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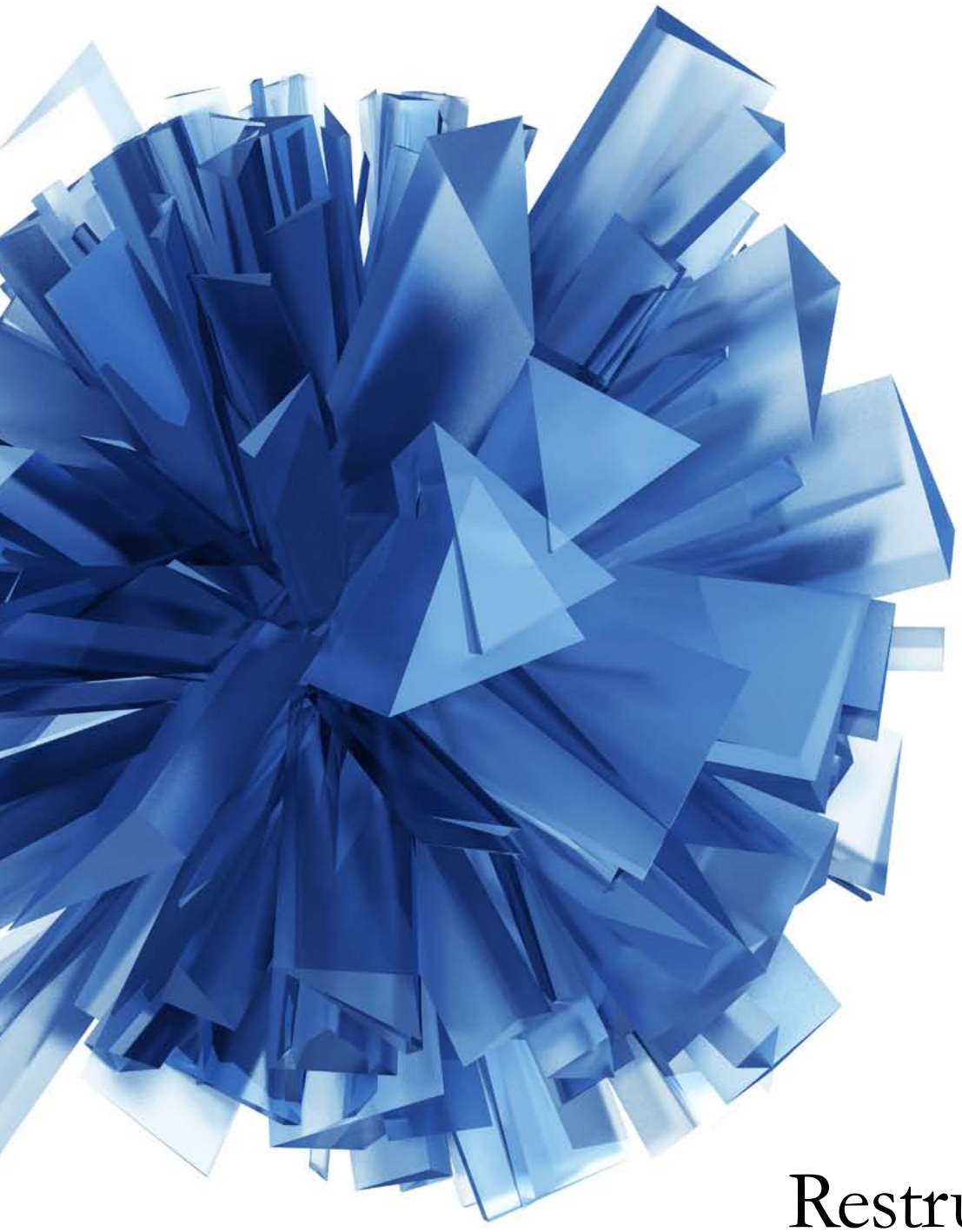

Restructuring and insolvency

What to watch out for in 2016

Legal outlook

What to watch out for in 2016

Key legislative/ procedural changes

New Insolvency Rules 2016
Significant rewrite and replacement of the existing Insolvency Rules 1986 currently expected to come into force in October 2016. Although these are supposedly procedural changes, some of the provisions (for example in respect of administration expenses) could have more substantive effect.

"Pre-packs" not yet out of the spotlight
Recent reforms (e.g. revised SIP 16 and the new voluntary "Pre-pack Pool" for sales to a connected party) will undoubtedly be monitored by The Insolvency Service throughout 2016 to determine if any further measures are required to address the concerns highlighted by the 2014 Graham Review.

Reform of corporate insolvency regimes
In addition to the adoption of the Bank Recovery and Resolution Directive in response to the financial crisis last summer, Greece is undertaking a major overhaul of its corporate insolvency laws. India, Australia and the UAE are also continuing to push forward (with varying degrees of speed and success) with similar reforms and more progress is expected in these jurisdictions in 2016.

Alternatives to the English scheme of arrangement
Credible alternatives to the English scheme of arrangement will continue to be introduced, developed and tested in other European jurisdictions (notably, Germany, the Netherlands and Spain) throughout 2016.

