SPOTLIGHT

Global FSDI Briefing

April 2014

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EVERSHEDS

Welcome to our latest quarterly briefing on legal developments across our global network. I hope you find the articles insightful and thought provoking. Highlights this quarter include recent developments in Italian derivatives case law, an overview of the amendments made to Spain's insolvency regulation and the UK's FCA issuing first warning notices against individuals.

If you have any questions or would like further information please do not hesitate to contact me, or one of our global key contacts.

Matthew Allen
Global Head
Financial Services Disputes and Investigations

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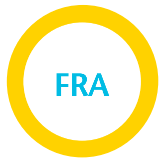

FRANCE

Conflicts of jurisdiction for the newly created and appointed Public Prosecutor for Financial Offences

France has recently created a new role in the prosecution office, a Public Prosecutor specifically for financial offences with national jurisdiction (the "**Public Prosecutor for Financial Offences**").

The first step towards appointing this new official was the adoption by the French Assemblée Nationale of the project of law on the fight against tax fraud and large-scale economic delinquency on 5 November 2013. The objective was to appoint one magistrate in the prosecution office to have exclusive jurisdiction over all matters concerning infringement of financial and market regulations.

A legal provision[1], added to the French Criminal Procedure Code, transferred to this new official the relevant competences from the local prosecutors and in some cases from the Paris Prosecutor. The *Tribunal de Grande Instance de Paris* (First Instance Court of Paris) will have exclusive jurisdiction for investigation proceedings and the judicial decisions in relation to the abovementioned offences.

The new Public Prosecutor for Financial Offences took office on 1 February 2014. Mrs. Eliane Houlette now has exclusive national jurisdiction over all cases resulting in infringements, offences, misdemeanours and crimes pursuant to financial regulations.

However, several traits of the statute law creating this specialised office show lack of articulation with other jurisdiction and competence provisions which might come into conflict, notably those benefiting the *Tribunal de Grande Instance de Paris* that are still enforceable.

1 Article 705-1 of the French Criminal Procedure Code, adopted through Law n°2013-1115 dated 6 December 2013

For instance, while the law states that the Public Prosecutor for Financial Offences has exclusive national jurisdiction for all financial and banking regulation offences, it quotes that said-jurisdiction will only be held for such offences as insider trading, dissemination of false or misleading information and market manipulation or insider dealing[2], forgetting to include, notably, the offence of manipulation of market indices[3].

Surprisingly enough, jurisdiction of the *Tribunal de Grande Instance de Paris* is also excluded from jurisdiction for the offence of manipulation of market indices as the same omission was made when the provision was voted on[4]. Therefore, for this particular offence, the regular rules of criminal jurisdiction will apply.

Similar procedural conflicts exist in respect of other offences provided for in the Monetary and Financial Code but also provisions stemming from the Criminal Code itself[5]. Other conflicts may arise, as such institutions as the *Autorité des Marchés Financiers* (French Financial Market Authority) do have competence to investigate into financial and market offences.

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2 Articles L.465-1 to L.465-2 of the French Monetary and Financial Code

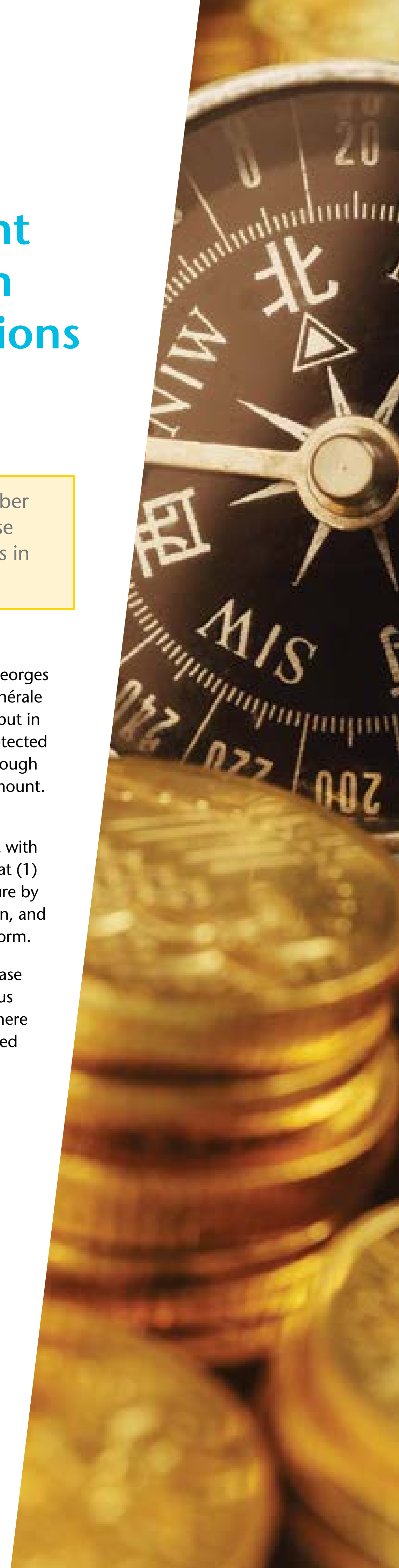
3 Article L.465-2-1 of the French Monetary and Financial Code

4 Law n°2013-672 dated 26 July 2013

5 ie Article L.421-1 of the French Criminal Code excludes the new official's jurisdiction for the special offence that is insider trading benefiting terrorism (even though this article has yet to be applied to this date)

FRA

A new definition of the extent of the obligation to inform in investment banking transactions



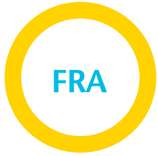
The Paris Court of Appeal passed down a decision on 23 September 2013[6], widening the scope of the duty to warn, inform and advise the client, the burden of which falls upon banking establishments in investment banking transactions.

A number of hedging investments were opened in 2005 by the Société Minière Georges Montagnat ("SMGM"), a mineral production company, with the bank Société Générale (the "Bank"), for nickel, as its price had been increasing. A double operation was put in place whereby the SMGM, through the purchase of a "put option", would be protected in case the price of nickel decreased to under a certain amount, and the Bank, through a "call option", would profit in case of an increase in nickel price over a certain amount. These opposite transactions allowed both parties to avoid costs in the operation.

In 2007 the price of the material significantly increased thereby benefiting the Bank with substantial profit. SMGM summoned the Bank before the French Court claiming that (1) the contract for the hedging operation was null and void due to the lack of disclosure by the Bank regarding its indirect remuneration, construed as a wilful misrepresentation, and (2) in any event, damages for the breach of the Bank's duty to warn, advise and inform.

First, the Court stated that none of the parties could have foreseen the price increase when the operation was concluded. In view of the lack of evidence of any fallacious intent, the Court had to reject the first claim of wilful misrepresentation. In fact, there was sufficient evidence to the contrary, showing that SMGM had made an informed and knowledgeable decision when contracting with the Bank.

6 Paris Court of Appeal, SARL Société Minière Georges Montagnat (SMGM) v. SA Société Générale, n°11/19539



As for the second claim, the Court dissociated the three prongs of the Bank's obligations as provided for by the French Legislation. First, the Court noted that with regards to the duty to warn, the obligation falls upon banks when dealing with non-professional clients for speculative transactions and the warning should cover any possible risk related to the transaction. Therefore, the contended breach of duty to warn by the Bank had to be rejected, as the operation was not speculative, was not a profit-based operation based on predictions of the market's fluctuation, and had the sole initial purpose to protect SMGM against potential losses.

