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Legal Briefs: A Round-up of Recent Developments

EU proposes a common insolvency regime for financial institutions

On 28 June 2010 a motion was passed by the European Parliamentary Committee on Economic and Monetary Affairs requesting that the European Parliament pass a resolution enabling the European Commission to prepare draft legislation on cross-border crisis management in the financial sector. The proposed framework would encompass amongst other things:

- the creation of an EU financial stability fund that would be financed, on risk-based criteria, by banks and financial institutions at systematic risk;
- a crisis management legislative framework that would initially govern the insolvency of banks and other financial institutions that operate within the borders of the EU; it would have its own set of rules that would apply across the EU, which in time would become common insolvency law; and
- the creation of a resolution unit responsible for managing the problems and insolvency of banks at systematic risk. It would be an independent body that forms part of the European Banking Authority, operating within the parameters of its mandate.

The resolution being proposed suggests that the legislation envisaged above should be drafted by the end of 2011.

UK: OFT recommendations on reforms to the Insolvency Service

In a market study, called "The market for corporate insolvency practitioners," published on 24 June 2010 The Office of Fair Trading (OFT), proposed extensive reforms of the current corporate insolvency regulatory regime. After an eight-month study the OFT believes that reforms are needed to build market trust and create a regime that works in the best interests of creditors as a whole.

A particular concern of the OFT was that certain secured creditors, such as banks, that appoint insolvency practitioners (IPs) are able to control the costs and activities of IPs, whereas unsecured creditors, such as HMRC and small businesses, are not. As a result, the OFT study found that, in circumstances where the unsecured creditors paid the IPs' bill, they were often charged more.

The OFT believes that the regime as it stands "is currently unable to effectively protect the interests of small creditors" and has suggested a number of recommendations regarding the regulation of IPs. These include:

- that a requirement should be put in place whereby IPs should provide creditors, before their appointment, with estimates regarding their envisaged fees;
- that an independent body be set up in order to deal with any complaints regarding excessive fees charged by IPs and require

that IPs make reimbursements accordingly, and impose fines, as necessary; and

- that the Insolvency Service, rather than directly regulating IPs, should monitor the regulatory work of certain professional institutions that have the power to licence IPs.

Statutory liens and aircraft operators

In the case of *Global Knafaim Leasing Ltd & Anor v The Civil Aviation Authority & Ors [2010] EWHC 1348 (Admin)*, the UK's High Court held that the Civil Aviation Authority (CAA) and BAA Ltd. (BAA) were entitled to a statutory lien of a lessor's aircraft, to ensure a lessor pays **all** the outstanding route and aircraft charges of an insolvent operator and its fleet of aircraft, and not just those related to the aircraft of the lessor.

In this case Global Knafaim Leasing Limited & CGTSN Limited (Global CGTSN) owned and leased aircraft. One of their aircraft was leased, by way of an operating lease, by Zoom Inc., a Canada-based airline, which went into liquidation.

The inability of Zoom Inc. to pay both route and airport charges to the CAA and BAA resulted in the aircraft leased by Zoom Inc. being detained at Glasgow Airport.

Global CGTSN found itself in a situation where in order to have its aircraft released, it had to pay not only the route and aircraft charges in relation to the aircraft it owned, and leased by Zoom Inc., but all the outstanding charges incurred by the whole fleet of Zoom Inc., and due to both the CAA and BAA.

Global CGTSN argued that the payment was unfair and disproportionate and was in contravention of Article 1 of the First Protocol to the European Convention of Human Rights regarding the protection of property, which protects individuals from unnecessary state interference.

This argument was rejected by the court, which stated that it was in the public interest that all charges be paid and that the statutory lien had been properly exercised.

In this case the court further highlighted that the onus was on the lessor to enquire into the financial health of an operator, under powers granted to it pursuant to its lease agreements, and deal with the issue accordingly. If the lessor had terminated its lease arrangements with the operator, it would have been liable to pay only those outstanding charges that were attached to its aircraft rather than the whole operator's fleet.

UK: Changes to the Tax Treatment of Debt Buy-Backs

The global financial crisis has resulted in many financial institutions trading loans at below par value. This has created an opportunity for companies to purchase their own debt at a reduced cost and extinguish that debt whilst booking a profit for accounting purposes. Changes to the way that debt buy-backs are taxed, contemplated by Schedule 15 of the Finance Act 2010 (the Act), would involve closing a loophole originally aimed at helping companies in financial difficulty, writes Matthew Jenkins of Squire Sanders' London office.

Taxation of debt buy-backs prior to the Act

When a corporate borrower books a profit pursuant to a debt buy-back, the profit is charged to tax. This tax treatment is extended to subsidiaries and to any other company that is "connected" with the borrower. In effect, the purchase of debt by a person connected with the debtor is deemed to be a release of the debt, to the extent of the difference between the face value of the debt and the amount paid by the connected person. In such cases, the debtor is subject to a tax charge in respect of the "deemed release."

Under an exemption that applied prior to the Act, the "deemed release" tax charge could be avoided if the following two-pronged test was satisfied:

1. the company acquiring the debt from the creditor did so at arm's length; and

2. the purchasing company was not connected with the debtor at any time during the three year period ending 12 months before the debt was acquired.

The purpose of this exemption was to aid the relief and rescue of companies that were in financial difficulty. However, it also gave companies the opportunity to buy back their debt, at a discount, on a tax neutral basis. By setting up a new group company to acquire the debt, companies were able to satisfy the conditions to qualify for the exemption from the "deemed release." The acquired debt was then released by the new, connected creditor, and the debtor company had effectively escaped a tax charge on the release of its debt.

Repeal and replacement of the previous exemption

On 14 October 2009, the previous UK government announced that only debt buy-backs "that are undertaken as part of a genuine corporate rescue will benefit from the buy-back profits not being subject to tax." The government statement made it clear that the existing exception was to be repealed and would be replaced with more-restrictive conditions to be satisfied.

Following the statement of 14 October 2009, HMRC published further proposals on 21 October and published draft legislation on 9 November.

Pursuant to the Act, the previous exemption from a deemed release is replaced with three new "exceptions":

- the corporate rescue exception;
- the debt-for-debt exception; or
- the equity-for-debt exception.

This article addresses the corporate rescue exception.

The corporate rescue exception under the Act

No deemed release arises for tax purposes upon the acquisition of impaired debt by a connected creditor where the corporate rescue exception applies. In order to gain the benefit of the corporate rescue exception, the following conditions must be satisfied:

3. the debt must be acquired by a connected person under an arm's-length transaction;
4. there must have been a change in the ownership of the debtor company at any time in the period beginning one year before, and ending 60 days after, the date of the buy-back;
5. it must have been reasonable to assume that, but for the change of ownership, the debtor company would, within 12 months of the change of ownership, have "met one of the insolvency conditions" – HMRC-speak for insolvent liquidation, insolvent administration or insolvent administrative receivership; and
6. it must have been reasonable to assume that, but for the change in ownership, the debt buy-back would not have been made.

Draft Guidance issued by HMRC

On 8 April 2010, HMRC published draft Guidance regarding the new debt buy-back rules. Comments were invited and had to be submitted by 28 May 2010.

With regard to the corporate rescue exception, the draft Guidance elaborated on point 3 above. HMRC stated that they would accept that it is reasonable to assume that the company would have met one of the insolvency conditions where, for example:

- insolvency is avoided not only by the change of ownership itself but also by steps taken following the change of ownership;
- under guarantee arrangements that apply to the debtor company's borrowing, enforcement action might actually be taken against another company in the group; or
- there is evidence that the insolvency conditions would be met but the company has not publicly acknowledged its potential insolvency because of the need to engage in sensitive discussions with lenders and auditors over banking covenants and its going-concern status.