Cross border advances

Extension of the Model Law
An extension of the UNCITRAL Model Law on Cross Border Insolvency to allow, among other things, recognition and enforcement of foreign insolvency-related judgments will be contemplated by UNCITRAL in 2016 (although may not be implemented until 2017). This would be a welcome measure to address (to a certain degree) the unsatisfactory state of English law in relation to assistance in cross border insolvency cases following the decision of the Supreme Court in Rubin in 2012*.

Harmonisation of European insolvency laws
As part of the European Commission's Capital Markets Union action plan and, more specifically, its aim of facilitating cross border investing, we expect to see a consultation process on European insolvency regimes (and their differences) commenced in the coming months with legislative proposals published in Q4 2016.

Potential case law developments

Schemes of arrangement – increased scrutiny
The jurisdiction of the English court in relation to foreign companies, class composition, comparator analysis if the scheme fails and the impact of any lock-up fees are just a few potentially contentious issues which are on the radar of English judges. Read more in our **recent bulletin "The rise and rise of the English scheme of arrangement".**

Wrongful trading claims
Will the recent expansion of the wrongful trading regime under the Insolvency Act 1986 have the desired effect of more cases being brought against directors (by administrators, liquidators or assignees of such claims) in 2016?

Cross border assistance
Pending any extension of the Model Law (referred to under "Cross border advances"), we may see further cases in 2016 concerning the scope of "any appropriate relief" under the common law and article 21 of the Cross Border Insolvency Regulations 2006.

Lehman Brothers – Waterfall litigation
The court will give judgment on the quantum of the entitlement to default interest under the ISDA Master Agreement in 2016. While the appeals of the rest of the Waterfall II litigation (regarding the entitlement to the surplus funds in the hands of the administrators) are unlikely to be heard until 2017, there is a chance the Supreme Court will hear the appeal on Waterfall I (regarding the ranking of the subordinated debt and whether currency conversion claims can be recovered as non-provable claims) in 2016.

Rubin and another v Eurofinance SA and others and New Cap Reinsurance Corporation Ltd and another v Grant and others [2012] UKSC 46

Financial institutions

Article 55 BRRD implementation continues
Article 55 requires EEA banks to include contractual provisions in non-EEA law governed contracts recognising and giving effect to an EEA bail-in. UK regulators have acknowledged the implementation issues caused by this by allowing a temporary delay to implementation (until 30 June 2016) where it would be impracticable to do so sooner. It is unclear whether other jurisdictions will follow suit but it is expected that the industry and trade bodies will continue to lobby the European Commission to narrow the scope of the requirements.
A number of trade bodies (including the LMA, LSTA and AFME) have worked with the industry to develop standard wording with the aim of bringing consistency in how firms comply with the requirements. Read more in our **recent bulletin "Contractual recognition of bail-in: Overview of the requirements and analysis of the ramifications for counterparties".**

Cross border recognition of resolution action
In November 2015, the Financial Stability Board published its Principles for Cross-border Effectiveness of Resolution Actions which, among other things, focused on temporary stays on early termination rights with the FSB committing to making adherence to contractual recognition of resolution stays in cross border contracts subject to regulatory requirements by 2017. The UK is the first jurisdiction to develop thinking on how to extend the ISDA Resolution Stay Protocol to other trade products – it will be interesting to see how the industry works to ensure compliance with those requirements from 1 June 2016 and also how other jurisdictions develop their approach to comply with the FSB Principles.

Bank resolution generally
It is clear that some European banks are still in significant financial difficulty. The recent Portuguese state rescue of Banco Internacional do Funchal (Banif) and the bail-in of almost €2bn of senior bonds at Novo Banco (the so-called "bad bank" created as part of the bail-in of Banco Espirito Santo) have shown the versatility of resolution measures under the BRRD. 2016 is likely to see more bank resolutions across Europe. The Single Resolution Board became operational on 1 January 2016 and is now the sole resolution authority for significant and cross border banking groups established within participating Member States which could have a significant impact on bank resolutions going forward.

Tax

Tax relief
The Finance (No. 2) Act 2015 received royal assent on 18 November 2015, finally bringing into force the long awaited measures giving relief from tax on releases of debt in the context of corporate rescues. On the flip-side, it also brought into force HMRC's new direct recovery powers (to take arrears of tax directly from taxpayers' bank accounts, subject to certain safeguards), despite strong representations from the insolvency industry that these could cut across creditor interests.

Tax avoidance
The Government continues to target what it sees as tax-avoidance. Recent proposals would attack the tax treatment of certain distributions from closely held companies to individual shareholders in members voluntary liquidations. Assuming the proposals are implemented, this is likely to be in the Finance Bill 2016. As always, the detailed drafting of any such legislation will be key to determining its impact (intended or unintended) on restructuring and insolvency transactions.

Pensions & Employment

Collective redundancy consultation
To address concerns raised in the Call for Evidence conducted in 2015, the Government is carrying out further work to clarify how collective redundancy consultation should be conducted when a company is facing or has moved into formal insolvency and how sanctions could be made more effective. No timetable has been published by the Government but employers and insolvency practitioners will have a keen interest in any consultation process undertaken (and any subsequent legislative proposals), particularly if this could result in potential liability for the insolvency officeholder.

