

International Rescue: English scheme makes Rodenstock's restructuring: F.A.B.

Whilst many European jurisdictions are playing catch up in developing their own effective restructuring regimes, the UK is leading the way in utilising tried and tested restructuring techniques to facilitate the rescue of non English entities. Today's judgment in the case of Rodenstock GmbH will encourage foreign borrowers to have finance agreements governed by English law, or to give the English courts exclusive jurisdiction to consider disputes. This latest case illustrates just how useful such provisions can be in establishing a sufficient basis for the English court to found its jurisdiction and sanction a restructuring that takes on the form of an English scheme of arrangement.

Philip Hertz, partner in the restructuring and insolvency group remarks "This is a very significant decision for the UK restructuring market, it shows how the English court is prepared to push the "jurisdiction envelope" on what constitutes sufficient connection for the purposes of sanctioning a scheme of arrangement in relation to a foreign company. Whilst it follows a number of other successful schemes that we have also been involved in, (most recently the Tele Columbus group (also German) and Metrovacesa (a Spanish incorporated entity)), today's decision represents the first fully reasoned judgment on the subject. It will be immensely helpful for future schemes of this type and will facilitate restructurings going forward."

The English High Court concluded that a scheme of arrangement pursuant to Part 26 of the Companies Act 2006 in relation to a German incorporated entity ought to be sanctioned. Crucially the judgment articulates that the only connection to England required in this case to enable the court to exercise its jurisdiction and sanction the scheme was the choice of English law and exclusive jurisdiction clause contained within a Senior Facilities Agreement.

Rodenstock GmbH is Europe's fourth largest manufacturer and distributor of spectacle lenses and frames, employing over 4000 people in over 80 countries. The scheme of arrangement effectively varies the finance facilities provided to the company by its senior lenders in relation to a €305m facility. Although the application to the court to bless the scheme of arrangement was unopposed at the hearing itself, a small group of lenders did submit evidence opposing the scheme on, amongst other things, jurisdiction. Whilst such objections were ultimately withdrawn just before the hearing, the judge recognised that the scheme gave rise to "serious questions of jurisdiction" in part because some of the issues may soon be the subject of other litigation at the European Court of Justice (ECJ) but also because it was recognised that any judicial guidance would be useful in relation to future schemes.

Key Issues

- English court exercises jurisdiction to sanction scheme of German company
- English law governed debt and exclusive jurisdiction clause provides enough for sufficient connection test
- Compromise of English law governed debt by English law scheme would be recognised in Germany

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Serious issues of jurisdiction

The facts that gave rise to the serious issues as regards the English Court's jurisdiction and ability to sanction the scheme were identified by the judge as follows:

- Rodenstock is incorporated in Germany and has its centre of main interests there;
- It has no establishment or assets in the UK affected by the scheme;
- There is no jurisdiction under German law to sanction solvent schemes of arrangement;
- A recent German court decision declined to recognise a solvent scheme upon the ground that an order for sanction by the English Court did not fall within EC Regulation No 44/2001 on jurisdiction and recognition of enforcement of judgments in civil and commercial matters (the "Judgments Regulation"); and
- A small minority of creditors asserted in correspondence that the court did not have jurisdiction or should not as a matter of discretion entertain the application.

Given these concerns, the judge considered the issues in detail and in particular the points raised by the objecting lenders in evidence.

Key terms of the restructuring

Under the scheme of arrangement:

- €40m of new monies are to be provided on a super senior basis;
- An increase in the interest is to be paid partly in cash and partly on an either PIYW (Pay if you want) or PIK (Payment in kind);
- Financial covenants are to be reset based on revised projections; and
- Conditional Subordinated Provisions are to be incorporated which will be triggered if assets do not cover liabilities which would otherwise mean a breach of the over-indebtedness German insolvency law test.

