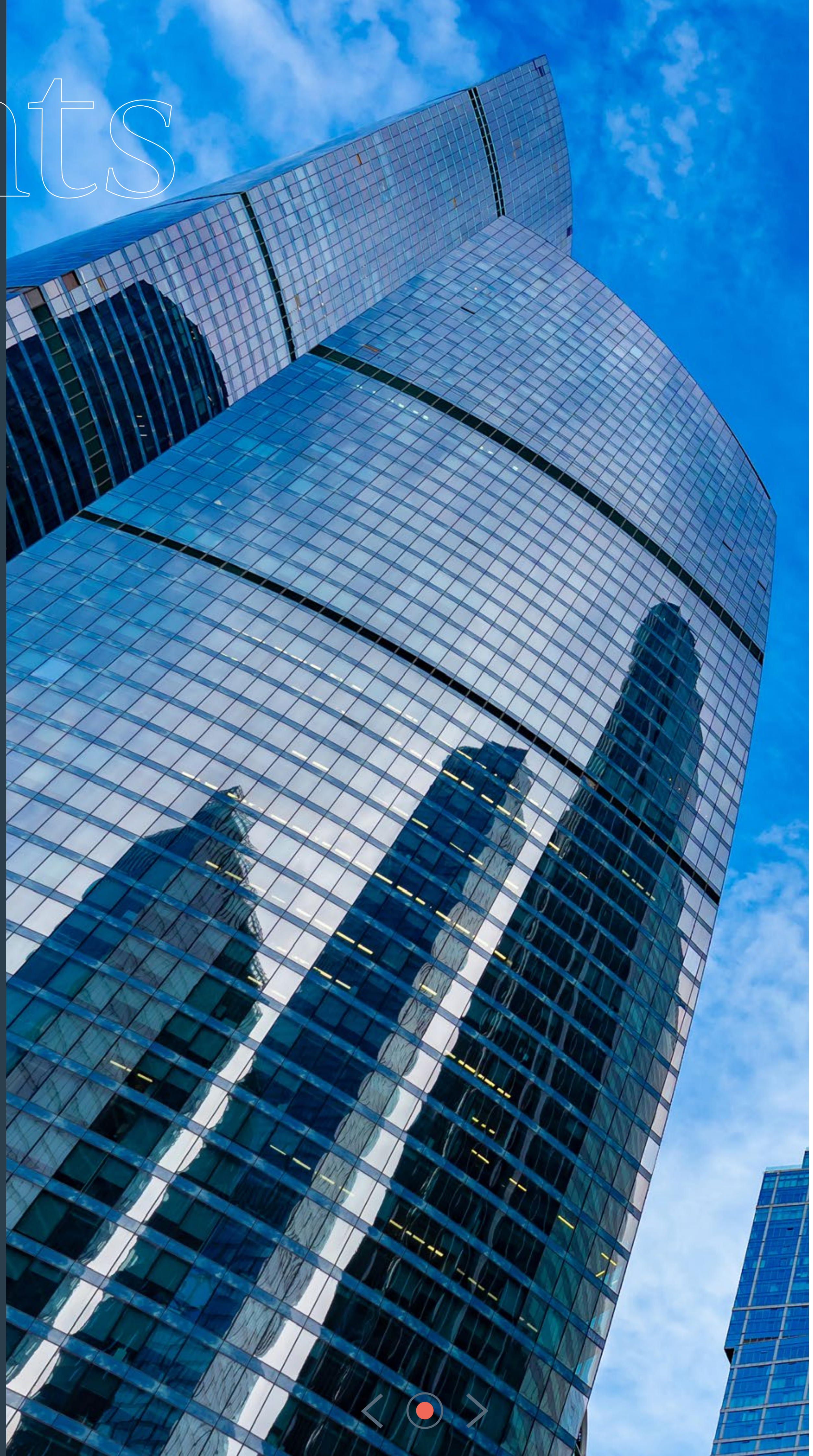
Funds Insider

August 2023

Outpacing change

contents



Foreword

Welcome to the summer edition of Funds Insider, our quarterly publication focusing on hot topics across a wide range of practice areas of particular interest to private capital clients.

This edition will cover:

- European restructuring and insolvency – London as a European restructuring forum reigns supreme
- The FCA's new Business Plan – what it means for enforcement
- European employment law – Sexual harassment: what do employers in Spain and the UK need to consider?
- Reform of Luxembourg Arbitration Law: how does it apply to your M&A transactions?
- European long term investment funds (ELTIF) 2.0: A new era for Private Funds Sponsors?

As the year progresses, dealmaking and fundraising across a number of key geographies have seen a considerable decline compared to previous years, partially due to pressures from high interest rates, recession fears and a weak outlook for corporate earnings. However, whilst some investors continue to exercise caution in their investment approach, with the 'flight to quality' dominating as the theme of the year when it comes to investment propositions, there is still a part of the market which looks to seize opportunities in key sectors, including infrastructure and energy transition, which are industries that are core to Ashurst's strategy and which have indeed witnessed resilient activity levels since the start of the year.

We hope you enjoy reading this edition of Funds Insider and please do get in touch if you have any feedback or if there are any topics that you would like us to cover in future editions.

