WIND Hellas

A complex restructuring in a global recession

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Christian Pilkington, Mark Glengarry, Colin Chang, Laura Prater, Ben Davies, James Greene and **Kevin Heverin** of **White & Case LLP** examine an innovative cross-border restructuring.

On 10 December 2010, the High Court granted administration orders in respect of the administration applications of five companies in the WIND Hellas group (the group). These five companies were the shareholder, Hellas Telecommunications (Luxembourg) III (HT3), Hellas Telecommunications IV (HT4), Hellas Telecommunications (Luxembourg) V (HT5) and Hellas Telecommunications Luxembourg (HT6) (together, the group holdcos) (*see box "The WIND Hellas group structure"*).

This milestone facilitated, among other things, a pre-packaged (pre-pack) administration sale of the shares in WIND Hellas Telecommunications S.A. (WIND Hellas) to a newly-incorporated group (the newco group) and signalled to the market that the much-publicised second financial restructuring of WIND Hellas was drawing to a successful conclusion.

On 16 December 2010, ownership of 100% of the shares in WIND Hellas and certain other assets were transferred from the group to the newco group. These final steps represented the close of one of the most high profile and complex financial restructurings of recent times. A truly innovative deal, it represented one of the first times that the market has seen so many restructuring mechanisms used to implement a restructuring.

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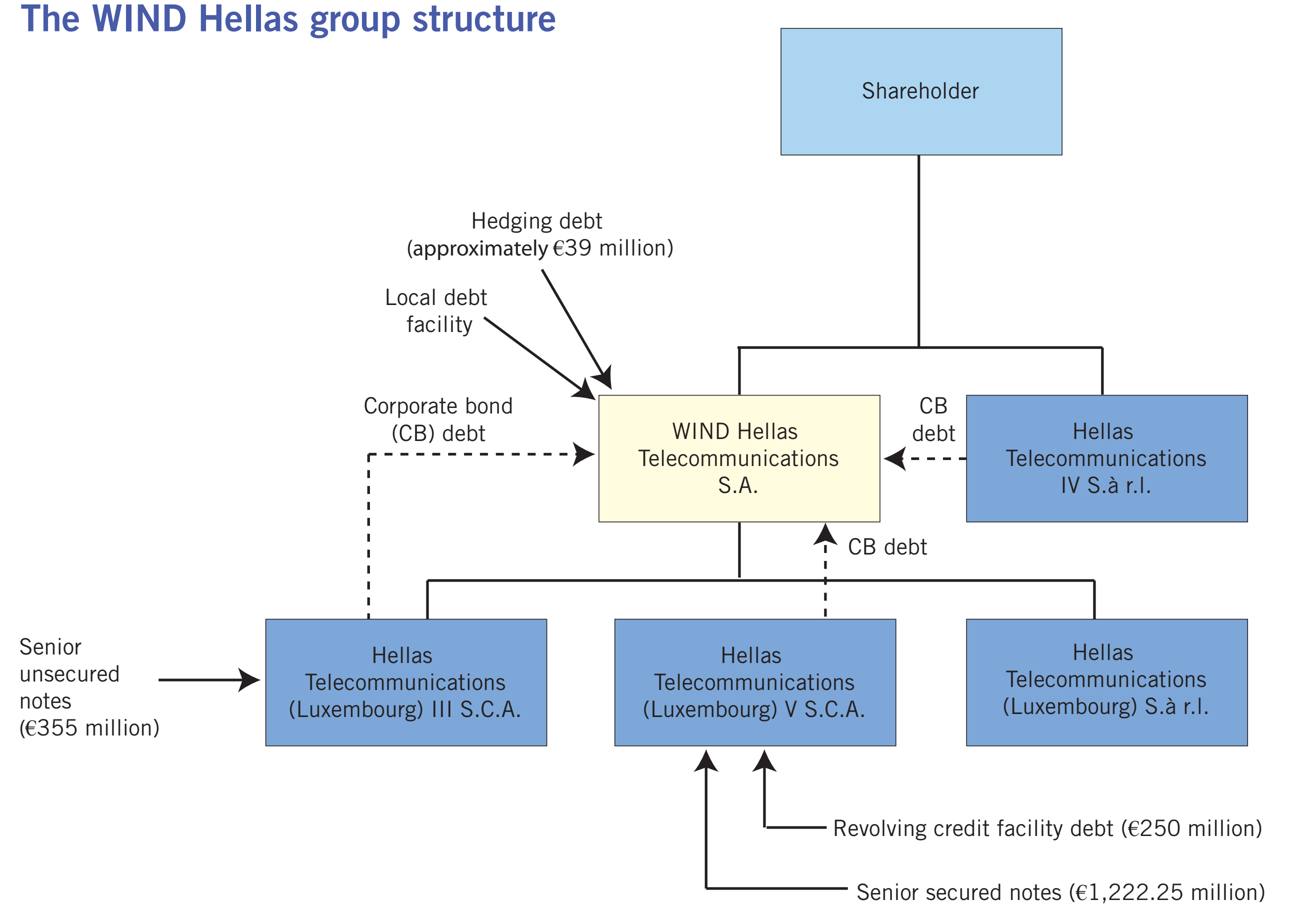
The WIND Hellas group structure