However, the Court further held that with regards to the duties to inform and advise, and pursuant to the obligation that they entail to act loyally, the Bank had an obligation to inform its client of the manner in which it would be paid (corresponding to margins that could be protected by banking confidentiality) and to counsel SMGM on its best interest. As the Bank had failed to give the relevant information and had not offered to consider any other possible transactions that might have best secured the interests of SMGM, the Bank was found to be in breach of its obligations.

Based on the lost opportunity of negotiating a better hedging transaction, and even though the actual losses could not have been foreseen, the Court ordered the Bank to pay 9 million US dollars in damages to SMGM.

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The Federal Supreme Court *(Bundesgerichtshof, BGH)* confirms ad-hoc obligation with respect to individual aspects of multi-step procedures *(Decision of 23 April 2013 – II ZB 7/09)*

FACTS OF THE CASE AND DECISION

The BGH decision concerned the resignation of the then chairman of Daimler AG (the "Company") management board, Jürgen Schrempp (the "Resignation"), and the question of when the Company should have published an ad-hoc announcement of this.

In a conversation on 17 May 2005, Mr Schrempp informed the chairman of the supervisory board of his intention to resign from the management board as of the end of 2005. Between June and July 2005, other members of the supervisory and management board were informed and a press release was drafted. On 18 July 2005, the chairman of the supervisory board and Mr Schrempp agreed to put the Resignation and the nomination of a successor as items on the agenda of the next supervisory board meeting. The supervisory board meeting dealt with these topics on 28 July 2005, and it was only following this meeting that the Company published an ad-hoc announcement of the Resignation. The BGH was required to decide whether the Company's ad-hoc announcement was published too late and whether the Company would consequently be liable for damages.

The BGH decided that the first conversation between Mr Schrempp and the then chairman of the supervisory board which took place on 17 May 2005 regarding the Resignation, as well as all the other events between that conversation and the publication of the ad-hoc announcement, each amounted to information of a circumstance which requires ad-hoc disclosure. This is because even in the case of a procedure that stretches over a longer period, as in this matter, every interim step may be considered insider information within the meaning of Sec. 13 para. 1 sent. 1 of the German Securities Trading Act (*Wertpapierhandelsgesetz, WpHG*) (the "Act").

PRACTICAL NOTE

Insider information must be published immediately by the company concerned pursuant to Sec. 15 para. 1 sent. 1 of the Act. What is to be considered insider information is set out in Sec. 13 para. 1 sent. 1 of the Act, and includes concrete information on circumstances not publicly known which relate to one or several issuers of insider securities or the insider securities themselves, and which are likely to significantly influence the stock exchange or market price of the insider securities. If a company violates the obligation to immediately publish insider information, it commits a regulatory offence and risks a fine being imposed by the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht, BaFin*). Furthermore, the company is then liable to the investors for any damages resulting from such a violation.

Due to the obligation to make ad-hoc disclosures in multi-step procedures as soon as possible, it is particularly important to carefully examine every single step as to whether it requires ad-hoc disclosure and in doing so, whether there is already substantial potential to influence the price. This is often easier said than done. However, Sec. 15 para. 3 of the Act provides that, in certain circumstances, a company can 'self-exempt' from the publication requirement and temporarily delay the ad-hoc announcement. In a multi-step procedure, the company must consider using self-exemption for every step in case any of these steps is subsequently assessed as insider information.

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The new Companies Ordinance in Hong Kong – major changes to company law

The new Companies Ordinance (Cap.622) in Hong Kong came into force on 3 March 2014. It marks a significant development of the company law in Hong Kong. The major initiatives and the key updates are summarised as set out below. With this major change, we will be able to help to ensure your full compliance with the new Companies Ordinance.

The major initiatives and some of the key updates are:

Major initiatives	Key updates
Measures for enhancing corporate governance	• Requiring at least one natural person as director for every private company • Clarifying the directors' duty of care, skill and diligence • Reducing the threshold requirement for members to demand a poll from 10% to 5% of total voting rights • Replacing the "headcount test" for privatisations and schemes of arrangement with a not more than 10% disinterested voting requirement • Extending the scope of the unfair prejudice remedy to cover "proposed acts and omissions" • Empowering an auditor to require a wider range of persons to provide information
Measures for ensuring better regulation	• Clarifying the powers of the Registrar of Companies relating to document registration • Requiring a company to deliver statement of capital whenever there is a change to its capital structure • Revising the list of registrable charges • Providing powers for the Registrar of Companies to obtain information to ascertain whether any false or misleading statement has been provided • Strengthening the enforcement regime in relation to liabilities of officers of companies for non-compliance • Introducing a new offence relating to inaccurate auditor's reports
Measures for facilitating business	• Allowing companies to dispense with AGM by unanimous shareholders' consent • Introducing a court-free procedure for reducing capital based on a solvency test • Introducing a court-free statutory amalgamation procedure for wholly owned intra-group companies • Facilitating SMEs to prepare simplified financial and directors' reports • Making the use of a common seal optional and relaxing the requirements for a company to have an official seal for use abroad • Permitting a general meeting to be held at more than one location using electronic technology • Setting out the rules governing communications to and by companies in electronic form
Measures for modernising the law	• Abolishing par value for shares • Abolishing Memorandum of Association

HOW CAN WE HELP YOU

We provide a full range of corporate services for investment banks, financial institutions and major corporations. Key areas of services regarding the new Companies Ordinance include:

- reviewing and updating corporate documents
- providing general advice on compliance with the new Companies Ordinance
- providing training on specific topics.

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IRELAND

Market Abuse Regime

The Market Abuse (Directive 2003/6/EC) Regulations 2005 transposed the EU Market Abuse Directive (**MAD I**) into Irish law. As has been widely reported, the current EU market abuse regime is in line for an overhaul. It is anticipated that the implementation of the new proposals may not come into force until 2016.

However, the wide ranging ramifications of these changes, including criminalisation of certain behaviours, means that companies should take account of the proposed new measures now and begin to adapt their governance and compliance structures accordingly. Otherwise they may find themselves subject to significant administrative or criminal sanctions.

The European Commission began a review of MAD I in 2009, the purpose of which was the strengthening and modernisation of the EU market abuse framework. Under the review, the Commission considered both the potential for simplification and burden reduction and ensuring greater effectiveness of its market abuse framework in order to respond adequately to any deficiencies that may have arisen (notably during the financial crisis) since the adoption and implementation of MAD I. Following a consultation process, the Commission published proposals to replace MAD I with two pieces of legislation, comprising:

(a) an EU Regulation on insider dealing and market manipulation (**MAR**); and

(b) an EU Directive on criminal sanctions for insider dealing and market manipulation (**CSMAD**).

Together, these two items of proposed legislation have become known as **MAD II**.

