JONES DAY®

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A wind blows through an English brothel

KEY POINTS

- A court should not be concerned as to whether there is a genuine commercial or business reason for a company moving its COMI.
- The location of COMI is very much tied to what the creditors' perception is from time to time as the place which is the centre of gravity of the debtor's operations.
- One of the most important features that a court will take into account is where negotiations between a company and its creditors take place.
- The judgment in *Hellas* is significant, not only for what it says about the location of the COMI but also because it is one of the few occasions on which an English court has expressly given support for a specific pre-pack strategy.

Wind Hellas combined two controversial strategies to save the business as a going concern: moving of COMI and a pre-pack sale both of which tactics were upheld by the English courts.

No two recessions are the same. The current recession is the first one since the coming into force of the EC Regulation on Insolvency Proceedings (the Insolvency Regulation). It offers the potentially exciting and dramatic ability for an individual or company facing financial disaster to open up an atlas and have a good, hard look at a map of Europe and leg it to the country where he or it can best restructure or where it is best for the debtor to go bankrupt or enter into a formal insolvency procedure. In legal terms, this occurs by a process known as 'COMI (or centre of main interests) migration'. One example of COMI migration was recently seen in the *Wind Hellas* case which attracted a lot of colourful press coverage in which accusations were made that England had become a brothel for bankrupts. In this feature, the authors shall look at the reasons for COMI migration, see how it was achieved in the *Wind Hellas* case and consider whether England is a bankruptcy brothel and whether it is such a bad thing if it is.

COMI migration is one example of 'forum shopping'. The wealthy have for long taken their pick of where they live, pay their taxes and divorce. US companies have long favoured incorporating in Delaware even though they may do no business there. In a similar vain, England has been a popular venue for bringing libel actions and offers (at least if you ask English restructuring professionals) the perfect place to restructure as a result of its respected body of insolvency legislation and associated case law, trusted and impartial judiciary, a developed rescue culture and the depth and breadth of its restructuring experience and expertise. Compared to many systems, England is (according to the views of the authors) both a creditor and debtor-friendly country for those seeking to restructure their financial liabilities even if they have had little connection with the country before. *Wind Hellas* certainly thought so.

Wind Hellas is one of Greece's largest telecoms groups with over five million customers, 400 stores in Greece and a turnover of more than €1bn a year. Last Summer, a Luxembourg registered entity, Hellas Telecommunications (Luxembourg) II S.C.A ('HTL') which held the group assets (comprising shares in operating companies) migrated its COMI (but not its registered office) from Luxembourg to London (HTL was a hybrid between a company and a partnership which has no equivalent under English law). Three months later, it applied to the English court for an administration order (the purpose of the administration being a better realisation of assets for creditors than would be achieved by a liquidation). In a short judgment delivered on 26 November 2009 (but not published until recently), the court held that HTL had successfully moved its COMI to England and could therefore make use of the UK administration procedure as a main insolvency proceeding for the purposes of the Insolvency Regulation. This in turn enabled it to effect a pre-packaged sale of its assets acting through its administrators which on the facts, the court specifically approved.

HTL's COMI migration may seem a curious decision in what was then the midst of the group's most difficult trading period. It is unlikely that it was done to facilitate the group's trading or to streamline operations. In fact, the move was clearly contrived and was done for the sole motive to effect an efficient and quick sale (via an English pre-packaged administration) of the group assets to the successful bidder (which was part of the Wind Hellas group) following a marketing exercise. Presumably, this option was not available in either Luxembourg or Greece. It should come as no surprise that the English court showed no concern as to whether there were genuine commercial or business reasons for moving the COMI. There is, after all, no stipulation in the Insolvency Regulation as to the reason why a debtor may choose to move its COMI or any prohibition on moving COMI purely for the purposes of entering into a more favourable insolvency procedure than would otherwise be available.

THE INSOLVENCY REGULATION

The Insolvency Regulation came into force throughout the European Union (other than Denmark) on 31 May 2002.

COMI is one of the key concepts of the Insolvency Regulation and confers a COMI on all legal persons. The geographical location of a debtor's COMI is important because it will govern where the debtor's main insolvency proceedings in the EU must commence. In the case of a company, regardless of where it is incorporated, if its COMI is in a member state, it must enter into one of the main insolvency proceedings applicable to that state.

Unfortunately (and surprisingly), there is no complete definition of COMI within the Insolvency Regulation itself. Guidance can,

however, be found in Recital 13 of the Regulation which provides: 'the centre of main interests should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.'