Funds Insider

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European restructuring and insolvency – London as a European restructuring forum reigns supreme

By Olga Galazoula, Ru-Woei Foong, Drew Sainsbury, Inga West and Charlotte Evans

Having failed to get its restructuring solution through in its home jurisdiction in Germany, beleaguered German real estate group, Adler, turned to London. After substituting a UK plc as issuer of six series of notes in order to propose an English restructuring plan, and in the face of fierce opposition from an ad hoc committee of 2029 noteholders (AHG), the group successfully forced the plan through just in time. This is the first time that a full-scale valuation challenge has been mounted against an English restructuring plan.

This article examines the main findings of the judgment and its implications for the attractiveness of the English restructuring plan for foreign companies. Lenders to companies that are facing or expected to face financial stress should take note. The restructuring plan is still a very new tool, and this case provides important insight into how it works, including importantly how judges approach a highly contested valuation dispute.

Did CIGA open the door for UK valuation disputes?

When the UK Corporate Governance and Insolvency Act (CIGA) introduced the restructuring plan into the UK restructuring toolkit in June 2020, it was suggested that the new Part 26A so-called "super scheme" could give rise to protracted debtor/creditor valuation disputes, on account of its voting mechanism and ability to cram down whole dissenting classes.

Until Adler came along, however, the English court was yet to see a full-blown valuation dispute. Virgin Active was the first restructuring plan in which it seemed possible that dissenting creditors might challenge the plan company's valuation evidence. Whilst dissenting classes of landlord creditors criticised the plan company's valuation evidence in that case, they declined to provide their own competing evidence for analysis. Snowden J took this opportunity to observe that it was important that "the potential utility of Part 26A is not undermined by lengthy valuation disputes" and it would be "most unfortunate if Part 26A plans were to become the subject of frequent interlocutory disputes". In Smile (No. 2), a senior lender did provide alternative valuation evidence in an effort to establish that it was not out of the money; but it did not formally oppose the plan in court, leading Snowden LJ to direct opposing creditors to "stop shouting from the spectators' seats and step up to the plate". Zacaroli J reiterated this message in Houst - the third restructuring plan which had potential to give rise to a valuation dispute – when HMRC chose not to provide alternative valuation evidence in spite of voting against the proposed plan.

By contrast, US Chapter 11 proceedings (from which the cross-class cram down concept is borrowed) are renowned for giving rise to lengthy and costly valuation disputes in the bankruptcy courts. So common are valuation disputes in US Chapter 11 proceedings that it is a distinguishing factor to be taken into account if deciding whether to carry out a US- or UK-based restructuring.

The market therefore watched with interest when Adler's restructuring plan was launched earlier this year. It was clear that the restructuring might give rise to a large-scale valuation dispute in the English courts when, following a failed consent solicitation process to amend the terms of certain of its senior unsecured notes (launched in accordance with German law in late 2022), a committee of 2029 noteholders voted against the group's proposed amendments.

Adler Restructuring Plan: the Background

Adler is a German property group which owns a large number of rental properties and its portfolio is estimated to be worth about €8 billion. The group was facing a liquidity crisis due to the Covid-19 pandemic, the invasion of Ukraine, a downturn in the property market and an adverse short seller report published in October 2021,. As a result (and following its failed consent solicitation process), the group proposed a UK restructuring plan with six classes of creditors, as the holders of six series of senior unsecured notes (SUNs) due 2024, 2025, January 2026, November 2026, 2027 and 2029.

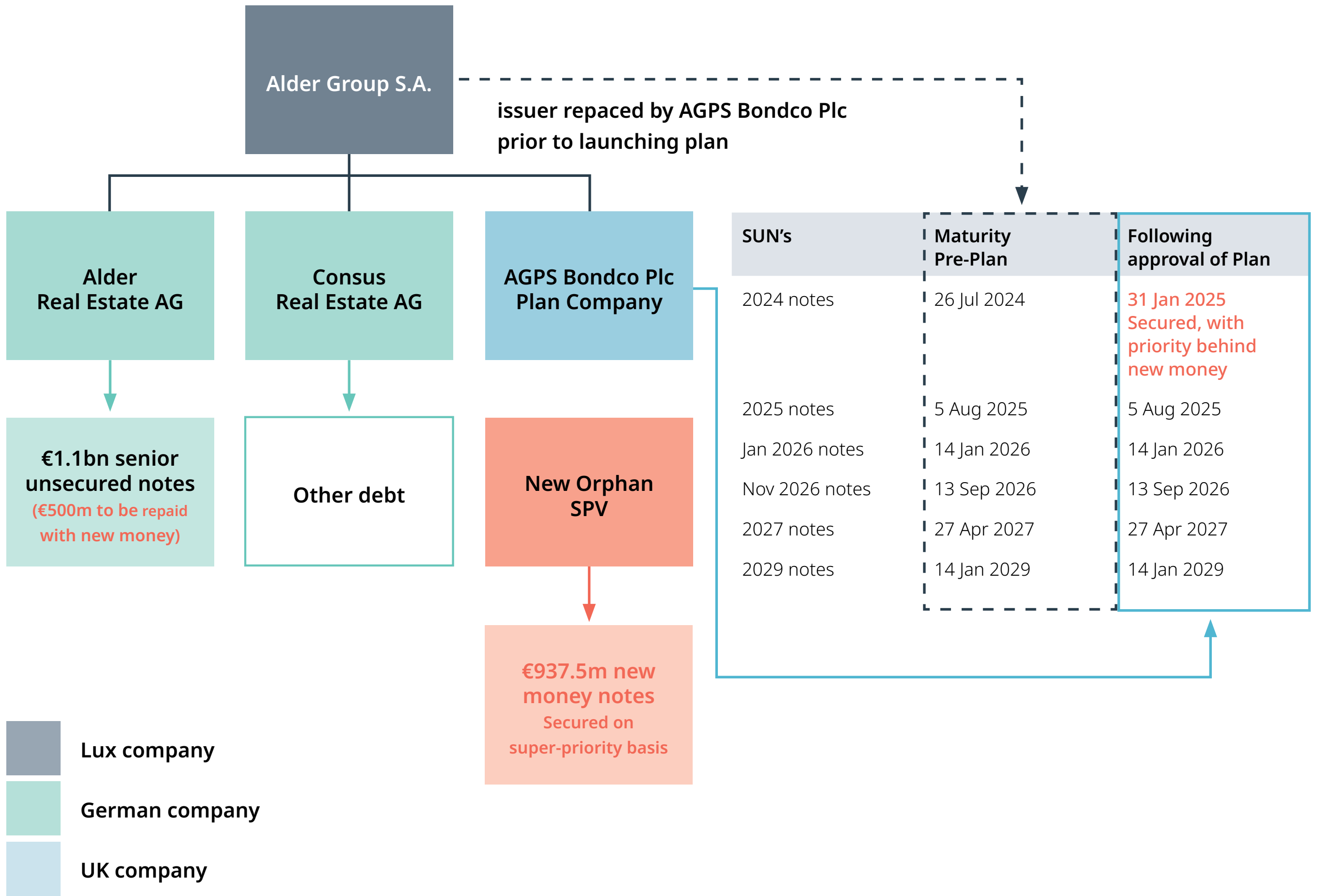
In brief, under the plan (see diagram below) Adler proposed to:

- extend the maturity date of the 2024 notes by one year (while retaining the maturities of the other SUNs); and
- vary the terms of the SUNs in order to (i) permit and facilitate the raising of €937.5 million; and (ii) modify certain negative pledge covenants to permit the creation of security.

The relevant alternative to the plan was a formal insolvency of the group, which was accepted by both AHG and the court.

The plan was approved by five out of six classes of creditors. As expected, the plan was not approved by the requisite majority of 2029 noteholders, with 37.72% of them voting against.

Simplified Alder group structure chart



SUN's	Maturity Pre-Plan	Following approval of Plan
2024 notes	26 Jul 2024	31 Jan 2025 Secured, with priority behind new money
2025 notes	5 Aug 2025	5 Aug 2025
Jan 2026 notes	14 Jan 2026	14 Jan 2026
Nov 2026 notes	13 Sep 2026	13 Sep 2026
2027 notes	27 Apr 2027	27 Apr 2027
2029 notes	14 Jan 2029	14 Jan 2029

* Red lettering denotes amendments effected by the restructuring plan

What was decided at the sanction hearing?

Mr Justice Leech sanctioned the plan on 12 April. An application to appeal the decision was heard by Leech J in a subsequent hearing on 25 April when permission to appeal was denied, which started the clock on a 21-day window in which the AHG could apply to the Court of Appeal to appeal the judgment.

The written sanction hearing judgment is lengthy (164 pages in total) and covers various issues, which are summarised in the table below. Our key takeaways from the judgment are as follows:

Practical Points

- The UK remains a leading restructuring centre: Notwithstanding the availability of the StaRUG, Adler substituted its bond issuer with a UK-incorporated entity in accordance with the substitution procedure under the German law-governed SUNs in order to make use of the English restructuring plan, demonstrating that the UK remains an attractive forum for foreign companies to carry out restructurings in spite of the development of new European restructuring tools.
- Majorities matter: The judge attributed weight to the fact that a simple majority of the dissenting class (62.28%) voted in favour of the plan together with the requisite plan majorities of each of the other creditor classes. They accepted that creditors are generally the best judge of their own interests.
- The court's role: The court reiterated that it does not have to be satisfied that the proposed plan is the best or fairest plan available. Echoing Trower J in Deep Ocean, who noted that a plan company will have "a fair wind behind it" provided the voting requirements are satisfied, it was accepted that once a plan reaches the court, it is the product of lengthy negotiations between the plan company and its stakeholders and is likely to be the only compromise expected to obtain the requisite approvals. It is therefore not the role of the court to interrogate whether a better or fairer alternative is available.
- May the best evidence win: When the plan company's valuation evidence is challenged, the court's decision will inevitably come down to the strength of each party's evidence. This gives rise to the question on everybody's lips: how will smaller creditors meet the cost of mounting an adequate challenge, particularly in an SME restructuring plan context? Perhaps the key to a successful "challenge" is engaging with the plan company and reaching a compromise before the plan gets to court.
- Appeal process: The AHG has sought permission to appeal the judgment in the Court of Appeal, but, if permission is granted, how will the practical implications of unwinding a partially implemented plan be dealt with? This was not addressed in the hearing or the judgment.

The No Worse Off Test and Valuation Evidence

The court will take a broad approach to the no worse off test: Leech J noted that both the plan company's and AHG's valuation evidence was "complex and uncertain" and that there are uncertainties when considering whether dissenting creditors would be any worse off, but he was guided by Virgin Active and Deep Ocean and observed that a broad approach could be taken, holding that "all of the legal consequences" of the restructuring plan for dissenting creditors should be considered.

