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# *APCOA Parking: Can the Amendment of Governing Law Provisions in Finance Documentation Provide a Global Gateway to U.K. Schemes of Arrangement?*

The recent case of *APCOA Parking*[1] has set a precedent by allowing yet more non-English incorporated debtors to implement financial and corporate restructurings using English schemes of arrangement. The *APCOA Parking* case endorses the premise that a simple amendment to the governing law and jurisdiction clause in finance documents could be a sufficient basis to give the English court jurisdiction to sanction a scheme of arrangement involving a non-English company, even when there are no other prior legal or factual connections to England. As a consequence, international companies may seek to use an English scheme of arrangement where a restructuring of financial indebtedness (whether secured or not) in their home jurisdictions is not available absent a damaging and more costly insolvency/bankruptcy process. Whether U.S. debtors looking to effect balance sheet restructurings will now consider using the flexible benefits of English schemes of arrangement as a viable alternative to chapter 11 cases remains to be seen. The *APCOA Parking* case, however, opens up the possibility that U.S. debtors will attempt to avail themselves of a scheme and then seek recognition of that scheme in the United States through a chapter 15 proceeding. We reported on this type of forum shopping in a previous client alert.[2]

## Schemes of Arrangement

A scheme of arrangement in England and Wales is a statutory (non-insolvency) process by which a company can restructure its secured and unsecured debt with relevant creditors' consent.

The company must seek leave of the court before convening meetings of the creditors whose rights the scheme would alter. English courts have held in recent years that a foreign company must demonstrate a "sufficient connection" to England for leave to be granted. In the last few years an increasing number of foreign companies seeking to propose schemes of arrangement have relocated their centres of main interests ("CoMI") to the U.K. to satisfy the sufficient connection test to avail themselves of the insolvency jurisdiction of the English courts.[3] An English court may then grant leave, allowing the company to convene a meeting of its scheme creditors. If the requisite majority of scheme creditors attending the meeting vote for the scheme, then the English court can sanction the scheme (i.e., confirm the plan).[4]

Schemes of arrangement require consent from (i) at least 75% in value of scheme creditors' claims, and (ii) more than 50% of scheme creditors by number, in each case voting at the relevant creditors' meeting, thus enabling a cram-down of minority creditors who oppose the scheme's terms.[5] If there is

more than one class of scheme creditors, then each creditor class will have a separate vote.[6] Notably, the English courts may not seek to create distinctions among different tranches of senior secured debt by separating such creditors into different classes, even where such tranches have different orders of priority, maturities, and interest rates.[7]

Although schemes have from time to time been contested, there is typically far less court involvement than in a U.S. chapter 11 case. Costs also are often lower, and, unlike chapter 11 cases, there are no official creditors' committees. A scheme also does not cause the same disruption as bankruptcy or insolvency proceedings because it may affect only one portion of a capital structure while not impacting the debtor's business and contracts. Moreover, if a scheme has been pre-approved by the requisite creditor majorities (which is common in many cases involving loan and bond restructurings) and the court dates are duly booked, then the statutory timetable allows the scheme to become effective within as little as seven to eight weeks from the first court date. If applicable U.S. credit documentation can be amended to make them subject to English law and the jurisdiction of the English courts, one may see certain U.S. debtors (particularly those with U.K. affiliates) actively considering a scheme as a route to effect a balance sheet restructuring, and, in turn, having the scheme recognised in the U.S. via a chapter 15 proceeding.

### How Has the "Sufficient Connection" Test Been Met?

The *Rodenstock GmbH case*[8] in 2011 was the first to allow a non-English incorporated company to enter a scheme of arrangement where English law-governed finance documents subject to English court jurisdiction was the debtor's sole connection to the U.K.

Not all foreign companies, though, have relied solely on the governing law clause, and some have shifted their CoMI to the U.K. For example, *Magyar Telecom B.V.'s*[9] notes were governed by New York law, so the company could not rely on the *Rodenstock* approach. The issuer instead shifted its CoMI from the Netherlands to the U.K. by, among other things, opening a U.K. office, sending notices to creditors and appointing U.K.-based directors, in order to avail of an English scheme of arrangement. A CoMI migration with a sufficient degree of permanence will satisfy the "sufficient connection" test, but such a shift is easier to undertake with a holding company or a special purpose vehicle issuer than with an operating company that has many potential objecting counterparties and creditors. The *Rodenstock* approach is clearly preferable for its simplicity. Indeed, Mr Justice Briggs stated in *Rodenstock* that as long as the relevant finance documents were governed by English law and subject to the jurisdiction of the English courts then the "sufficient connection" test would be met,[10] and there would be no need for a CoMI shift.

### The Decision in *APCOA Parking*

Mr Justice Hildyard in the *APCOA Parking* case seemed to pursue this line of thought further, deciding that foreign borrowers and guarantors could launch a scheme of arrangement in England despite having their CoMI outside England. The sole basis of the companies' sufficient connection to the U.K. was that a requisite contractual majority (66.6%) of their lenders had agreed to change the governing law and jurisdiction clause in the loan agreement from German law and the Frankfurt courts to English law and the English courts.

As a result, the company was able to propose a scheme to extend the maturity of its debt by three months, which otherwise would have required unanimity of its senior lenders. Such unanimous consent would likely not have been forthcoming, resulting in a German insolvency proceeding.