Although the existing EU market abuse regime was created through a Directive, thus allowing Member States some scope in implementing the Directive into national law, the Commission decided to create MAR through a Regulation as it considers it to be the most appropriate legal instrument to define a revised EU market abuse regime. It believes that MAR's direct applicability will reduce regulatory complexity and offer market participants greater legal certainty. In essence, through MAR, the Commission is seeking to introduce a single European rulebook in the area of market abuse.

On 10 September 2013 the European Parliament announced that it had adopted in plenary session a proposal to repeal MAD I, and to replace it with MAR. However, final legislative adoption of MAR will not occur until there is political agreement within the EU institutions concerning MiFID II (which is the proposed overhaul of the Markets in Financial Instruments Directive, Directive 2004/39/EC). This is due to the fact that aspects of MAR (in particular its scope) depend on the final text of MiFID II, and these will need to be fully aligned. MiFID II is not currently expected to be formally implemented until 2016 at the earliest.

MAR contains some significant changes. Chief among them is the proposed expansion of the definition of "insider information", changing and broadening it in some specific instances and incorporating a "reasonable investor" test.

While MAR will be introduced by Regulation, it is recognised that criminal sanctions for market abuse are the responsibility of Member States and, therefore, that CSMAD will be introduced through a Directive. Under the Lisbon Treaty, the UK and Ireland are not automatically bound by EU legislative proposals in respect of the area of freedom, security and justice matters. Instead, they are able to decide whether to opt in to any measure on a case-by-case basis. CSMAD falls within this category of legislative proposal. Whereas the UK decided to opt out (at this stage), Ireland has opted in. The Commission assessed existing sanctioning regimes and identified that "current sanctions are lacking in impact and are insufficiently dissuasive, which results in ineffective enforcement of [MAD I]". The Commission has also identified that the current sanction regimes for market abuse applied by Member States do not consistently use the same definition of market abuse offences and are different, allowing offenders to exploit gaps and loopholes. Hence changes were needed.

CSMAD sets out two market abuse offences – insider dealing and market manipulation. It also requires Member States to criminalise behaviour which amounts to inciting, aiding or abetting market abuse. Responding to recent high profile cases concerning manipulation of interest rate benchmarks (such as LIBOR and EURIBOR), such behaviour falls within MAD II's (and CSMAD's in particular) scope. Manipulating, or attempting to manipulate, such benchmarks will therefore become a criminal offence.

Companies should be aware that private individuals have sued companies in Ireland for damages for alleged breaches of the existing Irish Market Abuse Regulations (which implemented MAD I). A High Court case involving this issue is awaiting an appeal date in the Irish Supreme Court to determine if such claims are permissible.

Taking all of the above into account, it is clear that these proposals will have serious ramifications for banks, brokerage houses and other large firms participating in the financial markets as criminal liability will be extended to companies held liable for an offence. This will place a burden on all of these market players to ensure that their governance and compliance structures are sufficiently robust. We await with interest further progress on MAD II's implementation.

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The meaning of gross negligence under the Payment Services Regulations

INTRODUCTION

The European Communities (Payment Services) Regulations S.I. 383 of 2009 (the "**Regulations**") govern, amongst other things, liability for unauthorised payment transactions and the Financial Services Ombudsman has the task of adjudicating on any disputes that arise.

BANK LIABILITY

If a payment services user (**Customer**) becomes aware of an unauthorised transaction, within 13 months of its occurrence, and duly notifies their payment services provider (**Bank**) of the same, the Regulations provide that the Bank shall refund the Customer. The Bank will not be required to issue a refund if it can prove that the Customer authorised the transaction, although the Bank will generally not, in that regard, be solely permitted to rely on the fact that the transaction was so authenticated (eg where a PIN is used without error).

CUSTOMER LIABILITY

The Customer will, however, be liable for the first €75 in losses if the unauthorised transaction arose due to the payment instrument (eg debit card) being either lost or stolen or if the accompanying security features (eg PIN number/password) were not kept safe by the Customer.

The Customer is liable for the **entire** amount of losses if the Customer acted fraudulently or either intentionally or with gross negligence failed to:

(a) use the payment instrument in accordance with its governing terms and conditions;

(b) keep the instrument's security features safe; or

(c) notify the Bank without undue delay of the instrument's loss, theft, misappropriation or its unauthorised use.

Again, however, the Bank will generally not, in that regard, be solely permitted to rely on the fact that the transaction was authenticated (eg where a PIN is used without error) in seeking to prove that the Customer acted fraudulently, intentionally or with gross negligence.

GROSS NEGLIGENCE

While deliberate or fraudulent actions are well established concepts, "gross negligence" is not defined in the Regulations and does not exist as a concept as distinct from negligence in Irish civil law. However, effect must be given to the expression "gross negligence" as the phrase appears in the Regulations.

The notion of "gross negligence" is thus an important matter for customers and institutions alike and has, helpfully, been reviewed by the High Court and Supreme Court, in deciding the case of *ICDL Saudi Arabia v. European Computer Driving Licence Foundation Limited [2011] IEHC 343; [2012] IESC 55*.

While the case had a complex background and history, the issue before the court was whether the Defendant's breach of contract amounted to gross negligence as a clause in the pertinent agreement ***limited the Defendant's liability, except*** for damage *"caused by a wilful act or gross negligence"*.

In the High Court, Clarke J. considered the wording of the limitation clause and said that, as a matter of construction, *"one would expect persons to mean something different by the use of the term "gross" negligence rather than the simple use of the term "negligence". Why else would the word "gross" be used? Obviously negligence implies a breach of a duty of care. However, anyone involved with negligence litigation will be more than familiar with cases where the margin by which someone has failed to meet the duty of care imposed on them is large. It seems to me that that is the ordinary meaning of the term "gross negligence". It is a degree of negligence where whatever duty of care may be involved has not been met by a significant margin".* Clarke J. went on to state that a person accused of a breach said to be the result of gross negligence would have to have acted in a manner that was *"significantly careless as to its obligations"*.

On appeal, a majority of the Supreme Court upheld the High Court's decision that gross negligence must mean more than mere negligence, involving conduct exhibiting a significant degree of carelessness.

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ITALY

Italian fiscal monitoring regime and European law: a further incompatibility?

The implementation of Law no. 97 on 6 August 2013 has modified the rules on the Fiscal Monitoring Regime applicable to individuals and associations situated in Italy.

Law no. 97 reduces the duties required to be performed by the targeted taxpayer in relation to the filing of their Foreign Asset Monitoring Return (an obligation to report investment activities abroad and not other monetary flow) ("**the FAMR**"). This has been coupled with a reduction in the fines for misreporting, which have been reduced to a minimum of 3% with a maximum of 15% of the value of assets not declared (whereas before this was from 10% to 50%).

These changes were brought about when the European Commission challenged the Italian Parliament that: (i) there was no reason to justify the duties currently required to be performed for the FAMR, since Italy could obtain the same results through utilising the exchange of information between EU countries; and (ii) the fines for the violations of the requirements of the FAMR were discriminatory when compared to the fines for violation of such declaratory duties relative to the income arising from assets and investments made in Italy (EU Pilot 1711/10/TAX).

Although the above changes can be seen as a positive change for Italian taxpayers, at the same time the Italian Parliament has also introduced a withholding tax for specific miscellaneous incomes from abroad, which had earlier been subjected to taxation in the tax return only.