- The court does not have to satisfy itself that a particular event will definitely occur when considering the outcome for dissenting creditors if the plan is sanctioned (ie the third limb of the no worse off test): The court must simply be satisfied that the event is the most likely to occur of the alternatives presented to court. In Adler, Leech J observed that the principal point of contention between the plan company and AHG was not what the relevant alternative was and what the outcome of the relevant alternative would be for the 2029 noteholders (as was the case in Virgin Active; but what the outcome for the 2029 noteholders would be if the plan were sanctioned. However, he adopted the approach taken in Virgin Active and held that he did not have to be satisfied that the noteholders would definitely be paid in full if the plan were sanctioned (as per the plan company's evidence), but merely that this was the most likely alternative.

Issues considered at the sanction hearing

Issue	Decision
Did the proposed restructuring contravene the pari passu principle?	No. The plan preserves the existing maturities of the SUNs (save for the 2024 notes) and noteholders will be paid in full.
Were the conditions for cross-class cram down satisfied and should the court exercise its discretion to cross-class cram? This required a detailed analysis of whether the 2029 noteholders (as the dissenting class) would be **"any worse off"** under the plan than they would be in the event of the relevant alternative, for which the court considered the valuation evidence provided by the plan company and the AHG.	Yes. The court preferred the plan company's valuation evidence and accepted that the 2029 noteholders would be paid in full if the plan were sanctioned and would receive 63% of their principal in the event of the relevant alternative.
Was the substitution of the issuer (to avail itself of the English court's jurisdiction) valid?	Yes. The issuer substitution was valid and effective and the English court therefore had jurisdiction to sanction the plan. Note that the AHG are also litigating the validity of the issuer substitution in Germany.
Were there any **"blots"** on the plan? In this regard, the AHG argued that they had accelerated EUR 185 million of the 2029 notes and the court should therefore refuse sanction.	No blots on the plan. It was unnecessary to decide whether the 2029 notes had been accelerated, because acceleration of the notes would not render the plan unlawful or inoperable.
Was the company's explanatory statement adequate?	Yes. The explanatory statement did not fail to include sufficient information to enable the plan creditors to make an informal decision.
Was it appropriate for the equity holders to retain their 77.5% shareholding when they were not injecting new money into the group?	Yes. Although Leech J noted that he had the **"greatest concern"** about the fact that existing shareholders would benefit from the plan were it to succeed, despite their having provided no support for the plan or any additional funding, it was ultimately held that this was not a reason to decline to sanction the plan. This could, however, be an area of concern for future plans.

In short, Adler confirms that London is a major European restructuring hub, which can offer a restructuring solution that may be unavailable in the home jurisdiction and provide certainty of execution via its restructuring-friendly court system.

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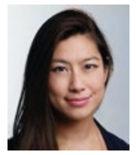
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The FCA's new Business Plan – what it means for enforcement

By Adam Jamieson and Mark Donnelly

On 5 April 2023, the FCA published its Business Plan for 2023/24. We've been considering what clues it gives us to the FCA's enforcement priorities for this year.

Interventions focus

The FCA is on a mission to become a more assertive regulator.

As part of this, we are seeing the FCA intervene earlier and use its formal powers, such as requiring firms to take or refrain from taking certain actions. These actions often involve firms' engaging with the supervision, enforcement and legal teams at the FCA.

Unsurprisingly, in the Business Plan, the FCA has identified the introduction of the Consumer Duty as a critical driver of its regulatory approach and mindset, and additional resources have been allocated to support its implementation. This extends to the FCA's enforcement priorities and processes, with a significant focus on early identification and intervention to prevent or reduce harm to consumers.

Interestingly, a new Interventions team has been created within the Enforcement division. The new team will become operational on 31 July 2023, at the same time that the Consumer Duty comes into force, and will enable the FCA to take rapid action where immediate consumer harm is identified.

This move towards greater intervention reflects the FCA's intention, as stated in its 2022 to 2025 strategy, to be more assertive and to use its enforcement and intervention powers more proactively. Case numbers suggest this is beginning to filter through. In 2021/2022:

- The FCA opened 142 cases relating to the use of voluntary requirements (VREQs). Enforcement helped secure 64 VREQs and 3 undertakings from various firms.
- It opened 35 cases relating to the use of own initiative requirements (OIREQs), up from 18 in 2020/21. Enforcement helped issue 22 OIREQs.
- The FCA used the s.166 (skilled person) appointment power in 38 cases.

Financial crime

The FCA is also taking a more assertive approach to tackling financial crime. It will be increasing the volume of its proactive assessments of firms' anti-money laundering systems and controls by, among other things, making greater use of data to identify firms more susceptible to receiving the proceeds of fraud. The FCA plans to develop further data-led analytical tools to support its anti-money laundering supervisory work.

Financial crime remains a core focus for the Enforcement division: a number of enforcement notices relating to firms' financial crime controls have already been published this year.

Operational resilience

Elsewhere, the Business Plan signals an intention to provide clearer guidance to firms on the procedure for reporting failures to meet the FCA's new standards on operational resilience, ahead of the 31 March 2025 deadline, from which time firms will need to demonstrate they can remain within the tolerances set out in the FCA's operational resilience rules.

