C/M/S/ Cameron McKenna

The heavyweight

Comprehensive coverage of this month's banking and insolvency law

June 2007

Looking forward

Developments scheduled for the month ahead

Date	Item	Significance
1 July 2007	**CrestCo changes name to Euroclear**	CRESTCo is changing its legal and operating name to Euroclear UK & Ireland Limited with effect from 1 July 2007.
1 July 2007	**UCP 600**	Revised rules on documentary credits expected to be written into most letters of credit come into effect.
16 July 2007	**European Commission Green Paper on retail financial services**	The Commission invites comments on the Green Paper by 16 July 2007 and intends to hold a public hearing on the issues raised in it during September 2007.
18 September 2007	**FSA to regulate travel insurance**	Consultation closes on draft legislation.
1 October 2007	**Companies Act 2006, partial implementation**	Sections relating to e.g., loans to directors, AGMs and meetings, written resolutions.
1 November	**Markets in Financial Instruments Directive**	MiFID will be implemented.

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Banking

CASES

Banking

Bank liability

"Agent and security trustee" binds other banks

British Energy Power & Energy and others v Credit Suisse and others

[2007] All ER (D) 190 (Jun) [2007] EWHC 1428 (Comm) Queen's Bench Division (Commercial Court) Langley J 19 June 2007

Restrictions contained in option agreements, entered into by one bank as an agent and trustee for a consortium of banks, bound the consortium of banks.

The proceedings concerned the Eggborough coal fired power station in North Yorkshire. The claimants were companies in the British Energy group. The third claimant was the owner of the business and assets of the power station. The station was acquired by British Energy in March 2000 for £646m. It was re-financed in July 2000 by a £550m loan advanced to the third claimant by a consortium of banks on the terms of a credit agreement. From 2002 to 2004 the claimants encountered financial difficulty, resulting in a general restructuring of its finances. In relation to the power station in September 2004 four detailed agreements were executed, namely an amended and restated version of the July 2000 credit agreement; a share option agreement, an asset option agreement and an amended and restated intercreditor deed. The effect of the restructuring was that the banks agreed to compromise their claims under the July 2000 credit agreement by writing off about £340m of principal debt due from the third claimant and agreeing to a new credit facility of £150m, and the claimants agreed to grant the options to purchase the shares in or assets of the third claimant in accordance with the two option agreements. The two option agreements were virtually identical; they were entered into by Barclays Bank plc (Barclays) as 'agent and security trustee' for the banks, including the first defendant which was the successor of about 90% of the interests of the banks. The second and third defendants (referred to collectively as 'Ampere') were companies incorporated for the purpose of consolidating various sub-participation rights in relation to the facilities granted by the banks to the third claimant. The consolidation was known as the Ampere transaction and it formed the basis of the dispute which led to proceedings being issued.

The first issue concerned whether the first defendant was bound by the terms of the option agreements at all. Those agreements contained restrictions on transfer or other dealing with the option

rights. The claimant contended that the words 'as agent and security trustee' bound the banks to the terms of, and in particular the restrictions contained in, the agreements. The defendants argued that the words were no more than descriptive of the role of Barclays and Barclays alone was bound by the restrictions. The second issue concerned whether, even if the first defendant was a party to the option agreements, the Ampere transaction was or would be (if executed) a breach of the restrictions concerning assignment or transfer or other disposition of the rights within the option agreements, in particular cl 31.2.1 which provided that until March 2010 'the buyer' might not enter into 'any agreement or other arrangement' that 'relates to the exercise of any of its rights under this Agreement'.

HELD:On the true construction of the relevant agreements, the defendant and other banks were parties to the option agreements, and bound by the restrictions therein. The Ampere transaction, if completed, would infringe the relevant restrictions also. The option agreements were valid and enforceable on their terms.

Unlawful bank charges case – compound interest?

Halliday v HBoS plc

[2007] All ER (D) 66 (Jun) Queen's Bench Division Underhill J 8 June 2007

Bank – Banker/client relationship – Implied term – Bank making unauthorised charges on client's account – Bank realising error and making full repayments with simple and statutory interest – Client contending his entitlement to compound interest on repayments – Whether term to be implied for compound interest.

The claimant opened a current account with the defendant bank. From time to time, the bank debited the claimant with various charges. The claimant contended that those charges were made unlawfully. He issued proceedings in the county court. The bank repaid the claimant the full amount which had been deducted, together with a number of other amounts which comprised simple and statutory interest, but not compound interest. Thereafter, the bank applied to strike out the claimant's claim, on the ground that there was no sum between it and the claimant outstanding. A single judge acceded to that application. The claimant appealed.

He submitted that the judge had erred in law, having not awarded him compound interest on the repayments which had been made by the bank. He argued, inter alia, that a term should be implied as a matter of law, to entitle him to the receipt of compound interest, as such a course was fair in the circumstances, particularly in light of the fact that the bank enjoyed a contractual right to charge compound interest to a customer for any unauthorised overdrafts.

The appeal would be dismissed.

Having regard to settled law, a term could not be implied simply for reasons of fairness, but could only be implied in circumstances where it was necessary to give business efficacy to a contract. In the instant set of circumstances, it was not necessary for such a term to be implied. The claimant had his rights protected by virtue of the fact that the bank had repaid him the full amount which it had unlawfully charged, together with the

simple and statutory interest which would have accrued during the period that those charges remained with the bank.

Accordingly, compound interest would not be awarded on the repayments that had been made by the bank.

Scally v Southern Health and Social Services Board (British Medical Association, third party) and other appeals [1991] 4 All ER 563 applied.

Hedge funds

Hedge fund liability

Signet Partners Ltd V Signet Research & Advisory Sa & Ors

[2007] EWHC 1263 (QB) QBD (Burton J) 24/5/2007

There had been no breach of an introducer agreement made between a hedge fund company and an introducer of hedge funds and the company was only liable to account for fees due under the agreement in relation to clients introduced by the introducer.

Trust

Law Debenture Trust Corporation Plc v (1) Concord Trust (2) Acciona SA (3) Elektrim Finance SA (4) Vivendi Holdings I Corp (2007)

[2007] EWHC 1380 (Ch) Ch D (Lewison J) 15/6/2007

An issuer and guarantor of bonds, which were held in trust, was not entitled to redeem its security that was in place to provide security for the performance of its obligations and the trustees should not be directed to distribute to bond holders any part of the trust money that might be required to indemnify them.

