

O wind (Hellas), if winter comes, can Spring be far behind?

A recent judgment in the case of *Hellas Telecommunications (Luxembourg) II SCA [2009] EWHC 3199 (Ch)*, encapsulates the equally destructive and rejuvenating qualities of the wind expressed by Shelley in his "Ode to the West Wind". For those in the restructuring world, the judgment illustrates how English driven restructurings can facilitate the rescue of distressed companies by way of pre-pack sales. The judgment is significant for a number of reasons: (1) it is the latest English case to consider the concept of centre of main interest (COMI) under the EC Regulation on Insolvency Proceedings (EUIR), and in particular illustrates how the court is ready to recognise the ability to move a COMI; and (2) it is the first case where the court has expressly given positive support for a specific pre-pack strategy.

In a short judgment delivered on 26 November (but not published until recently), Lewison J considered an application for the appointment of administrators in relation to Hellas Telecommunications (Luxembourg) II SCA ("Hellas"). Hellas had satisfied the grounds for making an administration order set out in Schedule B1 of the Insolvency Act 1986 as it was unable to pay its debts, and it was clear from the evidence that the administration would achieve a better realisation than a winding up. However, the court had to consider whether it had the requisite jurisdiction to make an administration order over a Luxembourg incorporated entity.

There were two key issues. The first was whether the company fell within the definition of company for the purposes of the Insolvency Act 1986. For the appointment of administrators pursuant to Schedule B1 of the Insolvency Act 1986 there is a bespoke definition of company contained within paragraph 111 of Schedule B1 which includes (amongst other things) companies incorporated in an EEA State other than the UK. After considering the evidence the court held that Hellas was a separate legal entity, being a cross between a joint stock company and limited partnership and fell within the paragraph 111 definition. Therefore the English Court theoretically had jurisdiction to make an administration order.

COMI: "Wild Spirit, which art moving everywhere"

The second issue to be satisfied to enable the court to make an administration order, was that Hellas' COMI needed to be located in England. In this regard it was noted that under the EUIR there was a rebuttable presumption that an entity's COMI was in its place of its registered office. In this case Hellas was a Luxembourg incorporated entity but had purported to migrate its COMI to London just 3 months prior to the application for administration.

Key Issues

- Luxembourg company migrates to London
- Creditor negotiations key factor in moving COMI
- Court expressly blesses pre-pack sale

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In considering whether Hellas had successfully moved its COMI, the court considered a number of factors including:

- its head office and principal operating address was in London;
- its creditors were notified of its change of address to London;
- a press announcement was made that its activities were moving to London;
- it had opened a London bank account; and
- it had registered under the Companies Act.

The Court however considered that the most significant evidence that the COMI had been migrated to England was that all the restructuring negotiations between the company and its creditors had taken place in London. This aspect of the judgment provides useful practical guidance on how to move COMI and is in accordance with the ECJ judgment in Eurofoods IFC in placing reliance on creditors' perception of COMI.

Pre-pack: "Destroyer and Preserver: hear, O hear"

A key aspect of the administration strategy was to facilitate a pre-pack sale of Hellas' main asset which was its shareholding in WIND Hellas, a Greek telecoms company operating in Greece. The sale was to take the form of a pre-pack whereby the administrators would effect the sale to a company called Weather which was within the same group as Hellas as soon as possible after their appointment. A lengthy sale process had taken place prior to the application for the appointment of administrators and by that stage there was only one bid on the table from Weather. The judge noted that any sale outside of a liquidation required the consent of the senior lenders who had also made it clear that the bid from Weather was the only bid they were willing to agree to and therefore on the evidence it was clear that there was no real alternative to the pre-pack sale to Weather. Whilst recognising that there had been some concern in relation to the use of pre-packs generally, which had resulted in the new disclosure regime embodied in the Statement of Insolvency Practice 16 (SIP 16), the judge found that in this case the guidance for proceeding with a pre-pack in SIP 16 had been fully complied with and he was prepared to expressly give the administrators liberty to enter into the pre-pack sale with Weather.

The case is particularly significant in this regard as, in addition to confirming prior decisions of the English court with regard to the legitimacy of the pre-pack sale as a restructuring technique, it is the first time that the courts have explicitly given positive support for a specific pre-pack strategy. The decision, however, should not be seen as a green light for all pre-packs, as there will remain (as the judge in this case recognised) a majority of cases where the court should not be concerned with or pass judgement on the merits of the pre-pack and where administrators should be left to make the decision as to whether a pre-pack is in the best interest of all creditors in any particular circumstance. (For more information on how pre-packs can be used as a valuable restructuring tool see our more detailed briefing "Pre-packs unwrapped".)

The judgment is a good example of how the English court can provide a viable forum for restructuring distressed businesses irrespective of their place of incorporation. It shows a willingness on the court's part to assert its jurisdiction to enable the use of recognised English restructuring techniques such as pre-packs which may not be available in other European jurisdictions.

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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