We expect operational resilience (including preparedness for incidents) to be another key focus for Enforcement, particularly in cases where operational disruption causes serious harm to consumers or has a significant market impact.

Changing of the guard

The release of the latest Business Plan follows the recent announcement of Therese Chambers and Steve Smart as new co-Executive Directors of Enforcement.

Given their respective backgrounds in consumer investments and national security, and in line with the themes set out in the Business Plan, we expect that the Consumer Duty and financial crime systems and controls will feature heavily as enforcement priorities in the coming years.

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European employment law – Sexual harassment: what do employers in Spain and the UK need to consider?

By Ruth Buchanan and Liz Parkin

In this article, we consider what businesses operating in Spain and the UK need to know about recent legislative measures introduced by the Spanish Government to address harassment in the workplace, and whether potential changes are still on the cards in the UK.

Potential criminal liability for companies in Spain

Companies in Spain have been criminally liable for the last 13 years for certain types of misconduct in the workplace, and on 6 September 2022 sexual harassment was added to this list.

This recent change was introduced to comply with various European standards and recommendations. However, the key drivers of change were the need to ensure that companies have robust internal systems in place to help prevent such conduct and that employers are monitoring such behaviour and raising awareness that it will not be tolerated in the workplace.

Companies operating in Spain must review their criminal compliance plans and assess their level risk in relation to harassment, taking into account factors such as their business activities, sector, size and staff structure. Thereafter, companies must adopt the necessary internal policies to minimise the risk of harassment and have measures in place which enable the employer to react quickly if such incidents occur. Clearly, in order for the company to be held criminally liable for an employee's harassment actions, the harassment must be committed in the course of the company's business and must benefit the company. It may be difficult to imagine a scenario in which harassment could benefit the company; however "benefit" is construed quite broadly. For example, if the person accused of harassment resigns, the company could benefit by not paying dismissal compensation, future remuneration and social security costs.

Additionally, for the company to be criminally liable, the harassment must be committed either by a director or manager, or by a worker who was not properly supervised by a director or manager. A defence available to the company would be that its criminal compliance plan was up to date and included internal anti-harassment policies, a harassment protocol to manage internal complaints and harassment-specific training.

Where a company is found to be criminally liable, this can result in a fine of up to €225,018 (about £200,000), a statutory termination payment and compensation for damages if the victim wants to terminate their employment. The company may also incur a social security benefits surcharge as the harassment can be classed as an accident at work if health and safety measures were not followed.

Are there possible changes in the pipeline for the UK?

Statutory protection from discrimination is already in place in the UK (including in relation to sex, which is a protected characteristic under UK law). The legislation is enforced via the employment tribunal system and leads to financial penalties for employers found liable. However, there is no regime to bring criminal charges directly against an employer in relation to sexual harassment, though certain forms of harassment such as assault or stalking would constitute a criminal offence with liability sitting with the individual perpetrator(s).

Current legislation already means that an employer can be held vicariously liable for harassment by one of its employees, unless the business can evidence it took all reasonable steps to prevent it (for example through regular training and enforcement of workplace policies). However, the Government has been supporting a new Bill to amend the Equality Act 2010, which would serve to strengthen workplace sexual harassment laws. In particular, it would introduce the right for employees to bring tribunal claims where the harassment is committed by a third party, for example a consultant or client, rather than another employee.

However, a recent influx of amendments added by Conservative backbench peers means that the Bill is unlikely to pass. Some members are concerned about implications for free speech and, fundamentally, there are concerns about employers being held liable for the actions of third parties over whom they have no ultimate control. Another worry expressed by members of the House of Lords is that the Bill's vague language will facilitate claims by "financially opportunistic, psychologically unstable, or hyper-sensitive employees" against their employers.

The amendments mean that the Bill will be sent back to the House of Commons for debate. Due to timing constraints and the amount of other legislation being debated, it looks unlikely that the Bill will be allocated sufficient time for debate and therefore it will most likely fall away entirely.

What does this mean for European businesses?

- The need for legal reform to address sexual harassment in the workplace has been recognised globally, with countries such as Spain taking a significantly more stringent approach than the UK. Where a business operates across jurisdictions with varying degrees of protection, it is often easier for the company to adhere to the most stringent rules firm-wide to ensure consistency of approach.
- Other jurisdictions, such as Australia, are proactively tackling harassment in the workplace by imposing a positive duty on employers to introduce reasonable and proportionate measures to eliminate workplace sexual harassment. This positive duty expressly covers the conduct of third parties, eg customers and clients, which is what the UK has been trying to achieve with the proposed amendments to the Equality Act. Furthermore, employees can apply for a "stop sexual harassment" order and there's a new civil penalty provision prohibiting sexual harassment in connection with work (including "after hours" conduct). Therefore, although the Australian Government hasn't gone as far as Spain, ie criminalising sexual harassment in the workplace, it has tried to offer employees more avenues to seek redress and to discourage such conduct by way of tribunal intervention and civil penalties. This could be a good indicator of the UK Government's likely route in the coming years.
- Regardless of how legislators respond to workplace sexual harassment, one conclusion is inescapable: employers with a multinational presence need to maintain a positive workplace culture across the organisation to promote gender equality. This should reduce the risk of sexual harassment claims, and other harassment, discrimination and bullying issues which can create liabilities for an employer.

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Reform of Luxembourg Arbitration Law: how does it apply to your M&A transactions?