Key features of the restructuring included:

- Shifting the centre of main interests (COMI) of the group holdcos to the UK (*see box "What is a COMI?"*).

- Negotiating and entering into a formal standstill agreement, followed by the execution of a comprehensive restructuring implementation agreement, in both cases with the support of the group's revolving credit facility (RCF) lenders, hedging banks and certain senior secured noteholders.

- Using an English law scheme of arrangement (the scheme) between HT5 and the senior secured noteholders to transfer 100% ownership of approximately €1.2 billion of senior secured notes to an entity within the newco group in order to facilitate the implementation of the broader restructuring.

- Conducting an exchange solicitation for the senior secured notes as an alternative to the scheme and an additional equity offering to the senior secured noteholders in conjunction with the scheme.

- Undertaking a formal mergers and acquisitions (M&A) process to identify potential financial and strategic buyers for WIND Hellas and ultimately identifying the newco group as the successful bidder with the support of the group's RCF lenders, hedging banks and senior secured noteholders.

- Using a pre-pack administration of the shareholder, the parent of WIND Hellas, to enable the sale of all of the shares in WIND Hellas to the newco group.

- Preparing for four further administrations of companies within the group and the sale of various rights of these companies to the newco group.

- Making a successful application for recognition of the scheme under Chapter 15 of the US Bankruptcy Code (Chapter 15) (*see box "What is Chapter 15?"*).

This article discusses each of these features in detail, together with the practical, commercial and legal issues which were key to delivering a comprehensive restructuring solution.

Background

WIND Hellas is the main operating company of the group. It is the third largest integrated telecommunications operator in Greece. It offers fixed line, internet and mobile telecommunications services with, as at 30 September 2010, a total mobile customer base of approximately 3.88 million customers, and a fixed line and internet customer base of approximately 556,000 customers.

In 2009, the group was the subject of a high-profile restructuring (2009 restructuring) as a result of competitive pressures in the market place and unfavourable macroeconomic conditions in Greece. The COMI of the then direct holding company of WIND Hellas, Hellas Telecommunications (Luxembourg) II (Hellas II), was shifted to the UK. The 2009 restructuring was then effected by means of an administration of Hellas II and a pre-packaged sale of the shares in WIND Hellas and its subsidiaries to the shareholder.

In 2010, the Greek economic crisis occurred at a time when the group was seeking to recover from the 2009 restructuring and increase its market position. The ongoing impact of the crisis, combined with a competitive market and the negative impact on consumers of the austerity measures introduced by the Greek government, contributed to the group's ongoing financial distress. The possibility of a further restructuring arose and the group faced several key pressure points including:

- Amortisation and interest payments on various layers of its debt falling due.
- Potential defaults and cross-defaults under its finance documents.
- Directors' duties considerations under both Luxembourg and Greek laws.

As a result, the group appointed financial advisers and legal counsel to start considering restructuring options.

What is a COMI?

