European Perspective in Brief

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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.

France—French insolvency proceedings will be significantly overhauled in the near term, as reforms are currently being implemented under the Enabling Law of January 2, 2014. The reforms are designed to strengthen the efficacy of preventive measures and procedures in order to avoid the need for formal public insolvency proceedings. Various new provisions are being contemplated, including the nonenforceability of contractual clauses providing for acceleration of an obligation in the event that *mandat ad hoc* or *conciliation* proceedings are commenced with respect to a debtor. It is also anticipated that it will now be possible to implement, in a conciliation agreement, a business plan providing for the sale of a company.

Furthermore, it is anticipated that the rules governing an accelerated financial safeguard procedure (*procédure de sauvegarde financière accélérée*) will be amended to make the procedure more accessible. Fast-track safeguard procedures would be segmented into two different procedures: one limited to financial creditors, and a second, separate procedure for financial creditors and trade suppliers.

Finally, the reforms are intended to balance the interests of different stakeholders involved in insolvency procedures. The reforms would be less "debtor-friendly" and would introduce a mechanism enabling creditors to be more involved in the process. For example, creditors would have the ability to propose their own restructuring plans. A presiding court would also have the power to order a sale of the controlling shareholders' shares or to appoint a legal representative to vote on a debt-for-equity swap, instead of the shareholders. The possibility of a "cram-down" of equity interests in French reorganization proceedings akin to procedures governing the confirmation of nonconsensual chapter 11 plans in the U.S. will have serious ramifications for the way future out-of-court restructurings are conducted.

The U.K.—On February 24, 2014, the English Court of Appeal ruled in *Pillar Denton Limited and Ors v Jervis & Ors* [2014] EWCA Civ 180 that an administrator or liquidator must pay the rent arising with respect to property leased by the company for any period during which the administrator or liquidator retains possession of the premises for the benefit of the administration or liquidation. Previous judgments (namely *Goldacre (Offices) Ltd v Nortel Networks UK Ltd* [2009] EWHC 3389 (Ch); [2011] Ch 455 and *Leisure (Norwich) II Ltd v Luminar Lava Ignite Ltd* [2012] EWHC 951 (Ch); [2013] 3 WLR 1132) relating to rent payable by a company in administration and whether an insolvent company's liability to pay rent will rank as an expense of the administration have been hotly disputed by landlords. In *Goldacre*, the High Court held that rent payable in advance and falling due before the commencement of administration could not be payable as an administration expense, even though the administrator might retain the property for the purposes of the administration for the whole or part of the period to which the advance payment related. The judgment in *Goldacre* has caused insolvency

practitioners and their advisors to make commercial decisions on the timing of appointments so as to prevent rent from becoming payable as an administration expense.

In *Pillar Denton*, the court of appeal (overruling *Goldacre*) held that an administrator must make payments at the rate of the rent for the duration of any period during which he retained possession of the premises for the benefit of the administration and that the rent would be treated as accruing from day to day. Accordingly, rent payable in advance (like rent payable in arrears) will be payable as an expense of the administration or winding up for the duration of the period of "beneficial retention." The duration of that period will be a question of fact and is not determined merely by reference to whether a rent day occurs before, during, or after such period.

Spain—On January 24, 2014, the Council of Ministers approved Royal Decree-Law 1/2014, which introduces certain changes in administrative regulations regarding the state's liability in the event of the termination of an administrative toll-road concession. Two specific regulations were amended in order to clarify the role of the state if it is obligated to compensate concession companies upon the termination of a concession: (i) Law 8/1972 of May 10, 1972, which governs the construction, maintenance, and operation of toll roads under the concession regime; and (ii) Legislative Royal Decree 3/2011 of November 14, 2011, in which the Rewritten Text to the Public Sector Agreements Act was approved.

The amendments were motivated by recent Spanish Supreme Court rulings construing the role of the state in expropriation procedures in the aftermath of the controversial toll-road concessions for Madrid (*Radiales*), whereby the state was declared liable (upon default of the concession

companies) for the payment of expropriation liabilities. The amendments were also enacted in the context of Spain's proposed rescue project for failed toll roads. The new changes were effective as of January 26, 2014. It is anticipated that the amendments will be retroactive. A more detailed discussion of the amendments can be found at http://www.jonesday.com/spanish-toll-motorways-concessions-new-regulations-regarding-the-states-liability-in-the-event-of-liquidation-01-29-2014/.

Spain—On March 8, 2014, significant changes to the Spanish Insolvency Act (the "Act") became effective that implement urgent reforms to the rules and procedures governing the refinancing and restructuring of corporate debts. The primary objective of Spanish Royal Decree-Law 4/2014, dated March 7 ("RDL 4/2014"), is to improve the legal framework for refinancing agreements and to remove the legal obstacles that have previously impeded the successful execution of restructuring and refinancing transactions.

Among the most significant amendments to the Act implemented by RDL 4/2014 are the following:

- **Enforcement of security.** Extending the stay on enforcement actions in pre-insolvency proceedings to assets required for the trading of the debtor's business. However, the moratorium on enforcement by secured creditors upon commencement of insolvency proceedings no longer applies where the relevant collateral comprises shares in an SPV holding company (provided that this will not affect the ability of the debtor to trade);
- **Insolvency claw-back.** A new safe-harbor regime for refinancing agreements removing the risk of claw-back in certain circumstances;
- **New money priority.** Priority as administration expense for new monies injected as part of a refinancing;

- **Insider rules for "compulsory subordination."** New rules governing the priority of related-party claims so that debt held by holders of equity obtained following a debt-for-equity swap is no longer at risk of being subordinated as an "insider" transaction;

- **Personal liability for shareholders.** Personal liability for equity holders who unreasonably reject a debt-for-equity swap as part of a refinancing agreement where the debtor is later declared insolvent and is forced into liquidation;

- **Voting.** Modified thresholds and procedures for creditors, as well as court approval of refinancing agreements, that will make it easier for a debtor to propose and obtain approval for a refinancing agreement; and

- **Takeover act exemptions.** Certain exemptions from the rules regarding takeover bids where a controlling stake in a company is acquired by means of a debt-for-equity swap.

A more detailed discussion of RDL 4/2014 is available at

http://thewritestuff.jonesday.com/rv/ff0015f1d33f32336c46ec8e5b4e98e3674acf89/p=3430586.

Other recent European developments can be tracked in Jones Day's *EuroResource*, available at

http://www.jonesday.com/euroresource--deals-and-debt-02-28-2014/.