By Isabelle Lentz and Geoffrey Delamarre

On 25 April 2023, the Luxembourg law of 19 April 2023 on the reform of the Luxembourg arbitration rules, implementing an adaptable up-to-date arbitration system in Luxembourg (The New Arbitration Law), entered into force. The New Arbitration Law is based on bill of law no. 7671 and is expected to further promote the Luxembourg arbitration framework as a reliable, efficient and highly flexible alternative to involving Luxembourg's national courts. The changes to the arbitration system have been made through implementation in the new Luxembourg Code of Civil Procedure.

The new Luxembourg provisions have introduced a single arbitration regime that does not exclude international arbitration structures, being based on French and Belgian arbitration law aspects and also reflecting to some extent the UNCITRAL arbitration rules, and can therefore be used for a variety of international multi-jurisdictional transactions.

The New Arbitration Law has no impact on investment arbitration scenarios with respect to the ICSID[1] Convention, except in relation to recognition and enforcement of judgments.

The new Luxembourg Arbitration Law regime

In a nutshell, the new rules concern three major topics:

General approach to exclusive application of arbitration rules

The new rules confirm that if a dispute about an arbitration agreement is brought before a Luxembourg national court such court must declare that it has no jurisdiction over such dispute.

The national court will be competent only if it comes to the conclusion that the subject matter is non-arbitrable or if the arbitration agreement is manifestly null and void or manifestly inapplicable. Consequently, the court's review of the arbitration agreement is restricted. In this respect, it is worth noting that the New Arbitration Law recognises the autonomy of the arbitration clause, which is considered separate and distinct from the other provisions of the relevant contract. Consequently, any invalidity or nullity of other provisions of the contract does not affect the arbitration clause.

Non-arbitrable matters are explicitly referred to in the new rules and comprise the status and capacity of natural persons, arbitration agreements between professionals and consumers, employment disputes as well as residential lease disputes. Such non-arbitrability continues to apply even after the relevant contractual relationship has ended. Furthermore, disputes which stem from insolvency are also not subject to arbitration. However, the resort to existing arbitration agreements is not hindered by the opening of insolvency proceedings, which may therefore be pursued in most instances.

As a general rule, even if proceedings have already been initiated before a state court, parties to disputed contracts can still refer the relevant matter to arbitration at any time.

On the other hand, if an arbitral court declares its lack of jurisdiction for nonarbitrability reasons for instance, any state proceedings which have already begun will be resumed provided a party to the disputed contract informs the state court of such arbitral court's decision.

The new role of a Luxembourg state supporting judge

The new rules have introduced a ***juge d'appui*** who supports the parties to an arbitration agreement by resolving procedural difficulties. Such procedural difficulties can range from disputes about the constitution of the arbitral court, to the appointment of the arbitrators, including the settlement of disagreements about the appointment and the removal or recusal of the arbitrators involved.

More specifically, the parties to a disputed contract can seek the supporting judge's assistance in obtaining an order of interim measures for protection in cases where the arbitration court has not yet been constituted or where it is clear that the particular measures being sought cannot be ordered by the arbitration court. This approach is consistent with the Rules of Arbitration of the Luxembourg Chamber of Commerce[2], which stipulate that the parties may ask the judicial state authority to grant interim or protection measures subsequent to the constitution of the arbitration court. The application for such state measures cannot be considered an infringement of the applicable arbitration rules or a waiver of the right to resort to arbitration in a particular case.

The supporting judge's orders are, however, not subjected to appeal or opposition.

The judge's involvement may be requested by the parties to the arbitration agreement or by the arbitral court. Generally speaking, such request may be made if the seat of arbitration is Luxembourg, if the parties submitted the relevant arbitration to Luxembourg law or where there is a significant link between the dispute and Luxembourg based on the idiosyncrasies of the underlying contractual framework.

In this respect, it is also worth noting that, if a specific District Court has been specified in the relevant arbitration clause, the supporting judge will be the president of such District Court. Failing that, the President of the District Court of Luxembourg will be the supporting judge.

1 International Centre for Settlement of Investment Disputes, Washington D.C.

2 The current version has been in force since 1 January 2020

Enforcement of arbitral awards in Luxembourg

As mentioned above, the new Luxembourg arbitration rules encompass both international and domestic Luxembourg arbitration frameworks and awards, and consequently contain provisions for the enforcement in Luxembourg of awards rendered in Luxembourg and those rendered abroad.

1 Awards rendered in Luxembourg

Awards based on an arbitration agreement in which Luxembourg is the designated seat of arbitration are automatically deemed rendered in Luxembourg and can be enforced by way of a simple procedure, which involves the filing of an ***exequatur*** request. The filing of such enforcement request must be made before the District Court of the jurisdiction in which the award was rendered. The District Court may refuse to grant the ***exequatur*** request only if at least one of the limited reasons for annulment set out in article 1238 of the New Luxembourg Code of Civil Procedure applies. Such reasons include the arbitration court having incorrectly asserted its jurisdiction or where the award is contrary to public policy

Any order granting ***exequatur*** is not subject to any separate appeal. This means that the award itself must be appealed by one of the parties (typically the party facing the enforcement). Such appeal will again be subject to the relevant arbitration rules and cannot be brought before a Luxembourg state court unless the arbitral court cannot be reconstituted, in which case the matter can be brought before the Court of Appeal. This rule is explicitly set out in article 1236 of the New Luxembourg Code of Civil Procedure. Consequently, the only option to bring proceedings before a Luxembourg state court is to file for annulment based on the limited grounds set out in article 1238. The competent court for such annulment proceedings will be the Court of Appeal, rather than the District Court competent to render the order of ***exequatur***. The filing of such annulment proceedings automatically implies an appeal against the execution of the award.