Examples of miscellaneous incomes are:

- The capital gains arising from the sale of participating interest;
- The capital gains arising from the sale of premises owned for less than five years;
- Income arising from business activities and occasional self-employment; and
- Income arising from brands, patents, know-how, lottery winnings, rent of premises abroad, etc.

The new rules state that the financial intermediaries involved are obliged to apply a withholding tax of 20% on the taxable income generated abroad. This is not only on the management of investments but also on simple monetary transfers. Furthermore, this new rule states that the taxpayer must provide the financial intermediary with the specific documentation needed to determine what is the taxable base of any transfers or transactions. If the taxpayer does not provide such information, the financial intermediary is obliged to apply the withholding tax to the entirety of the monetary flow from abroad to Italy, regardless of any exemptions or if the income has already been taxed[7].

For example, when a friend living outside of Italy donates money to another friend living within, in order to avoid the withholding tax, the receiver should fully document to the financial intermediary the true nature of the donation and that it is not subject to tax since it is not income, otherwise the 20% tax rate will be applied.

7 Article 4, paragraph 2, of Law Decree no. 167/1990, as modified by the Law no. 93/2013

Instead, for individuals in partnerships or self-employment, it is assumed that the monetary flows arise from the performing of business or professional activities and consequently the withholding tax should be applied (except if the taxpayer specifies otherwise). In any case, in the above circumstance, the intermediary is obligated to report to the Tax Authorities the taxpayer's name.

The concept of this withholding tax seems to conflict with European Law, specifically with the free movement of capital, since certain monetary flow from abroad to Italy would be subject to taxation, while the same monetary flow taking place solely within Italian borders is not.

Furthermore, there are increased requirements on financial intermediaries who are forced to carry out investigation procedures in order to ascertain the fiscal residency of the Italian taxpayer and the source of the monetary flow from the investments abroad.

Additionally, the taxpayer must demonstrate the source of the amount, whether there has been any taxation abroad or even if the same amounts have already been taxed in Italy, yet the law does not identify the type of proof that is required in order to determine the taxable base.

Example problem situations include where the income arising from financial activities abroad are taxed in Italy in the tax return of the financial year x. Five years later the money deriving from this income is sent (from abroad) to Italy through a financial intermediary. The taxpayer, in order to avoid the application of the withholding tax, will have to be able to demonstrate to the intermediary that this transfer has already been subjected to taxation five years earlier.

As such, the European Commission has forced the Italian Parliament to modify the regulations to remove excessive unjustified duties required by the taxpayer. The European Court of Justice has already asserted the predominance of the principles of European Law over national law: *"although direct taxation falls within the competence of the Member States, the latter must none the less exercise that competence consistent with Community law"* (for example, Decision of August 11, 1995, Case C-80/94, Wielocks, point 16).

Italy has reacted by abolishing declaratory duties on the monetary flows from Italy to abroad. However, in requiring the taxpayer to, (i) justify, through documentation, every monetary flow (even if minimal) carried out from abroad to Italy; and (ii) pay a withholding tax on transfers of money into Italy where documentation to quantify taxable income has not been provided, the Italian Legislator has seemingly increased the duties of Italian taxpayers in relation to the filing of their FAMR.

An additional intervention from the European Commission regarding the Fiscal Monitoring Regime may be necessary to further censor these Italian laws, but while doubts linger on its compatibility, the Minister of the Economy and Finance has deemed it necessary to suspend the application of the withholding tax until 1 July 2014[8]. Amounts that may already be held by financial intermediaries will be remitted to the interested parties by the intermediaries themselves. As part of a new bill of law, a provision to eliminate this withholding tax has been prepared.

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8 Measure no. 24663 of 19 February 2014

Recent developments in Italian derivatives case law: Court of Turin, 17 January 2014

The Civil Court of Turin ("the **Court**") has followed the precedent set by the Court of Appeal of Milan in case no. 3459/2013 and has declared an interest rate swap null and void for lack of causa[9] due to the fact that the risks of entering into the contract were not fully explained to the client.

BACKGROUND

Ms Bealessio Roberta, a retail client ("the **Client**"), entered into an interest rate swap agreement ("the **Swap**") with Banca Regionale Europea s.p.a. (UBI group) ("the **Bank**") in 2007 in connection with a 30 year floating rate mortgage for the sum of €175,000.

The Swap had a notional value of €100,000, whereby the Client paid a fixed rate of 4.72% and the Bank paid the six month Euribor rate. The Swap had a five year maturity and, at inception, the Euribor interest rate was 4.24%. The Euribor level was not explicitly stated to the Client at the point the Client entered into the Swap.

DECISION

The Court found that the Swap was entered into by the Client to protect her from the rise of Euribor on the loan, ie it was a hedge.

According to the Court, if a swap is structured in a way that a client is unlikely to benefit from the hedge (on the basis of the existing forward curve), then the swap lacks *causa* in that it is not aimed to fulfil the client's reason for entering into the agreement; it has no commercial rationale for the client and is therefore null and void *ab initio*.

The Court found that there was a 'financial imbalance' in the Swap, ie there was a negative mark to market value in the Swap, for the Client, at inception in that the present value of the interest that the Client paid to the Bank under the Swap was higher than the present value of the interest that the Bank paid to the Client. To re-balance the transaction, the Bank should have paid a sum upfront to the Client.

The Court found that the Bank did not disclose this imbalance at the time the Swap was entered into; the Client was not made aware in the Swap confirmation of the initial mark to market or indeed of the Euribor level and therefore could not quantify and assess the level of risk she was assuming.

9 Under Italian law, *causa* is the commercial rationale of a contract and is an essential component of the contract.

Due to this imbalance, the Court declared that the Swap lacked *causa*. It was irrelevant, in the Court's view, whether the imbalance was due to intermediary fees, counterparty risk costs or both. The fact that there was an imbalance, of which the Client was unaware, was deemed sufficient to make the Swap null and void *ab initio* (with the consequence that cash flows paid under the Swap had to be reverted). Had the Client been aware of the imbalance between the present value of payments made and payments received by the Client, the Swap would have been valid and legally binding.

The Court repeated the points made by the Court of Appeal of Milan, in case no. 3459 of 18 September 2013, on knowledge and the assumption of risk. In that case the Court of Appeal of Milan found that the Bank did not make the Client aware of the mark to market value of the derivative and all the possible risk scenarios in entering into the Swap. Nor did it seek to check the Client's understanding of the risks. The Court of Appeal of Milan criticised the Bank's decision to embed its profit into the structure of the Swap as it held that the remuneration for the Bank must be specifically agreed in the contract by the parties or it can be determined by reference to a pricing model shared between the Bank and the Client.

The Court agreed with the Court of Appeal of Milan and stated that the Bank, before entering the contract, should have explained to the Client how the Swap was going to hedge the Client from the risk, in particular by disclosing (i) the cost structure, including direct costs and the intermediary's margin; and (ii) the risks assumed by both parties.

COMMENT

This decision reinforces the approach introduced by the Court of Appeal of Milan in September 2013 regarding the absolute necessity of appropriate understanding on the client's part about the extent of the risk assumed when entering into a swap.