The court was required to determine issues between the claimant (L) and third defendant (E) in proceedings relating to bonds and securities. E was the issuer and guarantor of bonds, governed by bond conditions, held in trust by L. E had given security for the performance of its obligations and the securities were held under a security administration agreement. Following various events of default L gave notice of acceleration to E, which culminated in a summary judgment in favour of L that declared that events of default had occurred, that the bonds had fallen due and payable, that interest was owing under the trust deed and that L was entitled to its costs under the trust deed. E subsequently made a payment to L. There was no agreement between the parties about the amount required to redeem the bonds, what was to happen about various outstanding litigation, or about payment of L's costs and expenses both unpaid and future. The issues that arose for determination were, amongst other things, whether L was obliged to release to E the security given under the trust deed and whether L was obliged to distribute the monies to bond holders.

HELD: (1) E was not yet entitled to redeem its security in whole or in part. It was common ground that the contractual date for repayment had passed without payment; however, no equitable right of redemption arose. The equitable right to redeem could not be used to relieve the mortgagor of obligations that he would have had if he had exercised his legal right to redeem. The security secured not only accrued but contingent liabilities that might be incurred by L and against which E was obliged to indemnify it. When E

made the payment to L there had been a shortfall between sums accrued, which were secured by the security, and the amount actually paid. E was not entitled to redeem its securities until it had made provision for contingent liabilities assessed on the basis of what was, on reasonable assumptions in favour of L, the worst case scenario. (2) L should not be directed to distribute to the bond holders any part of the trust monies that might be required to indemnify L. The agreed arrangements did not allow for a partial redemption of the security. L was not entitled to redeem the bonds in full and retain the security. However, in its capacity as trustee L was entitled to retain, out of the trust fund, sufficient to secure its entitlement to indemnity. L's right to indemnity trumped the bondholders' entitlement to be paid and E's right to redeem its security.

Judgment accordingly

Security

Bonds & Guarantees

Demand on guarantee not needed before service of statutory demand

TS & S Global Ltd v Fithian-Franks and others

[2007] All ER (D) 171 (Jun) [2007] EWHC 1401 (Ch) Chancery Division David Richards J 18 June 2007

Insolvency – Statutory demand – Setting aside statutory demand – Liability under guarantee – No demand under guarantee served prior to service of statutory demands – Whether demand under guarantee necessary.

Statutory demands were served by the company on five individuals (the guarantors) who were shareholders in T Ltd and who by an agreement in writing dated 21 November 2005 (the guarantee) guaranteed the liabilities of T Ltd under a supply contract with the company. The guarantors applied to set aside the statutory demands on the ground that there had been no demand under the guarantee served prior to service of the statutory demands. They submitted that the liability under the guarantee was not immediately payable when the statutory demands were served, with the result that the demands could not be relied on for the purposes of establishing that the guarantors were unable to pay their debts under ss 267 and 268 of the Insolvency Act 1986. They relied on the terms of cl 2 of the guarantee that ‘the guarantor shall pay to the beneficiary on demand’ the amount unpaid by T Ltd, coupled with cl 2.2 which provided for the means of service of the demand. The district judge granted the guarantors’ application. The company appealed.

It contended that the guarantors’ liability under the guarantee was immediately payable before service of the statutory demand without the need for any prior demand for payment. Although the guarantee required the guarantors to pay on demand, it also provided in cl 1 that they were liable ‘as primary obligors’.

HELD: The appeal would be allowed.

In the circumstances the guarantors’ liability under the guarantee was immediately payable by them, without the need for a demand, before service of the statutory demands.

Law Debenture Trust Corporation plc v Concord Trust and others

[2007] All ER (D) 149 (Jun) [2007] EWHC 1380 (Ch) Chancery Division Lewison J 15 June 2007

Companies – Bond – Bond issue – Monies to value of bonds repaid to trustee by guarantor – Various issues arising in relation to redemption of bonds and security – Whether payment by guarantor redeeming bonds.

The case concerned a Eurobond issue of €510m 2 per cent bonds (the bonds) issued by Elektrim Finance BV and guaranteed by the third defendant. The claimant company was the trustee and the first and second defendants were bondholders. Following a number of disputes in relation to the bond issue *([2005] 1 All ER (Comm) 699; [2005] 2 All ER (Comm) 476; [2005] All ER (D) 73 (Sep); [2005] All ER (D) 100 (Nov) and [2006] All ER (D) 97 (Jun))*, on 26 October 2006 the third defendant paid the trustee the sum of €510m. That amount was paid without any agreement between the parties about the amount required to redeem the bonds, about what was to happen to outstanding extra-territorial litigation, or about the payment of the claimant's costs and expenses. Subsequently, a number of issues arose concerning, inter alia, the interpretation of the trust documents.

The issues that fell to be determined included: (i) whether the bonds had been redeemed; (ii) whether the claimant was obliged to release the security; (iii) whether the claimant was entitled to apply the monies to discharge costs, expenses and remuneration already incurred and/or to provide a retention against future costs and/or liabilities; (iii) whether the claimant was obliged to distribute the monies; and (iv) whether interest had continued to accrue on the bonds since 26 October 2006.

HELD: On a true construction of the contractual documentation, the bonds had not been redeemed by the third defendant. Moreover, the third defendant was not entitled to redeem its security until the bonds had been redeemed. That security secured not only accrued liabilities, but also contingent liabilities which could have been incurred by the claimant and against which the third defendant was obliged to indemnify it. In its capacity as trustee, the claimant was entitled to retain out of the trust fund sufficient to secure its entitlement to indemnity. Under the terms of the trust, the claimant's right to indemnity 'trumped' the bondholders' entitlement to be paid and the third defendant's right to redeem its security. Accordingly, the claimant would not be directed to distribute to the bondholders any part of the trust monies that (on a reasonable but worse case assumptions) might have been required to indemnify the claimant. Moreover, interest would continue to run unless and until the monies held by the claimant were either in the hands of the bondholders or fell to treated as so doing.

Re Rudd & Son Ltd (1986) 2 BCC 98; Law Debenture Trust Corporation plc v Elektrim Finance BV and others [2005] All ER (D) 73 (Sep) considered.

