JONES DAY | EuroRESOURCE– DEALS AND DEBT

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Recent Developments

Global—On 26 October 2012, the U.S. Court of Appeals for the Second Circuit, in a ruling that may impact sovereign debt restructurings, upheld a lower court order enjoining Argentina from making payments on restructured defaulted debt without making comparable payments to bondholders who did not participate in the restructuring. In 1994, Argentina began issuing bonds with a governing instrument that contained a "pari passu" or "equal treatment" clause providing that the bonds would constitute "direct, unconditional, unsecured and unsubordinated obligations of the Republic … [ranking] at all times … pari passu without any preference among themselves" and that "[t]he payment obligations of the Republic under the Securities shall at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness". Following a 2001 default on the bonds, Argentina offered bondholders new exchange bonds in 2005 and 2010. Argentina continued to make payments to holders of the exchange bonds, but pursuant to a "temporary moratorium" renewed each year since December 2001, has not made payments to bondholders who did not participate in the exchange. The old bondholders sued Argentina in the federal district court in New York (the old bond instrument being governed by New York law) to collect $1.33 billion in unpaid principal and interest. In February 2012, the district court held that Argentina's conduct violated the pari passu clause and enjoined further payments to exchange bondholders without corresponding payments to old bondholders.

The Second Circuit Court of Appeals upheld that ruling in NML Capital, Ltd. v. Republic of Argentina, Nos. 12-105(L) et al., 2012 BL 283459 (2d Cir. Oct. 26, 2012). The court was careful to predicate its ruling on the totality of Argentina's conduct, which included enacting unusual legislation rendering the defaulted bonds (and judgments obtained on them) unenforceable in Argentina. Even so, broadly speaking, the decision reflects judicial dissatisfaction with a sovereign debtor that for many years has flouted judgments entered by U.S. courts, notwithstanding the debtor's possession of resources sufficient to pay such judgments in whole or in part. It is expected that Argentina will seek to appeal the ruling to the U.S. Supreme Court. The full text of the opinion can be accessed here.

The UK—On 24 October 2012, the English Supreme Court handed down judgments in Rubin v Eurofinance SA and New Cap Re v A E Grant, two unrelated cases, in both of which insolvency practitioners were seeking to enforce foreign (non-EU) court judgments arising from insolvency proceedings in their jurisdictions through the English courts against English defendants. The majority held that Cambridge Gas, the previously leading case, which promoted the idea of universality of recognition in insolvency proceedings, was wrongly decided. Instead, the Supreme Court held that insolvency judgments are subject to the standard common law principles relating to recognition and enforcement. Specifically, the Supreme Court held that a foreign judgment cannot be enforced under the Cross-Border Insolvency Regulations 2006 (enacting the UNCITRAL Model Law on Cross-Border Insolvency in the UK) or under §426 of the Insolvency Act, as it was considered that in both cases the legislation was not designed to provide for the enforcement of judgments.

In light of this decision, there is no "special treatment" for judgments arising from insolvency proceedings. Parties wishing to enforce insolvency judgments in England through the English courts will have to rely on the traditional common law body of cases, and where appropriate the EC Regulation on Insolvency Proceedings, which is not affected by this judgment and which makes foreign judgments falling within the ambit of the EC Regulations enforceable automatically in the UK. The decision is likely to have significant consequences for cross-border insolvencies. At a minimum, it will make it more difficult to enforce foreign insolvency judgments in England and it may lead to an increase in the volume of parallel insolvency proceedings filed in English courts in cross-border bankruptcy cases (e.g., "nonmain" proceedings under the Model Law) for the purpose of obtaining recognition of (and enforcing) such judgments.

Spain—On 31 August 2012, the Spanish Government approved Royal Decree-Law 24/2012 ("RDL 24/2012") providing for the restructuring and resolution of "credit entities". Although the law became effective immediately, RDL 24/2012 has not yet been ratified by the Spanish Parliament, where the ruling party (Partido Popular) holds the majority. RDL 24/2012 implements a new framework for the restructuring and resolution of financial institutions, which will become an essential tool to manage the prevailing banking crisis in Spain. To that end, RDL 24/2012 reinforces the role of supervisors, available instruments and administrative procedures. The ultimate objective of the legislation is to safeguard the stability of the Spanish financial system as a whole, rather than any given entity, and to minimize the expense borne by taxpayers.