By asserting that the objective of the client is relevant to assess the validity of the agreement, the Turin decision sets a high threshold for the disclosure of relevant information and risks on sales staff at banks when dealing with retail clients. Not only will they need to ensure that the client is aware of all the components in the swap and every potential risk scenario in entering into the agreement, sales staff will also need to make checks to confirm that the client has understood the risks.

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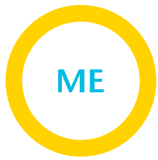


Arbitration in the Dubai International Financial Centre

The arbitration law of the Dubai International Financial Centre ("DIFC") has recently been amended to clarify the DIFC Court's power to stay proceedings in favour of a foreign-seated arbitration. The amendment ensures that the DIFC is now fully compliant with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

BACKGROUND

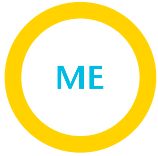
The New York Convention requires that the courts of any member state dismiss or stay any proceedings where the parties have made an agreement to arbitrate, if requested to do so by a party to the proceedings.

The purpose of this provision goes to the heart of the function of international arbitration as it eliminates the risk that proceedings are instigated in the courts while arbitration is ongoing.

THE CONFLICT

Two recent decisions of the DIFC Court brought the conflict between its arbitration laws and the New York Convention into focus and highlighted the fact that the arbitration laws did not contain an express requirement to stay proceedings in favour of a foreign-seated arbitration. In both instances the judges considered that there was a failure to implement the New York Convention but they differed on the interpretation of the courts inherent jurisdiction to remedy such a failure.

In *Injazat Capital Limited v Denton Wilde Sapte & Co* the judge found that the court did not have inherent jurisdiction to remedy the oversight and, as a result, he declined to stay proceedings in favour of LCIA arbitration. By contrast, the judge in *IES v Al Fattan* did not follow the reasoning in *Injazat* and took a more robust view by finding that it takes more than an inference from silence to oust the court's inherent jurisdiction. However, in this case the seat of arbitration and the DIFC were both in Dubai and the New York Convention (which deals with arbitration with a foreign seat) did not apply and in the circumstances a stay was not needed. Faced with these conflicting judgments, the second of which may in any event be distinguished on the basis of dealing with domestic arbitration, steps were certainly needed to clarify the position.



THE AMENDMENT:

The amended provisions came into force on 15 December 2013 and now provide that the arbitration law concerning the recognition of arbitration agreements applies:

1. where the seat of arbitration is the DIFC;
2. where the seat is other than the DIFC; and
3. where no seat is designated or determined.

There can no longer be any doubt that the DIFC Courts will stay proceedings in favour of an agreement to arbitrate, irrespective of what seat, if any, is stated in the agreement. This brings the law into compliance with the New York Convention and affords finality on an issue which has been the topic of much discussion and speculation within the arbitration community.

The change is a welcome one as it provides greater certainty for parties involved in arbitration both inside and outside the jurisdiction.

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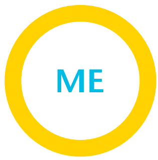

Attachment orders

In another show of support for arbitration, the Abu Dhabi Court of Cassation ruled that a precautionary attachment order can be granted on the basis of an arbitral award before that award has been formally recognised by courts and even without the need to show risk of dissipation. The ruling is the first of its kind in the Court of Cassation although it follows a line of similar judgments from the lower courts.

Unlike a common law jurisdiction, there is no strong system of precedent in the UAE but judgments of the Court of Cassation are considered highly persuasive and they are the only judgments that are officially reported.

In this case, the claimant had secured an arbitral award during domestic arbitration and it had also filed a claim seeking ratification of the award. At the same time, the claimant also sought a precautionary attachment order over the defendant's assets through the Abu Dhabi Court of Urgent Matters, this time without notice to the defendant.

In the Abu Dhabi Court of First Instance the claimant then sought ratification of the award and a confirmation that the attachment order was valid. The defendant in turn argued that the attachment order was void for a number of reasons, the most significant of which was that an arbitral award is not a judgment of a court and therefore cannot be enforceable until a national court has ratified the award.

Both the Abu Dhabi Court of First Instance and the Abu Dhabi Court of Appeal are understood to have confirmed the availability of attachment orders in support of enforcement actions of arbitral awards, pending ratification. The Abu Dhabi Court of Cassation affirmed the lower courts' rulings without reservation.

The judgment is significant as it clearly sets out the award-creditor's right to seek a precautionary attachment order against the assets of the award-debtor without the need to ratify the award first. The judgment also clarified that such an order can be sought as of right and must be granted even without the need to show that there is a risk of the assets being dissipated.

Although the arbitral award in the present case was granted following a domestic arbitration award, there is no reason to believe that the Abu Dhabi Court of Cassation's ruling would not also extend to enforcement actions in relation to foreign awards.

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Consolidation under the revised draft Netherlands arbitration law

On 29 January 2014, the Department of Justice submitted a further amendment on the Netherlands Arbitration Act (NAA) to Parliament. One key revision relates to the consolidation of arbitrations. The draft amendment proposes to broaden the scope of consolidation which exists under the current NAA, to include the possibility of consolidating a foreign seated arbitration.

Following the previous revised draft of the Netherlands Arbitration Act 1986 (NAA) presented to Parliament on 16 April 2013 (see ***Legal update, Proposal to modernise the Netherlands Arbitration Act submitted to Parliament***), the Department of Justice submitted a further draft amendment of the NAA to Parliament on 29 January 2014. One significant amendment concerns the provision relating to the consolidation of arbitrations. The NAA already includes a consolidation provision for arbitrations seated in the Netherlands. The draft amendment proposes to broaden its scope, to include the possibility of consolidating a foreign seated arbitration.

The consequences of such a provision could be far reaching, as arbitrations with a foreign seat would be subject to a possible relocation to the Netherlands if there is a sufficiently strong link with an arbitration seated in the Netherlands. The question whether to consolidate would be determined by the summary proceedings judge of the Amsterdam district court. However, a third party may also be appointed (an arbitration institute is suggested) to decide on consolidation requests.

Whether the revised draft provision on consolidation is a welcome modernisation may be questioned. The provision stipulates that the relevant deciding authority should consider factors such as avoiding unreasonable delay, the necessity of consolidated procedures and any procedural implications it may entail. If consolidation is ordered, the parties should agree on the appointment of the arbitral tribunal and the governing procedural rules. If they fail to do so, the decisions will be left to the relevant deciding authority.

The draft amendment poses numerous difficulties, such as whether:

- The relevant authority has the power to set aside the arbitration law of the foreign seated arbitration or whether the arbitration laws of both seats are applicable.
- An odd number of arbitrators can be appointed where the foreign arbitration called for the resolution of the dispute with an even number of arbitrators.
- The parties must adhere to institutional rules from the foreign seated arbitration.
- The arbitrators appointed in the foreign seated arbitration can be relieved from their duties in accordance with the NAA.

Furthermore, and potentially the most important factor, any award rendered by the (consolidated) arbitral tribunal may be unenforceable if enforced outside of the Netherlands since, for example, the procedure is not in accordance with the agreement of the parties of the foreign seated arbitration *(Art. V(1)(d) New York Convention) or it is against the public policy of the enforcing country (Art. V(2)(b) New York Convention)*.

These factors may suggest scope for reconsideration of the draft consolidation provision (or even the implementation of the draft consolidation provision in its entirety).