LEGISLATION

The Regulation of Investigatory Powers (Investigation of Protected Electronic Information: Code of Practice) Draft Order 2007

This Order brings into force the code of practice prepared under section 71 of the Regulation of Investigatory Powers Act 2000 relating to the investigation of protected electronic information under Part 3 of that Act. Under section 72(1) of that Act, a person exercising any power or duty in relation to which provision may be made by a code of practice under section 71 must, in doing so, have regard to the code's provisions (so far as applicable).

The full text is available at http://www.opsi.gov.uk/si/si2007/draft/20077245.htm

(Date in force, 1.10.07)

The Regulation of Investigatory Powers (Acquisition and Disclosure of Communications Data: Code of Practice) Draft Order 2007

This Order brings into force the code of practice prepared under section 71 of the Regulation of Investigatory Powers Act 2000 relating to the acquisition and disclosure of communications data (as defined by section 21(4) of that Act) under Chapter 2 of Part 1 of that Act. Under section 72(1) of that Act, a person exercising any power or duty in relation to which provisions may be made by a code of practice under section 71 must, in doing so, have regard to the code's provisions (as far as applicable).

The full text is available at http://www.opsi.gov.uk/si/si2007/draft/20077246.htm

(Date in force, 1.10.07)

The Financial Assistance For Industry (Increase of Limit) Draft Order 2007

Section 8 of the Industrial Development Act 1982 makes provision for the Secretary of State to provide financial assistance for industry.

Section 8(4) provides that the aggregate of—

- (a) the sums paid by the Secretary of State under this section or section 8 of the Industry Act 1972 (c.63), other than sums paid in respect of foreign currency guarantees, and
- (b) the liabilities of the Secretary of State under any guarantees given by him under either of those sections (exclusive of any liability in respect of interest on a principal sum so guaranteed and of any liability under a foreign currency guarantee), less repayments in respect of loans or guarantees (other than foreign currency guarantees) under either section shall not exceed the limit specified in section 8(5). Section 8(5), which was amended by section 1 of the Industrial Development (Financial Assistance) Act 2003

provided that the limit shall be £3,700 million but the Secretary of State may, on not more than four occasions, by Order made with the consent of the Treasury, increase or further increase that limit by a sum specified in that order not exceeding £600 million.

This is the first occasion that the sum has been increased under the section 8(5) (as amended) of the Industrial Development Act 1982. This Order increases the limit by £600 million to £4,300 million.

http://www.opsi.gov.uk/si/si2007/draft/20077476.htm

Anticipated date in force, 2007

ARTICLES

Banking

Bankers' liability for mistaken receipts and misdirected funds

Anchoring on the recent Court of Appeal decision in *Abou-Rahmah v Abacha*, this article seeks to review and evaluate the legal developments relating to bankers' liability for mistaken receipts and misdirected funds, in particular dishonest assistance and money had and received. For comparative purposes, reference will be made to the position under New York and California law.

(L. Chan Ho: JIBLR, 05.07, 240) 07.25.043

Capital Markets

Covered bond issuers take on the global market

The jumbo covered bond market had another banner year in 2006. A record €170 billion of issuance was accompanied by significant globalisation of the market. But the growing range of structures, from an ever-expanding group of countries, is a double-edged sword, adding complexity as well as diversification.

(Euromoney, 06.07, 116) 07.26.082

Commercial

Unincorporated associations

Unincorporated associations: getting to grips with the basics

This article examines how unincorporated associations are structured and governed, and the issues to be considered when dealing with them.

(E. Reed & M Ambrose, 06.07, 4
07.26.003

Reasonable endeavours

How far does "reasonable endeavours" go?

One of the differences between an absolute obligation merely to use reasonable endeavours is that in the latter case performance may be excused if it clashes with one's commercial interests. A second is that once it becomes apparent that the original "endeavours" has not yielded the objective, the obligation can lapse. Identifying when these qualifications do and do not apply is crucial, both from the viewpoint of those who conduct negotiations and draft the documents and from the perspective of those who subsequently wish to identify the obligation and ability to enforce the duty which is owed. This was examined in a recent case. *Rhodia International Holdings Ltd v Huntsman International LLC* [2007] EWHC 292.

(PLB, 2007, 28(1), 1) 07.26.009

Data Protection

Johnson v The MDU: 'processing' under the DPA

The recent Court of Appeal decision in *Johnson v The MDU* has generated debate over what constitutes 'processing' under the Data Protection Act, in this instance concerning the analysis and selection of data for input into a computer. In this article, the authors examine the judgment and its implications.

(T. Wright and D. Hodgkinson: e-commerce law & policy, 5.07, 5) 07.26.035

Finance & Security

Project Finance

PFI and the power of the plant

This article looks at the impact of the government's Energy White Paper, and asks whether nuclear really is a bankable option for the private finance industry

(D Smith: PPP Bulletin, 6.07, 12) 07.25.035

Real Estate Finance

Digging deeper

Real estate has never before presented so much opportunity for European structured finance investors, with CMBS, CRE CDOs, REITs and property derivatives all opening up new seams of relative value across the region. But could performance-related issues in the underlying assets dampen sentiment before these opportunities have been mined?

(J. Brandman: ISR, 06.07, 53) 07.25.039

Fraud

Carousel Fraud

Taken for a ride

Carousel trading costs the EU more than £40bn a year. And governments are still struggling to clamp down on the practice.

(M Raphael & N Swift: Lawyer, 18.06.2007, 25) 07.26.060

Money laundering

Implementation of the Third Money Laundering Directive – an overview

The EU Third Money Laundering Directive which is due to be implemented across the EEA by December 2007 brings significant changes to the existing regime governing anti-money laundering compliance by an ever expanding 'regulated sector'. This article aims to highlight the most significant changes to be introduced by the Directive and propose practical steps which investment firms and banks may wish to adopt in order to adequately accommodate such changes.

(E. Katz: LFMR, 05.07, 207) 07.23.087

Hedge funds

Have investors got the measure of quant?

Quantative hedge funds are increasing in number. Larger ones with the money to invest in research, technology and staff are becoming even bigger while smaller quant funds struggle to keep up. Are quantative strategies the sure-fire way to uncover and pin down alpha, as many investors are beginning to believe, or is human intervention in their implementation still all-too important?