PPF entry consultation
We may see changes to the PPF Entry Rules Regulations 2005 following a recent Government consultation. The key proposal is to redraft regulation 7 to ensure that all eligible pension schemes can enter the PPF, even if the sponsoring employer cannot experience a qualifying insolvency event (other minor changes to the entry rules are also proposed). Temporary changes were made to the entry rules in 2014 as a result of the *Olympic Airlines* litigation*, permitting access to the PPF where there is a European insolvency event, but these provisions are essentially limited to the Olympic Airlines scheme and will expire in July 2017 – the Olympic Airlines scheme could not otherwise access the PPF because the sponsoring employer could not be wound up under Part V of the Insolvency Act 1986 (as it had its centre of main interests in the EU but outside of the UK and no "establishment" in the UK). The proposed changes attempt to prevent a repeat of the Olympic Airlines scenario (and close other potential gaps in coverage) using a more generic approach.

*The changes were made in response to the Court of Appeal decision, which was ultimately upheld by the Supreme Court in 2015: *Re Olympic Airlines, SA* [2015] UKSC 27.

Market outlook

What might keep the market busy in 2016?

We expect to see the **continued use of the English scheme of arrangement as a restructuring tool** for English and foreign companies, although due consideration will need to be given to credible European alternatives.

The increased issuance of **European high yield bonds and spike in maturities** in spring/summer 2016 are likely to lead to a number of restructurings in 2016. This will bring challenges given the incurrence based covenants contained in the documents, the cross-jurisdictional nature of the guarantee and security package and the intercreditor issues that will arise.

More **bank resolutions across Europe** are anticipated (unless corporate restructuring procedures can be utilised as an effective alternative e.g. Russian Standard Bank and The Co-operative Bank using the English scheme of arrangement).

Opportunities in the commodities sectors (many of which began to come to a head in 2015) are set to escalate, as **demand drops across oil, gas, energy and mining and prices tumble**. These predictions come at a time when weaker-than-expected Chinese manufacturing data is emerging, as are broader signs of **slowing international trade**. Retail, health care, education and construction are also sectors to watch in 2016.

The prospect of a 'Brexit' will generate increasing market noise through 2016, particularly given the scale of impact Britain's exit from the EU could have on the UK's approach to European insolvency law. It may well be that, even if Britain were to leave the EU, it would put in place parallel legislation to replicate the effects of the European Insolvency Regulation. Whether UK insolvency proceedings would continue to be recognised in Europe would depend, however, on whether other Member States were willing to adopt such parallel legislation.

Let's not forget 2015

The year in which A&O:

pioneered the **first use of an English scheme of arrangement undertaken in respect of a Polish corporate** (Celsa Huta), acting for a group of Polish and international lenders

designed and launched a novel scheme 'lite' product to impose a moratorium on three series of pari passu bonds. This successfully gave Metinvest, our client and one of Ukraine's largest companies, a stable platform to negotiate a wider (c.USD2.2 billion) restructuring with its creditors

played a key role in **the first cross border trial conducted live before both the U.S. and Canadian courts** using video and telephonic equipment

acted for the financial creditors to Martinsa-Fadesa, historically one of the main real estate and construction groups in Spain, in **the largest insolvency in Spanish history**

advised various sponsors, issuers, RCF and term loan lenders and noteholders on the first wave of European high yield restructurings. This included advising PwC as administrators of the mobile phone retailer Phones 4U – **the first of the recent wave of UK high yield deals to go into administration**

designed a trade finance solution not previously seen in the market (a series of syndicated committed trade finance and borrowing base facilities) to ensure continued trade finance to a group (Stemcor, **one of the largest independent steel traders in the world**) which was in default on its core debt. This was instrumental in allowing the A&O team to develop an implementation plan for the successful restructuring of Stemcor

advised on **the recapitalisation and resolution of an unprecedented number of major European financial institutions**, including the resolutions of Piraeus Bank, National Bank of Greece and Banco Internacional do Funchal (Banif), further resolution measures in relation to Novo Banco and the recapitalisation of Russian Standard Bank

acted for key bidders and funders with our market leading real estate finance practice in **all major 2015 loan portfolio auctions**

solidified its position as **the first global elite law firm with an on-the-ground presence in South Africa**, acting on two of the market's most significant restructurings – the curatorship proceedings of African Bank Limited (a matter with **lasting impact on the availability of Tier II funding to banks in the South African market**) and the restructuring of Edcon Holdings Ltd and Edcon Ltd (one of **South Africa's key retailing groups**)

drew on our large pool of legal talent to execute the world's largest and most complex deals in unprecedented timeframes, such as:

- the insolvency of the O.W. Bunker Group – one of Denmark's largest companies – **in a case involving over 1000 separate claims in 18 jurisdictions**; and
- the restructuring of the Stemcor group, during which **A&O briefed and obtained instructions from over 40 lenders and made a successful urgent application to the court in the space of a few hours**

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