
**INTEGRA INTERNATIONAL & THE ALLIANCE OF BUSINESS LAWYERS:
BUSINESS RESTRUCTURING AND INSOLVENCY UNIT**

**INTERNATIONAL CORPORATE RESTRUCTURING
TAKING ADVANTAGE OF
CROSS BORDER INSOLVENCY PROCEDURES**

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INTRODUCTION

Following the harmonisation of EU Insolvency Regulation and the introduction of UNCITRAL model law on Cross Border Insolvency, international companies have increasingly taken the opportunity to move their Centre of Main Business Interest (COMI) from the jurisdiction from which they mainly operate to that of another, in order to take the benefit of an advantageous insolvency regime or of a restructuring procedure not possible in the country of origin.

FORUM SHOPPING

The procedure whereby the COMI is changed is usually termed 'Forum Shopping'. In corporate terms it is a process whereby a company identifies a jurisdiction that may provide a specific insolvency procedure or regime, that will ultimately enable the business to survive, either in its present format or by way of a transfer to another corporate entity whilst allowing the "problems" of the original company to be dealt with.

THE APPLICATION OF FORUM SHOPPING

The success of this procedure very much depends on the successful transfer of the COMI, from one jurisdiction into another, having first determined which jurisdiction is best suited to the particular issues faced by the company. If completed successfully, then the forum for the main insolvency proceedings together with the applicable insolvency law will be those of the new jurisdiction.

The overall purpose of the shift of the COMI is to provide a favourable jurisdiction to enable the desired result for an insolvent company, to restructure its debts and enable the underlying business to survive and, hopefully, thrive.

PRACTICAL REASONS TO EFFECT A COMI SHIFT

By way of example, under English law, relevant stakeholders have more influence on the identity and appointment of an administrator and liquidator and have the ability to bind objecting minority creditors with a potential debt for equity swap.

A COMI shift can provide an opportunity to take advantage of State funding, for example "Debtor in Possession" financing in Sweden and the US; or *Insolvenzgeld* in Germany and Austria, where there is funding by the state for workers' salaries during the first months of an insolvency. If this is a key factor, companies may want to explore a shift of the COMI to those countries before starting an insolvency process.

A COMI shift can also avoid the application for Acquired Rights EU Directive, so that in Holland, for example, if a company goes into liquidation and is sold as a going concern, the buyer is free to determine who the new buyer will employ without the risk of liability to those it does not employ. Again if this is a key concern, it may be that a company would try to effect a shift of their COMI to Holland before undergoing an insolvency process.

As a further example, under German law a debt-equity swap requires a greater approval quota than in the England. Again this may be a key factor in seeking a shift of the COMI.

THE MECHANICS OF A COMI SHIFT

Under the EC Insolvency Regulations there is a presumption that a company's COMI will be in its place of incorporation. This can be rebutted if there are clear, objective and ascertainable facts which point towards the COMI being elsewhere. In order to demonstrate this, it is essential that the company's creditors should know in which country the company is now based.

Certain indicators, such as the registered office address, where board meetings are held or where administrative functions are carried out, will assist in demonstrating where a COMI is situated.

THE ADVANTAGE OF CHOOSING THE RIGHT JURISDICTION

Certain jurisdictions allow stakeholders the opportunity to choose an appointed office holder, as opposed to an office holder being appointed by the Court from a panel; allowing no input from the stakeholder.

Certain jurisdictions may not allow the appointment of a sole office holder in respect of a group of companies, even though the companies are incorporated in the same jurisdiction.

There are other considerations with respect to the laws of each jurisdiction that can affect the responsibilities and liabilities of directors, for example:-

- The time that a director has a duty to file for an Insolvency procedure, which may potentially diminish the value of assets significantly
- The duties of an office holder to review past transactions and attempt to unwind and recover them, which could mean recovering monies from directors.

EXAMPLES OF A COMI SHIFT AND FINANCIAL RESTRUCTURE

Example 1 - Hellas Telecommunications (Luxemborg) II SCA (Hellas II)

Background

Hellas II, whose COMI was in Luxembourg, was a subsidiary of 'Weather', which traded in Greece as the second largest integrated operator of fixed line and mobile telephone service provider. It had complex loan arrangements, which involved Senior debt of €1,827m and Junior debt of €541m. Hellas had severe financial difficulties as a result of its borrowings.

Hellas II raised finance which it then loaned to Wind Hellas. In turn Wind Hellas would transfer monies across to Hellas II to fund interest payments. Therefore Hellas II was totally dependent on the ability of Wind Hellas to be cash positive.

In August 2009, steps were taken to achieve greater separation in corporate governance arrangements between Hellas II and Weather. The aim was for Hellas II to move its COMI from Luxembourg to England, to avail itself of a jurisdiction which the group considered would allow greater flexibility for restructuring;

An English registered company, Hellas Telecommunications (UK) Limited, (Hellas UK), was formed. and became the corporate general partner of Hellas II, together with directors of Hellas UK being appointed as members of the supervisory board of Hellas II.