(H Avery: Euromoney, 06.07, 124) 07.26.083

Regulation

Basel

The regulation of operational risk under the new Basel Capital Accord – critical issues

The article provides a selective discussion of critical constraints on the consistent implementation of the existing capital rules for operational risk under the New Basel Capital Accord. It shows how the elusive characteristics of operational risk and flexible operational risk measurement can compromise the integrity of risk-sensitive capital rules. The implications of our findings offer advice for a more effective regulatory framework.

(A. Jobst: JIBLR, 05.07, 249) 07.25.044

FSA

A year of enforcement

Last year the author asked to have a look at the caseload of the Financial Services and Markets Tribunal over the previous year. We thought that we would do the same for FSA enforcement practice to see whether the move towards principles-based regulation and the developing influence of Margaret Cole was changing enforcement practice.

(A Samuel: CM, 06.2007, 19) 07.26.064

MiFID

Multi-speed MiFID Europe: FSA goes for the chequered flag

The EU's Market in Financial Instruments Directive (MiFID) is expected to have far-reaching consequences when it comes into effect on 1 November 2007 and yet a multi-speed Europe makes it likely that the Directive will not have been implemented in many member states even though the Investment Services Directive will have been repealed. Discussion also continues around the remit of home and host regulators among other cross-border complexities that need to be watched and carefully managed if your firm is to capitalise fully on the promised opportunities. The author takes a look at the next steps for FSA-authorised firms.

(M Manzoor: CM, 06.2007, 15) 07.26.063

Trade Finance

Documentary Credits

The UCP600: documentary credits in the twenty-first Century

The focus of this article is upon the Uniform Customs and Practice for Documentary Credits (UCP), which consists of a set of principles which standardise banking procedures for payments by way of documentary credits. This article will examine some of the major changes made and will consider to what extent the UCP600 represents an improvement upon its predecessor.

(J. Ulph: JBL, 6.07, 355) 07.23.090

The Uniform Customs and Practice for Documentary Credits: their development and the current revisions

Summarises the reforms to the Uniform Customs and Practice for Documentary Credits (UCP), expected in force July 1, 2007, and compares the previous version of 1993. Considers:

- (1) the structure and nomenclature of the reformed version;
- (2) the position of issuing banks, advising banks, nominated banks and reimbursement banks;
- (3) amendments to credits;
- (4) the examination of documents;
- (5) formulae of rejection;
- (6) types of document; and
- (7) the legal effects and interpretation of the UCP.

Lloyd's Maritime and Commercial Law Quarterly L.M.C.L.Q. (2007) No.2 May Pages 152-180 Date: 1/4/2007-1/6/2007 E.P. Ellinger

TECHNICAL

Company

Companies Act 2006: Ministerial statement on implementation consultation

On 26 June 2007, Margaret Hodge, Minister for Industry and the Regions, issued a written statement regarding the government's position on certain key areas covered by the DTI's consultation on implementation of the Companies Act 2006 published on 1 March 2007 including:

- - reporting and accounting regulations;
- - procedure for derivative claims;
- - directors' home addresses;
- - limited disclosure of shareholders' addresses; and
- - a grace period for appointing natural directors.

DTI to become DBERR

On 28 June 2007, Gordon Brown announced, as part of his cabinet reshuffle, the creation of a new Department for Business, Enterprise and Regulatory Reform (DBERR).

As well as assuming responsibility from the DTI for policy on matters such as corporate law, energy and consumer issues, DBERR will be responsible for "creating the conditions for business success" and promoting "productivity and enterprise" across government and within the EU. In particular, it will promote better regulation across business. It will also take joint responsibility with the Department for International Development on trade policy, and with the Foreign and Commonwealth Office on trade promotion.

The Prime Minister also announced the creation of a Business Council for Britain to help the government with a strategy for the "long-term health of the UK economy". The Council will be made up of senior members of the business community.

Finance & Security

Cov-lite

ACT on covenant-lite loans

The Association of Corporate Treasurers has published a copy of a letter that it sent to the Treasury Select Committee on 20 June 2007.

The letter concludes that, while covenant-lite loans are more relaxed than highly leveraged loans, they do include significant covenants and restrictions (rather than *no* covenants as the name may suggest to some). The letter also explains that the Association of Corporate Treasurers is of the view that the covenants included in covenant-lite loan arrangements are generally similar to those included in high-yield bond documentation and are of an

"incurrence" nature (for example, preventing the borrower from taking on additional debt) rather than "maintenance" covenants (where, for example, the borrower agrees to keep its debt within defined parameters).

http://www.treasurers.org/purchase/customcf/download.cfm?resid=2302

Project Finance

NAO reports on PFI benchmarking and market testing

On 6 June 2007, the National Audit Office published via a press release a report, Benchmarking and market testing the ongoing services component of PFI projects. The report recommends that:

- 1) Public sector authorities procuring PFI projects should follow Treasury guidance on benchmarking and market testing (which already takes into account the NAO's findings). The guidance is incorporated in the Treasury's 2007 Standardisation of PFI Contracts version 4 (SoPC4). See Legal update, Standardisation of PFI contracts: latest edition of guidance published for more on SoPC4.
- 2) For the potential benefits of market testing to be realised, public sector project teams should foster competition between service providers, for example by keeping them informed about bidding opportunities.
- 3) The Treasury should draw up a central database of benchmarking and market testing information.

The report also contains a number of useful diagrams and flowcharts illustrating value testing processes and highlights some of the possible outcomes:

- 1) A price adjustment (up or down) for the incumbent service provider.
- 2) A new private sector service provider being appointed.
- 3) The service provision being taken in-house by the public sector.
- 4) A reduced specification being agreed.