Further assistance is found in art 3(1) of the Insolvency Regulation which provides: 'the place of the registered office shall be presumed to be the centre of main interests, in the absence of proof to the contrary.'

REBUTTABLE PRESUMPTION

Since the Insolvency Regulation came into force, there has been a number of reported cases on COMI migration relating to what 'proof to the contrary' is required to rebut the presumption that COMI is where the registered office is located. Similarly, there have been examples where a registered office has been moved but the COMI has not.

Schefenacker was a German company which moved its COMI as the first step in its chosen restructuring process which was the non-consensual restructuring of bondholder debt by way of a debt-for-equity swap implemented by an English company voluntary arrangement or CVA (the CVA being less cumbersome and having greater certainty of result compared to the *Insolvenzplan*, the German equivalent). In that case, an automotive supply group consisted of a German holding company with subsidiaries in various jurisdictions including England, USA, Australia and Germany. The German holding company decided that its best interests from a restructuring perspective would be to move ownership of its assets and liabilities to a new English holding company (using procedures available under German law). The company was then able to enter into an English company voluntary arrangement. Through German law, the holding company place of incorporation was successfully moved and the German court, also taking into account the movement of assets and liabilities, was satisfied that the company had moved its COMI to England. However, as demonstrated by *Hans Brochier Holdings Ltd v Exner* [2007] BCC 127 another case involving a German company, simply moving the jurisdiction of a company's incorporation though German law procedures, is not, by itself, sufficient to move a company's COMI.

IT'S NOT ENOUGH JUST TO COMMAND AND CONTROL

The tests used to establish COMI in a country different from the one where the debtor's registered office is located has had a somewhat turbulent history and until quite recently, the command and control test took hold in many countries in Europe including England. Under this test, it was often sufficient to base COMI in the country where the group parent was located on the ground that the parent determined the overall strategy of the group and many group functions were conducted in the parent's home country, eg IT services, human resources, treasury and finance functions, corporate branding and purchasing functions. Since 2006, the command and control test has been on the backburner following the ECJ ruling in *Eurofood IFSC Limited* (Case C-341/04) where the court stated that command and control by a parent in one country was not enough on its own to establish that the COMI of the parent's subsidiaries was the same as the parent's. The court stressed the need for the COMI to be ascertainable by third parties.

Following an extensive review of a number of decisions of the courts in England, the US and across Europe, *Eurofood* was recently applied by the Court of Appeal in *In Re Stanford International Bank Limited (in liquidation) 2010 EWCA Civ 137* (which was a case on the Cross Border Insolvency Regulations 2006 rather than the Insolvency Regulation but which uses COMI as well as the basis for recognition of foreign insolvency procedures) where the point in issue was whether an Antiguan incorporated bank had its COMI in the USA rather than in Antigua. On the evidence, the court found that the bank's COMI was in Antigua. Further, it was held that COMI was to be determined by the information about the debtor which was in the public domain and which a typical third party would learn as a result of its dealings with the debtor in the ordinary course of business. Matters that could only be established on enquiry should not be taken into account.

The recent judgment in *Kaupthing Capital Partners Master LP Inc Ch D (Proudman J)* 31 March 2010 is a further example of when the courts have applied the principles set out in *Stanford*. Kaupthing had its registered office in Guernsey but its day-to-day activities, including the performance of its administrative and business functions, were carried out in London. Administrators were appointed but the validity of their appointment was challenged on the basis that the company's COMI was in Guernsey and therefore the company was not one which could go into administration under English law.

The court in *Kaupthing* held that the presumption that the COMI is where the registered office is located can only be rebutted by factors which are both objective and ascertainable by third parties, being those who conduct business with the company. Simply to look at where head office functions are carried out is insufficient. In determining what is ascertainable by third parties, reference should be made to what third parties could find out in the public domain and what they could learn in the ordinary course of business (similar to the approach in *Stanford*). Information only ascertainable by investors (or industry insiders) should not be taken into account in assessing the COMI.

THE COURT DECISION IN *HELLAS*

Let us go back to HTL. How did HTL manage successfully to move its COMI and how did it do so, bearing in mind its size, in just three months? At the same time as moving its head office, the company also:

- informed creditors of the change in address to London;
- made a press announcement that its activities were moving to London;
- opened a London bank account;
- registered under the Companies Act as a foreign company; and

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- appointed UK resident individuals as directors of the English company which had become HTL's general partner.

HTL had kept its registered office in Luxembourg, only occupied relatively modest premises in London (certainly not befitting a parent company of a €1bn turnover group), retained a bank account in Luxembourg and may have remained liable to pay tax in Luxembourg.

