JONES DAY | EuroRESOURCE–
DEALS AND DEBT

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Recent Developments

Germany—In a decision issued on 27 March 2012, the Frankfurt Higher Regional Court ruled that even by majority vote, bondholders cannot restructure the terms of bonds governed by German law that were issued by foreign entities before the German Bond Act 2009 (*Schuldverschreibungsgesetz*) (the "Bond Act") came into force. Ruling in favour of individual bondholders, the court held that the terms of bonds issued in 2007 by Dutch entity Pfleiderer Finance B.V. and guaranteed by its parent, the German-listed company Pfleiderer AG, could not be restructured by the bondholder majority since the Bond Act did not apply. Pfleiderer AG subsequently filed for insolvency.

The Bond Act applies to bonds governed by German law and issued after 5 August 2009, the date the Bond Act became effective, regardless of whether the bonds were issued by entities located in Germany or abroad. The law allows bondholders to agree by majority vote to restructuring measures, such as the deferral or waiver of interest or principal. Such majority vote is binding on the minority of bondholders. Holders of bonds issued before 5 August 2009 may generally choose to apply the Bond Act to their bonds by majority vote ("opt in"). By its ruling, the Frankfurt court has curtailed the right of the bondholder majority to "opt in" when the issuer is a foreign entity. Bondholders in such cases could not be bound by majority vote under the German bond law in force before the Bond Act. In the *Pfleiderer* case, the court held that bondholders who subscribed to bonds at a time when the bonds were not subject to a majority vote could continue to rely on this legal position even after the Bond Act came into force.

Spain—Spanish Prime Minister Mariano Rajoy announced on 9 June 2012 that the Eurogroup panel of eurozone finance ministers has agreed to a widely anticipated bailout of Spanish banks by means of a €100 billion credit line. The credit line will be used to shore up the Spanish financial sector and, according to Economy Minister Luis de Guindos, will be available exclusively to Spanish banks. The Eurogroup conditioned the bailout on the implementation of "specific reforms" in the financial sector, including "restructuring plans" in accordance with Eurogroup guidelines.

Spain—On 11 May 2012, the Spanish government announced rule changes that require banks to increase provisioning for real estate loans (between 7 and 45 percent, in addition to the higher provisioning requirements already approved in February). This new requirement imposes on the system €30 billion in additional capital needs and could trigger more consolidation between mid-sized and small banks, as well as a more rapid decline in Spanish real property prices. The increase in reserves, including the higher requirement from February, does not exceed 20 percent, amounting to no more than 43 percent of the two largest banks' consolidated pre-impairment operating profits, so these banks should have little difficulty complying with the rules by year-end. However, smaller banks will likely explore merger opportunities or seek contingent convertible securities from the Fund for Orderly Bank Restructuring (the "FORB"). The government has incentivised mergers by giving this segment more time to comply than larger institutions, which must reach the new levels by year-end.

These reforms have increased the difficulties currently facing Spanish banks, which have been burdened by nonperforming real estate loans. In this regard, on 25 May 2012, after confirmation by the Ministry of Economy of the bailout of Bankia, the nation's fourth-largest lender, Bankia's management stated in a stock-exchange announcement that the bank needed €19 billion and offered a timeline for recapitalisation that would be coordinated with the Bank of Spain and the government. However, this amount must receive the approval of the FORB and the Bank of Spain, which might not be granted until the end of August.

Italy—In late December 2011, Italy introduced the *Aiuto alla Crescita Economica* ("ACE") system, the Italian version of the allowances for corporate equity provided for by the tax legislation of other countries. The implementing rules were enacted in March 2012. The ACE system is meant to stimulate the funding of enterprises through equity. In particular, the new regime's goal is to boost the "tax appeal" of equity injections and to bring the equity's tax efficiency closer to the tax efficiency of debt. The system is available to: (i) Italian resident individual entrepreneurs, partnerships and companies; and (ii) Italian permanent establishments of nonresident persons. Companies that are undergoing bankruptcy proceedings cannot benefit from the ACE system.

The ACE system is a tax break relevant for Italian income tax purposes only. It basically provides for the deduction (from the taxable base) of the notional return on the net equity increases that a company has experienced after 31 December 2010. Partnerships and individual entrepreneurs are allowed to deduct the notional return on their whole net equity (not only on the net equity increases that occurred after 31 December 2010), regardless of when such net equity was formed.

The UK—On 9 May 2012, the English High Court, in *Trillium (Nelson) Properties Ltd v Office Metro Ltd* [2012] EWHC 1191 (Ch) (09 May 2012), for the first time ruled on the requirements governing the existence of an "establishment" under the EC Insolvency Regulation (Council Regulation (EC) No 1346/2000) (the "Regulation"). Under the Regulation, "main" insolvency proceedings may be commenced on behalf of a debtor only in the single jurisdiction in which the debtor's "centre of main interests" (commonly referred to as "COMI") is located. Where a main proceeding has been instituted in one EC Member State, the Regulation provides that "secondary" proceedings may be commenced in another Member State if the debtor "possesses an establishment within the territory of that other Member State." "Establishment" is defined by the Regulation as "any place of operations where the debtor carries out non-transitory economic activity with human means and goods."

The key issue in *Trillium* was whether the English court had jurisdiction to open secondary proceedings for Office Metro Ltd ("Office Metro"), whose main insolvency proceedings had been opened in Luxembourg. The court acknowledged that Office Metro had a "place of operations" in England (even though it neither owned nor leased property there) and that it carried out some functions via agents in England, so as to satisfy the "human means" requirement of the "establishment" definition in the Regulation. However, the court ruled that the continued functions of the company in the UK were "transitory" and did not amount to "economic activity" necessary to create an "establishment." Therefore, the English court dismissed Office Metro's winding-up petition.

The UK—Jones Day and Linklaters advised Brazilian financier Moise Safra concerning the acquisition of One Plantation Place Unit Trust (the "Trust") from its existing unit holders, including Schroder Real Estate and Stobart Group. The Trust is the owner of Plantation Place, one of the largest office buildings in the City of London, the largest tenant of which is RSA Group. The deal values the property at £470 million. The Trust's purchase of Plantation Place in 2006 was financed through a loan facility that was subsequently securitised through a commercial mortgage-backed securitisation ("CMBS"). Delancey Estates plc ("Delancey") is a noteholder in the Class B Notes of the CMBS. Following a decline in the valuation of the property, the loan had been in default. The servicer of the CMBS approved the acquisition on the condition that the buyer cure the outstanding loan-to-value default. Delancey had previously blocked a plan proposed by the unit holders to waive the covenants in the loan and to agree on an extended timeframe for the sale of the property.

Newsworthy

Jones Day is pleased to announce that Dr. Karsten Müller-Eising has arrived in the Frankfurt Office as a partner in the Capital Markets Practice. Joined by Thomas Stoll and Daniela Schmitt, Dr. Müller-Eising will enhance a team of more than 120 Capital Markets lawyers worldwide. The addition of these three lawyers marks another important step in the expansion of the Firm's German practice, following the opening of the Düsseldorf Office in February and the addition of several lateral partners, as well as the promotion to the partnership of seven lawyers in Frankfurt and Munich at the beginning of the year.