Regulation

Accounting

CESR's technical advice on a mechanism for determining the equivalence of the generally accepted accounting principles of third countries

On 6 June 2007 CESR published its technical advice to the European Commission on a mechanism for determining the equivalence of the generally accepted accounting principles of third countries (non-EU countries) to IFRS as adopted by the EU. The Prospectus Directive and Regulation and the Transparency Directive require the Commission to establish by mid-2008 whether a given third country GAAP is equivalent to IFRS. This must be done in accordance with a definition of equivalence and an equivalence mechanism established before 1 January 2008. CESR has already advised the Commission on a definition of equivalence (broadly a third country GAAP should be regarded as equivalent if investors should be able to make a similar decision

irrespective of whether they are provided with financial statements based on IFRS or the relevant third country GAAP). This advice addresses the second element of the process and sets out the steps to be taken to determine equivalence of a particular country's GAAP. CESR advises that this should begin with the national standard setter applying to the Commission and setting out an assessment of whether the third country GAAP and IFRS are materially the same and, if not, an assessment of the differences. Even where there are significant differences, the CESR advice is that the GAAP may still be considered equivalent if the differences can be rectified by non-complex disclosures (which would be subject to audit). CESR would seek reactions from market users on the relevant GAAP and proposed rectifications by public . The Commission would then make the final assessment. CESR also recommends that the Commission extend the transitional period for those GAAPs which are converging with IFRS. The full text is available at http://www.cesr-eu.org/data/document/07_289.pdf

(CESR, June 2007)

Insurance

HM Treasury announces intention that FSA is to regulate all travel insurance

On 26 June 2007, HM Treasury announced its intention for the FSA to regulate the sale of travel insurance when it is sold together with a holiday and published a consultation on its preferred approach. The consultation includes draft legislation to implement the proposed regime. Currently, the FSA regulates insurance sold on a stand-alone basis, but not bundled travel insurance.

This announcement follows the Treasury Select Committee's recommendation in February 2007 that the FSA's insurance regime should be extended to cover bundled travel insurance. For information on HM Treasury's inquiry into the sale of stand-alone travel insurance.

HM Treasury proposes that all travel insurance sold in the UK should be sold through FSA authorised firms. However, travel firms that don't become FSA authorised firms would still be able to sell travel insurance as an 'appointed representative' of an appropriately FSA authorised firm. Travel firms may also be able to rely on certain exemptions from FSA authorisation.

The intention is for the new regime to be implemented by the FSA in January 2009. HM Treasury considers this would give the FSA sufficient time to consult on its own draft rules. Firms would be able to apply for FSA authorisation from 30 June 2008. An interim authorisation regime is also proposed, whereby travel firms who have applied for FSA authorisation by 15 November 2008 would be able to continue selling travel insurance if their application was still being processed.

This consultation is open for comment until 18 September 2007.

Unfair Commercial Practices

DTI issues response to consultation on implementing aspects of the Unfair Commercial Practices Directive

The DTI ave published a response to the consultation it launched in December 2006 on certain aspects of implementing the Unfair Commercial Practices Directive (UCPD). The DTI was seeking views on 2 key issues:

- (1) Which criminal offences in the regulations implementing the UCPD should be strict liability offences and which should require proof of a mental element ('mens rea').
- (2) Whether the OFT should have the power to bring criminal prosecutions.

The DTI has decided that:

- (1) The general prohibition on unfair commercial practices will require proof of a state of mind (knowledge or recklessness).
- (2) The remaining prohibitions on misleading actions and omissions, aggressive practices and certain specific unfair practices that are also prohibited, will be offences of strict liability.
- (3) The prohibition on "business-to-business misleading indications" in the regulations implementing the Misleading and Comparative Advertising Directive (MCAD) will be a strict liability offence.

The DTI plans to review these offences 3 years after the UCPD implementing regulations come into force.

The DTI has also decided to give the OFT the power to bring criminal prosecutions under the regulations implementing the UCPD and the MCAD.

26 June 2007 DTI

NOTICES

Auditor liability

publication of results of Commission consultation on possible reform

On 18 June 2007 the Commission published a summary report of responses received to the consultation on the need to reform the law on auditors' liability for negligence in the EU (see PLC Legal update, Auditor liability: Commission consultation).

The audit profession (comprising 30 of 85 responses received) supported the need for a Commission initiative on auditors' liability. The respondents from outside the profession were divided, with a majority of those supporting an initiative coming from countries where limitation on auditors' liability exists and a majority of those rejecting any Commission action coming from countries with unlimited liability.

Of the four different approaches to limiting liability proposed in the consultation paper, no clear preference was demonstrated. The preferred approach for the audit profession is to limit auditors' liability by capping (a cap based on audit fees being the best supported) whereas the supportive respondents from outside the profession favour the implementation of proportionate liability. Some respondents would support a combination of cap and proportionality. If a Commission recommendation is adopted, some respondents in favour of reform made the point that it should give member states maximum flexibility regarding the method to be adopted for the limitation at national level. Those opposed to any Commission action point out that member states can limit auditors' liability provided there is no evidence of a major threat to the public interest in the EU.

Among the arguments for reform discussed by the respondents is the lack of choice in the audit market. This is recognised as an important issue (and action to reduce barriers to entry should be taken) but not all respondents agree that limiting auditors' liability would be an appropriate way to address the issue.

http://ec.europa.eu/internal_market/auditing/docs/liability/summary_report_en.pdf

Banking

BBA looks at UK banking over 10 minutes

"10-minute snapshot of UK banking"

Every 10 minutes UK banks pay out more than £3 million through cash machines, the British Bankers' Association shows in its latest annual statistics published today.

The 24th Annual Abstract of Banking Statistics sets out the scale of one the UK's most globally successful business sectors. The abstract is the most authoritative and widely-used guide to key data on the UK banking and is produced annually by the BBA from figures supplied by its members and other bodies.

The Abstract shows that in every 10 minutes, banks:

- distribute nearly £3 million in cash through cash machines (Automated Teller Machines);
- process 25,000 cheques, 102,000 automatic credits and 123,000 plastic card payments;
- increase support for small businesses by £81,000;
- receive £750,000 from customers for safe keeping;
- approve mortgages worth more than £4 billion; and
- contribute £190,000 towards the UK's balance of payments and pay £175,000 in tax to the Exchequer.

Angela Knight CBE, Chief Executive of the British Bankers' Association, said:

"The 24th Annual Abstract of Banking Statistics proves the UK banking and financial sector is a huge global business bringing billions into the UK economy every year. At the same time our banks still manage to deal with thousands of transactions for people like you and me every few minutes.

"The figures also show trends in how we are all managing our finances. Perhaps most encouraging are signs that bank customers are saving more efficiently, using ISAs to an increasing extent. However we still need to do more to ensure borrowers are getting the right deal for them."

