

## Cross Border Restructuring and Insolvency Update

June 2012

### Olympic Airlines SA Pension and Life Assurance Scheme v Olympic Airlines [2012] EWHC 1412 (Ch)

#### UK's Jurisdiction to wind up Greek a company in liquidation

The state owned Greek Airline (Olympic) went into liquidation in Greece in 2009, and the trustees of the company's UK staff pension scheme presented a winding up petition in England in June 2010. The purpose of the English winding up of proceedings was to ensure that responsibility for the scheme would be assumed by the Pension Protection Fund.

The High Court considered whether it had jurisdiction to open secondary proceedings and wind up Olympic in England. The parties agreed that the trustees had to demonstrate that Olympic had an establishment in England at the time of the presentation of the winding up petition.

Following *Interdil*, the court stated that, to constitute an establishment, both (1) a structure comprising a minimum level of organisation and (2) a degree of stability necessary for pursuing economic activity were required.

The court held that the liquidation of an insolvent company and the winding up of its affairs was not incompatible with the possession of an establishment, otherwise there would be no scope for secondary proceedings. There would come a point in the liquidation when all the Olympic's assets would be disposed of and, at that time, Olympic would cease to have an establishment.

Therefore, there was an establishment, as at the time the petition was heard, that the company remained in occupation of its office in London, and two employees were retained on an ad hoc basis.

### Westwood Shipping Lines Inc v GMB Schiffahrts GMBH [2012] EWHC 1394 (Comm)

#### Test for "judgment opening insolvency proceedings" under the EC Insolvency Regulation

The High Court has considered what constitutes a "judgment opening insolvency proceedings" for the purpose of Council Regulation (EC) 1346/2000.

W obtained an arbitration award against G, who applied to open insolvency proceedings in Germany, its COMI. The German Court appointed a 'preliminary insolvency liquidator' and made an order, which prohibited any enforcement action against G.

Unaware of the German insolvency proceedings, W obtained a freezing order in the English courts. W also applied for the appointment of receivers. Having been informed of the German insolvency proceedings, W discontinued the freezing order. The court had to decide, among other things, whether to stay or to dismiss the receivership application.

It was held that the order of the German Court appointing a preliminary liquidator was a judgment opening insolvency



proceedings for the purposes of Regulation 1346/2000. The court stated that, although the judgment in *Re Eurofood* referred simply to "divestment", under article 1(1) of the Insolvency Regulation, a "partial divestment" would suffice.

## Updates from around the World

### South America

#### Payments for Creditors to vote for proposals held not to be bribes

The High Court held that, in a recent case, involving a claim against Brazilian, Uruguayan and Cayman companies, a facilitation payment to encourage creditors to vote through the restructuring proposals of creditors' debts was not an illegal bribe. In making its decision, the court had regard to the fact that the offer of payment was made openly to all relevant creditors, none of whom were prevented from voting on the proposals.

The court held that the claimant had acknowledged that the payments were legal by voting in favour of the first two proposals and accepting payments. The payments were offered openly and no one was prevented from voting, therefore the payment was not contrary to the *pari passu* principle. However, there have been a number of other cases, including some involving secret payments, where the proposals have been set aside.

### Germany

#### Insolvent German solar panel manufacturer receives boost with Chinese sale

Q-Cells' share price has risen by 8% after it was revealed that Chinese firm Hanergy has agreed to buy part of its operations. It has already agreed to sell a section of the firm that was responsible for the production of valuable PV Modules used in the creation of solar energy technology. This section, Solibro, is thought to be one of Q-Cells' most valuable assets, and the sale will be good news for bondholders who are owed hundreds of millions of euros by Q-Cell.

### UK

Bankruptcy tourism was again thrown into the spotlight when a member of the Irish boy band Westlife declared himself bankrupt in the UK, owing some £18m. Shane Filan is another victim of the Irish property crash, having embarked on a business venture with his brother.

Shane Filan is one of many Irish property developers to have used bankruptcy legislation in England, which is more favourable than in Ireland. Others have included Sean Quinn, once Ireland's richest man and former IRA hunger striker Tom McFeely.

### Poland

PBG, the Polish builder of three of the four Euro 2012 football stadiums, has filed for bankruptcy. The company, which is the country's third largest builder, has done so to help reach an agreement with creditors to cut debt by as much as 31 percent. The company, which specialised in oil and gas engineering, ventured out of its core business to bid on arena and motorway deals after Poland was selected to co-host the Euro 2012 football championships, only to see its debt swell on falling margins.

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