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Corporate Finance & Insolvency Litigation

5 January 2016

- Hellas case: The Luxembourg Commercial Court rejects the English liquidators' one billion EUR claim

In a well motivated judgment rendered on 23 December 2015, the Luxembourg Commercial Court has ruled in favor of the former private equity owners of Hellas Group, i.e. ultimately Apax Partners and TPG Capital, and dismissed the action of the English liquidators of Hellas Telecommunications II SCA (Hellas II) for reimbursement or damages of 973 million EUR.

Background: On or about 21 December 2006, the Hellas Group, formerly one of the largest cellular service providers in Greece, was restructured, and in the frame of its December 2006 refinancing, the Luxembourg Hellas entities paid approximately 973 million EUR to repurchase deeply subordinated convertible private equity certificates (CPECs), which were ultimately held by its shareholders, Apax Partners and TPG Capital.

Most of the 2006 refinancing was made through the issuance of Floating Rates Subordinated Notes for more than 960 million EUR and 275 million USD issued by Hellas II, which was put under English administration in November 2009 and ultimately into liquidation in December 2011.

The liquidators appointed by the English High Court of Justice took the position that the approximately 973 million EUR which were up-streamed to Apax Partners and TPG Capital should qualify as an illegal payment of dividends to the ultimate shareholders, and that the economic result of the Hellas Group back in 2006 did not allow to pay such kind of profits to the shareholders.

Therefore, on 15 December 2011, a few days before the occurrence of the 5 years time limitation, the English liquidators initiated actions before the Luxembourg Commercial Court against the limited and unlimited partners of Hellas II, and against all the directors of its unlimited partner, claiming reimbursement, respectively damages, for 973 million EUR.

On 23 December 2015, the Commercial Court rejected the liability action against the unlimited general partner and the directors (physical persons) in view of the discharge which was granted to them by the new shareholders back in July 2007, and in a very detailed and interesting analysis, the Commercial Court came to the conclusion that the payments made under the CPECs could not be requalified as illegal dividend distributions to the shareholders.

This is the first time that a Luxembourg Court was asked to analyse and to decide on the legal nature of the so-called CPECs, a debt instrument of contractual nature issued by one group entity and held by another group entity and allowing to upstream fair market value profits to the Holders of the CPECs. The Luxembourg Commercial Court has confirmed the position of the defendants' lawyers stating that the CPECs are to be seen under Luxembourg law as debt that do not confer any voting rights and that do not per se give the right to a share in the profits of the

company. Although they are often considered as hybrid instruments, because they are potentially convertible into shares, says the court, the CPECs do not qualify as shares, from an accounting point of view they are treated as liabilities, and thus, the Luxembourg corporate law provisions on illegal dividend distributions to shareholders do not apply.

By taking this position, the Court has given strong assurance and comfort to numerous professionals in the Luxembourg legal market, because hundreds of Luxembourg based corporate private equity or hedge fund structures use these debt instruments since the early 2000s, in investments worth billions of EUR.

Furthermore, the action of the English liquidators was also rejected on their fraud allegations. The Luxembourg Commercial Court indeed noted that back in 2006, several independent sources have confirmed the enterprise value of the Hellas Group that formed the underlying basis of the repurchase price of the CPECs, so that the allegations of fraud made by the English liquidators of Hellas II had neither any factual nor any legal basis.

The liquidators of Hellas II have announced in the press that they would lodge an appeal.

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