The draft Guidance is at pains to stress that if the connected creditor company subsequently releases the debtor from all or part of the debt, a credit will then be imposed on the debtor company on the "release of relevant rights" – the amount of the discount at which the creditor acquired the debt, less any amounts taxed on the creditor in respect of the discount.

Comment

Any clarification issued by HMRC is to be welcomed, particularly given the manner in which debt buy-backs had proliferated in light of the previous tax exemption and the considerable uncertainty that pervaded the market following the previous government's announcement on 14 October 2009.

Lenders in particular need to understand the changes introduced by the Act in connection with corporate rescues in which they are asked to participate as funders. They will take comfort from the fact that HMRC appear to be prepared to apply a generous interpretation of what constitutes an "insolvency condition" for the purposes of the Act. However, the Guidance lacks clarity in other respects. For example, what proof will be required to satisfy HMRC that "but for the change in ownership, the debt buy-back would not have been made"?

In addition, the question remains whether the changes to the taxation of debt buy-backs are desirable at all. Notwithstanding that the previous exemption could be, and was, exploited as a loophole, it gave significant relief to struggling companies and groups. The BVCA, in its 2010 Budget Submission, voiced the concerns of many commentators when it wrote:

> "There is already evidence that this change has made it harder and more complicated for struggling companies to restructure their balance sheets; a development which is compounded by the current economic climate. . . . This announcement is in sharp contrast to the US where provisions have recently been introduced to help companies in this position by making it easier for them to buy back their own debt without immediate tax penalties and it is unfortunate that the UK Government has chosen to do the opposite and make their position more difficult."

UK: Practical Considerations for Security Enforcement

For any lender, the decision to enforce a security interest that has been granted to it is a difficult one. This is the ultimate sanction available to a lender, and it may have the result that the company that granted the security will cease to exist as a going concern. Lauren Priest-Stephens of Squire Sanders' London office highlights key factors in making the decision whether to enforce.

Upon the provision of debt facilities to a borrower, a lender will often take security over assets of the borrower – and frequently of other members of the borrower's group of companies – as collateral for the performance by the borrower of its payment and other obligations to the lender. In relation to companies incorporated in England, this security will typically take the form of fixed and floating charges over all of the assets of the company. These charges should be registered against the relevant company at Companies House and on any relevant title register – for example, in the case of land, at HM Land Registry, and in the case of certain categories of intellectual property, the UK Intellectual Property Office.

Most lenders will become aware that a borrower is in difficulty through the early warning systems that are built into their lending documentation in the form of representations and covenants. Covenants may be informational (for instance the delivery of the annual accounts of the borrower each year), financial (for instance a measurement of the tangible net worth of the borrower or the group) or general (for instance a prohibition on the granting of security to a third party). Compliance with these obligations is usually tested by a review of financial information delivered on a regular basis by the borrower. Breach of the representations and covenants usually constitutes an event of default, which will entitle the lender to exercise certain rights, including the right to demand payment or repayment of the amount of the facilities that are outstanding and to enforce guarantees and security granted in respect of the borrower's obligations and liabilities.

Rights of the lender following an event of default

Upon either the discovery of facts or circumstances amounting to an event of default or receipt of confirmation from a borrower that an event of default has occurred, the lender will be faced with a decision as to how to react.

The rights and remedies available to the lender following the occurrence of an event of default are contractual. These rights are additional to any other rights to which the lender may be entitled at common law or in equity as a consequence of the

breach by the borrower or the client of the credit agreement.

Many events of default are of a minor or technical nature and, in practice, may be either overlooked by the lender or made the subject of a formal waiver at the borrower's or client's request.

If the event of default relates to a cash flow issue of the borrower, the lender may choose to make additional funds available to the borrower or to restructure the existing indebtedness to ease the burden of repayment on the borrower; this option may be suitable for a borrower that is going through a re-organisation or a temporary or seasonal cash flow shortage.

Demanding repayment, termination of the facilities and enforcement of the security must nevertheless be considered in respect of a serious breach of the facilities that can not be remedied or where the borrower has entered or is under threat of commencement of insolvency proceedings. However, this course of action represents the remedy of last resort for any lender as the enforcement of security will usually entail the cessation of a borrower as a going concern, even if options may exist to salvage the whole or part (or parts) of its business. It is unlikely that the borrower itself can continue, ultimately, to exist as a legal entity, even if the business or assets can be life-boated out in some manner.

Immediate practical steps

The first step for any lender that is considering enforcing its security following an event of default is to establish exactly what rights it has and where it has those rights. This is not as obvious a point as it sounds. English case law is littered with examples of lenders that found themselves in the wrong despite having, no doubt, considered themselves to have been entirely within their rights to take enforcement steps.

A forthcoming book, *Asset-Based Lending and Insolvency,* by my colleagues Andrew Knight and Grant Jones, contains a review of the relevant law. The English court decisions serve to caution lenders that, even if an event of default appears clear and objective on its face, it is still capable of being declared wrongfully by the lender.

In and of itself, an invalid declaration of an event of default or termination event is a nullity and creates no legal liability upon the lender. Since the declaration has no effect, it can not constitute a breach of contract. This frequently surprises those who assume that an invalid demand must necessarily impose a liability on the lender (even if only for defamation, by analogy with the old case law on the wrongful dishonouring of cheques, although in truth the analogy is somewhat stretched). The reasoning is simply that the borrower is entitled to disregard the declaration and the resulting demand, and therefore suffers no damage. Nevertheless, the scope for damage to the borrower is considerable, especially if the effect of the lender's declaration is to trigger cross-default provisions in other financing agreements to which the borrower or client is party or to cause its suppliers to refuse to continue supplying to it on credit terms.

The lender will, however, incur liability for the consequences of its own actions following a wrongful declaration. Since the lender's obligations under the credit agreement will not have been validly terminated because the declaration of the event of default or termination event was a nullity, the lender will commit a breach of contract if:

- it seeks to enforce its rights in its security or collateral; and/or
- it refuses to continue advancing funds to the borrower on the basis that it believes that it is entitled to cancel its commitment to provide finance.

A documentation review – commonly referred to as a "security review," although, in truth, it is somewhat more extensive than that – is usually recommended in order to provide the lender with the requisite comfort that its security is valid and enforceable, and that the lender is entitled to enforce the security in the particular circumstances. The lender's legal counsel will typically also comment on the range of enforcement options available to the lender, so that the lender can begin to consider the practicalities of enforcement. This review will have the added advantage of ensuring that the advisors to the lender are fully up to speed with the current situation of the borrower.

On a more practical level, the lender will require an appraisal of its collateral – for example, an up-to-date, on-site audit of the tangible assets, such as an inventory of plant and machinery, combined with a desktop audit of all intangibles, such as outstanding receivables, comprised within the collateral. Lenders vary in their approach to such appraisals and audits, but in cases where tangible assets have a material value or offer particular challenges – for example, in the case of retail inventory – they will frequently instruct external specialists to conduct the appraisal, in addition to advising on best strategy for realising cash from the assets. In the overwhelming majority of cases, there will be a trade-off between the speed of realisation and the price at which assets can be liquidated.

The legal review and the appraisal, taken together, will provide the lender with a clear picture of both its rights to enforce and the possible means of enforcement. A lender that typically holds fixed and floating security over all of the borrower's undertaking and the assets may tend to consider that the appointment of an administrator represents the most comprehensive solution. Ideally this decision should be deferred, if time permits, until after the lender has been able to consider the various reports as these may suggest alternative enforcement options that would not otherwise have been taken into account by the lender.