Establishing the COMI of Hellas II In England

- Hellas II opened in London, where board meetings were held and from which correspondence was sent out;
- Hellas II was registered at Companies House as a foreign company and as a UK establishment of an overseas company;
- Notices of change of registered and correspondence address were sent to all creditors;
- All negotiations between Hellas II and its creditors were conducted in London

Lead up to Administration

On 15 October 2009, Hellas II defaulted on its interest payments under a series of Subordinated Loan Notes together with other payments, and there was no prospect of making any further payments in the future.

By early November, two serious bids emerged, one from Weather Finance (owned by Weather) and one from a committee of Subordinated Note holders, with both providing for cash injection and assuming that, the Senior Secured Notes and the Senior Notes would remain in place and roll into the new structure. The former bid was ultimately preferred.

Administration

Hellas II undertook the process of soliciting formal consents from the senior creditor groups which triggered its proposal to apply for administration.

On 17 November 2009 an application was submitted to the High Court for an Administration Order to be made. A sale agreement was agreed prior to that with the intended Administrators, to sell the assets to Weather Finance (guaranteed by Weather) [a method known as a “pre-pack sale”]. In the meantime, the Subordinated Noteholder Committee made an improved offer.

At the Court hearing for the administration on 26 November 2009. Hellas II was placed into administration and the following matters were discussed in Court:-

The COMI of Hellas II had been moved deliberately, expressly and openly from Luxembourg to England. The Court was satisfied that the COMI was in England at the time of the hearing and was ascertainable by third parties and all negotiations with the creditors of Hellas II during the restructuring process took place in England.

The Court was therefore satisfied that Hellas II's COMI, under EC Regulation on Insolvency Proceedings 2000, was located in England. Furthermore, it was satisfied that the Weather bid was the only bid which had the consent of the creditors, whose consents were required for its implementation and that compelling evidence had been produced to the Court for the implementation of the pre-packaged sale to Weather. The Court gave the Administrators the power to sell the assets of Wind Hellas II. The shift in COMI was successful.

Example 2 - La Seda de Barcelona SA

La Seda de Barcelona SA had tried to enter in to a scheme under Spanish law but only obtained 95.5% of votes favouring the financial restructuring process of the syndicate loan. Under Spanish Law there must be a 100% agreement.

It was decided that the COMI should be moved to England, where less votes were required to approve the scheme. The move took place and a Scheme of Arrangement was sent to creditors for them to consider and approve.

On 26 May 2010 the High Court in England sanctioned the first ever English Scheme of Arrangement undertaken by a Spanish company, which allows a company to carry out a debt renegotiation, counting on the support of 75% of its liabilities.

This highlights how such Schemes of Arrangement have become a popular tool in large restructurings. They are increasingly being considered by European companies that have a connection to the UK, which due to the lack of a local equivalent does not enable them to successfully restructure their debt without the unanimous consent of their creditors.

SUMMARY

The examples above highlight the combination of moving the COMI and carrying out a restructuring process in another jurisdiction. Of course moving the COMI may not always be successful and therefore careful thought and planning must go into that process. To effect this there is a need for a practical working knowledge of International Insolvency.

The concept of Forum Shopping has a broad International reach beyond the EU and involves UNCITRAL Model Law on cross border insolvency. These provide a framework for the courts of one country, which has accepted the model law, to recognise the concept of COMI as a means to establish jurisdiction over main and non main proceedings.

INTEGRA & ABL BUSINESS RESTRUCTURING AND INSOLVENCY UNIT

INTEGRA INTERNATIONAL is a global association of independent accounting and consulting firms dedicated to exchanging information and advising growing businesses and professionals, which is associated with **The ALLIANCE OF BUSINESS LAWYERS**, an international network of lawyers with a similar philosophy to that of Integra International.

These two networks have members actively involved in business restructuring, rescue and insolvency; and as a result have formed a specialist **Business Restructuring and Insolvency Group**. This Group provides a co-ordinated effort to effect a dynamic and successful restructuring process when dealing with cross border matters. It is able to assist in determining the most effective course of action to arrive at a successful outcome when dealing with the complex and varied needs of clients.

The Business Restructuring and Insolvency Group is co-chaired by **Norman Cowan**, a Licence Insolvency Practitioner, Chartered Accountant and a Partner in Wilder Coe LLP together with **Chris Axford**, a Corporate & Restructuring Lawyer and Partner in Druces LL, both based in London. They will be pleased to offer practical advice to try and resolve your questions and to assist with guiding you to a relevant practitioner in your local jurisdiction if required. Their contact details are set out below:

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