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Client briefing
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Metrovacesa S.A. scheme of arrangement sanctioned

The English high court has provided useful guidance on its preparedness to exercise jurisdiction to sanction schemes of arrangement proposed by non-English incorporated companies under Part 26 of the Companies Act 2006.

Key Issues

- **English court exercises jurisdiction to sanction scheme of Spanish company**
- **English law governed debt most significant connection to jurisdiction**
- **Compromise of English law governed debt by English law scheme would be recognised in Spain**

Mr Justice Vos's judgment in the case of *Re Metrovacesa SA* follows a line of recent unreported cases where the court has been willing to exercise its jurisdiction to sanction schemes proposed by foreign companies with limited connection to the English jurisdiction (see, for example, *La Seda de Barcelona* SA [2010] EWHC 1364 (Ch) and the unreported Tele Columbus schemes of arrangement). In those cases, the court sanctioned schemes of arrangement where the most significant connection of the companies to the English jurisdiction was the governing law of their debt which was the subject of the schemes. The enunciation in a written judgment of the principles underpinning the court's jurisdiction in the Metrovacesa case is to be warmly welcomed.

Metrovacesa is a large Spanish real estate group with assets in Spain, France and Germany. The scheme of arrangement will form one limb of a wider restructuring of the group's balance sheet which will include the voluntary conversion of debt to equity by certain banks that are existing shareholders of the group, an initial capital raise under Spanish law (including a rights issue) and the voluntary compromise by lenders of various bilateral facilities governed by Spanish law (see below). The scheme will compromise an English law governed facility but is conditional upon fulfilment of the other restructuring steps by the company and the other relevant parties. As the capital raise is a relatively lengthy process in Spain, the scheme is not expected to take full effect until later in the year but the scheme will terminate should the remaining restructuring steps fail to occur before a long-stop date.

Key commercial terms of Metrovacesa restructuring

- amendment of the existing syndicated loan facility into a 5 year tranche linked to the group's rental assets business and secured over shares in a material French subsidiary and a 10 year tranche linked to the group's land and development business;
- debt for equity swap by shareholder scheme creditors of their syndicated debt with an option for other scheme creditors to participate on similar terms;
- post-closing debt for assets swaps and other debt restructuring options for scheme creditors;
- consensual restructuring or capitalisation of bilateral facilities with shareholder banks and other lenders not governed by English law; and
- review of a feasibility plan by an independent expert appointed by the Spanish mercantile registry under the Spanish Insolvency Law in order to reduce the risk of the restructuring being subsequently challenged by an insolvency officeholder.

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Exercise of English court's jurisdiction

The court found that Metrovacesa was "liable to be wound up" under the Insolvency Act 1986 for the purposes of section 895 of the Companies Act 2006. In finding so it followed the decision of Lawrence Collins J in *Re Drax Holdings Ltd* [2003] EWHC 2743 (Ch) which was affirmed with respect to a company incorporated in another member state of the European Union in *Re DAP Holding NV* [2005] EWHC 2092 (Ch). Furthermore, the court exercised its discretion to assert jurisdiction because it found that Metrovacesa had a sufficient connection to England and Wales by virtue of the finance documents being governed by English law (and subject to the exclusive jurisdiction of the English courts) and that many scheme creditors were based in the jurisdiction.

Class composition

The court was satisfied that scheme creditors formed a single class notwithstanding the potentially differing interests between scheme creditors who were existing shareholders and those who held only debt. This followed the established distinction to be drawn between creditors' rights and interests, most recently discussed by David Richards J in *Re Telewest Communications plc* [2004] EWHC 924 (Ch).

Recognition and sanction

A report from a Spanish professor of commercial law was evidenced to demonstrate to the court that Spanish law lacked a similar "cram down" mechanism to an English scheme of arrangement outside of formal insolvency proceedings and that the effect of the scheme would be recognised by the Spanish courts as a matter of private international law. The professor considered whether the scheme would offend Spanish public policy and concluded that it would not, citing in support of his view the draft amendment bill to the Insolvency Law published by the Spanish Ministry of Justice in December 2010 which expressly provided for the introduction of a pre-insolvency restructuring mechanism permitting a majority of creditors to bind a dissenting minority in certain specified circumstances (Schemes of Arrangement to be introduced into Spanish Insolvency Law).

Sanction of the scheme completes the first stage of the group's restructuring and provides a platform for it to launch the initial capital raise in accordance with the Spanish law procedure.

Clifford Chance LLP in Madrid and London acted on behalf of the co-ordinating committee of syndicated lenders in this case.

What is a scheme of arrangement?

- A creditors' scheme of arrangement is a statutory contract or arrangement between a company and its creditors (or any class of them) made pursuant to the Companies Act 2006. It is not an insolvency proceeding but can be implemented in conjunction with formal insolvency proceedings, such as administration or liquidation or on a standalone basis. The scheme becomes legally binding on the company and such creditors (or any class of them) if:
  - a majority in number representing not less than three-fourths in value of creditors (or any class of them) present and voting in person or by proxy at meetings summoned pursuant to an order of the Court, vote in favour of the scheme; and
  - the scheme is sanctioned by a further order of the Court after the creditors' meetings; and
  - an office copy of the order sanctioning the scheme is delivered to the Registrar of Companies for registration.
- If the requisite majorities set out above are obtained, the scheme will bind all the relevant company's creditors as at the date of the scheme (or the relevant class or classes of them) whether they were notified of the scheme and/or whether they voted in favour of the scheme or not. Notwithstanding this, the Court will need to be satisfied that every effort has been made to contact all creditors.
- A scheme provides a useful mechanism for (i) overcoming the impossibility or impracticality of obtaining the individual consent of every creditor to be bound to a proposed course of action; and (ii) for preventing, in appropriate circumstances, a minority of creditors from frustrating what is otherwise in the interests of a company's creditors generally (where, for example, the alternative is an insolvency process which may destroy value). Currently in Spain (as in many other jurisdictions in Europe) unanimous creditor approval would have been required for such an arrangement outside of a formal insolvency process.

This Client briefing does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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