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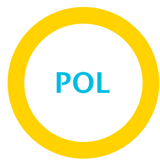


POLAND

Conducting group litigation in Poland 2014

The Act on Pursuing Claims in Group Proceedings ("The Act") which came into force on 19 July 2010 is a step forward in the process of unifying Polish law with European Union law in relation to group litigation.

The Act applies only to (i) consumer protection cases; (ii) product liability cases; and (iii) tort cases, excluding personal rights protection, eg defamation.

The group of claimants must consist of at least 10 members and every member of the group holds his/her own respective claim; these separate claims are managed together in one joint proceeding. A group member who has been elected by all other group members can bring group proceedings in which he/she is the only plaintiff but whose claim serves to represent those of the other group members. Additionally, in consumer protection cases a group may elect a Municipal Consumer Ombudsman to fulfil the role of plaintiff.

All claims must arise from the same or similar facts (the "factual test") and must be of the same type (the "legal test"). Based on its assessment of the similarity of the claims, the court must decide whether the case is admissible in an open court hearing and such decision is appealable to the Appellate Court. If admissible, the court will initiate the next stage, which is to notify all potential claimants of the opportunity to join the group. An announcement must be published in every daily newspaper of nationwide circulation and claimants have to join by the cut-off date imposed by the court.

COURT PROCEDURES

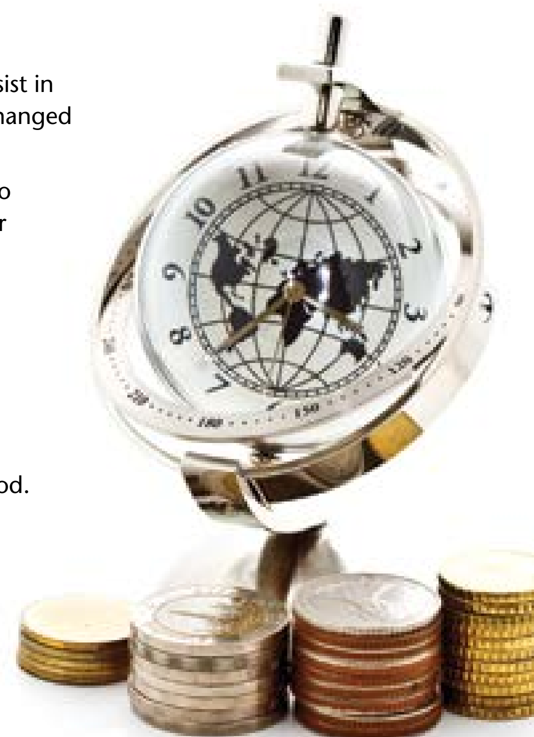
There are no case management procedures.

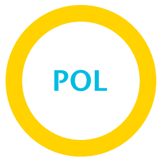
In relation to evidence:

- Witnesses may only testify orally and directly before the judges trying the case.
- Parties may present expert evidence, but the court may also appoint experts to assist in considering technical issues. Written reports of experts are admissible and are exchanged prior to trial or, if necessary, during the course of the proceedings.
- There is no obligation to disclose all documentary evidence. The court is entitled to require each party and, if necessary, third parties, to disclose specific documents or groups of documents.

In relation to the limitation period:

- The general statute of limitations on civil claims under Polish law is 10 years (a claim for damages caused by a tort is time-barred three years from the date the injured party became aware of the injury and the identity of the person liable to redress it, but in any case 10 years from the date of the event that caused the injury). Often a particular field of consumer law provides a specific limitations period. Otherwise, the 10-year rule applies.
- Concealment or fraud does not affect the running of the statute of limitations but could be relevant to disallowing the defence on statute of limitations as the court has discretion to deny such defence if allowing the defence would contradict socioeconomic purposes or the principles of community life and good faith.





REMEDIES AND SETTLEMENT

Under the group action procedure, monetary compensation is available. Additionally, the plaintiff is entitled to limit the remedy sought to a declaration of the defendant's liability in principle (if, for example, calculating the separate damages for each group member would be problematic). Injunctive and declaratory relief is also available.

In consumer protection and product liability cases, damage to property is recoverable, while in tort cases, economic loss can also be recoverable.

There is no upper limit on damages recoverable from one defendant but punitive damages are not recoverable. The court is required to list all members of the group in its judgment and award a specific sum to each group member. Thus, the judgment is the direct basis for sharing the total amount of the award amongst group members.

To assist the court in doing this, the plaintiff may divide the group of claimants into subgroups, each consisting of at least two members. Each member of a subgroup may be awarded a "unified amount".

Settlement is admissible at any stage of the proceedings. Using an alternative method of dispute resolution does not restrict or limit the available remedies. The court must approve the settlement and determine whether it is made in good faith. Additionally, mediation as an alternative means of dispute resolution is admissible regardless of the stage of the proceedings.

COSTS

The 'loser pays' rule applies. However, at the end of the proceedings, when the winning party presents a breakdown of the costs incurred, the court may impose a cap on those costs, finding that everything above the cap was unnecessary to handle the case properly and diligently.

Polish law limits the attorney's fees in one proceeding to PLN 43,200 (approx. EUR 11,000). At the same time, under the Group Action Act, the plaintiff's attorney may agree with the group represented by an elected member that the attorney's final fee will not exceed 20% of the gross adjudicated amount, and as such in some cases, the plaintiff's attorneys may be willing to finance the case.

Group members are free to regulate their respective share of costs in line with contract law.

Generally, public funding is not available. The only exception is where a Municipal Consumer Ombudsman acts as plaintiff and, as such, is exempt from costs during the proceedings. Nevertheless even in such a situation the 'loser pays' rule applies. Third party funding is not prohibited and can be regulated contractually. There are no separate rules in this respect in the Act.

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ESP

SPAIN

Amendments to Spain's insolvency regulation

On 8 March 2014, **Spain's Royal Decree-law nº 4/2014 on urgent measures concerning the refinancing and restructuring of corporate debt** (the **"Royal Decree-law"**) was published and automatically applied not only to refinancing agreements that are to be negotiated in due course, but also to refinancing agreements currently under negotiation if the debtor has not yet requested the appointment of an independent expert to opine on the refinancing agreement. The amendments are wide-ranging and remarkable, and must be fully understood and assumed by all participants in the Spanish corporate debt market.

The Royal Decree-law recognises that there existed a degree of inflexibility within certain aspects of Spain's pre-insolvency and insolvency regimes that discouraged financial creditors from entering into refinancing agreements, and led to a number of companies that were viable from an operational perspective going into liquidation due to their excessive debt burden.

The Royal Decree-law seeks to encourage the refinancing discussions by:

- protecting refinancing arrangements from the risk of claw-back;
- improving the ability of a group of financial creditors and the debtor to bind all financial creditors through a judicially-sanctioned refinancing agreement;
- facilitating debt-for-equity swap transactions and encouraging the provision of new money; and
- providing a more stable pre-insolvency environment in which the critical assets of the debtor are protected against enforcement.

