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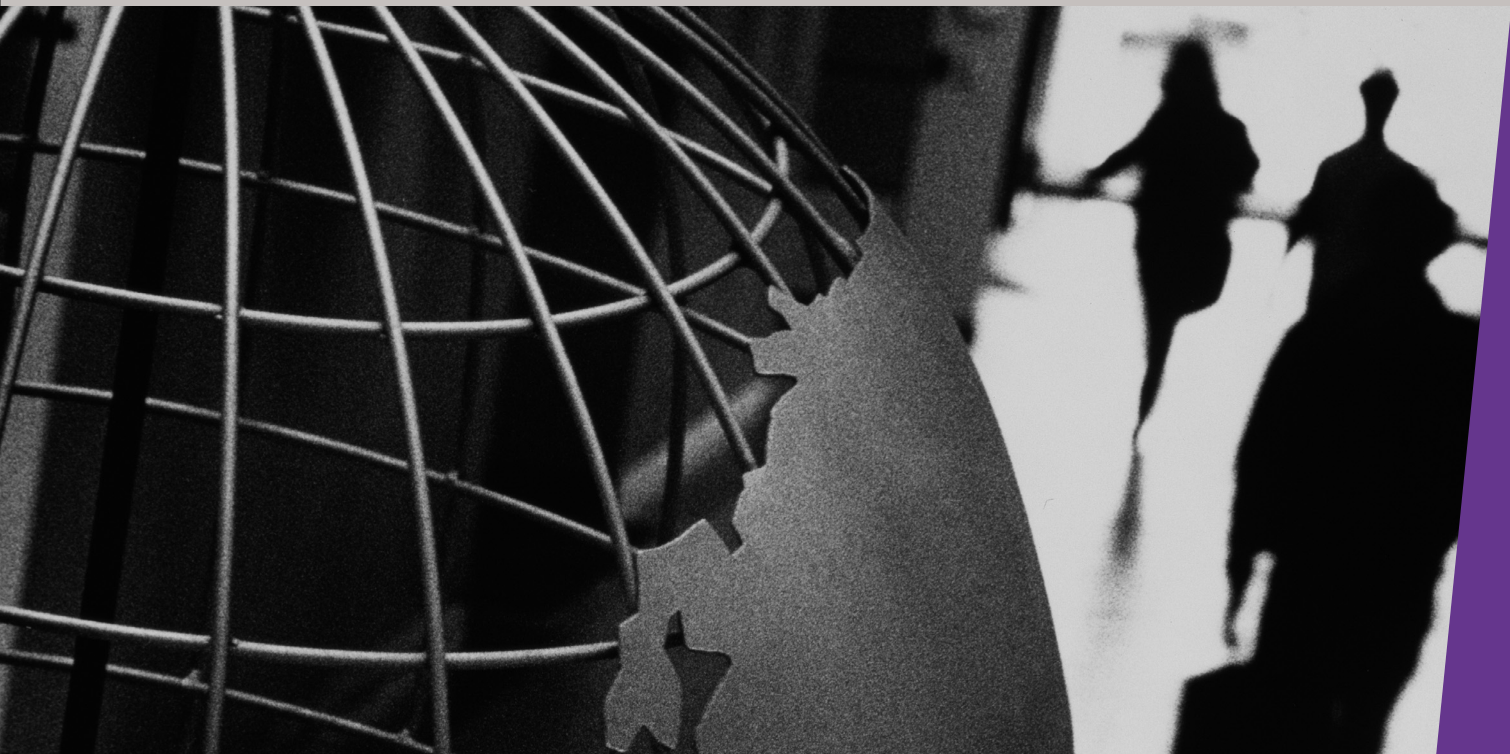

CMS Restructuring and Insolvency in Europe

Newsletter

Spring 2008

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CMS Restructuring and Insolvency in Europe

Introduction

We are pleased to present this spring edition of the CMS Restructuring and Insolvency European Newsletter. We aim to give information on topical issues in insolvency and restructuring law where there have been significant developments in countries in which CMS offices are located.