The concept of a company's centre of main interests (COMI) became part of EU law under the EC Regulation on Insolvency Proceedings (*1346/2000/EC*) (Insolvency Regulation) which came into force on 31 March 2002 in all EU member states except Denmark. COMI has subsequently been incorporated into EU legislation dealing with the cross-border insolvency of credit institutions and insurers and is also used in the UNCITRAL (UN Commission on International Trade Law) Model Law on cross-border insolvency (the model law), which was enacted in Great Britain pursuant to the Cross-Border Insolvency Regulations 2006 (*SI 2006/1030*) and in the US as Chapter 15 of the US Bankruptcy Code.

The Insolvency Regulation does not define COMI; however, there is a rebuttable presumption that a company's COMI is located in the jurisdiction in which its registered office is located (*Article 3(1)*). In addition, the COMI 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 (*Preamble 13, Insolvency Regulation*).

The European Court of Justice has said that the COMI must be identified by reference to criteria that are both objective and ascertainable by third parties (*Re Eurofood IFCS Ltd, Case C-341/04*) (*see News Brief "Eurofood: was it worth the wait?", www.practicallaw.com/1-202-4602*).

More recently, in *Re Stanford International Bank Ltd (in liquidation),* the Court of Appeal held that the court must consider only those objective factors ascertainable to third parties that are typical when dealing with the company; namely, those factors in the public domain that such a third party would learn in their course of dealing with the company (*[2010] EWCA Civ 137; www.practicallaw.com/6-502-1179*).

The Insolvency Regulation stipulates that a company may only open main insolvency proceedings in the jurisdiction in which its COMI is located. Under the Insolvency Regulation, main proceedings opened in one member state are automatically recognised in all other member states without further effect or formality, and the insolvency officer in those proceedings (whom the Insolvency Regulation calls a "liquidator", irrespective of his actual title) is able to exercise, for the most part, the same powers as he has in his home member state in all other member states.

Under the model law, automatic relief (usually including a stay) arises where a court grants an application for recognition of a foreign main proceeding. If an application for recognition of a foreign non-main insolvency proceeding is granted, then no automatic relief arises, although the applicant may petition the court to grant discretionary relief.

Debt and security structure

The group's debt and security structure is outlined below (*see also box "The WIND Hellas group structure"*). The group debt included:

- A €250 million RCF (the senior subscription agreement) between HT5, as borrower, WIND Hellas, the shareholder, HT4 and HT6, as guarantors, and certain financial institutions (the RCF lenders), which was fully drawn down and owing to the lenders under the senior subscription agreement.
- A series of interest rate swap agreements (the hedges) entered into by WIND Hellas with certain financial institutions (the hedging banks), which were closed out and replaced by hedging unwind amendment agreements in June 2010. These agreements closed out the hedges and crystallised the amounts owing to the hedging banks in a total amount of approximately €39 million.
- Senior secured notes in the amount of €1,222,250,000 due 2012, issued by HT5 (the senior secured notes) and guaranteed by each of the shareholder, WIND Hellas, HT4 and HT6 under a senior secured indenture (the senior secured indenture).
- Senior unsecured notes in the amount of €355 million due 2013, issued by HT3 (the senior unsecured notes) and guaranteed by each of the shareholder, WIND Hellas, HT4 and HT6 under the senior unsecured indenture (the senior unsecured indenture). The senior unsecured notes were contractually subordinated to the debt mentioned in the above paragraphs.

The above debt was secured by, among other things, a share pledge over the shareholder's shares in WIND Hellas and parent guarantees from the shareholder.

In addition to the debt outlined above, amounts borrowed by HT5 under the senior subscription agreement and the senior secured notes, and by HT3 under the senior unsecured notes (the CB debt), were on-lent to WIND Hellas in exchange for the issuance by WIND Hellas of corporate bonds under certain corporate bond programmes.

The relative rights of the group's creditors under these financing arrangements were governed by an intercreditor agreement (the intercreditor agreement). It provided that the transaction security granted by the various group members ranked and secured the debts owed, and the proceeds of its enforcement ranked in right and priority of payment, in the following order (excluding, for these purposes, the rights of certain administrative agents):

- The debt owed to the RCF lenders and the hedging banks.
- The debt owed to the senior secured noteholders.
- The debt owed to the senior unsecured noteholders.
- Certain intercompany debt other than the CB debt.