Once bankrupt, a debtor has a period of two months during which it must file for insolvency (this period can be extended by four months). Under the previous regulation, such a filing did not prevent enforcement by creditors and therefore the practical benefit of filing for insolvency was limited. Now, with the Royal Decree-law, during such period:

- enforcement by any creditor over assets necessary for the continuity of the business is not possible; and
- enforcement by financial creditors is not possible over any of the assets if financial creditors holding at least 51% of the indebtedness owed to such creditors have expressed their support for the commencement of refinancing negotiations and have agreed not to initiate enforcement proceedings.

Furthermore, under the previous law, any transaction entered into by a debtor during the two-year period prior to its declaration of insolvency could be 'clawed-back' if, in the opinion of the judge, such transaction was prejudicial to the assets of the debtor available on insolvency. This was a significant risk on all refinancing transactions with a distressed debtor.

The Royal Decree-law however provides protection against claw-back for refinancing arrangements provided they fall into one of three groups:

(i) individual refinancing agreements;

(ii) collective refinancing agreements; or

(iii) judicially-sanctioned agreements.

Judicially-sanctioned agreements are the only type of refinancing agreement which, by law, are capable of binding dissenting unsecured and secured creditors in relation to the debt owed (obligations of third-party guarantors are unaffected). Whether dissenting creditors are bound by a judicially-sanctioned agreement depends on the level of support received from other financial creditors.

If the amount of debt owed to a secured creditor exceeds the value of the assets secured in favour of such creditor, then such creditor is treated as an unsecured creditor for the amount of debt equal to the shortfall. In this regard, if the judge determines that a debtor has failed to comply with the terms of a judicially-sanctioned agreement and secured creditors seek to enforce their security, the Royal Decree-law provides that they shall be entitled to recover the full value of the asset up to the amount of the original debt.

Under the prior regime, if new money was granted within the context of an Article 71.6 refinancing agreement, only 50% of the principal amount would be treated as a 'preferred credit' for recovery of the debt in an insolvency event, and new money granted by a related party to the debtor received no such preference. The Royal Decree-law has now extended the principle of preferred credit to the new money granted pursuant to a collective, individual or judicially-sanctioned agreement.

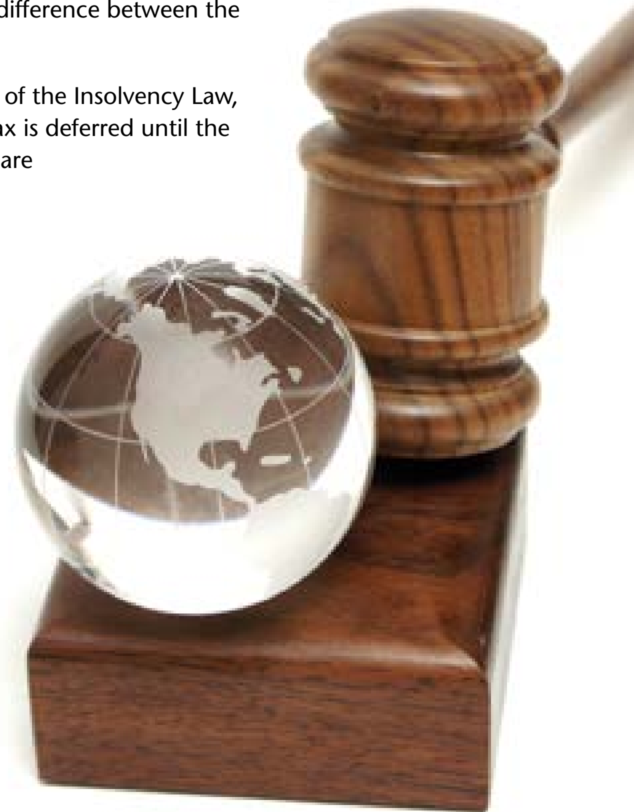
Furthermore, the Royal Decree-law permits the acceptance of transactions by debtors where debt is exchanged for shares, securities or convertible instruments.

Previously, upon the declaration of insolvency/bankruptcy, a moratorium of up to one year was applied prohibiting the enforcement of security over assets necessary for the continuity of the business. This definition has been narrowed by the Royal Decree-law and now the moratorium will only apply to those assets that are necessary for the continuity of the business.

In relation to the subordinate creditors, with the amendments introduced by the Royal Decree-law, any creditor that is party to a collective, individual or judicially-sanctioned refinancing agreement will not be considered a de facto director of the debtor by reason only of the obligations assumed by the debtor in the viability plan produced within the framework of the refinancing agreement.

From a tax standpoint, the adaptation of the General Accounting Plan to the International Financial Reporting Standards hindered the debt capitalisation transactions when these were not carried out by the total shareholders of the affected companies or not in proportion to their respective holding. The difference between the debt acquisition value and its fair value generated an accounting income which formed the taxable base of the Corporate Income Tax; the acquisition by shareholders of claims from third parties also generated accounting income (and positive income for Corporate Income Tax purposes) upon the capitalisation of the acquired claim for the difference between the value of the claim and its acquisition value.

As regards the debt reductions and extensions carried out in the framework of the Insolvency Law, their recognition as income for the taxable base of the Corporate Income Tax is deferred until the financing expenses arising from the refinancing or restructuring agreement are recognised from time to time; if the accounting income is greater than the financing expenses to be registered, they will be allocated proportionally.



Stamp duty to be paid by the debtor in the event of debt reductions and other agreements for refinancing or out-of-court payment agreements approved in the context of the Insolvency Law, is also removed.

INDIVIDUAL REFINANCING AGREEMENTS

Introduced by the Royal Decree-law, these are notarised agreements that do not meet the requirements for a 'collective refinancing agreement' but do satisfy each of the following conditions as regards their content:

- they improve the ratio of assets over liabilities;
- they ensure that the current assets are no less than the current liabilities;
- the value of the security interests (calculated in accordance with the Royal-Decree Law) (i) is not of a greater proportion of the outstanding debt owed to such creditors than of the debt prior to the refinancing, and (ii) does not exceed 90% of the value of the outstanding debt owed to such creditors;
- they do not increase the interest rate of the debt by more than one third of the interest rate applicable to the debt prior to the refinancing; and
- they expressly state the reasons that justify, from an economic point of view, the terms of the refinancing, making specific reference to each of the above conditions.

COLLECTIVE REFINANCING AGREEMENTS

New Article 71.6 of the Royal Decree-law regulates refinancing agreements, now referred to as 'collective refinancing agreements', which are notarised agreements that:

- extend maturities dates and/or grant new credit and/or replace financial obligations, in each case in accordance with a viability plan that allows business activity to continue in the short and medium term; and
- have the support of creditors whose claims represent at least three-fifths of all the debtor's indebtedness.

JUDICIALLY-SANCTIONED AGREEMENTS

These are agreements that:

- have the support of creditors whose claims represent at least 51% of the debt;
- otherwise satisfy the requirements for a "collective refinancing agreement"; and
- have received the sanction of the insolvency judge as to the compliance with the requirements set out above.

OTHER IMPORTANT DEVELOPMENTS ON REFINANCING

- Classification of the risk of restructured claims by the Bank of Spain; within one month from the entry into force of the Royal-Decree Law, the Bank of Spain will establish and publish criteria to classify as "*normal risk*" those transactions restructured as a result of a refinancing agreement.
- Renewal of the exclusion of certain impairments to determine the cause of the winding-up of companies; for financial years ending in 2014 the Royal-Decree Law renews the exclusion of losses due to impairment arising from tangible fixed assets, real estate investments and stocks for the purposes of determining whether the debtor falls within: (a) winding-up cause, (b) mandatory capital reduction, or (c) objective cause of insolvency.