As a separate and independent step, the asset-based lender should, as soon as it becomes aware of any event of default, issue a "reservation of rights" letter to the borrower. If the lender fails to do so and continues to operate the credit agreement (as opposed to taking immediate action to accelerate, terminate and/or enforce) it may be deemed to have waived its rights in relation to the particular event. The risk exists

regardless of any "no waiver" clauses that may have been included in the credit agreement with the precise intention of avoiding just such a problem. In the 2009 case of *Tele2 International Card Company SA and others v Post Office Ltd,* the English Court of Appeal found that a "no waivers" clause would not be sufficient to override the innocent party's continued conduct of an agreement notwithstanding a breach or default of that agreement by the other party.

Non-insolvent borrower

If a formal insolvency process has commenced, the practical options available to the lender will be more or less limited in scope according to the type of insolvency proceedings to which the borrower or client is subject. If, conversely, a formal process has not yet commenced, the lender's decisions are, if anything, more difficult. It may be asked to support a workout or restructuring outside a formal insolvency process. Since such a process frequently involves continuing to provide financial accommodation to the borrower, the lender must assess whether the rescue plan presented to it is a realistic one and whether, if the plan fails, the lender may be in a worse position as regards its ultimate recovery of funds advance than if it had used the brief period before formal proceedings began as an opportunity to exercise its rights under the relevant financing documents.

Similar considerations may apply if the borrower has committed an event of default that is capable of remedy and seeks the lender's agreement to continue to provide support while the remedy is implemented.

In either case, any rescue, turnaround or remedial action must be examined carefully in order to establish any issues that may arise upon a subsequent insolvency, in particular the setting aside of that security. For instance, an administrator of an England-based company may set aside security that it deems has been granted as a preference in the six months prior to insolvency or constitutes a transaction in the two years prior to insolvency.

This exercise may be expensive in terms of both time and fees. The scope of any such review should be established from the outset. In particular, if the review needs to be carried out across a number of jurisdictions, the lender should carry out an initial cost/benefit analysis and ensure that it is kept up to date in relation to the costs that accrue. It can be startlingly easy for the lender to find itself presented with unexpected invoices for fees in such cases, and although it would be normal for the borrower to indemnify the lender for those costs, that will be of scant comfort if the quantum claimed is large enough to cause fresh financial difficulties for the borrower.

Insolvent borrower

If the borrower is formally insolvent, the lender will need to decide the best course of action for the protection both of the assets over which it has taken security and of its security rights themselves. Once again, advice should be taken from legal

counsel and financial advisors as to any particular requirements in a jurisdiction that need to be satisfied (such as the location of inventory within the prescribed area for the enforcement of security over the same in Germany).

An essential part of any connected security review will be the examination of the relationship between the lender and any other creditors, in particular any intercreditor or priority agreements, to confirm whether it is possible for the lender to compel them to take action (or indeed whether the lender may be compelled to take action). The results of this examination will determine how the lender approaches such parties, or indeed, if it approaches them at all.

The lender may wish to approach the other creditors to agree how they should proceed. This course of action would have the advantage of ensuring that all creditors aim towards a single goal, however, the approach to the other creditors may tip them off that the lender is planning to take enforcement action and they may take pre-emptive steps, for instance, if the borrower in question is based in England, another creditor may apply for the appointment of an administrator. The appointment of an administrator would mean that a moratorium upon enforcement would come into effect and it would not be possible for the lender to enforce its security.

Another party that the lender should approach as soon as possible is the prospective insolvency practitioner who is to be appointed over the borrower. The identity of this party will vary between different jurisdictions – in England, it is likely that the insolvency practitioner will be appointed by the lender and be well known to it, while in other jurisdictions this may be a court-appointed official. In any event, as soon as the identity of this party is known to the lender, the lender should take steps to contact the insolvency practitioner and explain its claim against the company and its position as a secured lender, particularly in relation to any particular assets over which it has security (for instance a particular property or piece of equipment).

Other parties that the lender may wish to engage in discussion, particularly if the review of the business has shown potential retention of title claims or has revealed that the insolvency office-holder can not trade without ongoing key supplies, are the suppliers to the borrower. An early approach to such parties may serve to highlight any claims that they have and ensure that they will continue to supply goods or services to the borrower on such terms as it may be possible to agree on under applicable insolvency laws during the initial trading period following the commencement of insolvency proceedings.

UK: Recent Developments in English Insolvency Law

The summer months are upon us, and developments in insolvency law and practice continue apace. Since our Spring issue the courts have pronounced in a number of interesting cases; Graeme D. Levy of Squire Sanders' London office reports on some of those below. At the time of writing, the World Cup is underway – it would perhaps be remiss not to have some football flavour in this article, and so some observations on the plight of Portsmouth FC are appropriate (though saved till the end).

Successive notices of intention to appoint administrators: more than one moratorium?

Interesting case law came to the aid of directors in the recent case of *Re Cornercare Limited [2010] EWHC 893 (Ch)*. This case concerned the working of paragraph 28(2) of Schedule B1 to the Insolvency Act 1986. By way of reminder, Schedule B1 to the Insolvency Act 1986 (Schedule B1) contains provisions relating to the insolvency process of administration, and allows a number of different ways in which administration may commence, including especially the ability of various categories of persons to put a company into administration without any court hearing. The company concerned, or its directors, may use the "out-of-court" process, and Schedule B1 lays out the various forms that must be used (more on that below) and the persons to whom notice must be given. Companies in financial distress may need a short period of time to arrange for the planning necessary to enable an insolvency practitioner to be able to formulate a plan for the administration and to be able to state (as he will have to do) that he is of the opinion that the (defined statutory) purpose of administration can be achieved in this case. And in that light, where creditors are pressing for payment or steps are being taken by creditors which might preclude the fruition of those plans, Schedule B1 allows for the directors/company to have the benefit of what is known as an "interim moratorium," which is obtained by filing a notice of intention to appoint an administrator: that notice does not place the company into the hands of the administrators (the directors remain at their posts), but (most) creditor action is frozen. The period of the moratorium is limited to 10 business days, and if no administrator is appointed in that time the moratorium expires and thereafter no appointment may be made in reliance on that notice. In the case of *Re Cornercare Limited* the court held that directors of a company can legitimately file successive notices of intention to appoint an administrator without actually appointing one, and thus benefit from a number of successive moratoriums. The decision comes as something of a surprise to some insolvency professionals and leaves the way open to abuse of process if serial notifications are filed merely to obtain a moratorium and preclude actions by

creditors. Further litigation on this topic in due course is, regrettably, assured.