BBA 28 June 2007

Capital adequacy

CEBS consults in relation to its advice to the European Commission on large exposures

On 15 June 2007, the Committee of European Banking Supervisors published a consultation paper on the first part of its advice to the European Commission in relation to the large exposures regime under the Capital Requirements Directive.

The consultation closes on 15 August 2007. The Commission expects the Committee of European Banking Supervisors to report back to it by the end of September 2007.

Commodity Derivatives

Working Group advises cautious approach to commodity derivatives regulation

On 20 June 2007, the Commodity Derivatives Working Group (CDWG) issued a response to the European Commission, warning regulators to exercise caution when regulating for firms that trade commodity derivatives. The CDWG warned that "disproportionate or unduly burdensome regulation" could force out or prevent commodity firms from entering the market, and damage liquidity.

It also advised that financial regulators should not try to regulate the underlying physical markets.

The CDWG (which comprises the International Swaps and Derivatives Association (ISDA), the Futures and

Options Association (FOA) and the European Federation of Energy Traders (EFET)) published its comments in response to a consultation paper issued by the Committee of European Banking Supervisors on the risks in commodities trading.

Consumer Credit

OFT announces Consumer Credit Consultations

The OFT has announced a formal consultation on the draft guidance on fitness and requirements for holders and applicants of Consumer Credit licences, as well as simultaneously consulting on a draft statement of policy on civil penalties for failure to comply with requirements.

OFT, 26/06/07

Response to super-complaint on credit card interest rate calculation methods by Which?

The Office of Fair Trading has published its response to a super-complaint by *Which?* in relation to credit card interest rate calculations. The OFT proposes to undertake a new programme of work with the credit card industry and consumer bodies in a voluntary initiative to increase transparency and make the costs of credit cards easier for consumers to understand

The full text is available at http://www.oft.gov.uk/shared_oft/reports/financial_products/oft935.pdf

(OFT, June 2007)

Debt

HMRC consults on managing payment and debt

Options for improved payment methods for taxpayers and modernised debt management operations are contained in a consultation document published by HM Revenue & Customs. The consultation paper forms part of HMRC's work to modernise its powers, deterrents and the accompanying safeguards. It invites comments on a range of ideas to make it easier for taxpayers to pay on time and improve the way HMRC deals with those who do not.

(HMRC, 25/06/07)

ECGD

A new financial framework

Ministers have agreed a new financial framework for ECGD, the UK's official export credit agency. Minister for Trade, Investment and Foreign Affairs Ian McCartney announced the new framework, which has been agreed with the Chief Secretary to the Treasury and the Shareholder Executive, to MPs.

(ECGD, 26/06/07)

Investment Exchanges and Clearing Houses Act 2006

FSA consults on implementation

On 25 June 2007, the FSA published a consultation on amending certain parts of the FSA Handbook in order to implement the notification obligations under the Investment Exchanges and Clearing Houses Act 2006.

The consultation will be of interest to people who participate in the markets provided or supported by UK recognised investment exchanges and clearing houses .

The Act came into force in December 2006 and gave the FSA powers under the Financial Services and Markets Act 2000 to review the rules and other regulatory provisions made by recognised bodies and to prevent recognised bodies from making excessive regulatory provisions.

Since the Act came into force, the FSA has put temporary waivers in place to relieve recognised bodies from the notification obligation in certain cases.

Implementation of the Act will result in changes to the Recognised Investment Exchanges and Recognised Clearing Houses sourcebook and related definitions in the FSA's Glossary. The new rules and guidance will cover the extent of the notification duty on recognised bodies and the information that should accompany notifications. The FSA intends the proposed rule changes to broadly achieve the same outcome as the temporary waivers.

The deadline for comments on this consultation is 25 September 2007. The FSA plans to publish a feedback statement in the fourth quarter of 2007 and needs to make the relevant Handbook changes by 19 December 2007.

Retail distribution

A review of retail distribution

In this Overview the FSA summarises the issues they are seeking to resolve through this review of retail distribution, the ideas that have already been put forward, and how far they think these ideas could make a real difference to the retail investment market. They provide more detail later in the document, together with the questions they want to answer and the further work we need to do before we decide how to go forward.

http://www.fsa.gov.uk/pubs/discussion/dp07_01.pdf

(FSA Discussion Paper 07/1, June 2007)

Insolvency

CASES

Insolvency process

Would purpose of administration be achieved?

Re Skycat Group Ltd

[2007] All ER (D) 295 (Jun) CHANCERY DIVISION RIMER J 25 JUNE 2007

Company – Administration – Order – Company being funded by two groups of investors – Relationship between investors subsequently breaking down – Company becoming insolvent on cashflow basis – Applicant creditors applying for administration order in respect of company – Whether purpose of administration likely to be achieved – Insolvency Act 1986, Sch B1, para 11.

SG Ltd (the company) was incorporated in August 2005 to acquire the assets of ATG Ltd, comprising intellectual property rights and unique patents relating to air ship technology. The company itself was a joint venture between SI Srl (the A investor) and HAP Ltd (the B investor). The company had been entirely funded by the A and B investors who had subscribed for shares or made unsecured loans to the company. By the terms of the joint venture agreement, the A investor held 55% of the company's shares while the B investor held 45%. The relationship between the A and B investors subsequently broke down. The B investor was critical of the way in which the chief executive officer and a director appointed by the A investor had managed the company's business. There were disputes as to further funding and the A investor appeared to be unwilling to support the sale of the company's business as a going concern. The company became insolvent on a cashflow basis and there were a number of disputes between the A and B investors on corporate governance and financial issues. Neither investor was prepared to provide further funds to the company until those disputes were resolved. There was also an urgent requirement for funding of £200,000 for, inter alia, the payment of wages to the company's staff. In those circumstances, three of the company's creditors (the applicants) applied for an administration order in respect of the company pursuant to para 12(1)(b) of Sch B1 to the Insolvency Act 1986 on the basis that the statutory purpose of administration under Sch B1 to the Act would be achieved by the making of an administration order. At the hearing of that application, the A investor sought an adjournment to give it time to make a payment of £200,000 to the company in order for it to pay its staff. The adjournment was granted, and in the meantime the A investor attempted to transfer the funds to the company's accounts. Those attempts were met with

delays on the part of the A investor's bank, which wanted to ensure that the transfer was not a money laundering transaction. On the return date, the moneys had still not been transferred to the company's account. The applicants pressed for an administration order, while the A investor requested a further adjournment to give the moneys time to reach the company's bank account.