What is Chapter 15?

Chapter 15 of the US Bankruptcy Code applies to ancillary and other cross-border bankruptcy cases. Chapter 15 enacts the UNCITRAL (UN Commission on International Trade Law) Model Law on cross-border insolvency and is intended to encourage co-operation between the US and other countries with respect to cross-border insolvency cases. Chapter 15 applies where:

- A non-US court or foreign representative seeks assistance in the US.
- A US bankruptcy case is pending and assistance is sought in a country other than the US.
- The same debtor is subject to both a ***foreign proceeding*** (*see Glossary*) and a US bankruptcy case.
- Non-US creditors or other interested persons have an interest in commencing or participating in a US bankruptcy case.

On an application for recognition of a foreign main proceeding being successful, Chapter 15 provides automatic relief. This relief includes the provision of the US Bankruptcy Code governing adequate protection, and the automatic stay that applies to the debtor and its property within the territorial jurisdiction of the US.

Planning the restructuring

In June 2010, the group and its advisers started to explore its restructuring options with key stakeholders. This involved discussions with, among others, a steering committee of the RCF lenders and an ad hoc committee of the senior secured noteholders.

Key implementation considerations included protecting WIND Hellas and its key assets (in particular, its telecoms licence).

Restructuring the group's debt obligations was considered more desirable than commencing formal insolvency proceedings in the Greek courts in respect of WIND Hellas for a number of reasons, including as entry into insolvency would have given rise to a risk of termination of its telecoms licence and therefore a likelihood of significant value destruction for all of the group's creditors.

While restructuring solutions were being discussed with creditor groups, the group took steps to address its key pressure points (*see "Background" above*) by entering into a standstill agreement with its relevant creditors (the standstill agreement). It also appointed a chief restructuring officer to assist with managing liquidity and engaging and negotiating with the group's creditors.

Importantly, the group also took steps to move the COMI of the group holdcos to the UK to avail of certain English law restructuring procedures (including a scheme of arrangement and a pre-pack administration), which were considered more flexible than those available in Greece or Luxembourg, to facilitate the implementation of a successful restructuring or sale.

COMI shift

At an early stage of the restructuring planning, the group took steps to ensure that the COMI shift was supported by a sufficient number of "objective and ascertainable" factors to satisfy an English court that it had met the requirements to establish the COMI of the entities within the group in the UK. The steps taken in relation to each of the relevant group members included, among other things:

- Moving the head office and the principal operating address to London.
- Appointing new directors, who were British nationals and UK residents, to the board of directors.
- Holding all board meetings in London.
- Notifying all creditors, relevant parties and bodies (including the Luxembourg Stock Exchange) of its move to London.
- Holding all negotiations with creditors in London and ensuring that all correspondence was sent and

administrative functions were conducted from London.

- Registering with Companies House as a foreign company with a UK establishment.
- Ensuring that it became a resident in the UK for tax purposes.
- Moving the corporate books and records to London.
- Terminating the domiciliation and services agreements with the former Luxembourg domiciliation agent and executing an agreement with an English provider for the provision of corporate administration services in London.

By July 2010, in the group's view, the COMI of each group holdco was in the UK. This was on the basis that there were objective factors in the public domain that were ascertainable to those third parties dealing with the relevant group creditors in their ordinary course of business, which supported the position that the COMIs of each of the group companies had moved to London.

The M&A process provided an important foundation for the prospective administrators' appointment. The criteria for the M&A process were derived from the terms of the intercreditor agreement and a consideration of the prospective administrators' duties. It was important to ensure that:

- The relevant assets could be transferred to an incoming buyer of the group unencumbered by existing creditors' claims over such assets.
- The prospective administrators would be sufficiently comfortable (in light of their statutory and fiduciary duties) to accept their appointment and execute the sale documents.

In order to accept an appointment in circumstances in which a pre-packaged administration is likely to occur, the prospective administrator must also consider his ***SIP 16*** obligations (*see Glossary*) and, in particular, be satisfied that the best price has been obtained for the assets.

The purpose of the hearings

Two court hearings are required in order for a scheme to be approved.