Out-of-court appointments: additional risks

More procedural alarm was raised by the case of *Pillar Securitisation Sarl and others v Spicer and Shinners [2010] EWHC 836 (Ch).* In that case the court had to determine, amongst other things, whether administrators of a Guernsey limited partnership were validly appointed. The issue would not, to casual observers, seem to have been a major one: the appointment had been made using the wrong statutory appointment form. Instead of using the form prescribed by the Insolvent Partnerships 1994, the appointment had been effected using the form promulgated for limited companies under the Insolvency Act 1986. Even though the court found that, unlike English limited partnerships, Guernsey limited partnerships have separate legal personality (and accordingly the "company" form actually used may have fitted the situation better than the partnership form which should have been used), the court felt unable to categorise the entity as a company for the purposes of Schedule B1 to the Insolvency Act (which provides for a narrower class of entities which may be subjected to administration proceedings under that Schedule than may be wound up as "unregistered companies" under Part V of the Insolvency Act 1986). The consequences of getting the form wrong were severe: the appointment was invalid, the court could not cure the invalidity using a presumption of validity under paragraph 104 of Schedule B1 (as there was nothing to cure) and nor did it believe it was able to exercise a discretion under the more general provision of Rule 7.55, which constitute saving provisions, where there are formal defects in "insolvency proceedings." It has been held, separately, that out-of-court appointments are not, for the purposes of this Rule at least, "insolvency proceedings." The decision leaves the status of the acts (and the remuneration) of the administrators horribly up in the air. Practitioners should consider, therefore, very carefully which forms to use and the advisability of using the court appointment process, rather than the out-of-court appointment route, for (in particular) overseas entities.

More on the anti-deprivation principle

Demonstrating that you can wait ages for one case on a topic to come around and then three come at once, the latest in the recent spate of cases on the so-called "anti-deprivation principle" hit the courts in *Mayhew v King and others [2010] EWHC 1121 (Ch).* The anti-deprivation principle is probably best described as a rule that no person can make a valid deal that his assets should be divested from him without value on his insolvency. The rule is of limited application (because a full statutory scheme exists) and is subject to several clear(ish) exceptions (so that, for example, contractual rights for a licensor of real estate to terminate a license on the insolvency of a licensee will not be struck down), but there are clearly going to be grey areas and room for development of the principle – this is where *Mayhew v King* is interesting. In this case a haulage company agreed that it would lose the benefit of an insurance-related indemnity if and

when it became insolvent. It became insolvent, and the claim (which was assigned by the insolvent entity's administrators to the claimant) was pursued in the insolvency by the assignee, and of course resisted by the indemnifier on the basis that the claim could no longer be made. It was held that the arrangements offended the anti-deprivation principle. The judge rejected submissions either that the limit on the operation of the claim had to be regarded as merely an unobjectionable time limit or that it was an intrinsic part of the agreement and to strike out the limitation was to rewrite the bargain between the parties. He also agreed with dicta in other case law which made it clear that just because the relevant provisions were agreed as part of the original agreement, and not as an afterthought, the provisions were not immune from the application of the principle. This case is interesting not only because it marks further judicial consideration of what is turning into a valuable weapon in the practitioner's arsenal in insolvency matters, but also because it was not being relied on by the insolvent itself (but by an assignee), and because the court indicated that it could strike down a provision as offending the anti-deprivation principle even if the offending termination did not operate expressly by reference to insolvency, if however that was its effect.

This latest case on the anti-deprivation principle leads nicely into the football arena (or perhaps stadium).

Portsmouth City Football Club v football creditors: match postponed or cancelled?

Portsmouth City Football Club Limited (in this article the company and the club itself are both referred to as the "Club" – for completists it should be noted that the two are not however the same and that, in some contexts, can be important) was placed into administration on 26 February 2010 and has been the subject of significant public interest. Its unsecured creditors included a range of suppliers and, perhaps most volubly, the UK taxation authorities (HMRC). As foreshadowed from the very start of the insolvency, the administrators have been seeking an exit from administration by way of a company voluntary arrangement (CVA). To this end meetings were held for the purposes of approving CVA proposals on 17 June 2010 and (subject to any challenge on the basis of unfair prejudice or material irregularity being made within 28 days of the meetings' decisions being reported to the court) the necessary resolutions were apparently then passed. The exit through a CVA enables the Club to avail itself of certain football-related benefits not relevant to this article but leaves open to further debate the operation of the so-called "Football Creditors Rule."

The background to the Football Creditors Rule and its operation is as follows. Clubs that play in the Football Association Premier League (FAPL) are required to comply with the Football Association Rules (the FA Rules). The FA Rules include the Football Creditors Rule.

Though the Football Creditors Rule has come before the courts in other contexts, it has only done so in a tangential manner. It is possible that once again the issue will escape direct court consideration, because the Club's CVA proposals as approved by the relevant meetings (subject to the outcome of any challenge made within the allowed period) allow for the football creditors to be paid in full. Accordingly there will be no court consideration of the issue unless either the CVA is challenged or the operation by the FAPL of the Football Creditors Rule before the CVA (as apparently did occur according to the CVA proposal documentation) is challenged by a creditor (assuming that a creditor has the locus to do so). It would appear from the CVA proposal documentation that the Portsmouth administrators do not intend to make any challenge themselves, either now or if and when the same persons become liquidators.

The Football Creditors Rule provides that on an event of insolvency (which has happened to Portsmouth FC by reason of the administration of the parent company) the FAPL has power to "suspend" the Club, which affects various match playing rights. That suspension also purports to entitle the FAPL (though it does not oblige the FAPL) to make payments, out of various broadcasting rights income, sponsorship and certain other monies which otherwise would be payable to the Club, direct to certain (in essence) football-related creditors. The FAPL's rules also provide that in exercising its powers the FAPL shall have regard to all the circumstances of the case and to a number of other expressly mentioned items, and these include the provisions of the Insolvency Act 1986 and various elements which can broadly be described as issues relating to the integrity, reputation and continuity of the League competition and the FAPL.

If the Football Creditors Rule applies as written, football creditors within the ambit of the Football Creditors Rule may be treated differently and better than other unsecured creditors of an insolvent Premier League club company. The problem with this is that, under English law, a statutory scheme provides that unsecured creditors rank *pari passu* (equally and rateably). Allied to this is the the anti-deprivation principle which is a principle of public policy to the effect that a person cannot arrange his affairs so that his assets are divested (other than for proper value) upon his insolvency.

The following issues present themselves:

1. Does the Football Creditors Rule constitute a breach of the non-excludable statutory scheme, or offend principles of transaction at an undervalue?

2. Does the Football Creditors Rule offend the anti-deprivation principle referred to earlier in this article?

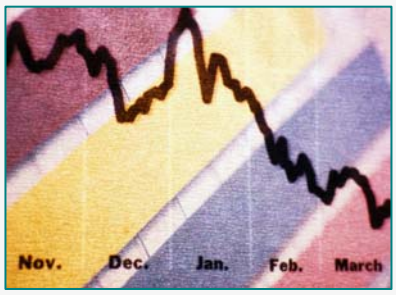
3. Are the arrangements in fact best and properly characterized as security for the benefit of the football creditors? If so, is that security arrangement registrable as a charge with the English Registrar of Companies (and, if not registered, void)?

4. On what footing is the FAPL entitled to act in the way contemplated by the Football Creditors Rule: if it is a trustee, on what basis does it act? What is the ambit of its powers and to whom are its duties and obligations owed? If it is an agent, for whom is it an agent? If for the Club, would the liquidation of the relevant club's company automatically terminate the agency and re-introduce the statutory scheme?

5. Are the rights of the FAPL to pay football creditors either necessarily incompatible or incompatible in any given case with the provisions of the FA Rules which contemplate the FAPL having regard to various reputation, continuity and other considerations? Are the Football Association's determinations in this regard matters of absolute discretion, or can they be the subject of court direction?

It will be interesting to see whether the Football Creditors Rule finally comes for full consideration before the courts and, if so, how the courts deal with it.

Germany: How Rights of Preferred Stockholders Are Affected by Insolvency Plan Proceedings – GARANT



The German Federal Civil Court (BGH) in its decision of 15 April 2010 (IX ZR 188/09) clarified the legal position of holders of preferred stock in insolvency plan proceedings, reports Andreas Lehmann, the Frankfurt-based co-chair of European Finance for Squire Sanders.