The applicants submitted that British Aerospace was interested in buying the company's intellectual property rights and patents, and even if it did not do so, there were other potential purchasers with whom a sale could be negotiated, with the effect that the company would be rescued as a going concern or produce a better result for creditors than would be likely if the company was to be wound up.

The application would be allowed.

Pursuant to para 11 of Sch B1 of the Act, the court might make an administration order only if it was satisfied that: (i) the company was or was likely to become unable to pay its debts, and (ii) that the administration order was reasonably necessary to achieve the purpose of administration.

In the circumstances, a further adjournment of the application would serve no purpose. Even if the moneys were paid into the company's bank account in the next few days, it would only be a short answer to the company's problems. The relationship between both groups of investors had broken down and there was no means of resolving the difficulties between them. On the evidence, the purpose of administration was likely to be achieved if the administration order was made.

The administration order would be granted as sought.

Ring-fenced fund exceptionally ignored

Re Hydroserve Ltd

[2007] All ER (D) 184 (Jun) Chancery Division Rimer J 19 June 2007

Company – Administration order – Powers – Extension of order – Company's joint administrators applying for order disapplying certain statutory provisions – Administrators further applying for extension of administration order – Whether cost of making relevant distribution to unsecured creditors disproportionate to benefits – Whether application should be granted – Insolvency Act 1986, s 176A(2), (5).

Section 176A of the Insolvency Act 1986 provides, so far as is material: '(1) This section applies where a floating charge relates to property of a company (a) which has gone into liquidation, (b) which is in administration, (c) of which there is a provisional liquidator, or (d) of which there is a receiver .. (2) The liquidator, administrator or receiver (a) shall make a prescribed part of the company's net property available for the satisfaction of unsecured debts, and (b) shall not distribute that part to the proprietor of a floating charge except in so far as it exceeds the amount required for the satisfaction of unsecured debts … (3) Subsection (2) shall not apply to a company if (a) the company's net property is less than the prescribed minimum, and (b) the liquidator, administrator or receiver thinks that the cost of making a distribution to unsecured creditors would

be disproportionate to the benefits … (5) Subsection (2) shall also not apply to a company if (a) the liquidator, administrator or receiver applies to the court for an order under this subsection on the ground that the cost of making a distribution to unsecured creditors would be disproportionate to the benefits, and (b) the court orders that subsection (2) shall not apply'.

H Ltd (the company) went into administration with the HSBC bank (the bank) having a floating charge over the company's assets. The company's 126 unsecured creditors submitted claims to the administrators. Out of those 126 creditors, four of them were group creditors, whilst 122 of them were non-group creditors. The total amount owing to the unsecured creditors was £3.5m, of which £3m was owed to the four non-group creditors. Pursuant to s 176A(2) of the Insolvency Act 1986, an administrator was under an obligation to make a prescribed part of the company's net property available for the satisfaction of unsecured debts and not to distribute that part to the proprietor of a floating charge except in so far as it exceeded the amount required for the satisfaction of unsecured debts. The four group creditors were willing to forgo their entitlement to a dividend out of the prescribed part on the basis that the moneys they would receive would, if s 176A was disapplied, be paid to the bank, thereby reducing the amount which they were liable to the bank for under the guarantees they had given in respect of the company's indebtedness. The 122 non-group creditors who would be entitled to a share of the prescribed part were entitled to such a small sum, about £5,000 between them, that the cost of agreeing the value of their claims against the company and making a distribution to them would be disproportionate to the benefits. Consequently, the company's joint administrators applied for an order under s 176A(5) of the Act, disapplying s 176A(2), and extending the duration of the administration for a further six months.

HELD The application would be allowed.

In the circumstances, it was clear that the costs of paying the available dividends to the unsecured creditors would be disproportionate to the benefits.

Accordingly, the court would make an order under s 176A(5) of the Act that s 176A(2) should not apply, with a provision entitling any creditor to apply to set the order aside within 28 days. The court would also extend the administration for a further period of six months.

Scheme of arrangement

Re PDQ Mobility Ltd; PCR Recruitment Ltd v PDQ Mobility Ltd and another

[2007] All ER (D) 153 (Jun) Chancery Division Sir Francis Ferris 15 June 2007

Company – Scheme of arrangement – Scheme of arrangement between company and creditors – Creditor seeking declaration that no longer bound by scheme – Whether company in default of scheme – Whether scheme failing – Companies Act 1985, s 425.

The claimant company was an unsecured non-preferential creditor of the first defendant. The first defendant ran into financial difficulties and began to prepare to enter into a scheme of arrangement

under s 425 of the Companies Act 1985. In anticipation of approval of the scheme, the first defendant entered into two agreements (the agreements) with a third party, who was an associated company of the first defendant. Pursuant to those agreements, the first defendant agreed to sell, to the third party, various assets in return for a rental charge equal to 7% of the value of all sales. That rental payment was to be used to pay the first defendant's creditors and to continue until all of the creditors had been paid in full. That proposal was implemented by the scheme of arrangement (the scheme) which was duly sanctioned. Clause 2 of the scheme required the first defendant to pay the proceeds of the agreements to the company's solicitors, the second defendant, and required the second defendant to pay the proceeds to the creditors. Clause 4 of the scheme provided that in the event that the third party failed to pay the second defendant any part of the proceeds of the agreement and that if the third party failed to remedy the failure, the creditors would no longer be bound by the scheme. After the scheme became operative the second defendant gave a notice default under cl 4 of the scheme, by letter, to the principal director of the first defendant requiring the third party to be made to remedy non-payment of the moneys due under the scheme. It further stated that in the event of failure to remedy the default the creditors would no longer be bound by the scheme. The claimant applied to the court for a declaratory relief.

The claimant submitted that the first defendant had failed to comply with its obligations under the scheme and that accordingly, it was entitled to a declaration that the first defendant's creditors were no longer bound by the scheme.

HELD: The application would be allowed.

On the evidence, there was no doubt that the company's solicitors had been entitled to serve the notice of default. Since the date of the notice, the first defendant had not done anything to remedy that default. The notice had been justified and had not been complied with and the scheme had therefore failed. Accordingly, the company's creditors were no longer bound by the scheme.

