PrimaCom – confirming the extraterritoriality of English schemes of arrangement

Introduction

Hildyard J's recent sanctioning of the scheme of arrangement proposed by PrimaCom Holding GmbH (**"PrimaCom"**), a German incorporated company whose creditors were domiciled outside of the UK, has reaffirmed the extra-territorial jurisdiction of the English courts in respect of schemes of arrangement and confirmed their status as a useful instrument for foreign companies looking to restructure[1].

The process

A scheme of arrangement is a formal procedure under the Companies Act 2006 by which a company may enter into a compromise or arrangement with its creditors, or any class of them. The scheme must be approved by at least 50% in number constituting 75% in value of each class of creditor, and then requires sanctioning at a subsequent court hearing. The scheme will become effective upon delivery of the relevant sanction order by the English court to the Registrar of Companies in England & Wales and will bind all creditors of each relevant class.

The 'conundrum'

Recent cases have illustrated the English courts' willingness to exercise its jurisdiction to sanction schemes of arrangement proposed by foreign companies with a relatively limited connection to England[2]. The judgment of Briggs J in *Re Rodenstock* was one such case, but it identified a legal conundrum arising under Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition of Enforcement of Judgments in Civil and Commercial Matters (**"the Brussels I Regulation"**)[3].

Article 2 of the Brussels I Regulation states that persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State. The question therefore arises whether, for a scheme to have effect, the creditors of a company proposing a scheme of arrangement should be domiciled in the UK.

Briggs J felt the facts of *Re Rodenstock* did not require him to resolve the conundrum. However, in the proposed *PrimaCom* scheme, the vast majority of creditors were domiciled outside of the UK. Hildyard J, although himself also declining to provide a definitive resolution to the conundrum, identified four possible solutions:

1. Article 2 of the Brussels I Regulation has no application to schemes of arrangement since they are not adversarial proceedings and there are no 'defendants' being sued.

2. If Article 2 were to apply to schemes, it is still subject to the Brussels I Regulation as a whole. Article 23 states that where parties (one or more of whom is domiciled in a Member State) agree to confer jurisdiction to the courts of a particular Member State to settle any disputes, those courts shall have jurisdiction (and indeed that such jurisdiction shall be exclusive unless the parties have agreed otherwise). In *PrimaCom*, every one of the loan agreements and also the umbrella agreement expressly nominated the English forum as the exclusive forum for the adjudication of disputes (and also was expressly governed by English law).

1 *Primacom Holding GmbH and others v Credit Agricole and others* [2012] EWHC 164 (Ch) – 20 January 2012

2 Examples of recent cases include: *In the matter of Rodenstock GmbH* [2011] EWHC 1104 (Ch), *In the matter of Tele Columbus GmbH* [2010] and *Re La Seda De Barcelona SA* [2010] EWHC 1364 (Ch)

3 The Brussels I Regulation applies in "civil and commercial matters" but excludes from its scope *"bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons judicial arrangements, compositions and analogous proceedings"* (Article 1.2(b)), Although some other cases had suggested that the Brussels I Regulation had no application in a case such as this, Briggs J had considered that a scheme of arrangement for a company that is not currently in insolvency proceedings (a solvent scheme) is a civil and commercial matter within the scope of the Brussels I Regulation.

3. Article 24 of the Brussels I Regulation, if applicable, overrides Article 2[4]. That is because it states that a court of a Member State before which a defendant enters an appearance shall have jurisdiction. In *PrimaCom*, a majority of creditors had participated in previous court proceedings convening the creditor meetings, which was held to be a submission to the jurisdiction of the English court.

4. Finally, it was posited in *Re Rodenstock* that each Member State should apply its own domestic rules of private international law in the context of a process such as a scheme of arrangement – by analogy with Article 4 of the Brussels I Regulation. That was on the basis that Article 4 represents the "fall-back" position when none of the other Brussels I Regulation provisions are applicable.

Hildyard J said that he tended towards the first possible solution outlined above. However, he held that, although his preference would be not to adopt the fourth possibility, each of the above four possibilities provided a basis for concluding that the Brussels I Regulation did not prevent the English court from having jurisdiction in relation to the *PrimaCom* scheme of arrangement.

Finally, the judgment also addressed the potential complication presented by the refusal of the German court in 2009 to recognise the English scheme in relation to Equitable Life[5]. Hildyard J cited expert evidence that distinguished the Equitable Life case on the basis that the relevant contracts in those proceedings were governed by German law, whereas all of the *PrimaCom* agreements had exclusive English law and jurisdiction clauses. The judge was therefore persuaded that there was a reasonable prospect of the German courts accepting the order and that was enough for him to conclude that he should make it.

Conclusion

The High Court in *PrimaCom* confirmed that English schemes of arrangement may be put forward by companies domiciled outside the UK, even in circumstances where the majority of creditors of the company proposing the scheme are also domiciled outside of the UK. Given the judgment does not confirm which one of the four possible solutions outlined above was the correct basis for taking jurisdiction, a different outcome is conceivable in the future, particularly where contracts with creditors do not allocate jurisdiction to the English Courts (and/or are not governed by English law) or when creditors refuse to appear in English court proceedings.

For now, however, the judgment continues the trend of judges giving effect to schemes of arrangement proposed by foreign companies and ensures that English schemes of arrangement will continue to be a popular tool for foreign companies looking to restructure.

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4 Such "submission" even overrides an exclusive jurisdiction clause (*Elefanten Schuh GmbH v Jacqmain* Case 150/80 [1981] E,C,R, 1671).
5 *OLG Celle 8 U 46/09*

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0220con
March 2012