes of creditors

For a scheme to be binding on all creditors it needs to be approved by a meeting of creditors or, where applicable, by a meeting of each class of creditors on the basis of two separate voting thresholds:

(a) value threshold - at least three-quarters by value of those creditors at the meeting are required to vote in favour of the scheme; and

(b) numerosity threshold - a majority in number of those creditors voting at the meeting are required to vote in favour of the scheme.

Fundamental to a successful scheme is the identification of any separate classes of creditors that will be required to vote on the scheme, with the value/numerosity thresholds identified above applying separately to each class. There is no statutory definition of what will constitute a class of creditors but case law has established that, in making this determination, each class must be made up of creditors whose rights are “not so dissimilar as to make it impossible for them to consult together with a view to their common interest.”

This test involves an analysis of how each creditor’s existing legal rights against the company will be affected by the scheme (as opposed to the relevant creditors’ commercial interests or motives). If, in analysing these legal rights, no dissimilarities in those rights are identified, all creditors should be considered able to “consult” together and will therefore constitute one class. However, if differences in those rights are identified, it is necessary to determine where those differences are such “as to make impossible sensible discussion with a view to the common interest of all those concerned.” This does not preclude a lender’s interests deriving from those rights being subsequently considered as part of the convening hearing to determine the overall fairness of the scheme, by reference to what the alternative would be (often insolvency) if the scheme is not sanctioned and considering, in that alternative, whether in the words of the judge in the Apcoa first instance decision “objectively there would be more to unite than divide the creditors in the proposed class, ignoring for that purpose any personal or extraneous interest or subjective motivation operating in the case of any particular creditors”.

---

7 Per Lord Millett in Re UDL Holdings Ltd [2002] 1 HKC 172: “The test is based on similarity or dissimilarity of legal rights against the company, not on similarity or dissimilarity of interest not derived from such legal rights. The fact that individuals may hold divergent views based on their private interests not derived from their legal rights against the company is not a ground for calling separate meetings.”
Court sanction

Even if the scheme is approved by the requisite thresholds of creditors, it must still be sanctioned by the court to become binding and effective. Whilst the fact that a scheme has received overwhelming support from the relevant creditors may be an important factor for the court's consideration, the sanction hearing is not a formality and, before exercising its discretion to sanction a scheme, the court will need to be satisfied that the statutory requirements for voting have been met and that its terms are fair, with the onus on the party proposing the scheme to demonstrate that the scheme's terms are fair.

In assessing fairness, the court will consider whether the scheme is commercially “fair” i.e. that the scheme proposed is one in respect of which an “intelligent and honest man, a member of the class concerned and acting in respect of his interest might reasonably approve”. The court will also consider whether the scheme will be binding on the creditors it purports to bind as the court will not exercise its discretion if the result of doing so would be futile and the scheme would not therefore serve its purpose. For example, in the circumstances of a sanction hearing to consider the scheme of a foreign company (see below), the court will need to be persuaded (by reference to independent expert evidence) that the scheme will be recognised in the relevant company’s jurisdiction of incorporation. Consideration of the binding effect of the scheme in the company’s “home” jurisdiction also constitutes part of the court’s overall assessment of fairness because if it will not be binding in that jurisdiction it potentially means a creditor could take unilateral action in that jurisdiction and gain an unfair advantage over other creditors who are unable to take such action (e.g. because they are subject to the jurisdiction of the English court and could not therefore take unilateral action in the company’s “home” jurisdiction).

Schemes and foreign companies – a detailed legal analysis

An English court’s jurisdiction under English law

The English court has statutory jurisdiction to sanction a scheme in relation to any “company” which, for these purposes, is defined as any company which is “liable to be wound up” under the Insolvency Act 1986 (section 895(2) of the Companies Act 2006). Under section 220 of the Insolvency Act 1986 this includes any unregistered company, a concept which includes a foreign company.

This wide statutory jurisdiction has been supplemented by case law which has established additional conditions for when a court may exercise its jurisdiction to make a winding-up order over a foreign company, one such condition being that the company in question has “a sufficient connection” with England. As a matter of English law therefore, English courts have jurisdiction to sanction a scheme of a foreign company, although the court will not exercise this jurisdiction unless “sufficient connection” with England is shown. The purpose of this requirement is to ensure that the English court declines to exercise what may otherwise appear as an “exorbitant jurisdiction” unless it is appropriate to do so. Whilst this sufficiency of connection test is a factual matter for each particular case, it is now well established by a large number of first instance cases that the fact that a company has English law governed finance documents which are subject to the jurisdiction of the English courts will satisfy this test. These line of cases inevitably begs the question whether a governing law clause could be amended to English law so as to invoke an English court’s scheme jurisdiction. In Re Apcoa Parking Holdings GmbH and others [2014] EWHC 1867 (Ch) schemes were sanctioned where the only connection with the English jurisdiction was that the governing law and exclusive jurisdiction clauses of the relevant finance documents had been changed to English law and jurisdiction shortly before schemes were proposed and with the express intention of thereby enabling those schemes to be undertaken.