The scheme of arrangement is only one part of the restructuring equation which includes (amongst other things) the provision of warrants representing 44% of the share capital to be issued to the senior lenders (which if exercised will give those creditors 46% shareholding), it also includes "step-in" rights for the senior lenders if Rodenstock breaches minimum liquidity covenants, and also contains a provision to convert a loan into a hybrid debt/equity instruments to improve the consolidated indebtedness for financial report standards.

Exercise of English court's jurisdiction

The court found that Rodenstock was "liable to be wound up" under the Insolvency Act 1986 for the purposes of section 895 of the Companies Act 2006 and that nothing in either the Judgments Regulation (referred to above) or the EC Regulation on Insolvency Proceedings narrowed the scope or definition of company for these purposes. In so finding it followed the decision of Lawrence Collins J in *Re Drax Holdings Ltd* [2003] EWHC 2743 (Ch) which was affirmed with respect to a company incorporated in another member state of the European Union in *Re DAP Holding NV* [2005] EWHC 2092 (Ch).

Furthermore, the court was prepared to exercise its jurisdiction on the basis that a sufficient connection to England and Wales was established by virtue of the English choice of law and jurisdiction clause governing the senior creditors' lending relationship with Rodenstock. This alone was sufficient to establish the connection. The judge was persuaded by the unitary nature of the Senior Facilities Agreement, binding all senior lenders and therefore all the scheme creditors, into a single English legal structure. There is a suggestion and indeed a hypothetical example provided by the judge himself that where simply by chance the majority of creditors had, under a series of individual agreements, all separately chosen English law and/or jurisdiction, such a connection may not suffice. In this case the judge noted that "the single agreement therefore regulates not merely a series of individual creditor/debtor relationships between each lender and the company, but the relationships between each of the senior lenders *inter se*, and between them as a body and the company." Although Counsel for the company also submitted that other factors fortified the connection, i.e. the restructuring had been devised and negotiated in England (this has been relied upon in the context of other recent restructurings, for example Wind Hellas) and the judge also considered whether the creditors' participation in the court convened meetings also reinforced the connection, he concluded that neither of these factors added any real substance to the connection criteria.

Effectiveness of the scheme in Germany

Loren Richards, partner in our finance group in Frankfurt notes *"The English courts being satisfied as to the recognition and effectiveness of the scheme in Germany was crucial in this case. To this end the English court considered opinions not only from a leading German professor on international private law, but also a retired senior judge of the arm of the German Supreme Court that would normally deal with insolvency and recognition issues."* Whilst there is an unresolved dispute before the German courts that may ultimately require reference to the ECJ, these experts suggested there is a real prospect that the scheme would be considered capable of recognition in Germany by dint of the Judgments Regulation (referred to above). Loren adds *"More importantly, however, is another conclusion that follows from the opinions of the German law experts. Namely, in practice the scheme would be legally effective in Germany on the basis that the applicable rules of private international law would require the German courts to apply English law to the question of whether the senior lenders' rights had been varied by the scheme. This has to be the right approach in such cases."*

Scheme formalities and merits

The judgment also confirmed that the scheme formalities had been satisfied in this case, in particular that requisite voting majorities were achieved and that the scheme was one that an intelligent and honest creditor would reasonably approve. Of particular note was the fact that the scheme was the result of a lengthy negotiation where all the alternatives had been explored and there was no realistic alternative to the scheme if Rodenstock wished to avoid a formal insolvency process in Germany.

Stefan Sax, partner in our restructuring and insolvency group in Frankfurt concludes as follows *"This decision has been eagerly awaited in Germany. Rodenstock is a very high profile organisation and the success of its restructuring hinged upon the scheme of arrangement receiving the approval of the English Court. Whilst this represents a further example of how the English scheme of arrangement has proved to be the ideal mechanism for restructuring, it also highlights the need for the current German restructuring reforms to come into effect, so that a similar offering can be made in Germany to deal with companies in financial difficulty."*

Clifford Chance LLP in Frankfurt and London acted on behalf of the co-ordinating committee of senior lenders in this case.

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