

Codere: The Case for Good Forum Shopping

In December 2015, the Codere Group obtained the English Court's approval of a scheme of arrangement to implement its long-running EUR1.2 billion financial restructuring. The proposed Scheme had received a level of notoriety having been described by the Court at an earlier hearing as an example of "extreme forum shopping". However, the subsequent sanction hearing demonstrated that, whilst the Scheme had some relatively novel aspects, it was consistent with the English Courts' general wish to assist restructurings, including of foreign groups, particularly in the absence of other viable alternatives. In the present case, a refusal to sanction the scheme could have resulted in a loss of approximately EUR600 million to creditors.

Iain White, partner in the Clifford Chance LLP London Restructuring Team advising in respect of the Scheme, notes:

"The convergence of a number of factors led us to the conclusion that Codere needed to pursue a novel or, at least, less conventional path to establish UK scheme jurisdiction. Justice Newey's willingness to recognise that "forum shopping" can be a good thing is welcome news for foreign companies looking to use UK schemes to restructure their indebtedness; however, there is no room for complacency. The Court will look carefully at schemes by companies whose connection to the jurisdiction are either not longstanding or otherwise limited and determine whether or not to exercise its jurisdiction and or discretion to sanction the Scheme based on the individual circumstances of the case. We are delighted that, with material support from its noteholders, our

client was able to satisfy the Court in this particular instance."

Background

The Group is engaged in multi-national gaming activities. The parent company, Codere S.A., is incorporated and listed in Spain, although the Group has subsidiaries throughout Latin America, as well as in Italy and Spain. The Group's principal financing came from two series of notes (the Existing Notes) issued by a Luxembourg subsidiary of Codere S.A., Codere Finance (Luxembourg) S.A. (Codere Lux) and guaranteed by other subsidiaries within the Group. The Existing Notes were each governed by New York law and subject to the jurisdiction of the New York Courts.

The Group had experienced financial difficulties since 2012. By 2014, it had ceased to pay interest on the Existing Notes and was reliant on creditor forbearance for its continued operation.

Key issues

- English court recognises case for good forum shopping
- Novel approach to establishing jurisdiction: using English SPV to accede to liabilities for US bonds
- Enabled New York debt to be restructured using English scheme
- US Bankruptcy Court's recognition obtained for the English scheme

In September 2014, following lengthy negotiations, the key terms of a restructuring were agreed between the Group and in excess of 97% of the Existing Noteholders. The terms of the restructuring were complex but in very broad summary provided for the exchange of the Existing Notes into new notes and shares in Codere

S.A and the injection of approximately US\$380 million of new money.

The Issue

Implementation of the restructuring through a consensual process required the unanimous consent of the Existing Noteholders. However, as is common with notes publicly traded through the clearing systems, Codere was not in a position to identify all of the Existing Noteholders. Indeed, even by the end of the very long restructuring process, over 1% remained unidentified. In addition, certain of the Existing Noteholders simply chose not to participate in the process, presumably taking the view that, given their very small holdings, engagement in the restructuring process wasn't worth their time or resources.

Consequently, the Group sought legal advice in each of the jurisdictions in which it carried out its principal activities to ascertain the options available to implement the proposed restructuring with less than 100% support. It became clear that such jurisdictions either (a) did not have a Group wide procedure available that would bind in a dissenting minority and/or (b) such proceedings were only available within a formal insolvency. Formal insolvency proceedings would have had dire consequences for the Group. In particular there was a serious risk that gaming licences granted to it by local regulatory authorities (without which the Group could not carry on its gaming activities) would be immediately terminated thereby eliminating the Group's ability to generate income and destroying future value for the Group and its stakeholders.

It was clear that a UK scheme could, in principle, deliver the restructuring, however, previous precedent required that a foreign company seeking to implement a scheme must demonstrate that it had a sufficient connection with the English jurisdiction, for example by showing that:

- its COMI was in England (see cases such as *Re Magyar Telecom BV*; *Re Zlomrex International Finance SA*; *New World Resources NV*; *DTEK*; *Re Gallery Capital SA* and *Re Hellas Telecommunications (Luxembourg) II SCA*); or
- the obligations which were to be the subject of the scheme were governed by English law and subject to the jurisdiction of the English courts (see cases such as *Re TeleColumbus Group*; *Re Rodenstock* and *Re Primacom*).