The “sufficient connection” test should not be confused with the question of whether, for the purposes of the EC Insolvency Regulation, a company has its centre of main interest (COMI) in the UK although, as demonstrated by the Magyar case, the fact that a company has its COMI in England may be sufficient to satisfy the “sufficient connection” test because it will mean that any main insolvency proceedings in relation that that company would have to occur in England. In the Magyar case a scheme was sanctioned in respect of Dutch company whose main business activities were undertaken in Hungary and which was party to a New York law governed bond indenture. As part of its restructuring and before the convening hearing, the company had moved its COMI to England.

The impact of European legislation

The above summary of domestic English law is complicated in respect of foreign companies incorporated in an EU Member State because of the provisions of the EC Insolvency Regulation and the Judgments Regulation (also known as the Brussels Regulation). Each of these Regulations contains rules for allocating jurisdiction over certain matters between EU Member States, with the intention that the two Regulations should seamlessly ‘dovetail’ such that the former deals with insolvent companies and the later with solvent companies.

EC Insolvency Regulation

Whilst the opening of insolvency proceedings in England is governed by the EC Insolvency Regulation, because schemes are creatures of corporate rather than insolvency law (and, as a result, do not concern “collective insolvency proceedings”) they are not currently governed by the EC Insolvency Regulation and, as a result, their use is not limited to companies that have their COMI in the United Kingdom. Conversely, because the EC Insolvency Regulation does not apply to schemes, an English scheme will not automatically be recognised in other EU Member States unless combined with one of the insolvency procedures which are recognised by the EC Insolvency Regulation, such as administration. However, there are other routes to recognition in other EU Member States and in other non-European jurisdictions there are various statutory and/or common law means to enable recognition of overseas restructuring procedures (for example Chapter 15 in the United States).

Whilst schemes are not within the ambit of the EC Insolvency Regulation, there has been a concern that because the EC Insolvency Regulation regulates when a company can be wound up in the UK (i.e. it must have it COMI, or otherwise have an establishment, in the UK), this could impact on an English court’s ability to sanction a scheme in respect of a foreign company, dependent as that is on the relevant company being “liable to be wound up” in the UK under the Insolvency Act 1986.

Judgments Regulation

The Judgments Regulation assigns jurisdiction in cross-border disputes concerning “civil and commercial matters” in all EU Member States (except Denmark). Specifically excluded from the ambit of the Judgments Regulation however are “bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings” (the bankruptcy exemption). Whilst excluding insolvent winding-up, in the context of a solvent winding up the Judgments Regulation does apply to proceedings which have as their object “the dissolution of companies” and, in this respect, gives exclusive jurisdiction

---

9 For example, Article 3(1) of Council Regulation (EC) No. 593/2008 (Rome I) provides that that a contract will be governed by the law chosen by the parties and Article 12 provides that the governing law of the contract should also govern “the various ways of extinguishing obligations and prescriptions and limitations on actions” in relation to the contract. Whilst there has been some debate as to whether schemes fall within the ambit of Rome 1 (which does not apply to questions governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies, corporate or unincorporated, and the personal liability of officers and members as such for the obligations of the company or body), in various schemes involving German companies expert opinions have been provided by German law academics to the effect that schemes are capable of being recognised and enforced in Germany under Rome I.
to the courts of the Member State in which the company "has its seat", regardless of domicile (Article 22.2). As Article 22(2) restricts the jurisdiction of the English court to wind up any solvent company which has its seat in another Member State, an argument can be made, akin to the argument that applies in the context of an insolvent winding up under the EC Insolvency Regulation, that the Judgments Regulation restricts an English court's jurisdiction to sanction the scheme of a solvent company as it interposes on the meaning of "liable to be wound up" for this purpose.

Prior to the Rodenstock judgment referred to below, there was however first instance authority\(^\text{10}\) that the Judgments Regulation was inapplicable to schemes on the basis that schemes constitute "judicial arrangements, compositions and analogous proceedings" for the purposes of the bankruptcy exemption. This line of authority, combined with the fact that schemes do not feature as a main proceeding to be recognised under the EC Insolvency Regulation, would mean that schemes would fall into a "legislative lacuna" being subject to neither Regulation and therefore an English court should apply its own domestic rules (as summarised above) to the issue of jurisdiction.

**Re Rodenstock**

The English courts have rejected the contention that the combined effect of the Insolvency Regulation and the Judgments Regulation is to restrict their jurisdiction to sanction a scheme of a foreign company. The reasoning for this has varied from case to case but the leading case in this matter is now considered to be *Re Rodenstock GmbH [2011] EWHC 1104*, in which the court held that whilst the Judgments Regulation and the Insolvency Regulation do limit, respectively, the court's jurisdiction to wind up solvent and insolvent companies, neither of these Regulations was intended to limit the English court's jurisdiction in respect of schemes. In reaching this decision the court took a purposive approach to the Regulations, holding that neither Regulation had been intended to narrow the court's scheme jurisdiction by reference to the territorial scope of the court's winding-up jurisdiction.