Legislation

Phoenix company – rule change

The Insolvency Service has published the text of amendments which will be made to the Insolvency Rules 1986 to remedy the problems caused by the Court of Appeal decision in *Churchill v First Independent Factors and Finance Limited* regarding the use of prohibited names.

The changes, which will be made by the Insolvency (Amendment) Rules 2007, are expected to come into effect on 23 July 2007. A draft of the Amendment Rules is now available on the Insolvency Service web site here:

http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/legislation/uk/amendmentsrules.doc

Minor changes to the ECIR

A number of minor changes have been made to the regulation in the following jurisdictions, none of which directly affect E&W.

- Annex A: (Insolvency Proceedings - Now Annex I)
  - Czech Republic; Romania
- Annex B: (Winding-up Proceedings - Now Annex II)
  - Czech Republic; Romania; Italy
- Annex C: (Liquidators - Now Annex III)
  - Czech Republic; Romania; Italy; Sweden

Articles

Administration expenses

Exeter City Council v (1) Vivian Murray Bairstow (2) James Patrick Martin (3) Trident Fashions plc [2007] EWHC 400

On the proper construction of the Insolvency Rules 1986 rule 2.67 non-domestic rates for retail premises occupied by a company whilst in administration rank as expenses of the administration.

(M. Haywood: ICR, [2007] 4(3), 166) 07.26.040

Cross-border

The Empire doesn’t strike back

The Court of Appeal decision in *Re HIH Casualty and General Insurance Ltd & ors* [2006] EWCA Civ 732 [2007] 1 All ER 177 (‘the HIH case’) included some consideration of the three main legislative systems for international insolvency cooperation under English law, namely section 426 of the Insolvency Act 1986, the EC Regulation on Insolvency Proceedings (Council Regulation 1346/2000) (‘the EC Regulation’) and the Cross-Border Insolvency Regulations 2006 SI 2006/1030 (‘The 2006 Regulations’).

The leading judgment of the Vice-Chancellor also makes brief reference to the recent advice of the Pr*ivy Council in Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc & ors* [2006] 2 All ER 829 (‘Cambridge Gas’) on the assistance which may be granted under the English common law, hence outside of those three legislative systems.

(L. Tamlyn: ICR, 2007 4(2), 63) 07.26.036

Insolvency proceedings and shareholdings: when is a foreign judgment not a judgment?

Comments on the Privy Council judgment in Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc on whether a US bankruptcy ruling could be enforced against a Cayman Islands corporation which owned shares in an Isle of Man holding company. Discusses whether the US plan of reorganisation was a judgment in rem or in personam or was a judgment at all, for the purposes of enforcement in the Isle of Man.

Lloyd's Maritime and Commercial Law Quarterly L.M.C.L.Q. (2007) No.2 May Pages 129-136: 1/4/2007-1/6/2007; Chee Ho Tham (Singapore Management University)

European insurance restructuring and reorganisation – the potential for discontinued business rationalisation

The European insurance regulatory framework has undergone significant change over the past fifteen years. Various European-wide regulations and directives have been implemented and more are in the pipeline as the European Commission seeks to create a single

European insurance market through harmonising regulation and removing barriers to trade on a cross-border basis. The diagram below illustrates how active the Commission has been over a sustained period.

(C Whitcombe: ICR, [2007] 4(3), 135) 07.26.086

Restructuring

Liabilities of directors of Phoenix Companies

Churchill v First Independent Factors and Finance Limited [2006] EWCA Civ 1623

The Insolvency Act 1986 introduced a number of new provisions designed to deal with the problems posed by a 'phoenix' company, where the business of an insolvent company was simply sold on to the former owners/controllers which then carried on business effectively as if nothing had happened, leaving behind the claims of creditors of the old company. Section 216 of the 1986 Act therefore made it a criminal offence for the name of a company which had gone into insolvency liquidation to be used by a director of that company. However, the Insolvency Rules at the same time specified three excepted cases where the prohibition does not apply.

(T. Smith: ICR, [2007] 4(3), 164) 07.26.039

Dealing with pensions and the UK Pensions Regulator on corporate rescues

Pensions are increasingly becoming one of the underlying causes behind the need for corporate rescues as the real cost of maintaining the pension scheme is better understood. As a result, dealing with pensions and the UK Pensions Regulator (the 'Pensions Regulator') is now a key issue in a corporate rescue. In any corporate rescue or corporate options review where pensions are an important issue, it is necessary to fully understand the pension creditor claim and the trustees' position and to assess the scope the Pensions Regulator has in using its moral hazard powers. In terms of structuring a corporate rescue, the Pensions Regulator's negotiating position has now been clearly established on a number of high profile transactions and this needs to be taken into account upfront.

(M Butler: ICR, [2007] 4(3), 119) 07.26.087

Failing firm defence: a success or failure for corporate restructuring?

Nowadays, we face global restructuring of industries that may be the most significant economic change of recent decades. Distressed companies on the verge of bankruptcy are a common phenomenon, to be observed in both developed and developing economies and markets. Companies that are in distressed financial conditions may choose to embark on a restructuring process in order to ensure their viability and profitability.

(I. Kokkoris: ICR, [2007] 4(3), 149) 07.26.038

United States

Executive compensation and the recent US Bankruptcy Code amendments: fundamental change or an invitation to negotiate?

On 20 April 2005, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ('BAPCPA'). BAPCPA made substantial amendments to the Bankruptcy Code and Rules, creating significant changes for business and consumer bankruptcy cases. One of the most high-profile corporate issues addressed in BAPCPA is how executive compensation is treated in a chapter 11 case.

(L.A. Larose, S.S. Kohn and S.L. Trum: ICR, [2007] 4(3), 140) 07.26.037

Notices

Commission consults industry on reorganisation and winding up of credit institutions

The European Commission has launched a public consultation on the Directive on reorganisation and winding up of credit institutions. The Commission is seeking to analyse whether the Directive (2001/24/EC) completely fulfils its objectives, whether it could be extended to cross-border banking groups, and how obstacles related to asset transferability within such groups can be addressed. Stakeholders are invited to give the Commission their views on the issues by 30 September 2007.

http://ec.europa.eu/internal_market/bank/docs/windingup/consultation_questionaire_en.pdf

(CEC, 12.06.07)

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