This edition looks at:

- the impact on the UK insolvency law cash flow test of a recent UK court ruling concerning the receivership of the failed structured investment vehicle, Cheyne Finance;
- a decision of the House of Lords in the UK in relation to a request for assistance from an Australian liquidator;
- a preliminary draft new Insolvency Act in the Netherlands;
- the impact of new German legislation on social security payments during a financial crisis; and.
- the options for achieving a debt restructuring under Italian insolvency law.

CMS is the organisation of independent European law and tax firms of choice for organisations based in, or looking to move into, Europe. CMS provides a deep local understanding of legal, tax and business issues and delivers client-focused services through a joint strategy executed locally across 28 jurisdictions with 56 offices in Western and Central Europe and beyond. CMS was established in 1999 and today comprises nine CMS firms, employing over 2,200 lawyers and is headquartered in Frankfurt, Germany.

The CMS Practice Group for Restructuring and Insolvency represents all the restructuring and insolvency departments of the various CMS member firms. The restructuring and insolvency departments of each CMS firm have a long history of association and command strong positions, both in our respective homes and on the international market. Individually we bring a strong track record and extensive experience. Together we have created a formidable force within the world's market for professional services. The member firms operate under a common identity, CMS, and offer clients consistent and high-quality services.

Members of the Practice Group advise on restructuring and insolvency issues affecting business across Europe. The group was created in order to meet the growing demand for integrated, multi-jurisdictional legal services. Restructuring and insolvency issues can be particularly complex as there is such a wide range of different laws and regulations affecting them. The integration of our firms across Europe can simplify these complexities, leaving us to concentrate on the legal issues without being hampered by additional barriers. In consequence we offer coordinated European advice through a single point of contact.

Editorial

In our last edition we talked of tumultuous times following the sub-prime crisis in the US. Since then, the contraction in the credit markets has continued to be felt and take its toll.

Hot on the heels of the nationalisation of the Northern Rock bank in the UK (following the first run on a UK bank in living memory), we have seen what was the fifth largest investment bank in the US taken to the brink of insolvency by a sudden collapse in confidence on the part of its hedge fund clients. Bear Stearns, which had been at the centre of the US mortgage crisis, was valued at US$18 billion only twelve months ago. As readers will be aware, its shares lost 98% of their value when in March it was "rescued" by JP Morgan Chase for just US$236 million and with financial support from the Federal Reserve.

The freezing up of the credit markets has created problems for a number of companies which rely on borrowing money to fund their business. We have seen what were previously refinancings turning back into restructurings. Lenders have adopted an approach to risk and pricing that has not been seen for many years.

We live in interesting times and, in the case of all of those involved in turnaround and insolvency, what look set to become very busy times.

In the UK, we have seen the first judicial decisions arising out of the collapses caused by the "credit crunch". In this edition, we report on a decision of the English High Court on the meaning of the cash flow insolvency test under English law arising out of the collapse of the structured investment vehicle, Cheyne Finance.

In April, there was an interesting decision of the UK's highest judicial authority, the House of Lords, on the issue of in what circumstances the English court will accede to a request from another jurisdiction to remit UK-based assets for distribution under that other jurisdiction's insolvency law. The case itself concerned a request made by an Australian liquidator and was brought under a provision of the UK Insolvency Act. It is of direct relevance to those jurisdictions that enjoy 'designated' status under the UK's Insolvency Act (essentially Commonwealth or ex Commonwealth nations) but the case is of potentially wider significance, as we explain below.

New insolvency legislation is being proposed in the Netherlands and new insolvency-related legislation has come into force in Germany, both of which we consider in this bulletin. We also take stock of the options for a debt restructuring under Italian law.

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United Kingdom

Cheyne Finance plc: Impact on the UK insolvency cash flow test

Introduction

Under UK insolvency law, a company is deemed to be insolvent if it is unable to pay its debts as they fall due (section 123(1)(e) of the Insolvency Act 1986). This is often referred to as the "cash flow test". It follows that a company can therefore be deemed to be insolvent even where its assets exceed its liabilities.

In a recent High Court case concerning the receivership of a structured investment vehicle, it was held that the "cash flow test" under section 123(1)(e) includes prospective or contingent debts and the standard of proof is the balance of probabilities.

SIVs

A structured investment vehicle ("SIV") is an entity set up by an investment bank that undertakes arbitrage activities for other investors. It is formed to make profits from the difference between short-term borrowing rates and long-term returns on its investments.