GARANT Schuh + Mode AG (GARANT), a listed German stock corporation, had issued shares of both common stock and preferred stock. Preferred stock generally did not have voting rights, but a right to a minimum guaranteed annual dividend amount payable in advance from GARANT's profits and the right to a dividend higher than the dividend payable to holders of common stock. GARANT had losses in 2003 and did not pay the 2003 dividend to the preferred shareholders. In 2004 the business situation of GARANT deteriorated even more, and insolvency proceedings over the assets of GARANT were opened on 1 December 2004. No dividend payments to preferred shareholders were made in the course of the insolvency proceedings.

The insolvency creditors decided that GARANT should not be liquidated, but that it should undergo an insolvency plan restructuring and survive as a legal entity. In the course of the financial restructuring. as provided for in the insolvency plan adopted by the insolvency creditors in 2007, insolvency creditors accepted a substantial haircut and waived the majority of their claims. Also, the shareholders agreed in a shareholders' meeting to first reduce the statutory capital (and thus the number of issued shares of common stock), and subsequently to issue new shares of common stock to a Newco, which would hold the new shares with the purpose to sell these to an investor in the future for the benefit of the insolvency creditors. In the course of the financial restructuring, the participation quota of pre-insolvency shareholders in GARANT's equity was effectively reduced to about 30 percent of all shares post-restructuring.

After the insolvency plan had become binding and the insolvency court terminated the insolvency proceedings with effect at the end of 2007, a dispute arose about whether or not the preferred shareholders were entitled to claim the dividend payments for the years 2003 to 2007 and whether they were entitled to voting rights until the dividend payments were made. Pursuant to Section 140 of the German Stock Corporation Act (*Aktiengesetz* – AktG), in case a guaranteed dividend is not paid for a year and also not paid in the following year, preferred stockholders are

granted voting rights for the time the respective overdue payments are outstanding. Section 227 of the German Insolvency Code (*Insolvenzordnung* – InsO) provides that, unless the insolvency plan provides otherwise, upon making the payments to the insolvency creditors as provided for in the insolvency plan, the insolvent debtor will be released from all other liabilities and obligations against these creditors. On the basis of this provision, and because the insolvency plan did not explicitly state that the dividend payment claims of preferred shareholders would survive the insolvency proceedings, GARANT management published a declaration on 2 January 2008 stating that the claims of preferred shareholders for dividend payments for the years 2003 to 2007 were cancelled as a result of the termination of the insolvency proceedings, and that consequently these shares no longer had voting rights.

The preferred shareholders took a different view and claimed that the insolvency plan proceedings had not affected their right to receive the dividend payments for the years 2003 to 2007, so that their voting rights remained in place. Their main argument was that Section 227 InsO deals only with claims of insolvency creditors and not with claims of shareholders. The preferred shareholders argued that they were not insolvency creditors in the meaning of this provision. Also, they had not been involved in the decision process on the insolvency plan, and the shareholders' meeting of GARANT had also not resolved on the loss of the legal position of the preferred shareholders. The preferred shareholders went to court to get their dividend and voting rights confirmed, and initially were successful: both the local court of Düsseldorf (LG Düsseldorf, decision of 10 October 2008; 39 O 99/08) and the court of appeal in Düsseldorf (OLG Düsseldorf, decision of 30 September 2009; 6 U 166/08) followed the arguments of the plaintiffs.

Upon further appeal by GARANT, on 15 April 2010 the German Federal Civil Court (BGH) reversed the decision of the Düsseldorf courts and decided in favour of the company (IX ZR 188/09). The BGH confirmed that the claims of the preferred shareholders were not insolvency claims, but did not agree with the conclusion drawn from this fact by the Düsseldorf courts that these claims were not affected by the insolvency plan. According to the BGH, the relevant laws need to be interpreted beyond the letter of the law in the light of the underlying fundamental principles. One of these principles is that (preferred) shareholders can not be in a better position than insolvency creditors, but will receive a recovery only after all insolvency creditors' claims have been satisfied. On the basis of a general evaluation of the treatment of the different stakeholders in insolvency proceedings, the BGH found that the claims of preferred shareholders have to be treated as if they were ranking in the last group of (subordinated) insolvency creditors.

This result is in line with what most professionals active in the restructuring and insolvency business would probably have taken for granted. Commentators either had regarded the earlier decisions of the Düsseldorf courts as "wrong result" or – where they conceded that the German law was applied correctly according to its wording

– had pointed out the necessity for the legislator to amend the laws so that the legal framework would make sense.

The importance of the BGH decision is not only that it clarifies the specific question of the status of preferred shareholder claims in an insolvency plan, but also that it gives general guidance on how to interpret the German insolvency laws. Although the new insolvency laws have been effective since 1999, many questions, in particular in respect of insolvency plan proceedings, have not yet been tested in the courts. It is important that the BGH has clarified that fundamental principles of the insolvency regime need to prevail in a case where an application of the law by its exact wording would lead to a result which violates such principles. There is now hope that also lower courts will in the future have comfort not to stick to the exact letter of the law in particular where the principles of corporate laws and insolvency laws seem not to work together properly, like in the GARANT situation.

Latest news on GARANT: Although the preferred shareholders ultimately lost the lawsuit and will not receive preferred dividend payments for the years 2003 to 2007, they are now again entitled to voting rights, because post-insolvency GARANT did not pay any dividends for 2008 and 2009 either. I doubt that the preferred shareholders will regard this as a really positive development.

Germany: Proposed Amendment to the German Insolvency Code – Tax Claims as Preferred Insolvency Claims

As part of the German government's costs savings package, a change in the German Insolvency Code may be implemented which will grant to the German fiscal authorities a preferred creditor status, writes Andreas Lehmann of Squire Sanders' Frankfurt office.

On 7 June 2010, Angela Merkel and Guido Westerwelle, who chair the current government coalition, announced a "cost savings package" with alleged potential savings of €80 billion by the year 2014, which is a first step in meeting the constitutional obligations on budget discipline. These savings, however, will not be achieved entirely by reduced government spending. In fact, a number of new taxes and other measures are being introduced which aim at increasing governmental income. It is hoped that by granting outstanding tax claims a preferred status in insolvency proceedings, the government could increase its income by approximately €500 million annually.

It is too early to assess whether such a change will be implemented at all (after all, this would require the German parliament to adopt respective legislation) and how the preference will be structured. However, this may end up being a quick procedure. The most likely implementation seems to be a reinstatement of a similar privilege which existed until the beginning of 1999 under the old German insolvency laws. This system provided for preferred status for fiscal claims within the group of non-subordinated unsecured creditors. If this was implemented, secured creditors would still rank prior to the fiscal claims. However, to the extent that recoveries from their security (after deduction of the receiver's portion) would not be sufficient to satisfy the secured claims, the secured creditors would be adversely affected by a change in legislation, and of course all other unsecured creditors would directly be affected.

In any event, all creditors whose Germany-based debtors are in (or may get into) financial difficulties are well advised to review the value of their security and to review how they may be affected by the new legislation.

