

EMEA DC Meeting Statement 5 August 2016

Summary

The DC met on 5 August 2016 to continue its discussion of whether a Bankruptcy Credit Event had occurred with respect to Grupo Isolux Corsán Finance B.V. (the **Reference Entity**) as a result of the filing by the Reference Entity on 28 July 2016 of a petition for suspension of payments (*surseance van betaling*) (a **Moratorium**) in the Amsterdam District Court (the **Dutch Court**) pursuant to Article 214 of the Dutch Bankruptcy Act (*Faillissementswet*).¹

The DC Resolved:

- (a) to treat the DC Question as separate requests in respect of (i) 2014 Transactions and (ii) Updated 2003 Transactions²;
- (b) that a Bankruptcy Credit Event had occurred with respect to the Reference Entity in relation to 2014 Transactions;
- (c) that a Bankruptcy Credit Event had also occurred with respect to the Reference Entity in relation to Updated 2003 Transactions;
- (d) that the date of the Bankruptcy Credit Event with respect to the Reference Entity in relation to both 2014 Transactions and Updated 2003 Transactions is 28 July 2016;
- (e) the Credit Event Resolution Request Date is 2 August 2016; and
- (f) to hold an Auction in respect of 2014 Transactions on a date to be determined in August 2016. The intention is to combine the Auction for 2014 Transactions with an Auction for Updated 2003 Transactions if the Deliverable Obligations for each set of transactions are identical.

Capitalised terms used but not defined in this Meeting Statement have the meanings given to them in the Credit Derivatives Determinations Committees Rules (January 20, 2016 version) (including in the 2014 Definitions and the Updated 2003 Definitions, each as defined therein) (the **DC Rules**).

Effect of a Moratorium

The DC obtained Dutch legal advice as to the nature of a Moratorium and the effect filing a request for a Moratorium and the Moratorium itself has on the debtor requesting it and its creditors' rights.

A Moratorium seeks to protect a debtor from its unsecured, non preferential creditors (the **Affected Creditors**) if the debtor is unable to meet its liabilities and/or obligations when they fall due, by imposing a court ordered standstill, provided that there is a reasonable prospect of the debtor being able to satisfy its liabilities and obligations to its Affected Creditors. This does not mean that the Affected Creditors must be paid in full: partial payment will be sufficient, provided that it is accepted by a majority of an absolute majority in number of the debtor's admitted Affected Creditors representing at least 50% in amount of the total debt owing to the admitted Affected Creditors of the debtor. A petition for a Moratorium may only be made by the debtor itself and will only commence by order of the Dutch Court, as opposed to commencing on the filing of the petition in the Dutch Court by the debtor.³

¹ Further details of the Moratorium filing are available on the Isolux website: <http://www.isoluxcorsan.com/en/communication/press-releases/update-on-the-restructuring-process.html?texto=&idCategoria=0&fechaDesde=&fechaHasta=>

² In accordance with the DC Rules, "Updated 2003 Transaction" means a March 2009 Supplement Transaction or a July 2009 Supplement Transaction (and not a Credit Derivative Transaction incorporating the 2014 Definitions as a result of the ISDA 2014 Credit Derivatives Definitions Protocol).

The main purpose of a Moratorium is to restructure a company's debts by way of offering a composition plan to the company's Affected Creditors. If the voting thresholds (as noted above) are met and the composition plan is subsequently ratified by the Dutch Court, it will be binding on all of the debtor's Affected Creditors thus allowing the debtor to continue its business on a restructured basis. A Moratorium that does not lead to the approval and ratification of a composition plan will usually result in the debtor being put into bankruptcy/liquidation proceedings.

A Moratorium may last up to 18 months, which may be extended once by the Dutch Court for a further 18 months. During a Moratorium, a creditor cannot apply for the bankruptcy of the debtor on the regular grounds.

An administrator is also appointed by the Dutch Court for the duration of the Moratorium. During the Moratorium the debtor's management will not be able to act on behalf of or bind the debtor in any way without the consent of the court-appointed administrator who itself is supervised by an examining judge if the court has decided to appoint one (which, in practice, is usually the case). Generally speaking, the administrator will be able to act without the consent of the examining judge on all matters. The examining judge will typically only intervene if the administrator or the Affected Creditors request the examining judge to make a determination on a specific matter. Thus the management of the debtor will be in the hands of the court-appointed administrator and its management, acting jointly. Significantly, therefore, the management of the debtor will not be able to dispose of the debtor's assets without the consent of the administrator and any disposal other than in accordance with this requirement will be ineffective.