A SIV funds itself by issuing short-term, low yield commercial paper ("CP") to investors. The SIV then invests in longer term, higher yielding debt securities, such as bonds and mortgage-backed securities.

From 2002 there was a growth in US sub-prime mortgages (i.e. loans made to borrowers with poor credit histories), which fuelled a growth in residential mortgage backed securities ("RMBS"). This led SIVs to invest heavily in RMBS. However, in 2006 US property prices fell markedly. This, coupled with rising US interest rates, saw large-scale defaults of sub-prime loans and a dramatic fall in the market value of RMBS (and therefore SIV investments) followed in 2007. In addition, the CP market drew to a standstill, meaning that SIVs had experienced difficulties issuing new CP, creating a funding shortfall.

Cheyne Finance plc ("Cheyne")

Cheyne was one of the first SIVs to be hit by the credit crunch. Cheyne was a two year old £3.3 billion SIV run by Cheyne Capital, a London hedge fund. In August 2007 it announced to investors that it had breached funding restrictions, forcing it to wind down. On the same day Standard & Poor downgraded Cheyne's senior debt by six grades. Receivers were appointed over the business and assets of Cheyne on 4 September 2007 pursuant to a Security Trust Deed (the "Trust Deed") dated August 2005 between Cheyne and the Bank of New York.

Cheyne Receivership

In mid September 2007, the Receivers of Cheyne sought directions from the Court as to how they should apply monies coming into their hands from the date of their appointment to the happening (if one should happen) of an "Insolvency Event" as defined in the Common Terms Agreement. The court held that until the happening of an Insolvency Event, the Receivers should apply monies coming into their hands on a "pay as you go" basis, rather than giving precedence to making full and timely provision for payment of all senior debt. They should, firstly, pay the debts of senior creditors and any prior debts as and when they fell due and, secondly, make provision for payment of the same classes of debt not yet due. In the event that this left a surplus (which was unlikely) the monies should be applied in the manner provided for in the payment priority clause of the Trust Deed.

Following the first hearing, the Receivers calculated that they would be able to continue with the "pay as you go" approach until 31 October 2007 and that Cheyne would not be able to pay all its senior debts in full, as they fell due, in the future. The Receivers therefore returned to court and sought directions as to whether, on the assumed facts, an "Insolvency Event" had occurred, within the definition of the Common Terms Agreement.

In the matter of Cheyne Finance plc [2007] EWHC 2402 (Ch)

The Common Terms Agreement defined Insolvency Event as a determination by the Receiver that Cheyne *"is, or is about to become, unable to pay its debts as they fall due to senior creditors and any other persons whose claims against [Cheyne] are required to be paid in priority thereto, as contemplated by section 123(1) of the Insolvency Act 1986"*.

As set out above, section 123(1)(e) provides that *"A company is deemed unable to pay its debts if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due"*.

The court was asked to determine to what extent, when assessing whether a company is unable to pay its debts as they fall due within section 123(1)(e), it is possible to take into account future events (that is, senior debts falling due in the future).

The court held as follows:

(a) It is possible to take into account known future events (which may not necessarily be events taking place in the immediate future) when assessing whether a company is unable to pay its debts as they fall due.

(b) The assessment of such future events is fact sensitive.

(c) An inability to pay debts as they fall due must be proven on a balance of probabilities (i.e. it must be more likely than not, after careful and thorough enquiry).

The court concluded that on the assumed facts an Insolvency Event had occurred since Cheyne was unable to pay its senior debts (including those debts falling due **in the future**) as they fell due. On the balance of probabilities, Cheyne would default in paying the senior debts, at the latest, in February 2009.

Comment

Prospective and contingent liabilities are taken into account under the second test of insolvency under section 123(2) of the Insolvency Act 1986: the "balance sheet test" whereby a company is deemed to be insolvent if it is proved to the satisfaction of the court that the value of its assets is less than its liabilities.

However, prior to this case, there had been no authority on the question of whether it was possible to take into account future (i.e. prospective) liabilities when applying the "cash flow test" under section 123(1)(e).