At the first hearing, a company submits the proposed scheme to the High Court in order to obtain leave to convene a meeting of the creditors or members who will vote on the scheme. The court will order separate meetings for each class of creditors or members if it sees fit and will hear objections as to the composition of classes of creditors or members and to the fairness of the scheme. Whether or not there are any objections, the court will form a prima facie view as to the appropriateness of any division of creditors and/or members into classes (*Equitable Life Assurance Society, 26 November 2001, unreported*).

If the scheme is approved at the relevant meeting of creditors, the company will return to court to seek sanction of the scheme. At the sanction hearing, the court may again hear objections as to the composition of classes and the fairness of the scheme, as well as objections relating to procedural matters, and may use its discretion not to sanction the scheme notwithstanding overwhelming support from the creditors and/or members. Once the order sanctioning the scheme has been filed with Companies House, it becomes effective as a matter of English law and the scheme is binding on all creditors or members in the relevant classes whether or not they had notice of the meetings and whether or not they voted in favour of the scheme, thus binding dissenting creditors to the terms of the scheme.

The intercreditor agreement was also crucial to the structuring of the M&A process as it contained several requirements around the parameters within which any enforcement sale could occur. In particular, it provided that the security agent would be able to release all security and claims against WIND Hellas and the relevant group entities under the finance documents, to facilitate a sale of the WIND Hellas shares, only if a bidder offered all-cash consideration for such a sale, at a price which was supported by a fairness opinion from an internationally recognised investment bank.

The intercreditor agreement did not allow for the release of principal and interest. Therefore, certain put options that existed between the parent of the shareholder and WIND Hellas in respect of HT3, HT5 and HT6 needed to be exercised in order to enable WIND Hellas to be sold free of its subsidiaries. This was completed during the course of the restructuring and had the effect of transferring the shares of HT3, HT5 and HT6 to the ownership of the shareholder's parent. This was significant as it allowed WIND Hellas to be sold free of its subsidiaries and their principal and interest obligations.

From early July 2010, a lengthy and detailed M&A process was conducted to secure a sale of the shares in WIND Hellas, the CB debt and certain of the relevant group companies' rights, interest and claims against WIND Hellas. The process took into account the requirements of the intercreditor agreement and resulted in a successful bidder being identified, with the support of the RCF lenders, the hedging banks and the senior secured noteholders, in October 2010. The successful bidder (the newco group) was an ad hoc group of certain senior secured noteholders.

Creditor consents and implementation

Following the identification of the newco group as the successful bidder, the group entered into a restructuring agreement with the newco group, the RCF lenders, the hedging banks, certain senior secured noteholders and various administrative parties. This agreement focused on providing both formal consent for the commercial deal and consent to the detailed implementation structure that had been developed by the parties' advisers.

In relation to the senior secured noteholders, it was contemplated that an English law scheme of arrangement would be required in order to "cram down" any dissenting senior secured noteholders. Parties would otherwise be able to take their pro rata entitlement to the proceeds of realisation under the ***waterfall*** provisions of the intercreditor agreement. Therefore, in order to bind all senior secured noteholders to the overall restructuring, thereby preventing any cash leakage, the scheme was proposed.

Structuring the scheme

The scheme sought to bind all of HT5's creditors to its terms. It featured only one class of creditors; namely, the senior secured noteholders (the scheme creditors). The main features of the scheme were as follows:

- An instruction from the senior secured noteholders to transfer 100% of the senior secured notes to the newco group in consideration for equity within the newco group's holding structure.
- An additional offering to allow senior secured noteholders to subscribe in cash for further equity in the newco group's holding structure to part-finance the purchase price for WIND Hellas and to provide for the immediate cash needs of its business.
- Authorisation of HT5 to enter into certain specified restructuring documents for and on behalf of all senior secured noteholders.
- A deed of covenant whereby the scheme creditors agreed, in consideration for receiving the rights and benefits under the scheme, not to take legal action against certain other identified parties.

Jurisdiction for schemes

The question as to whether it has jurisdiction to sanction a scheme is of central importance to an English court when it is presented with a scheme proposal in respect of a foreign company. In such circumstances, the court will only exercise its discretion to order that the creditors' meeting to consider the scheme be convened if it is satisfied that, among other things, the company proposing the scheme is a company liable to be wound up under the Insolvency Act 1986 (1986 Act).