Germany: Draft Act Aimed at Hindering Unfair Securities and Derivatives Transactions (*Entwurf eines Gesetzes zur Vorbeugung gegen missbräuchliche Wertpapier – und Derivategeschäfte*)

*On 21 May 2010 the German Ministry of Finance (*Bundesministerium der Finanzen, *BMF) has presented a draft for debate on an act aimed at strengthening the financial markets, which was originally going to be included in the Act Aimed at Improved Investor Protection and Optimization of the Functionality of the Capital Market (*Gesetzesentwurf zur Stärkung des Anlegerschutzes und Verbesserung der Funktionsfähigkeit des Kapitalmarktes*). After a hearing on 27 May 2010 the draft has been renamed to an act aimed at hindering unfair securities and derivatives transactions (the Draft) on 1 June 2010, in which the prohibition of short sales without coverage were contemplated. Dr. Andreas Fillmann of Squire Sanders' Frankfurt office provides an analysis.*

The BMF has realized that the worldwide financial crisis has caused many problems and argued that a stricter regulatory regime is required. The turbulences in relation to EU state bonds and the volatility of the euro have reached a new level of market disturbance, and therefore the BMF plans to regulate transactions which are regarded as responsible for contributing to the crisis. The belief is that higher transparency measures could strengthen market stability. The Draft is intended to cover planned disclosure requirements for covered short sales and the prohibition of short sales without coverage.

The Draft comprises – among other measures – the following provisions:

The prohibition of uncovered short sales of German stocks and government bonds of states of the euro zone which are listed on a domestic stock exchange for trading on a regulated market

The BMF is of the opinion that based on uncovered short sales a huge amount of securities can be sold without any costs for coverage through lending or repo transactions. The huge amount of uncovered short sales could in turn increase pressure on the market price of these securities. To limit this pressure the BMF wants to prohibit such uncovered short sales.

The implementation of a two fold transparency system for holders of net short sales positions

The BMF proposes a two fold system: (1) Germany's Financial Services Regulatory Agency (*Bundesanstalt für Finanzdienstleistungsaufsich,* BaFin) has to be informed of such net short sales; (2) details regarding larger net short sales positions have to be published. Covered by this transparency regime are net short positions in stocks and also equity derivatives that replicate uncovered short selling.

The prohibition of credit default swaps without coverage inherent in risk of states within the euro zone

The BMF argues that the values of credit default swaps (CDSs) are increasing with the default risk of states within the euro zone. If such CDSs are traded buyers of the CDSs without any hedge position might have an interest in the credit rating of the CDSs deteriorating. Therefore such uncovered CDSs might increase negative market trends.

In addition the BMF and the BaFin have been empowered to issue ordinances or decrees to define the prohibitions in more detail and state exemptions from such prohibitions.

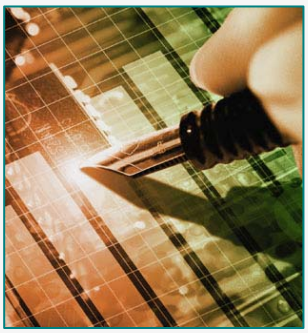
In contrast to the first draft, derivatives that illustrate uncovered short sales of German stock shares and currency derivatives that are not used for currency hedging reasons shall not be prohibited by law. Instead, the BMF and the BaFin are empowered to issue ordinances or decrees which prohibit other transactions, in particular:

- derivatives which illustrate sales of German stocks without coverage;
- derivatives which illustrate short sales in government bonds of the euro zone without coverage; and
- currency derivatives regarding the euro which are not used for currency hedging reasons.

The German government has declared its consent to the Draft on 2 June 2 2010. Many aspects of the Draft will be evaluated in more detail in the coming weeks before the act will finally be enacted.

The German government declared its consent to the Draft on 2 June 2010. After final decisions being made by the German Parliament and Council the new Act might be enacted on 9 July 2010.

Czech Republic: Validity of Existing Security Transfers of Rights at Risk Due to Jurisdiction of the Czech Supreme Court



A security transfer of right (security transfer) is one of the security instruments relied upon by creditors as security for loans provided to debtors. Under a written agreement the debtor transfers to the creditor the debtor's right towards a third person (a receivable) or a property right, including the right of ownership, as security. This institute is regulated in Section 533 of Act No. 40/1964 Coll., the Civil Code of the Czech Republic, as amended. Danica Šebestová and Ivan Karpják of Squire Sanders' Prague office examine the current and future status of security transfers in the Czech Republic.

Intervention of the Czech Supreme Court

In autumn 2008, in the midst of the global economic crisis, the Supreme Court of the Czech Republic decided to contribute its own portion of uncertainty to the established system of credit financing. In its decision file no. 31 Odo 495/2006 dated 15 October 2008 the court sought to bring greater clarity to the current legal regulation of the security transfer. In its decision, the court reached the following conclusions:

(i) An agreement for a security transfer is an agreement with a condition subsequent, by performance of which the original owner (i.e. the debtor who provided the security) automatically regains the ownership of the item. The Supreme Court made it clear that the so-called *fiduciary* transfer of right (i.e. when the debtor has a contractual right to demand a re-transfer of ownership from the creditor) is inadmissible and invalid. The Supreme Court reasoned that the *fiduciary* transfer does not constitute a property right recognizable to third parties.

(ii) An agreement for a security transfer which does not regulate the settlement of the parties if the debtor fails to pay to the creditor the secured sums in a due and timely manner is absolutely invalid. The Supreme Court said that the reason for invalidity lies in a lack of certainty regarding the content of the rights and obligations of the parties to the agreement should the debtor fail to meet its obligation to satisfy the secured receivable. The law does not provide for any supporting regulation of the parties' rights for this purpose.

(iii) An agreement for a security transfer which contains a condition subsequent applicable only for the *due and timely* payment of the secured sums is absolutely invalid. If late payment of the secured receivable occurs the secured receivable will cease to exist, *but* the creditor will become the permanent owner of the transferred property. The Supreme Court

held that such agreement shows all attributes of an inadmissible forfeitable pledge.

The Supreme Court offered the following solutions:

The agreement on the security transfer can be executed in the form of a purchase agreement, in which the maturity of the purchase price is bound to the moment of maturity of the secured receivable. If the payment of the secured receivable is *made duly and in time,* the purchase agreement is terminated (based on the condition subsequent) and the debtor's ownership right is renewed. If the payment of the secured receivable is *not made duly and in time,* the purchase price will be set off against the secured receivable.

The agreement on the security transfer can state that the creditor is entitled to realize (e.g. sell) the property in an agreed manner and to return to the debtor the possible realization excess. Such agreement, however, assumes that the debtor is delayed in the payment of the secured receivable until the moment of the realization. It is necessary that such agreement includes provisions regulating (i) impact of the late satisfaction of the secured receivable by the debtor on the creditor's right of ownership to such property and (ii) regime of possible benefits generated until that date by such property.

Impacts of the Czech Supreme Court's conclusions

Despite protests from legal professionals and commentators, as of the time of writing the Supreme Court has not corrected its opinion as expressed in the above decision.

It is well-established practice in the Czech market that, under an agreement for a security transfer, the debtor has a contractual right to demand the re-transfer of the ownership from the creditor upon satisfaction of the secured obligations. Therefore, the Supreme Court's requirement for automatic re-transfer of the ownership upon satisfaction of the secured receivable comes as an unpleasant surprise. It is even more surprising because Czech law recognizes agreements including the creditor's obligation to re-transfer the transferred right as valid.

Moreover, the solution proposed by the Supreme Court to settle the debtor's delay by upholding the creditor's right of ownership coupled with the parallel set-off of the purchase price against the secured receivable resembles too obviously the forfeitable pledge. The only difference between the solution proposed by the Supreme Court and the original institute banned by the law is that in the Supreme Court's solution the right of ownership is transferred by establishment of the security transfer and not after the secured obligation is breached. Therefore, the Supreme Court's solutions for safe drafting of an agreement on the security transfer raise more questions than answers.