At the heart of this purposive approach is the fact that the legislative touchstone of an English court's jurisdiction to sanction a scheme of a foreign company is a provision of domestic law (i.e. as now found in section 895 of the Companies Act 2006) which was introduced long before there were any European rules governing the allocation of jurisdiction and that nothing in these Regulations is directed at restricting the English court's scheme jurisdiction. In the case of the EC Insolvency Regulation, the absence of schemes from the ambit of that Regulation makes it clear that the EC Insolvency Regulation jurisdiction rules were never intended to apply to the English court's domestic jurisdiction in respect of schemes. Similarly, for the purposes of the Judgments Regulation, the presence of a company's seat in another Member State will not deprive the English court of its domestic jurisdiction to sanction a scheme involving that company. In particular, the drafting in the Companies Act 2006 continued to define a company by reference to the court's winding-up jurisdiction under the Insolvency Act 1986, notwithstanding the implementation of the two Regulations.

Whilst the overall outcome of Rodenstock did not disturb the general proposition that the English courts have jurisdiction to sanction schemes of foreign companies incorporated in another EU Member State provided they have "sufficient connection" with England, the court in Rodenstock did reject the previous first instance authority that the Judgments Regulations was not applicable to solvent schemes on the basis that a scheme is a "civil and commercial matter" and that the exclusion of "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings" from the Judgments Regulation does not exclude matters which do not fall within the Insolvency Regulation, or more generally, matters that are not connected with bankruptcy or insolvency i.e.

\(^{10}\) *Re DAP Holding NV and others [2005] EWHC 2092 (Ch).*
for solvent schemes at least there is no “legislative lacuna” as previously suggested in the *Re DAP Holding* judgment.  

There therefore has been some residual concerns that the Judgments Regulation could impact the court’s jurisdiction to sanction a solvent scheme on another basis. In particular, Article 2(1) of Chapter II of the Judgments Regulation provides that persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State. As noted by the court in *Rodenstock*, as the court's sanction of a scheme is as a judgment *in personam* against scheme creditors (being a judicial determination of the existence of rights against a person), there may be circumstances where, if the scheme creditors are domiciled outside the United Kingdom, the English courts may not have jurisdiction to sanction a scheme as a result of Article 2(1) of the Judgments Regulation. It was recognised in *Rodenstock* however that, although the Judgments Regulation regulates the court's international *in personam* jurisdiction by providing that a person is to be sued in the Member State in which he is domiciled, it is hard to apply Article 2 of the Judgments Regulation in a scheme scenario on account of the fact that there can be multiple scheme creditors in different jurisdictions and the fact that scheme proceedings don’t really involve adversarial proceedings with a specific defendant as contemplated by Article 2. Ultimately the court in Rodenstock avoided having to come to a conclusion on Article 2 as more than 50 per cent. by value of the creditors in that case were domiciled in the UK, such that the court was satisfied that it was appropriate to apply English jurisdiction.

This issue had to be confronted in *Re Primacom Holding GmbH* [2012] EWHC 164 (Ch) as very few of the creditors in that case were domiciled in the UK. In that case the court held that it was not a pre-requisite for scheme jurisdiction that the majority of scheme creditors be domiciled in the UK on the basis that Article 2 of the Judgments Regulation has no application to schemes because schemes are not a conventional form of adversarial proceeding i.e. no one is actually being sued in a scheme and therefore it was wrong to view scheme creditors as defendants for the purposes of Article 2. In addition, the court in this case referred to Article 23 of the Judgments Regulation which provides that if “the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction.” The inclusion in the underlying Primacom finance documentation (as in Rodenstock) of the exclusive selection of English law and English jurisdiction to settle disputes was enough to satisfy this requirement. Furthermore, Article 24 of the Judgments Regulation may also be relevant as it provides that, apart from jurisdiction derived from other provisions of that Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. Since all the scheme creditors in Primacom had, by participating in the first proceedings before the court, submitted to the jurisdiction of the English court, it was arguable that Article 24 was satisfied.

Finally, Article 6 of the Judgments Regulation (which was not analysed in Rodenstock or Primacom but was in the *Magyar case*) provides that a person domiciled in a Member State may be sued, where that person is one of a number of defendants, in the courts for the place where any of the other defendants are domiciled provided that the claims against the defendants as a whole are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. In the Magyar case a number of the noteholders were domiciled in England such that the court held that, even if Article 2 did apply, Article 6 would also apply because a number of the noteholders were domiciled in England in this case and accordingly the English court had jurisdiction to sanction the scheme under the Judgments Regulation.

---

11 The categorisation of *Re Rodenstock* as a “solvent scheme”, even though it was clear that the alternative to a successful scheme would be the company’s insolvency, appeared to be on the basis that the company was not yet in formal insolvency proceedings. Justice Briggs’ reasoning in Rodenstock was agreed with by Justice Richards in *Re Magyar Telecom B.V.* [2013] EWHC 3900 (Ch) who unambiguously concluded that the Judgments Regulation applied to schemes proposed by companies not yet in formal insolvency proceedings.
Contacts

For more information please contact Peter Manning, Alan Gar, Alyson Lockett or Alistair Hill.