European Perspective in Brief

September/October 2013

Mark G. Douglas

Europe has struggled mightily during the last several years to triage a long series of critical blows to the economies of the 28 countries that comprise the European Union, as well as the collective viability of eurozone economies. Here we provide a snapshot of some recent developments regarding insolvency, restructuring, and related issues in the EU.

Germany—On July 25, 2013, the Higher Regional Court (*Oberlandesgericht*) of Munich ruled that an irrevocable license does not become unenforceable in German insolvency proceedings. The judgment concerned the rejection of a cross-license by an insolvency administrator. Such licenses play a significant role in industries with a high concentration of patents, such as the semiconductor, biotechnology, software, and internet industries. To minimize the risks of patent violations, market participants grant to each other rights of use in patents, patent applications, and know-how. An appeal against the judgment has been filed. The decision follows an obiter dictum by the German Federal Supreme Court (*Bundesgerichtshof*) in 2012, in which the court indicated that it does not consider license agreements insolvency-proof. Despite the Munich decision, there is currently no certainty that a license agreement, whether exclusive or nonexclusive, cannot be rejected by a German insolvency administrator. Companies may try to benefit from enhanced protections available for sublicense (as distinguished from main-license) agreements. A more detailed discussion of the ruling can be accessed at http://www.jonesday.com/cross-license-agreements-in-german-insolvency-proceedings-an-update-08-21-2013/.

France—On July 26, 2013, Law No. 2013-672, relating to the separation and regulation of banking activities, was formally enacted. The law was introduced to respond to lessons learned from the 2007–2008 financial crisis, which highlighted the limited number of tools available to supervisory authorities to limit the risks created in the financial system by systemically important financial institutions. The provisions of the law extend over a broad array of issues, such as ring-fencing of certain proprietary trading activities, anti–tax haven rules, money laundering, trading of agricultural commodities, high-frequency trading, mandatory clearing, and central supervision of counterparties. Most important, the law creates a new banking-resolution regime that applies to credit establishments, financial companies, financial holding companies, and investment firms (with the exception of portfolio management companies).

Under the new regime, the French Prudential Control and Resolution Authority (*Autorité de contrôle prudentiel et de résolution*) has the power to implement a number of resolution measures. Such measures include: (i) requesting information; (ii) appointing a special resolution administrator; (iii) changing governance; (iv) transferring all or part of a business unit; (v) temporarily using a bridge financial institution in support of the failing institution; (vi) activating subordinated bond loss-absorption clauses; (vii) recapitalizing the failing institution; and (viii) suspending or prohibiting certain businesses of the failing institution. Two measures are of particular relevance to the OTC derivatives industry: (i) a prohibition of termination or closeout netting in case of a temporary or permanent transfer, to a bridge or successor financial institution, of transactions governed by a master agreement, without prejudice to the single agreement principle; and (ii) the declaration of a temporary stay of the exercise of early termination and closeout netting rights. A more detailed discussion of Law No. 2013-672 can be accessed at http://www.jonesday.com/making-french-banks-safer-impact-of-the-new-french-law-relating-to-separation-and-regulation-of-banking-activities-on-netting-agreements-08-09-2013/.

Other recent European developments can be tracked in Jones Day's *EuroResource*, available at http://www.jonesday.com/euroresource--deals-and-debt-september-2013/.