Following the Cheyne decision, it is possible that a company that temporarily cannot pay its debts as they fall due (because of, say, short-term cash flow problems, which can be remedied) may not be deemed insolvent, as it might otherwise have been. Equally, a company which is doomed to failure in the long term but which can pay its debts in the very short term may now be deemed insolvent under the "cash flow test". It is however important to bear in mind that every assessment of future events will be highly fact sensitive.

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HIH Casualty & General Insurance Ltd (also known as McMahon v McGrath) [2008] UKHL 21 (HL)

In this case, the House of Lords (the UK's highest judicial authority), acceded to a letter of request received from an Australian judge of the Supreme Court of New South Wales and ordered that assets held in England by the HIH group be remitted to Australia for distribution in accordance with Australian insolvency law to the benefit of creditors of the HIH Group as a whole.

Four insolvent Australian insurance companies each had assets situated in England. Provisional liquidators had been appointed in England and the judge in Australia requested that the provisional liquidators be directed by the High Court in England to remit the English-based assets to the Australian liquidators for distribution, following the payment of their expenses.

It was agreed by all parties to the case that if the English assets were sent to Australia, insurance and reinsurance creditors would be paid in priority to ordinary creditors.

At first instance, the High Court had held that it did not have power to remit assets situated in England to Australia, given that the statutory distribution to creditors would have been different to that which would have applied in England. That decision was appealed to the Court of Appeal, which held that it did have the power but in the end declined to exercise its discretion on the basis that it would prejudice the interests of non-insurance creditors.

Following the Court of Appeal's refusal to direct the English provisional liquidators to remit the English assets to the Australian liquidators for distribution, the Australian liquidators appealed.

The House of Lords, in allowing the appeal, held as follows:

(a) Section 426(4) and section 426(5) of the Insolvency Act 1986 provide the court with jurisdiction to grant the Australian court's request and the court ought to grant it on the facts. To hold that the power to direct the remission of the assets to Australia (where the principal liquidation was occurring) could not be exercised (because that would cause a reduction of the dividends any class of creditors would receive in England) would undermine the intended purpose of section 426, namely to enable a universal scheme for distribution of assets on insolvency.

(b) Although a refusal to remit assets may be justified in other cases, the fact that there would be a significant class of preferential creditors under Australian law, who would not have priority under English law, was not in itself found to be a justifiable reason to warrant a refusal. In addition, the fact that Australia had been designated a "relevant country or territory" for the purposes of section 426 indicated that the Australian insolvency regime was, in principle, acceptable so far as English law is concerned.

(c) Under common law, the court could direct remittal of the English assets, regardless of any differences between the English and the foreign system of distribution. Such differences were only relevant with regards to the question of whether or not the court should exercise its discretion to do so.

Comment

This decision of the House of Lords is helpful in clarifying when and how the English courts will use their statutory discretion to accede to requests for assistance from other jurisdictions.

And it is clear in the judgment that the Law Lords were very much aware of and persuaded by the benefits of using their discretion to promote a universal scheme for distribution of assets on an insolvency.

This is encouraging news for more jurisdictions that enjoy 'designated' status under section 426 of the Insolvency Act 1986 (which include, for example, Canada, Ireland, New Zealand, South Africa, Bermuda and Hong Kong).

It could also be seen as encouraging for those jurisdictions that can put forward a persuasive case to the English courts where the English winding-up is not the main liquidation. The Law Lords were divided as to the source of the power of the English court to order that assets be remitted to another jurisdiction, in particular, where that jurisdiction was not 'designated' for the purposes of section 426 of the Insolvency Act 1986. In those cases, however, the relevant jurisdiction may be able to rely on the UNCITRAL model law on cross-border insolvency (implemented into English law by the Cross-Border Insolvency Regulations 2006), Article 21(2) of which provides that English courts may entrust the distribution of UK-based assets to a foreign liquidator 'provided that the interests of creditors in Great Britain are adequately protected'. The Law Lords' judgment in this HIH case, although not strictly applicable to Article 21, could be cited as principles that apply by analogy. The guiding principle in Lord Hoffman's words is "modified universalism".

Finally, it is worth reminding readers that the contrast between section 426 of the Insolvency Act 1986 (and the UNCITRAL model law) and the EC Regulation on Insolvency Proceedings is that where the latter applies, it is mandatory for other jurisdictions in the EU to co-operate with the office-holders of the "main proceeding", which would include remitting assets.