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THE UNITED KINGDOM

FCA publishes first warning notices against individuals

SUMMARY

The FCA has, for the first time, issued warning notices against individuals, revealing that a number of bankers are under investigation for manipulating an interest rate benchmark.

THE FCA'S POWER TO PUBLISH WARNING NOTICES

The FCA issues warning notices to firms and individuals where it is minded to take enforcement action against them. The firm or individual has an opportunity to make representations to the FCA's Regulatory Decisions Committee (the "RDC") which makes a decision as to whether to proceed with the enforcement action.

Until recently, information about enforcement action was only published once a decision had been made by the RDC. The FCA acquired the power to publish information about warning notices under the Financial Services Act 2012. In October 2013, the FCA released its policy statement PS13/9 explaining the circumstances in which it would publish warning notices against both firms and individuals.

The FCA expects that it will normally be appropriate to publish details of the warning notice to enable consumers, firms and market users to understand the nature of their concerns. It will also normally be appropriate to identify a firm that is the subject of a warning notice, but not to identify an individual given that the potential harm caused to an individual from publication at that stage of enforcement proceedings would normally exceed the benefits of early transparency. However, the policy statement does provide examples of circumstances where the FCA considers it will be appropriate to identify individuals at the warning stage. For example, where the FCA has published a final notice against a firm and a warning notice has been issued to the CEO, publication of details of the warning notice may include revealing the identity of the individual to avoid other senior persons at the firm being mistaken for the person in breach.

Firms and individuals will be able to argue against publication of a warning notice if it would be unfair and they would suffer a '*disproportionate level of damage*'. The policy statement gives examples of such damages, including materially affecting a person's health, bankruptcy or insolvency or prejudice criminal proceedings to which they are a party.

The publishing of this information is seen to support the FCA's objectives of consumer protection and enhancing the integrity of the UK's financial system and will make the enforcement process more transparent.

WARNING NOTICES PUBLISHED AGAINST INDIVIDUALS

A number of warning notices have now been issued against individuals. The first were issued in November, three more have since followed in the New Year. In each case, there has been an approximate delay of two months before publication. This may suggest that the individuals made representations to seek to persuade the FCA not to publish or not to publish their identities.

Whilst the FCA has declined to name the individuals concerned, it has provided some information as to their roles. In the first two notices published, it confirmed that one notice concerned an individual responsible for submitting interest rate benchmarks and another was a bank manager.

The warning notices make clear that the individual has the right to make representations to the RDC which will decide whether to issue a decision notice. It goes on to say that if a decision notice is issued, the individual has the right to refer the matter to the Upper Tribunal. They therefore make clear that a warning notice is not the final decision of the FCA.

The warning notices issued to date all concern interest rate benchmarks. The FCA considers that the individuals were knowingly concerned in the contravention of Principle 5 for significant failings in relation to an interest rate benchmark. It considers that one individual was also knowingly concerned in the contravention of Principal 3. Principal 3 states that a firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems. Principle 5 states that a firm must observe proper standards of market conduct.

COMMENT

It remains to be seen whether the publication of the warning notices at an early stage of the enforcement proceedings will have a deterrent effect but these notices demonstrate the change in culture within the regulator, that individuals will now be held to account for conduct and governance failings. Pursuing the firms alone is no longer enough

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European Court rules on the UK's challenge to the powers of ESMA under the Short Selling Regulation

United Kingdom v Parliament and Council [2014] C-270/12

SUMMARY

The power of the European Securities and Markets Authority ("ESMA") to adopt emergency measures on the financial markets of the Member States in order to regulate or prohibit short selling is compatible with EU law.

BACKGROUND

In 2012 the EU adopted a regulation which aimed to harmonise short selling across Europe (the "Regulation"). Short selling is a practice where an investor borrows an asset (such as shares and securities) from another investor and then sells that asset in the relevant market hoping the price will fall. The aim is to buy back the asset at a lower price, return it to its owner and pocket the difference.

Article 28 of the Regulation gives emergency intervention powers to ESMA to ban or impose conditions on short selling and to require the notification or publication of short positions where there is a threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the EU.

The Regulation was adopted under Article 114 of the Treaty on the Functioning of the European Union ("TFEU"). That article permits the adoption of harmonisation measures which are necessary for the establishment and functioning of the internal market.

ACTION BY THE UK

In May 2012, the UK brought an action before the European Court of Justice ("ECJ") seeking annulment of Article 28. The UK argued that the powers set out in Article 28 exceeded that which could be delegated to an EU agency. The main thrust of the UK's argument was that ESMA had been given too much discretion, which contravened EU law. The UK claimed that discretion could have economic and financial policy implications which in turn would have long-term consequences on general confidence in the markets.

It was argued that the factors outlined in Article 28, to which ESMA was to have regard when taking a decision, contained tests which were highly subjective and the range of measures available to ESMA was too wide.

The UK claimed that different member states have taken different approaches to short selling which served to highlight the discretionary nature of dealing with this problem. ESMA would have the power to determine whether member states have taken appropriate measures. That meant there was a risk ESMA would be required to arbitrate between conflicting public interests, make value judgments and carry out complex economic assessments.

The UK further argued that Article 114 was not the correct legal basis for the adoption of the rules set out in Article 28 of the Regulation.

The Advocate General ('AG'), in an opinion delivered in September 2013, proposed that Article 28 be annulled. The AG agreed that Article 114 was not a proper basis for its adoption. His view was that Article 114 permits the adoption of harmonisation measures which are necessary for the establishment and functioning of the internal market. Article 28 gave ESMA emergency powers to restrict short selling, in circumstances where it was likely the member states did not agree on the action to be taken. It was difficult to see then how Article 28 could contribute to harmonisation. Rather, it appeared to enable the substitution of EU decision making for national decision making. However, while the AG takes a position on the case presented to the court, that opinion is persuasive, not binding.

THE DECISION

In January 2014, the ECJ, contrary to the decision of the AG, dismissed the UK's case. In particular it stated the Regulation does not confer any autonomous power on ESMA that goes beyond the powers granted to that authority when it was created. The ECJ highlighted that ESMA's discretion in acting is limited by various conditions and criteria. For example, ESMA is required to take into account the extent to which any measures it adopts address the threat to the financial markets/ stability of the EU financial system or significantly improve the ability of the competent national authorities to monitor the threat.

The ECJ further stated that ESMA must ensure that the measures do not have a detrimental effect on the efficiency of financial markets (including the reduction of their liquidity) or creating uncertainty which is disproportionate to the benefits of the measure.

COMMENT

This decision confirms ESMA's powers to take action on short selling where there is considered to be a threat to the orderly functioning and integrity of financial markets or the whole or part of the financial system in the EU. However, the significance of this decision runs wider than ESMA's powers under Article 28. This decision may impact upon further delegation of powers to ESMA and other EU supervisory agencies for the financial services sector and the level of discretion which such agencies can exercise.

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