The 1986 Act does not prescribe the specific circumstances in which a court may exercise its power of winding up. Therefore, case law has established the considerations for a court when determining whether a company is liable to be wound up, including for the purposes of a scheme of arrangement. In *Re Drax Holdings Limited*, the court noted the following requirements to be satisfied before a foreign company could be wound up in England:

- There must be a sufficient connection with England which may, but does not necessarily have to, consist of assets within the jurisdiction.
- There must be a reasonable possibility, if a winding up order is made, of benefit to those applying for the winding up order.
- One or more persons interested in the distribution of assets of the company must be persons over whom the court can exercise jurisdiction (*[2004] 1 WLR 1049*).

An argument has been raised as to whether, notwithstanding the sufficient connection test set out in *Drax*, in the case of companies incorporated in jurisdictions outside the UK which are subject to the EU Regulation on Insolvency Proceedings (*1346/2000/EC*) (Insolvency Regulation), a company must nevertheless have its centre of main interests (COMI) or an establishment in the UK in order to be a company liable to be wound up for the purposes of a scheme of arrangement (*see "COMI shift" in the main text*). The basis for this argument is that, post-enactment of the Insolvency Regulation, a company cannot be wound up in the UK unless its COMI is in the UK or it has an establishment in the UK.

However, in *Re DAP Holding NV*, the court exercised jurisdiction to sanction a scheme with respect to a Dutch company, notwithstanding the fact that it did not have its COMI or an establishment in the UK (*[2006] BCC 48; see News brief "DAP solvent scheme: still in business", www.practicallaw.com/5-201-4781*). The court followed *Drax* in holding that, in the context of a scheme, certain of the otherwise mandatory provisions of section 221(5) of the 1986 Act (relating to the circumstances in which an unregistered company may be wound up) were not mandatory (because a winding up would not occur).

In light of this case law, there is at least a strong case for arguing that the Insolvency Regulation was not intended to apply with the effect that a company must have a COMI or establishment in the UK in order for a UK law scheme of arrangement to be sanctioned. *DAP Holding* represents a more purposive interpretation of the Insolvency Regulation.

While on an uncontested scheme application a court may well follow *DAP Holding*, the outcome may be more uncertain in the case of a contested application.

Exchange solicitation

As an alternative to the scheme, the scheme creditors were also given the opportunity to tender any amount of the senior secured notes to Holdco, a company within the newco group's holding structure, in exchange for their pro rata share of approximately 10% of the equity, and a further right to subscribe in cash pro rata for the remainder of the equity, in Holdco. This exchange solicitation, which ran in tandem with the early stages of the scheme process, could have been effected at the option of Holdco, provided certain conditions were met, including that a minimum acceptance threshold (set at 90% or more of the outstanding principal amount of the senior secured notes) was reached. If the restructuring had proceeded by way of exchange solicitation, the proposed scheme would ultimately have been discontinued. However, the decision was taken to follow the scheme route.

First hearing and jurisdiction

On 4 November 2010, HT5 applied to the court (*see box "The purpose of the hearings"*) pursuant to section 896(1) of the Companies Act 2006 (2006 Act) for an order to convene a meeting of a single class of its creditors, being those persons with a beneficial interest as principal in the senior secured notes, and to appoint a ***foreign representative*** for the purposes of recognition proceedings overseas. The court needed to be satisfied that:

- HT5 was a company liable to be wound up under the Insolvency Act 1986 (1986 Act) (*section 895(2)(b), 2006 Act*) (*see box "Jurisdiction for schemes"*).
- HT5 had a sufficient connection with the UK so that it was appropriate for the court to exercise its jurisdiction (*Re Drax Holdings Ltd [2004] 1 WLR 1049*).
- The class of creditors as proposed by HT5 was the correct class (pursuant to *Practice Statement (Companies: Schemes of Arrangement) [2002] 1 WLR 1345*).