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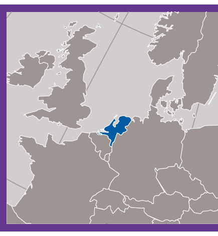

The Dutch Preliminary Draft Insolvency Act

Last November, the Insolvency Commission (also known as the Commission Kortmann) presented the Preliminary Dutch Insolvency Act to the Minister of Justice. The draft is a complete revision of the Insolvency Act which is currently in force.

The distinction between bankruptcy, legal moratorium and the debt restructuring for natural persons will no longer be made. The Insolvency Commission has opted for a single insolvency procedure. In that procedure the administrator would be able to liquidate the assets or to continue the business of a bankrupt company under special circumstances. Moreover, the draft contains all the previously announced subjects (please see previous CMS Newsletters January 2006 and October 2006*) and it includes some suggestions for related legislation, like tax and employment law.

The most far reaching amendments are that the administrator will have more authorities and powers. For instance, every insolvency procedure will start with a cooling-off period, which enables the administrator to see if the continuation or relaunch of the company in question is an option. Furthermore, the priority of claims will change.

The first comments have already been made to the Preliminary Act by legal authors. All authors agree that some changes are needed, but quite a few authors question the need for a complete revision of the current Dutch Insolvency Act. Bearing in mind that only a preliminary draft has been presented, we will just have to wait and see if changes will be made and what the scope of these changes will be. At the time of writing, it is expected that discussions will take a while. It is most likely that the current Insolvency Act will remain in force for the next few years.

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Germany

New German legislation on social security payments during a crisis

"Guessing Games" concerning §28e(1)(2) of the German Social Security Code IV (SGB IV)

With effect as of 1 January 2008, the following sentence was added to §28e(1) of the German Social Security Code IV (SBG IV). *"Payment of the share of the overall social security contribution to be borne by the employee shall be deemed to have been rendered out of the employee's assets."* The first legal scholars to present their opinion consider this amendment to jeopardise the principle of equal treatment of creditors that is firmly established in German insolvency/bankruptcy law.

Why is that so? Since 1999, according to the new German Insolvency Act (InsO), all unsecured creditors are treated equally. In particular, there are generally no preferential rights regarding unpaid taxes or social security contributions. Furthermore, the German Federal Court of Justice ruled in 2004 that employees' interests in the payment of their contributions are not particularly protected in the event of their employers' insolvency. The Court held that the employer pays the employees' shares of the social security contributions – like the employees' wages – out of the employers' assets. There is no trust-like relationship between employer and employees as regards social security contributions.

In the recent past, the German government made – however unsuccessful – a number of attempts to (indirectly) implement such preferential rights, e.g. by excluding the repayment of public payables from the rules of preference in insolvency. Such attempts have been subject to loud criticism among German scholars. Nevertheless, around the end of last year, an Act was passed in the German Parliament in which the above mentioned provision was "hidden", which – again – was strongly criticized by scholars and even by members of the German Parliament itself.

The amendment to § 28e(1) SGB IV shall have the following effect: According to the right of contestation under §129 ff. of the German Insolvency Act, certain legal actions which take place prior to insolvency, can be contested by an insolvency administrator if they turn out to be detrimental to third-party creditors. With regard to this issue it is important, at the time of payment, to whose assets the funds belong out of which the payment to a certain creditor is made. The broad aim of §28e(1)(2) SGB IV is to exempt payments of the employees' shares of the overall social security contributions from contestability by receivers, since such payments are – however by way of a legal fiction – made directly out of the employees' assets.

There remains strong doubt whether a consequence of the new legislation will be that social security contributions paid during the hardening periods will indeed be exempt from being contestable by a receiver in the event of insolvency and thus treating the social security institutions more favourably than other creditors of an insolvent party. It should, however, be assumed that, in most cases, laws are not amended without purpose. In any event, the wording is clear. The only question is whether this will continue to have such "formal" significance. It is therefore likely to be left up to the courts to provide §28e(1)(2) SGB IV with substance. The first ruling of the highest court is awaited with great interest.