The court's approach in determining COMI was in line with *Eurofood* and *Stanford* and it found on the evidence that the presumption that HTL's COMI was in Luxembourg was rebutted and that its COMI was in England based on objective and ascertainable facts. It is interesting to note that the court held one factor to be the most significant. The judge, Lewison J, said: 'The purpose of the COMI is to enable creditors in particular to know where the company is and where it may deal with the company. Therefore it seems to me that one of the most important features of the evidence ... is that all negotiations between the company and its creditors have taken place in London'.

The case therefore takes the same tack as the German court did in the PIN Group where it held that the COMI of a Luxembourg group company was in Germany because all the group's financial restructuring negotiations took place in Germany (poor Luxembourg, it does not get much success in COMI cases). Following *Hellas*, we have a better idea as to the importance that the English court will place on the location of negotiations with creditors. Advice to foreign directors in trying to establish an English COMI for their companies is to fly to England and once in England, book hotel rooms or rent a house and conduct your creditor meetings here.

USE OR ABUSE OF FORUM SHOPPING

It is in no way unique to corporate restructurings that well-advised clients will seek to place themselves in the best possible position. Whether it be setting up a tax efficient corporate structure or keeping parts of corporate structures insolvency remote, clients will try to seek an advantage in whatever way they can. Migrating COMI is no different although it is understandable why certain creditors may feel aggrieved.

Central to the issue of COMI is the idea that it would be unfair to creditors for a debtor to be able to avail itself of an insolvency regime in a different jurisdiction to that which was ascertainable by that creditor. But the fact that a company can change its COMI in a relatively short timescale could be seen to render this protection redundant. An unsecured creditor may decide to enter into a debtor-creditor relationship with a party based upon many factors, one of which being that he knows what his rights would be if the debtor went into an insolvency procedure. The creditor, even one who obtained specialist legal advice at the outset of the relationship, will have based his knowledge on the COMI of the debtor at that time (and the associated insolvency laws), but he would have no way of knowing if, and if so, where, the debtor may decide to move its COMI.

PRE-PACK

The judgment in *Hellas* is not just significant because of the issues relating to COMI. A significant aspect of the migration of the COMI to England was to facilitate a pre-pack of the company's main asset, its shares in the main trading telecoms company, to a new group company leaving behind subordinated lenders with nearly €1.5bn of debt as creditors of a company with no assets. Whilst recognising that there had been significant concern expressed in relation to the use (or mis-use) of pre-packs generally, which had resulted in the new Statement of Insolvency Practice 16 (SIP 16), the court held that the guidance provided by SIP 16 had been complied with and expressly gave the administrators liberty to proceed with the pre-pack as on the evidence, there was no realistic alternative to realising better value for creditors. Whilst pre-packs are not new, the judgment is one of the few occasions on which the English court has expressly given support for a specific pre-pack strategy.

CONCLUSION

There has been much criticism from non-legal sources in relation to both key aspects of the *Wind Hellas* case. Aggrieved creditors are incensed that a debtor can blatantly 'play the rules' and move its COMI to gain, what they perceive to be an unfair advantage. Additionally, pre-packs have gained more bad publicity which was probably inevitable given the size of the business in question and the volume of the debt left behind. Administrators have to act in the best interests of creditors generally and, in circumstances where the court has considered the pre-pack strategy and approved it, there is no question that any creditor could successfully challenge their conduct. It does seem a fair bet to say that forum shopping will continue to play a central role in cross border insolvencies as commerce and industry continues to become more globalised. However, whether English is quite the 'brothel for bankruptcy' remains to be seen. Quite a few Germans have been known to decamp to England for a while before declaring themselves bankrupt. We suspect that the attractions of the English countryside, the weather and the food did not provide the sole motivation for the migration but rather the less severe nature of English bankruptcy laws compared to their German equivalents may have had something to do with it. On the corporate side, England has also benefited at the expense of Germany.

Two examples illustrate the relative attraction of English insolvency law. First, German directors face severe civil and criminal penalties if they fail to file for insolvency within three weeks of the company becoming insolvent (as defined). Secondly, the German *Insolvenzplan* is underutilised and largely ignored. Compare the pragmatism of English wrongful trading laws and the flexibility and user friendly English CVA and you have some understanding of why England trumps German insolvency and restructuring in many cases. If English law and procedures can benefit debtors and creditors alike, let 'em come over here in their hundreds. We won't (and should not) stop them. Forum shopping is, after all, a way stakeholders in restructurings can vote with their feet. If England is a beneficiary of insolvency forum shopping, what is wrong with that? £10 for a quick English pre-pack anyone? ■