Voting on the scheme

A scheme must be approved by a simple majority of persons in each class present in person or by proxy at a scheme meeting and, in the case of each class of creditors, that majority must represent at least 75% in value of the debts owed to that class. The requisite majority of each separate class must approve the scheme for the entire scheme to come into force.

The question as to who may be considered a creditor for voting purposes arises on a scheme in respect of bonds issued under a global note structure. As the registered holder of the global note is the legal owner of the bond, this single holder could be considered to be the only true creditor. However, a numerosity issue arises from the fact that a scheme must be approved by 75% in value and a majority in number of those voting in person or by proxy, as the requisite majority in number would be practically difficult to achieve in a global note structure. Further, a registered holder or trustee may refuse to vote on a proposed scheme and it could therefore be important to enfranchise the ultimate beneficial owners in order to proceed with a scheme.

Any such bonds could be definitised (in other words, individual bond certificates could be issued to each beneficial holder) in certain circumstances so that each beneficial holder becomes a legal owner of bonds. However, this process would add administrative complexity at a time when a company's resources are already likely to be stretched. A more practical alternative is to treat ultimate beneficial holders as contingent creditors and permit them to vote on a scheme on this basis (while seeking confirmation from the registered holder and/or trustee that they will not vote on the scheme).

The suitability of the contingent creditor approach to voting will also depend on an interpretation of the underlying documents. If, for example, an indenture provides for cases in which beneficial holders have an enforceable right to call for definitive notes, it is arguably more appropriate to view beneficial holders as being contingent creditors.

The contingent creditor approach has received some support in the English courts. In *Re Castle Holdco 4 Limited*, Mr Justice Norris considered that the scheme in question ought obviously to be considered by those who have an economic interest in the debt (that is, the ultimate beneficial owner or principal) (*judgment of Norris J, unreported, 23 March 2009 (Ch)*). It is likely that beneficial holders of bonds will continue to be viewed as contingent creditors for the purposes of voting on schemes, given the practical difficulties involved in definitising notes for the purposes of voting on a scheme.

The court found that these requirements had been met and granted HT5 leave to convene a meeting of its creditors for the purposes of considering, and if thought fit, approving, the scheme.

Scheme sanction

On 6 December 2010, a scheme meeting was held, at which a majority of the senior secured noteholders as scheme creditors, representing 98.48% in value, voted in favour of the scheme (*see box "Voting on the scheme"*).

On 8 December 2010, HT5 made an application under section 899(1) of the 2006 Act for an order to sanction the scheme.

The court considered, among other things, whether the established requirements referred to in previous cases, including in *Re Telewest Communications plc (No 2)*, had been met (*[2005] 1 BCLC 772*). The court had to be satisfied that:

- The provisions of the relevant statute had been complied with.
- The class of creditors was fairly represented at the scheme meeting.
- The arrangement was such that an intelligent and honest man, a member of the class concerned and acting in respect of his interests, might reasonably approve.

Purpose of administration

The administrator of a company must perform his function with the objective of any of the following:

- Rescuing the company as a going concern.
- Achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration).
- Realising property in order to make a distribution to one or more secured or preferential creditors (*paragraph 3(1), Schedule B1, Insolvency Act 1986*).

The court was satisfied that, based on the terms of the scheme, the overall proposed restructuring, the procedure followed, the support expressed for the scheme, and the absence of opposition, the scheme met the above requirements and was fair. The court therefore granted the order sanctioning the scheme.

Chapter 15 recognition

Once a scheme that forms part of a cross-border financial restructuring becomes effective under English law, it is important to consider the relevant company's ability to enforce the terms of the scheme in other jurisdictions. For example, if there is a risk of challenge in foreign courts (for example, by dissident creditors), securing recognition of the scheme overseas will become important. The considerations for advisers when developing a strategy on recognition/enforcement of a scheme include:

- The defensive strategies that can be designed and put in place so that the company is ready to meet any creditor challenge.
- The jurisdictions in which foreign recognition of the scheme should be sought immediately after it is sanctioned.

The key overseas jurisdictions for the WIND Hellas restructuring were the US (as the senior secured indenture and senior unsecured indenture were governed by New York law), Greece and Luxembourg.