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Italy

Debt restructuring under the Italian insolvency legislation

Introduction

The Italian insolvency legislation is aimed at facilitating the preservation and recovery of a debtor's business, rather than the formal liquidation of that debtor's assets upon insolvency.

In particular, Italian Bankruptcy Law (Royal Decree no. 267/1942, as recently amended) provides that an Italian debtor company facing financial difficulties is entitled to either:

(a) reach a composition with its creditors (**"concordato preventivo"**) under judicial supervision; or

(b) agree a restructuring plan with its creditors (**"accordi di ristrutturazione dei debiti"**) which is approved by the competent Italian court or in an out-of-court settlement with creditors.

Moreover, the Legislative Decree no. 270/1999 and Law no. 39/2004 provide for two extraordinary administration procedures, which are available only to very large companies that meet certain criteria set out in the legislation (namely, in terms of size and amount of indebtedness). These extraordinary administration procedures are carried out under the supervision of an extraordinary administrator.

This article also considers some of the transactions which are excluded from the existing claw back action legislation under Italian Bankruptcy Law, including payments made or transactions entered into pursuant to a restructuring plan.

Compositions with creditors (concordato preventive)

A composition must be accepted by a majority of the company's creditors holding a majority of the claims admitted to vote. Should the proposed composition provide for the full payment of a secured creditor's debt, the secured creditor may be admitted to vote subject to the waiver of his priority rights.

The composition proposals can provide for the creation of different classes of creditors and for those classes of creditors to be treated differently. The majority of those classes of creditors must approve the proposals. No minimum level of payments to creditors is required.

The court shall not inquire as to the merits of the proposals. The court's role is to verify the completeness of the documents submitted and the criteria utilized to create the different classes of creditors.

Debt restructuring agreements (accordi di ristrutturazione dei debiti)

As to the restructuring agreements under article 182-bis of the Italian Bankruptcy Law, the debtor can agree a debt restructuring plan with the creditors representing at least 60% of the debtor's total liabilities. The court must then approve the agreement.

The restructuring agreement must provide that all creditors "*who remain extraneous to the plan*" (i.e. those creditors that did not sign up to the agreement) shall be paid in full. Legal authors have commented that the "claw back" exemptions under Article 67 of the Italian Bankruptcy Law must include (a) payments made to those creditors who entered into the agreement and (b) those creditors who did not approve/ enter into the agreement, since it is a precondition to the court's final approval of the agreement that (b) are paid in full.

The debt restructuring agreement must be supported by an expert's report confirming, inter alia, the feasibility of the agreement and, in particular, whether it deals appropriately with the due and full payment of the creditors who did not enter into the agreement.

The restructuring agreement (and expert's report) must be filed with the competent court. It becomes effective after being published in the Enterprises' Registry. The court of Milan (Decision 23 January 2007) recently stated that the approval of the restructuring agreement by the court shall involve an evaluation of its merits and, in particular, its feasibility.

The extraordinary administration procedures

As mentioned above, only companies meeting certain conditions in terms of size and amount of indebtedness can enter into extraordinary administration under Legislative Decree no. 270/1999 and Law No. 39/2004. These administrations are carried out under the supervision of an extraordinary administrator.

Under both extraordinary procedures, the recovery of the company may be achieved through an assignment of the company's going concerns or a restructuring plan (which shall not last for more than two years).

The extraordinary administration procedure provided for by Decree no. 39/2004 (which was enacted in response to the Parmalat insolvency), provides that the restructuring plan may include proposals for a settlement with creditors, which can set forth different treatments for classes of creditors and the repayment of creditors via any technically possible method – in particular, through the assignment to creditors (or classes of creditors) of shares/bonds or other financial instruments.

The acts, payments and guarantees made pursuant to the implementation of the extraordinary administration are not revocable, since they are deemed to have been put in place by the extraordinary administration.

Limitation to the claw back action

Should the company be adjudicated in bankruptcy, according to article 67, paragraph 3 of the Italian Bankruptcy Law, the official receiver cannot claw back, inter alia, payments, acts and guarantees granted according to a composition with creditors, an extraordinary administration, any restructuring plans approved by the court under article 182-bis of the Italian Bankruptcy Law or under a plan which appears able to restructure the company's debt and ensure its financial stability and whose fairness is confirmed by an authorized auditor.

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