Finally, the Supreme Court did not limit the effects of its decision whatsoever. Thus, it is very probable that the sanction of invalidity applies to already existing security transfer agreements.

Conclusion

We can only hope that the Supreme Court will change its, in our opinion, hasty conclusions by

which it has threatened validity of already existing security transfer agreements.

Because the legal analyses of and rules applicable to security transfers and security assignments of receivables are conceptually close in Czech law, it is possible that similar rules and restrictions will apply in the security assignment of receivables.

Until the Supreme Court makes a new decision in this matter, we recommend that creditors use security instruments other than security transfers or security assignments of receivables – e.g. a right of pledge.

Moreover, it is necessary to examine whether existing agreements for security transfers (and the security assignments of receivables) are in the form of *fiduciary* transfers. If they are, for the sake of legal certainty, it is desirable to terminate such agreements and enter into pledge agreements instead.

Poland: Class Action Lawsuits Permitted

New regulations allowing class action lawsuits are about to be introduced in Poland, following the enactment in January 2010 of a new law on so-called "group proceedings". Pursuant to the new regulations, which come into force in mid-July, it will now become possible for a group of at least 10 individuals or companies to initiate joint civil action against a common defendant. Peter Swiecicki and Maciej A. Szwedowski of Squire Sanders' Warsaw office provide an analysis of the new regulations.

To date Polish law has lacked similar regulations, meaning that all plaintiffs intending to sue a particular entity had to file separate lawsuits, even when all of their claims were the result of the same action or omission by the offending party. When the new law comes into force companies such as financial institutions, broker-dealers, issuers of publicly traded securities and others will now potentially face lawsuits by multiple plaintiffs.

A joint lawsuit may be brought by a group of plaintiffs whose claims share a common factual basis. Joint lawsuits are permitted when the claim is based on consumer protection, product liability or tort (with the exception of libel or defamation). The basis for legal action is therefore broader in comparison with that of some of the other European countries, where class action is restricted, for instance, to consumer and competition cases (Austria, Italy and Greece).

All plaintiffs must agree on one common amount of compensation that each of them will claim, or, alternatively, the plaintiffs can create sub-groups of at least two plaintiffs each, with each plaintiff in the sub-group claiming the same amount. This means that plaintiffs intending to file must first come to such an agreement prior to filing the claim, and waive any claim to a higher amount. Consequently in many cases this will force the injured parties to limit their claims, but the inconvenience should be compensated by the fact that their overall expenses related to the lawsuit will be reduced. Alternatively, plaintiffs would also be able to obtain in group proceedings a judgment ascertaining the liability of the defendant, and then file individual lawsuits for specific amounts, without having to limit them in line with the others.

Polish legislators realised that effective management of large-scale joint lawsuits would require adequate judicial infrastructure. With that in mind, group proceedings will be considered by the larger regional courts (*sądy okręgowe*), rather than by local district courts (*sądy rejonowe*), regardless of the amount claimed. Furthermore, each such lawsuit will be heard before a panel of three judges, rather than the more usual single judge. Also, certain procedural restrictions applying in regular proceedings were excluded in relation to group proceedings.

Joint plaintiffs will be represented by an elected group representative, and representation by professional counsel is compulsory. The latter

rule has already caused criticism, in addition to the fact that counsel representing group plaintiffs have been given the right to a success fee of up to 20 percent of the amount recovered from the defendant (incidentally, this is the first reference to success fees in Polish law). Since the terms of counsel's remuneration must be disclosed to the public (for the benefit of plaintiffs who join in the proceedings at a later date) and since opportunities to represent plaintiffs in such proceedings will be sought by lawyers, it is to be expected that in reality the negotiated success fees would be lower than the statutory 20-percent cap.

In an effort to promote the use of this new legal tool, the filing fee has been reduced from the usual 5 percent of the amount claimed to 2 percent. The 2 percent is not unlimited; it is capped at PLN 100,000 (approximately €25,000). The law does not prevent the filing fee from being paid by counsel on behalf of the group plaintiffs. This means that Poland may see the growth of well-capitalised plaintiffs' lawyers specialising in class actions.

In designing the new law the legislators selected the *opt-in* model (which is applied in several other European countries such as Germany, Sweden and Italy), rather than the *opt-out* model, which is the norm in the United States. Under the *opt-out* system, a judgement has effect in respect of all potential plaintiffs, except those who expressly declare to leave the group. Under the *opt-in* system, the judgement would apply only in respect of the plaintiffs who file jointly or expressly choose to join the group at a later date. Other plaintiffs are free to bring legal action individually or form their own group.

While the *opt-out* system encourages amicable resolution of disputes, this is not the case under the *opt-in* model. Since a judgment applies only in relation to particular parties, it would not prevent others from initiating separate legal action. Therefore, a settlement would not protect the defendant from any future lawsuits, as is usually the case in proceedings before US courts. In fact, any settlement with plaintiffs would be likely to only encourage new claims from persons who did not join the group but decided to await the outcome, so defendants are likely to try to fight to the end in court, hoping to at least drag the case out long enough to discourage others from following in the footsteps of the first group of plaintiffs. From that perspective the new regulations might result, on the one hand, in unnecessary or frivolous lawsuits against banks and other deep-pocket targets, while, on the other hand, making a swift resolution of disputes difficult.

In contrast to the system in the United States, where class actions are the most developed, there are no provisions in Polish law for extensive discovery of evidence such as permitted in the United States, thus avoiding the time and expense involved in such discovery. In accordance with general rules of civil procedure, the initial complaint must be specific, and the plaintiffs will not have the benefit of extensive discovery to fish for additional facts to support a claim.

Also, as mentioned earlier, group proceedings will be tried by three-judge panels and not by juries. This eliminates a major item of uncertainty present in the United States. The system of class actions in the United States has had the effect of shifting certain types of regulatory authority to the judiciary. Whether the Polish judiciary will be as open to accepting such a role remains to be seen. During the initial period following the entry of the new rules into force many courts may be reluctant to accept group lawsuits due to the unfamiliarity of the new institution, and will side with the defendants' counsel whose primary tactic would be to try to have a group lawsuit turned down on formal grounds.

Finally, the level of damage awards in Poland is historically much lower than that in the United States, as for example it is not possible for plaintiffs to demand punitive damages. However, given the potentially large number of plaintiffs and low amount claimed by each plaintiff in any consumer claim, this differential may turn out to be less significant.

Whether the introduction of the class action rules will result in a wave of frivolous lawsuits remains to be seen. In any regard, as has been the case in the past with other new legislation, these regulations are likely to be billed as a magical solution to the problems of the Polish judicial system, which is still somewhat lacking in efficiency. A growing number of Polish lawyers may also find this to be a useful tool for expanding their client base, at the expense of those companies considered easy targets. Among the first to be hit could be major retail chains, already suffering bad press due to allegations of infringement of employee rights, telecommunication companies and food manufacturers. Consumer banks and securities brokers, especially those representing consumers, could also be targets in the financial sector. The extent to which allegations of securities fraud will become one of the mainstays of class actions, as in the United States, remains to be seen.

Contributor Profiles

Andrew J. Knight co-chairs Squire Sanders' European Finance Practice. His practice focuses on international financial law in the context of asset-based lending, syndications, restructuring, loan and receivables finance book sales, secondary market transactions and distressed debt trading. Mr. Knight mainly represents banks and other lending institutions, especially asset-based lenders based in the United Kingdom and the United States. He has particular expertise in negotiating, documenting and restructuring multijurisdictional credit facilities extended to transnational borrowers and groups including cross-border insolvencies and pre-packed exits.