HT5 and its advisers decided that an application for recognition of the scheme in the US under Chapter 15 would be beneficial. Recognition in the US would provide an automatic stay in relation to actions against HT5 and its property within the US and facilitate implementation of the restructuring by mitigating the risk of delay or damage to the process as a result of action from a dissident creditor in the US courts. The US Bankruptcy Court granted recognition of the scheme on 14 December 2010.

In relation to Greece and Luxembourg, the group developed defensive strategies in the event that any creditor action was commenced in those jurisdictions.

Administration

On 10 December 2010, the group holdcos successfully applied to the court for administration orders. In order to grant the administration orders the court had to be satisfied that requirements of paragraph 11(a) of Schedule B1 of the 1986 Act had been met in relation to each of the companies, namely that:

- The company was or was likely to become unable to pay its debts (on the balance of probabilities (*Re AA Mutual International Insurance Co Ltd [2005] 2 BCLC 8*)).
- The administration order was reasonably likely to achieve the purpose of administration. Specifically, the court had to be satisfied that there was a real prospect of achieving one or more of the purposes of administration (*Re Harris Simons Construction Ltd* (*[1989] 1 WLR 368*, as applied in *AA Mutual*) (*see box "Purpose of administration"*).

The court was satisfied that each of the companies was "presently, or if not presently…is soon likely to become unable to pay its debt …", in light of the debt and security structure of the group and, in particular, given each of the companies seeking administration

Glossary

Foreign proceeding (in respect of Chapter 15 of the US Bankruptcy Code (Chapter 15)). A collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt where the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation.

Foreign representative (in respect of Chapter 15). A person or body, including a person or body appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding.

SIP 16. The Statement of Insolvency Practice 16 is a guidance note in respect of pre-packaged administrations for licensed insolvency practitioners designed to maintain standards among insolvency practitioners.

Waterfall. The pre-determined flow of funds and priority of distributions or allocations between or among debt or equity holders specified in intercreditor agreements or security trust arrangements.

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orders was liable as principal or guarantor for substantial sums in respect of one or more layers of the debt.

The court was also satisfied that there was a real prospect of achieving one of the statutory purposes of administration. It highlighted that the administration was likely to realise property in order to make a distribution to one or more secured or preferential creditors and/or achieve a better result for each company's creditors as a whole than would be likely if each company were to be wound up immediately.

The administration sale of the WIND Hellas shares and other assets would result in realisations for the RCF lenders, the hedging banks and the senior secured noteholders and the court acknowledged that the overall terms of the restructuring would secure a better result for each of the company's creditors than if each of the group companies were placed into liquidation (as mentioned above, the entry into liquidation would give rise to a risk that WIND Hellas's telecoms licence could be revoked (*see "Planning the restructuring" above*)).

The court was satisfied "that the proposed pre-pack administration, and in particular the proposed sale, is realistically the only way forward. It is the only bid that has commanded the support of the necessary groups of creditors. Other possibilities have simply not commanded the support of those which it needed to have. Moreover, if the pre-pack sale that is proposed does not go ahead, it seems perfectly clear that the only realistic alternative is going to be some form of liquidation or other insolvency process which is going to result in a drastic deterioration in the value of the group which will benefit no-one."

Closing WIND Hellas

On 17 December 2010, the administrators conducted the pre-packaged sale of WIND Hellas as outlined above and the restructuring of WIND Hellas reached a successful close. The buyer used a daylight facility to fund the cash purchase price required under the intercreditor agreement. The RCF lenders and the hedging banks were paid out in full. The senior secured noteholders received their relevant participation through the scheme in the newco group and, as amounts owing to the senior secured noteholders far exceeded the purchase price for the assets of the group, the senior unsecured noteholders did not receive any payments under the intercreditor agreement payment waterfall.

Christian Pilkington and Mark Glengarry are partners, and Laura Prater, Ben Davies and Kevin Heverin are associates, in the Financial Restructuring and Insolvency team of the London office of White & Case LLP, which led the restructuring for WIND Hellas. In addition, Colin Chang is a partner, and James Greene is an associate, in the London office of White & Case LLP, and they advised on aspects of the New York law governed senior secured notes and senior unsecured notes.