During a Moratorium, the debtor's payment obligations are not suspended in the sense of not becoming due and payable on their scheduled payment date in accordance with their original terms and conditions (indeed, they continue to become due and payable on such date) rather the debtor cannot be forced to pay its creditors as such amounts become due and payable. Other contractual provisions (e.g. acceleration or early termination rights) are similarly unaffected per se by the Moratorium. In any event, any such amounts which have become due will ultimately only be paid in accordance with any approved and ratified composition plan or will be subject to any bankruptcy proceedings which may follow the Moratorium. During a Moratorium, the debtor may still be sued and existing proceedings may be continued against the debtor, although enforcement of a judgment or claim will not be possible.

As is also the case with respect to Dutch bankruptcy/liquidation proceedings, secured and preferential (in the sense that particular assets attach to the preferential claim) creditors are still able to enforce against the relevant assets during a Moratorium. However, the court may order a cooling-down period for a maximum period of four months during which time secured and preferential creditors will be unable to enforce their security interest/preferential claim. In addition, creditors with a title claim to certain assets (e.g. lessors) will be barred from repossessing these assets during such cooling-down period.

Whether a Bankruptcy Credit Event has occurred in relation to 2014 Transactions

Section 4.2(d) of the 2014 Definitions

Limb (d) of the definition of Bankruptcy Credit Event in Section 4.2 of the 2014 Definitions provides as follows:

"the Reference Entity... institutes or has instituted against it a proceeding seeking a judgment of insolvency or bankruptcy or any other similar relief under any bankruptcy or insolvency law or other law affecting creditors' rights..."

³ The DC understands that the Dutch Court ordered a preliminary Moratorium with respect to the Reference Entity on 28 July 2016.

The DC was of the view that the Reference Entity having filed a petition for a Moratorium with the Dutch Court would constitute the "[institution of] a proceeding". The law under which the filing was made is the Dutch Bankruptcy Act, which is a bankruptcy or insolvency law or other law affecting creditors' rights.

The DC noted that this particular limb of the Bankruptcy Credit Event definition in the 2014 Definitions was considered in some detail by the DC in relation to two other recent Bankruptcy Credit Event questions: Abengoa⁴ and Portugal Telecom⁵. As for the Abengoa and Portugal Telecom questions, the key issue in relation to the 2014 Transactions turned on whether the relief sought by virtue of the Moratorium (or, in the case of Abengoa, Spanish *preconcurso* proceedings and, in the case of Portugal Telecom, Brazilian judicial reorganisation proceedings) was "similar" to that of a "judgment of insolvency or bankruptcy". As such, the DC made reference to its analysis and determinations with respect to the Abengoa⁶ and Portugal Telecom⁷ questions for the purposes of considering the present DC question.

The DC was of the view that the relief granted by a Moratorium is sufficiently similar in effect to that of a judgment of insolvency or of bankruptcy, and noted a number of points in reaching this conclusion:

- (a) the effect of a Moratorium is for the Reference Entity to avail itself of an automatic stay (albeit temporary in nature), providing relief for all of its assets and from all of its creditors (subject in each case to certain exceptions) – i.e. universal application. Specifically, this takes the form of a stay on creditor petitions for bankruptcy as well as enforcement claims against the debtor and/or all of its assets, subject to certain limited exceptions;
- (b) further, even those creditors who are generally exempted from the automatic stay – secured and preferential creditors – may be subject to a cooling-off period for up to four months during which time they would be unable to enforce their security interest/ preferential claim and/or repossess assets in which they have a title claim. Even though, so far as the DC is aware, no such order has been made in respect of this Moratorium, it was considered to be significant that such an order is permitted in certain circumstances;
- (c) the debtor is effectively relieved from having to satisfy its payment obligations until the composition plan is approved by the Affected Creditors and ratified by the Dutch Court (although a Moratorium does not prevent acceleration / early termination as a result of any such non-payment and/or other default);
- (d) an administrator is appointed by the court for the duration of a Moratorium who not only supervises and monitors the debtor's management but also engages in the management function itself. Significantly, the debtor's management may not act on behalf of or bind the debtor in any way without the consent of the administrator. For example, any disposal of the debtor's assets without the consent of the administrator will be ineffective;
- (e) a Moratorium is a court-based process and ultimately requires approval of the court to commence the Moratorium process as well as ratify the composition plan. Additionally, there are specific creditor filing requirements in that Affected Creditors must file a proof of claim for all unpaid claims and such filing must generally be made within two to four months of filing the Moratorium petition;
- (f) further, the composition plan which must be submitted by the debtor during the Moratorium may provide for, *inter alia*, extensions of existing debt maturities, haircuts on existing debt, exchanges of debt into equity, changes in interest rates and to default interest accruals. If the composition plan is adopted by the required qualified majority of the Affected Creditors and subsequently ratified by the