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Andreas Lehmann co-chairs the firm's European Finance Practice. He advises banks on all aspects of debt financing structures including syndicated loans, corporate bonds and securitization transactions. Mr. Lehmann has advised institutional investors, in particular investment funds, venture capital funds and real estate funds, in respect to their investments in Germany. His finance experience includes financial restructurings and nonperforming loan (NPL) transactions and other distressed debt investments as well as the refinancing of real estate acquisitions. His experience also includes factoring, receivables finance and asset-based lending structures. Mr. Lehmann has advised corporate clients in obtaining financing, particularly in structured finance transactions.

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Matthew Jenkins serves as editor of Squire Sanders' *European Finance Law Update.* His practice focuses primarily on cross-border asset-based lending and debt finance. Mr. Jenkins also has experience in cross-border restructuring, advising on the disposal and reorganization of distressed businesses. Prior to joining Squire Sanders, Mr. Jenkins worked in the banking department of a Ukraine-based law firm. His experience included working on syndicated loans and structured credit facilities.

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Dr. Andreas Fillmann's practice has focused exclusively on banking and capital markets. He provides advice in the fields of banking and finance regulatory, structured finance, securitizations, syndicated loans and derivatives, as well as representing hedge funds and banks in issues relating to capital markets law. Dr. Fillmann's experience in derivatives includes advice to investment banks and hedge funds on swaps and hedging activity. In addition, he has advised on a large number of

capital markets transactions, in relation to both equity and debt finance, including primary and secondary stock placements and the issue of stand-alone and structured bonds, as well as issues programs for medium term notes (MTNs) in which Dr. Fillmann was active for both issuers and consortium banks.

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Ivan Karpják focuses his practice on general corporate matters. Prior to joining Squire Sanders, he gained experience as a law clerk, drafting various legal documents and improving his legal research and analysis skills.

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Lauren Priest-Stephens focuses her practice on asset-based lending, banking and debt finance matters. Her experience includes financing transactions from the negotiation of term sheets and the structuring of a transaction to the completion of financing documents. Ms. Priest-Stephens is familiar with the negotiation and drafting of documents for complex cross-border transactions and has extensive experience representing all parties in a financing including lenders, borrowers and syndicate members. Following the completion of transactions, she often undertakes ongoing portfolio support work, including the review and drafting of syndication documentation, and has experience with the termination of transactions, through refinancings and restructurings.

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Danica Šebestová focuses her practice on financial services and general corporate matters. She also has experience in international arbitration. Ms. Šebestová's finance experience includes the representation of major financial institutions and real estate funds in connection with financing development and the acquisition of residential, office and commercial projects throughout Central and Eastern Europe. Ms. Šebestová's corporate experience includes mergers and acquisitions, and assisting large international clients with corporate and commercial matters on an ongoing basis.

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Peter Swiecicki's practice includes some of the largest infrastructure financings and privatizations in Central and Eastern Europe. His experience includes financings of the largest and most complex toll motorway project in Poland, as well as the main gas pipeline and the tallest office building in Central Europe. During the telecommunications boom, he handled both debt and equity telecommunications financings. He has represented international companies in a wide variety of

matters relating to cross-border investments including financings, acquisitions, divestitures, restructurings, governance and real estate matters.

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Maciej A. Szwedowski focuses his practice on litigation and arbitration, as well as on real estate and construction law, insolvency and corporate issues. He represents corporate clients in court and arbitration proceedings including in relation to disputes arising as part of construction and development projects and in securities-related litigation. He has acted on behalf of directors of several companies in management liability proceedings in Poland.

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New Partner

Restructuring lawyer **Graeme D. Levy** has joined Squire, Sanders & Dempsey as co-chair of the firm's international financial restructuring practice and a partner in the London office's financial services and bankruptcy and restructuring practices. Mr. Levy is an experienced and highly acclaimed restructuring counsel with 25 years of experience in nearly every aspect of insolvency and restructuring including extensive expertise in banking and corporate matters. Mr. Levy's background will further add to the firm's already sizeable cross-border bankruptcy practice.

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Distinctions

Chambers Europe 2010 lists our financial services lawyers as leaders in the Czech Republic, Hungary, Poland, Russia and the Slovak Republic.

The 2010 edition of ***The Legal 500 Europe, Middle East & Africa*** recognizes us as a recommended firm for banking and financial services matters in Bratislava, Budapest, Prague and Warsaw.

PLC Which lawyer? recommends our financial services practice and lawyers in the Czech Republic, Hungary and Poland, and recognizes us in the Slovak Republic.

Recent Engagements

Squire Sanders participates in Round the Island Race charity challenge

Squire Sanders rallied a crew of lawyers, asset-based lenders and business people to join more than 16,000 sailors on board 1,750 yachts taking part in the annual **J.P. Morgan Asset Management Round the Island Race,** one of the largest yacht races in the world.

The race, which attracts sailors from all over the UK, other parts of Europe and as far away as the United States to race 50 nautical miles around the Isle of Wight, has become a major charity event. Squire Sanders co-chair of European Finance and sailing enthusiast **Andrew J. Knight** (London) acted as tactician on board the Group 1 Elan 450 *Hurricane* in support of Macmillan Cancer Support. Macmillan provides specialist health care, information and financial support to people affected by cancer. Team Pindar and Vendée Globe sailing star Brian Thompson acted as skipper.

The Squire Sanders *Hurricane* came in second in Division 1C and seventh overall in its class of more than 130 yachts. More than £3,000 was raised for Macmillan Cancer Support, placing the yacht third overall in the top 10 fundraisers for the event. The team's JustGiving website is still open, and all donations are welcomed.

"Squire Sanders is thrilled to support this extraordinary event and to help Macmillan Cancer Support in its vital work," Knight said.

Squire Sanders makes presentation at Compliance for Financial Institutions event

On 24 June 2010 **Dr. Andreas Fillmann** (Frankfurt) presented "Market Protection Rules in the Banking Sector" as part of the **Compliance for Financial Institutions** event presented by Deutsches Aktieninstitut in Frankfurt. His presentation covered compliance-related EU Directives and their implementation into German law – in particular, regulatory aspects of insider trading, market abuse and conflict-of-interest aspects, and the related compliance rules to prevent such issues.

Squire Sanders sponsors the Business Money All-Asset Finance Conference in London

On 29 April 2010, Squire Sanders sponsored the **Business Money All-Asset Finance Conference,** which took place at the CBI Conference Centre, Centre Point, London. Partners **Andrew Knight** (London), **Guy Guinn** (Cleveland) along with consultant **Grant Jones** (London) were amongst the distinguished guests to present. The event was one of the most successful to date with a total of 97 delegates attending, which included senior executives from 16 lenders.

Media Appearances

Leading Poland-based newspaper ***Rzeczpospolita*** listed **Tomasz J. Stawecki** (Warsaw) among the leading banking lawyers and recommending our Warsaw office in banking law and organizing and financing investment activities.

Getting the Deal Through – Securities Finance 2010 published an article by **Dr. Andreas Fillmann, Manfred Baumbach** and **Jörg Uhlmann** (all of Frankfurt) regarding the relevant statutes and regulations governing securities offerings in Germany.

Securities Industry News quoted **Dr. Andreas Fillmann** (Frankfurt) on 5 April regarding the challenges inherent in developing a global standard for regulating and reporting risks associated with financial institutions.

SQUIRE SANDERS | LEGAL COUNSEL WORLDWIDE

EUROPEAN FINANCE LAW UPDATE

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