This situation was slightly more difficult and time-consuming to navigate before the reform, because prior to requesting annulment of the award, the relevant party had to file a request before the competent district court for the award to be set aside. Only subsequently, could such decision be appealed by way of proceedings before the Court of Appeal. The new regime now provides for the direct seizing of the Court of Appeal in annulment matters.

Finally, any order refusing ***exequatur*** must be appealed before the Luxembourg Court of Appeal, which turns this court into the only competent court of appeal in arbitration award enforcement scenarios, thus eliminating the former necessity to appeal the award twice.

2 Awards rendered outside of Luxembourg

The new articles 1245 ff. of the New Luxembourg Court of Civil Procedure set out the enforcement rules with respect to awards rendered abroad. The procedure is very similar to the one applicable for awards rendered in Luxembourg and as such also requires an order of ***exequatur*** granted by the District Court of competent jurisdiction where the person against whom enforcement is filed is domiciled. In the absence of such court, the competent court will be the district court of the jurisdiction where the award was intended to be enforced from a transactional perspective. Here, again, an ***exequatur*** order cannot be granted if the award is manifestly tainted by at least one of the reasons for annulment set out in article 1246.

However, unlike the enforcement system applicable to Luxembourgrendered awards, the order granting ***exequatur*** can be directly appealed before the Luxembourg Court of Appeal. An appeal against the foreign award itself before the Luxembourg courts is for obvious reasons not possible, as the new rules leave competency for such procedure to the original court of competent jurisdiction in the foreign seat of arbitration.

Pursuant to article 1246 of the New Luxembourg Code of Civil Procedure, the applicable grounds for granting such an ***exequatur*** order annulment filing are largely the same those for the annulment appeal of a Luxembourgrendered award (article 1236) but they also include further specific grounds based on fraud, later stage discovery of decisive documents as well as reliance on inaccurate documents or false testimonies.

Arbitration clauses in M&A transactions

General overview

The use of arbitration is a relatively popular choice in European cross-border transactions for governing key documents such as share purchase agreements or shareholders agreements, in particular with regard to mid-cap and large-cap transactions. Typically, Luxembourg transactions are governed by national law, which means they are impacted by the New Arbitration Law.

Practical considerations

From a transactional and contractual perspective, the introduction of the new rules should not affect customary ways of drafting Luxembourg-governed arbitration clauses to any great extent. Nevertheless, the New Arbitration Law will position Luxembourg as a prime site of choice for arbitration with a discreet and efficient alternative means of dispute resolution which is essential for M&A transactions.

If you have any further questions on the new Luxembourg arbitration regime or you require any assistance in respect of Luxembourg arbitration in general, do not hesitate to contact our dedicated Ashurst Luxembourg team.

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European long term investment funds (ELTIF) 2.0: A new era for Private Funds Sponsors?

By Antonios Nezeritis, Arnaud Julien, Marc Hirtz and Amina-Nadège Guelaoui

Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds (the ELTIF Regulation) was aimed at boosting European long-term investments (ELTIFs) in the real economy, as long-term finance has been identified as crucial in putting the European economy on a path towards smart, sustainable and inclusive growth.

However, since the adoption of the ELTIF Regulation, very few ELTIFs have been authorised and they have not evolved as expected, despite the EU's desire to promote long-term finance.

As a result, the European Commission (the Commission) has committed to review the ELTIF Regulation. On 15 February 2023, the Council of Europe, the Economic and Social Committee and the Commission reached a political agreement, which has been adopted on first reading by the European Parliament. The ELTIF Regulation was then amended by Regulation (EU) 2023/606 of the European Parliament and of the Council of 15 March 2023 as regards the requirements pertaining to the investment policies and operating conditions of European long-term investment funds and the scope of eligible assets, the portfolio composition and diversification requirements and the borrowing of cash and other fund rules (the Updated Regulation), which was published in the Official Journal of the EU on 20 March 2023.

This article highlights the Updated Regulation's key changes to the ELTIF Regulation:

Broadening of the eligible assets scope, fund structures and applicable thresholds

Some of the core changes introduced by the Updated Regulation come from the broadening of the eligible assets scope, fund structures and applicable thresholds. These changes are summarised below:

Additions and clarifications

a) The Updated Regulation has included the following as eligible assets for ELTIFs:

(i) simple, transparent and standardised securitisations (to promote ELTIF investments in securitised assets);

(ii) green bonds (to encourage the trend towards private capital flows within more environmentally sustainable investments); and

(iii) "real assets" are now redefined as assets that have an "intrinsic value due to their substance and properties".

b) As part of broadening the scope of eligible assets, the Updated Regulation has improved the definition of "qualifying portfolio undertaking" (ie the issuer of the eligible assets) by:

(i) including newly authorised or registered financial undertakings aimed at bolstering innovation by favouring investments in FinTechs (though the definition is broad in referring to a five-year period between registration/authorisation of the financial undertaking and the ELTIF's initial investment in such financial undertaking);

(ii) increasing the market capitalisation (from €500 million to €1.5 billion) with respect to undertakings admitted to trading on a regulated market or on a multilateral trading facility; and

(iii) amending the framework surrounding investments located in a third country.