No opposition was presented by any creditor at the convening hearing and Mr Justice Hildyard's decision remains unchallenged, suggesting that the dissenting creditors acknowledged that there was no basis for opposing his reasoning. Furthermore, 83 out of the 93 creditors voted in favor of the scheme on April 9, 2014, with all of the other 10 creditors choosing to abstain rather than vote against the scheme. Indeed, APCOA's lawyer cited this lack of opposition as an indication that the scheme was fair to the creditors, which is one of the main factors to be considered by an English court, leading to the court sanctioning the scheme on April 14, 2014.

### Impact on Foreign Debtors

A thorough understanding of the impact of *APCOA Parking* will not be possible until a transcript of the sanction hearing, showing all of the judge's comments, becomes available.

Nonetheless, the case appears to follow and pragmatically extend the *Rodenstock* principles by allowing a non-English incorporated company, the CoMI of which remains outside England, to use an English scheme of arrangement to cram-down minority creditors, even where the relevant finance documents were not originally governed by English law.

Governing law and jurisdiction clauses are not generally provisions that require unanimous lender consent to amend. *APCOA Parking*, therefore, suggests a relatively quick and straightforward means of making a scheme of arrangement available to a non-English company. Proposing a scheme may allow a company to circumvent those provisions of a credit agreement, such as maturity dates, payment terms, or collateral releases, that are typically implicated in a restructuring and which often cannot be amended without approval from a super-majority or all lenders. The *APCOA Parking* case also could have significant impact in the bond market, where a bare majority of holders can approve a change of governing law and jurisdiction.

Moreover, *Magyar Telecom B.V.* was able to obtain recognition of its scheme under chapter 15 of the U.S. Bankruptcy Code,[11] as opposed to commencing cases under chapter 11, and counsel for *APCOA Parking* produced expert evidence showing that its scheme would similarly be recognised in both Germany and the United States.[12] It remains to be seen, however, whether a U.S. court would recognize a scheme where the only connection to the U.K. is a recent change in the governing law and jurisdiction clause in U.S. credit documentation. Indeed, some U.S. courts have raised concerns about debtors attempting opportunistically to shift CoMI prior to a chapter 15 filing, thereby thwarting third party expectations.[13]

Nevertheless, pursuing a scheme and having that scheme recognized in another jurisdiction arguably enables debtors to reorganise their debt with their creditors with minimal publicity. As a result, forum shopping in England and Wales to propose a scheme of arrangement or a company voluntary arrangement is likely to grow in popularity – with companies from Germany, Greece, Italy, Spain, Denmark, Hungary, and Vietnam[14] already having done so.

Lastly, even where there is no obvious connection to the U.K., non-English incorporated borrowers and issuers (including those based outside the E.U.) can usefully employ the principles set out in *Rodenstock*, and now extended by *APCOA Parking*, as a negotiating tool with their creditors.

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[1] See *Re APCOA Parking (UK) Ltd & Ors* [2014] EWHC 997 (Ch) for a transcript of the convening hearing on 26 March 2014. The sanction hearing took place on 14 April 2014 and, at the time of writing, there is no transcript of that hearing.

[2] *This Trend May Not Be Your Friend: Could Catalyst Paper Spawn a New Breed of Chapter 15 Cases for U.S. Debtors?* Paul Hastings Client Alert, April 2012 (noting risk that a U.S. company may seek to avail itself of non-U.S. insolvency regime and then seek recognition of non-U.S. proceeding in United States through chapter 15 case).

[3] *See, e.g., Re Magyar Telecom B.V.* [2013] All ER (D) 20 (Dec) and *Re Zlomrex International Finance SA* [2013] EWHC 4605 (Ch).

[4] Companies Act 2006, section 899.

[5] Companies Act 2006, section 899(1).

[6] Companies Act 2006, section 899(1); *see also Re Hawk Insurance Company Limited* [2001] 2 BCLC 675.

[7] *Primacom Holding GmbH and others v Credit Agricole and others (No. 1)* [2011] EWHC 3746 (Ch) 20.12.11 and *(No. 2)* [2012] EWHC 164 (Ch) 20.01.12, and *APCOA Parking (UK) Ltd & Ors [2014] EWHC 997 (Ch)*.

[8] *Re Rodenstock* [2011] EWHC 1104 (Ch).

[9] *Re Magyar Telecom B.V.* [2013] All ER (D) 20 (Dec).

[10] *Re Rodenstock* [2011] EWHC 1104 (Ch).

[11] *In re Magyar Telecom B.V.*, Case No. 13-13508 (SHL) (Bankr. D. Del. Dec. 12, 2013). We note, however, that the request for recognition in that case was uncontested and may thus be of limited precedential import.

[12] This included evidence from distinguished academics and legal experts from different jurisdictions. The expert for Germany was Professor Dr. Paulus.

[13] *See, e.g., In re Fairfield Sentry Limited, et al.*, 440 B.R. 60, 66 (Bankr. S.D.N.Y. 2010) (noting that "of great concern to the Court is the potential for mischief and COMI manipulation" and therefore requiring "a broader temporal COMI assessment where there may have been an opportunistic shift to establish COMI (i.e., insider exploitation, untoward manipulation, overt thwarting of third party expectations)").

[14] *See Re Vietnam Shipbuilding Industry Group* [2013] All ER (D) 241 (Jun).