Whilst the Group did have some existing connections with this jurisdiction, there was a concern that such connections would be insufficient to satisfy the Court and the Group's ability to augment those connections (as was done in previous cases) was constrained by tax concerns.

The Proposed Solution

Given these issues, more innovative ways had to be found in order to deliver the restructuring using a UK scheme. The option landed upon was to create an English incorporated special purpose vehicle, Codere Finance (UK) Limited (Codere UK), whose purpose would be to accede as a co-issuer of the Existing Notes with a full primary, joint and several obligation to meet each of the liabilities outstanding under the Existing Notes. The accession of Codere UK was permitted under the

Existing Notes indentures, provided that more than 50% of the Existing Noteholders consented to it. Codere UK would then propose a UK scheme for the purpose of compromising not only its obligations under the Existing Notes, but those of its co-issuer Codere Lux, as well as the guarantors thereof (such scheme to be recognised in the United States by means of an order of recognition under Chapter 15 of the United States Bankruptcy Code). Codere UK would not be required to demonstrate that it had sufficient connection with the jurisdiction as, by virtue of being an English incorporated company, the English Court would clearly have jurisdiction.

The terms of the restructuring, together with the proposed steps for delivering such restructuring (i.e. through the accession of Codere UK for the express purpose of implementing a subsequent scheme) was agreed by in excess of 97% of the Existing Noteholders under the terms of a Lock-Up Agreement.

Whilst the question of jurisdiction was clear, the question which remained was whether the Court would exercise its inherent discretion to sanction the Scheme given the deliberate steps taken to invoke its scheme jurisdiction. At the first Court hearing (held for the purpose of seeking the Court's permission to convene the meeting of creditors to vote on the scheme), the answer to that question did not have to be determined. However, Mr. Justice Nugee fired a very clear warning shot to the parties involved as to the Court's potential concerns:

"... this is a group of companies with a Spanish holding company and operating companies trading in Europe and Latin America with no apparent connection with the UK

before the restructuring took place ... The notes which are sought to be restructured are obligations of a Luxembourg company. They are obligations governed by New York law, and it is clear from the evidence that the connection with the UK has been brought about deliberately by the acquisition of the scheme company as a UK company ... That seems to me, at first blush, to be quite an extreme form of forum shopping ... I regard ... these matters as giving rise to quite serious issues which should be looked at the sanction hearing ..."

The Arguments Made

At the second Court hearing to sanction the Scheme, Counsel made 7 key points:

1. there was no alternative proceeding available to the Group in any jurisdiction outside of England;
2. there was commercial justification for pursuing a less conventional method of establishing UK Scheme jurisdiction;
3. this was not a scheme company "forum shopping" by itself to avoid its liabilities. On the contrary the scheme had been devised with the agreement of the scheme creditors;
4. the alternative to the Scheme was formal insolvency proceedings, with all of the attendant dismal consequences for the Group and the creditors;
5. the Scheme had been unanimously supported at the Scheme meeting (with c.99% of creditors actually voting and voting "yes"). There was no opposition to the Scheme;
6. independent expert opinion from each of the principal jurisdictions had confirmed that the Scheme (with the benefit of the US Chapter 15 recognition order) was likely to be recognised; and
7. 90 scheme creditors, representing 97% percent by value of the Existing Notes had written to the Court to support the scheme and expressly submit to the jurisdiction of the English Court for that purpose.

The Court's View

The Court ordered the sanction of the Scheme. Accepting each of the points noted above, Mr Justice Newey concluded by saying:

"In a sense, of course, ... what is sought to be achieved in the present case, is forum shopping. Debtors are seeking to give the English court jurisdiction so that they can take advantage of the scheme jurisdiction available here and which is not widely available, if available at all, elsewhere. Plainly forum shopping can be undesirable. That can potentially be so, for example, where a debtor seeks to move his COMI with a view to taking advantage of a more favourable bankruptcy regime and so escaping his debts. In cases such as the present, however, what is being attempted is to achieve a position where resort can be had to the law of a particular jurisdiction, not in order to evade debts but rather with a view to achieving the best possible outcome for creditors. If in those circumstances it is appropriate to speak of forum shopping at all, it must be on the basis that there can sometimes be good forum shopping."

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