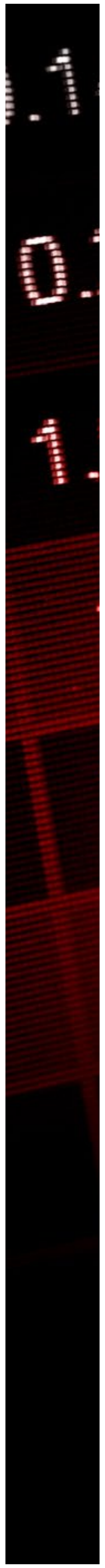
Structuring possibilities

The Updated Regulation further provides for (i) more options in terms of fund-of-funds strategies (by including UCITS and EU AIFs managed by EU AIFMs as potential investments, the Commission shows it is conscious of the benefit that fund-of-funds strategies can offer in terms of exposure to illiquid assets) and (ii) master feeder structures (though limited to feeder ELTIFs investing in master ELTIFs only).

Updated thresholds

First of all, the Updated Regulation has lowered the threshold for capital that an ELTIF can invest in eligible assets from 70% to 55% (thereby increasing the threshold for potential investment in other assets from 30% to 45%).

In addition, the threshold for investment in (i) a single real asset, (ii) instruments issued by (or loans granted to) a single qualifying portfolio undertaking and (iii) units/shares of any single ELTIF/EuVECA/EuSEF/UCITS/EU AIF has been increased from 10% to 20% (with an increase from 5% to 10% for UCITS-type assets, when issued by a single body).



Retail investors vs professional investors

Some amendments have also been introduced to increase the attractiveness of ELTIFs to both retail and professional investors.

Retail investors

The Updated Regulation has removed the restrictions relating to (i) minimum initial investment (€10,000) for retail investors and (ii) the disposal of a financial portfolio (not more than 10% for a portfolio of €500,000 or less).

In addition, a suitability assessment and related statement of suitability (in line with MiFID II) have been put in place, together with a clear written alert to be issued to retail investors under certain circumstances (though these requirements do not apply where the retail investor is a member of senior staff, or a portfolio manager, or director, officer, agent or employee of the manager of the ELTIF, or of an affiliate of the manager of the ELTIF, who has sufficient knowledge about the ELTIF).

Professional investors

In order for ELTIFs to remain attractive to professional investors, the Updated Regulation clearly states that the investment and concentration limits do not apply to, and borrowing limits are higher for, ELTIFs solely marketed to professional investors.

Liquidity and redemptions

The redemption provisions and liquidity profile have also been amended as part of the ambition to upscale the use of ELTIFs, as follows:

a) In relation to redemptions, a minimum holding period (which may also refer to the life of the ELTIF) has been introduced, though the length of such period is not specified;

b) in relation to borrowing, a 30% limit based on the capital of the ELTIF has been replaced with a 50% limit based on the net asset value of the ELTIF with respect retail investors, and with a 100% limit based on the net asset value of the ELTIF for ELTIFs that are marketed to professional investors only; and

c) in relation to secondary trading of ELTIF units or shares, the option has been introduced to organise, under certain conditions, a full or partial matching of transfer requests by exiting investors with transfer requests by potential investors.

Miscellaneous

In addition to the above, the following amendments are worth mentioning:

a) ELTIF register – the Updated Regulation now requires a list of specific information to be kept up to date in the ELTIF register held by ESMA;

b) Preferential treatment – the Updated Regulation specifies that preferential treatment among ELTIF's retail investors is based on classes of shares/units;

c) Local facilities – the obligation to provide facilities in the Member State where the ELTIF is intended to be distributed has been removed; and

d) Sustainability of ELTIFs – the Updated Regulation specifically provides for an assessment to be undertaken in relation to an ELTIF labelled "environmentally sustainable/green", regardless of whether a general obligation of the principle of "do no significant harm" should apply to ELTIFs and ELTIFs' place within the objectives of the European Green Deal.

Entry into force

The Updated Regulation entered into force on 9 April 2023 and will apply from 10 January 2024 onwards.

A transitional period of five years (until 11 January 2029) has been implemented for ELTIFs authorised under and in compliance with the ELTIF Regulation before 10 January 2024 (except that ELTIFs which are authorised under the ELTIF Regulation before 10 January 2024 and which do not raise additional capital do not need to comply with the Updated Regulation).

Finally, it is important to note that any ELTIFs authorised before 10 January 2024 can opt in, and be subject, to the Updated Regulation.

Conclusion

At first glance, one can only be happy and enthusiastic about the Updated Regulation's boosting and reshaping of the ELTIF Regulation, which wisely enough is based on existing ELTIF foundations and takes into account the market pressure for solutions that align private markets strategies to retail investors, while also ensuring that ELTIFs remain attractive to professional investors.

In this respect, any private fund sponsors will not only be seduced by the Updated Regulation itself, but also (and potentially more importantly) by the structuring possibilities it brings to (existing) investment strategies, which will broaden the investor base.

The next key milestone is the Updated Regulation's implementation and beyond – when we will see the real extent of progress and whether there is a real prospect of a genuine ELTIF 2.0.

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