⁴ For further details see: <http://dc.isda.org/cds/abengoa-sa-2/>

⁵ For further details see: <http://dc.isda.org/cds/portugal-telecom-international-finance-b-v/>

⁶ Please see the EMEA DC meeting statement dated 8 December 2015 for further details: <http://dc.isda.org/documents/2015/12/emea-dc-decision-09122015.pdf>

⁷ Please see the EMEA DC meeting statement dated 1 July 2016 for further details: <http://dc.isda.org/documents/2016/07/emea-dc-decision-01072016-meeting-statement.pdf>

Dutch Court, all of the Affected Creditors of the debtor are bound by the composition plan. As such, through the Moratorium procedure, dissenting creditors may be crammed down; and

- (g) a Moratorium can last for up to 18 months and may be extended for a further period of 18 months by the Dutch court – i.e. a significant amount of time for creditors' rights to be restricted in the ways described above.

The DC was of the view that the relief granted by a Moratorium is therefore sufficiently "similar" to a judgment of insolvency or bankruptcy for purposes of limb (d) of the Bankruptcy Credit Event definition under the 2014 Definitions.

Section 4.2(f) of the 2014 Definitions

The DC also considered limb (f) of the definition of Bankruptcy Credit Event in Section 4.2 of the 2014 Definitions and whether the court-appointed administrator under a Moratorium was similar to the types of official described in that limb. The DC noted that the administrator has a very significant role in exercising the management of the debtor: although the administrator may not take actions or make decisions unilaterally, the debtor's management may not act on behalf of or take any actions to bind the debtor without the consent of the administrator. In light of this co-extensive management role, the DC was of the view that the court-appointed administrator under a Moratorium is similar to the types of official described in limb (f) of the Bankruptcy Credit Event definition under the 2014 Definitions.

Conclusion

Accordingly, in light of its analysis and conclusions with respect to Section 4.2(d) and (f) of the 2014 Definitions, the DC resolved that a Bankruptcy Credit Event had occurred with respect to the Reference Entity in relation to 2014 Transactions.

Whether a Bankruptcy Credit Event has occurred in relation to Updated 2003 Transactions

Section 4.2(d) of the Updated 2003 Definitions

The DC noted that limb (d) of the definition of Bankruptcy Credit Event in Section 4.2 of the Updated 2003 Definitions is drafted slightly differently to limb (d) of the definition of Bankruptcy Credit Event in Section 4.2 of the 2014 Definitions.

Specifically, under the Updated 2003 Definitions, one of the requirements in order to constitute a Bankruptcy Credit Event is that the relief sought be "a judgment of insolvency or bankruptcy or any other relief" (emphasis added). Unlike under the 2014 Definitions, there is no requirement in the wording of the provision that the relevant relief be similar to a judgment of insolvency or bankruptcy.

The DC was of the view that the relief sought pursuant to a Moratorium did constitute such "other relief", considering the universal application of the automatic stay on enforcement actions, the payment obligation relief, the appointment of an administrator to co-manage the Reference Entity, the claim filing requirements, the fact that the composition plan could bind dissenting creditors, and the time for which the the Moratorium is in place.

Section 4.2(f) of the Updated 2003 Definitions

See analysis above in relation to Section 4.2(f) of the 2014 Definitions which applies equally here.

Conclusion

Accordingly, in light of its analysis and conclusions with respect to Section 4.2(d) and (f) of the Updated 2003 Definitions, the DC resolved that a Bankruptcy Credit Event had occurred with respect to the Reference Entity in relation to Updated 2003 Transactions.

Other issues considered

The DC noted that the Reference Entity has made a filing in the New York courts for Chapter 15 relief under the U.S. Bankruptcy Code. The DC understands that Chapter 15 of the U.S. Bankruptcy Code provides a mechanism for recognising foreign proceedings in the U.S. and, among other things, a foreign debtor may obtain various forms of relief thereunder in the U.S. This includes a stay on enforcement against assets located in the U.S. In light of the fact that the DC had already concluded that the filing of the Moratorium petition constituted a Bankruptcy Credit Event under limbs (d) and (f) of the definition thereof, the DC did not believe it was necessary to consider or make a determination as to whether the Chapter 15 filing would trigger a Bankruptcy Credit Event question. Accordingly, the DC expresses no opinion on this point.