



Jones Day EuroResource--Deals and Debt | 3 May 2012

Recent Developments

The UK—On 3 April 2012, the English Court of Appeal handed down its keenly anticipated judgment in four related appeals (*sub nom. Lomas v Firth Rixson and others* [2012] EWCA Civ 419), all of which concerned the consequences of an event of default and the impact of Section 2(a)(iii) of the International Swaps and Derivatives Association ("ISDA") Master Agreement. All four appeals focused primarily on the 1992 version of the ISDA Master Agreement, but the Court of Appeal's reasoning and decision apply equally to the 2002 version. The meaning of Section 2(a)(iii) has been controversial over the last few years, with UK and US courts weighing in on the issue with sometimes inconsistent results. The UK Court of Appeal's unanimous decision clarifies, from the English-law perspective, that: (i) reliance on Section 2(a)(iii) cannot prevent payment or delivery obligations from arising under the ISDA Master Agreement; (ii) Section 2(a)(iii) suspends, but does not extinguish, payment or delivery obligations; (iii) suspended payment obligations cannot be revived other than by curing an event of default; and (iv) suspended payment obligations are not extinguished on maturity. Finally, the Court of Appeal ruled that Section 2(c) netting remains applicable in circumstances where the nondefaulting party relies on Section 2(a)(iii). However, the judgment does not address the potential impact of non-English law or procedure (particularly foreign insolvency law) on any suspension of obligations under Section 2(a)(iii), even where a relevant ISDA Master Agreement is governed by English law.

The Netherlands—On 5 April 2012, the Amsterdam Companies and Business Court (Ondernemingskamer) upheld mismanagement claims against Fortis N.V. by the Dutch Investors Association and partially rescinded the discharge granted to the board of directors for its management in 2007. The court held that Fortis (now Ageas N.V.) engaged in mismanagement from September 2007 through September 2008 by not timely adjusting the group's solvency plan, given uncertainties regarding significant disinvestment transactions, and by failing to communicate adequately with respect to: (i) its exposure to the US subprime-mortgage market; (ii) the expected reduced return on the sale of Dutch subsidiary HBU (which was mandated by the European Commission after Fortis' participation in the takeover of ABN AMRO), which would have a negative impact of €800 million on solvency; (iii) the increased probability that the sale of Fortis Investment Management to Ping An for €2.15 billion would not occur; and (iv) the group's solvency and liquidity positions, planned share issuance and cessation of dividends. The court rejected claims of mismanagement with respect to Fortis's participation in the acquisition of ABN AMRO, including its decision not to invoke a "material adverse change" clause. Ageas announced that it would appeal. The judgment, the full text of which is available at www.rechtspraak.nl, was issued shortly after a ruling by the Dutch Court of Utrecht that Fortis had made false and/or misleading statements to investors, as reported in the 28 March 2012 edition of EuroResource.

France—On 12 March 2012, the French legislature modified French bankruptcy law to allow bankruptcy court-appointed officials to seek interim protective measures against de jure and de facto managers of insolvent companies. The reform was enacted rapidly in response to the reorganisation proceeding of oil refinery Petroplus Petit-Couronne, a French subsidiary of the Swiss group Petroplus. Prior to the "Petroplus law", a mismanagement claim for shortfall of assets could be prosecuted only in a liquidation proceeding (*liquidation judiciaire*). With the reform, tort claims against de jure and de facto managers for mismanagement that results in a cessation of payments by the debtor may also be pursued in safeguard (*sauvegarde*) and reorganisation (*redressement judiciaire*)

proceedings. The new law also implements rules to coordinate the sale of assets subject to interim protective measures during insolvency proceedings (i.e., before a court rules on the merits of claims for mismanagement or requests for consolidation of proceedings). It is anticipated that the reform will facilitate the restructuring of French operating-subsidiary debtors whose assets are held at the parent level.

News-worthy

Jones Day is currently advising, as one of four lead advisors, the French state-controlled energy company Electricité de France SA ("EDF") on the strategic transaction recently announced between EDF and its Italian partners, A2A and Iren, whereby EDF will assume control of Italy's energy group Edison S.p.A. Jones Day also acts as lead tax counsel on the transaction.

Jones Day advised The Procter & Gamble Company ("P&G") in connection with the sale of its household-appliances business and the perpetual licensing of the Braun brand to De'Longhi, S.p.A. The total consideration payable in connection with the transaction is €140 million (\$183.7 million) and an earnout opportunity of an additional €74 million (US\$97 million). In addition to a perpetual right to use the Braun brand and connected patents, the transaction includes the acquisition of certain production assets and the inventory. It is anticipated that certain P&G employees, located predominantly in Germany, will become De'Longhi employees upon the closing of the deal. Ownership of the Braun brand will remain with P&G.

Jones Day's [Brussels Office](#) was honoured as "TMT Law Firm of the Year" at the Belgian Legal Awards ceremony on 15 March 2012. The jury, composed of peers and in-house counsel from the Belgian legal community, based this award on the Brussels Office's "impressive list of deals achieved in 2011", its "great track record of clients" and "accolades from all relevant league tables and directories" for its practice in technology, media and telecommunications. This is the Brussels Office's third award at the Belgian Legal Awards.

The 2012 edition of *Chambers Global, The World's Leading Lawyers for Business*, one of the most reputable directories for leading lawyers and law firms worldwide, ranked Jones Day's German offices ([Düsseldorf](#), [Frankfurt](#) and [Munich](#)) for the practice areas Corporate/M&A, Dispute Resolution and Intellectual Property: Patent Litigation.

Global Competition Review ("GCR"), the international antitrust and competition law journal and news service, has included [Paris Office](#) partner [Eric Barbier de La Serre](#) in its "40 under 40" survey of the world's most talented young competition lawyers. Eric Barbier de La Serre's practice focuses on European and French competition law, with a particular emphasis on antitrust litigation, state aid and merger control. He has handled numerous antitrust matters involving the telecommunications, electronic components, media, financial services and energy sectors.