With the publication of RDL 24/2012, the Spanish Government has fulfilled commitments made on 20 July 2012 to the Eurogroup under the program of financial assistance to Spain for the recapitalization of the banking sector, which are included in the Memorandum of Understanding signed between Spain and the European Commission. RDL 24/2012 includes not only commitments that must be implemented before 31 August 2012 but also other measures which were to be implemented in the ensuing months, including the creation of a "bad bank", the strengthening of the Fund for Orderly Bank Restructuring (Fondo de Restructuración Ordenada Bancaria, or "FROB"), enhanced protection for retail investors and the transfer of sanctioning and licensing powers from the Ministry of Economy to the Bank of Spain ("BoS").

Among other things, RDL 24/2012 provides for: (i) a new framework for early intervention, restructuring and orderly resolution of credit entities; (ii) the establishment of an asset management company (a Sociedad de Gestión de Activos) as a repository for distressed real estate assets, or a "bad bank"; (iii) management of hybrid instruments until June 2013; (iv) reinforcement of FROB's administrative powers; (v) augmented capital requirements for financial institutions; and (vi) delegation of powers by the Ministry of Economy to BoS.

Spain—On 28 September 2012, Oliver Wyman released a Spanish bank "stress test" report concluding that Spain's ailing banking industry could need as much as €59.3 billion ($76.4 billion) in additional capital. The report was prepared on the basis of information provided by BoS, the tested entities (i.e., the 14 most significant Spanish bank groups, representing 90 percent of the banking industry's assets), audit companies and real estate appraisers. The report divides all tested banking entities other than nationalized entities into two groups: (i) banks that do not require equity infusions (i.e., seven bank groups representing more than 62 percent of the analyzed credits, including Santander, BBVA and CaixaBank); and (ii) banks that are equity deficient.

In accordance with the timetable for a complete restructuring of the Spanish financial sector which was updated by the Spanish Ministry of Economy on 13 September 2012: (i) in November 2012, FROB will cover the capital needs of the four groups that have already been nationalized (Bankia, CatalunyaCaixa, Novagalicia and Banco de Valencia); and (ii) in January 2013, public funds will cover the capital needs of weaker entities that, although not controlled by the State, require public support to satisfy their capital requirements.

Banks that, according to Oliver Wyman's report, are equity deficient were obligated to submit recapitalization plans no later than October 2012. Such plans have been analyzed by the BoS and the EU. On the basis of the reports, the BoS and the EU have divided the credit entities into: (i) banks that can recapitalize themselves (i.e., Banco Popular and Ibercaja); and (ii) banks that require public aid (i.e., Banco Mare Nostrum, Caja3, Ceiss and Liberbank). Banks in the first category will have until June 2013 to complete a recapitalization. The remaining banks have already formulated restructuring plans to be approved by the BoS and the EU as a condition to public assistance. It is anticipated that such approval will be forthcoming in December 2012 and that said entities, which will transfer their distressed assets to the "bad bank", will receive public funding in January 2013.

Newsworthy

Jones Day is acting as European Union state aid counsel to Athens-based Alpha Bank in connection with Alpha Bank's exclusive negotiations with Paris-based Crédit Agricole S.A. to acquire the entire share capital of Emporiki Bank, the fifth-largest bank in Greece. Alpha Bank will acquire Emporiki Bank's entire share capital in accordance with the terms and conditions set by the Hellenic Financial Stability Fund. The transaction, which will result in a net recapitalization of the combined group of €3 billion, represents a major step in the restructuring of the Greek banking sector, with the combined Emporiki and Alpha Bank having a pro forma market share of 19 percent of Greek deposits and 25 percent in lending, including leading market shares in mortgages and corporate lending. Alpha Bank is currently the second-largest bank in Greece after National Bank of Greece, with 450 branches throughout the country.

Jones Day will open an office in Amsterdam in early 2013. The Amsterdam Office will be Jones Day's 38th worldwide and 10th in Europe. The Amsterdam Office follows closely the recent opening of the Firm's Düsseldorf Office, and this expansion reflects the importance that the Firm attaches to its clients' European operations. The new Amsterdam Office will initially focus on matters related to corporate and M&A, private equity, capital markets, litigation and antitrust law, and it will provide the benefits of Jones Day's integrated global capacity to Dutch companies and international clients with operations in the Netherlands.

Jones Day represented British Land in connection with the execution of a new joint venture ownership agreement with Norges Bank Investment Management ("Norges"), the investment manager for the government pension fund of Norway, following Norges' acquisition of London & Stamford's 50 percent shareholding in the Meadowhall Shopping Centre in Sheffield ("Meadowhall"), one of only six super-regional shopping centres in the UK. London & Stamford's 50 percent stake in Meadowhall was acquired in February 2009 and, following its disposal, the centre is now valued at £1.525 billion.