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Hunkemöller: A Significant English Decision for Liability Management Exercises

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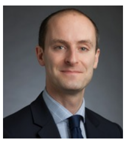

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As liability management exercises fuel increasingly aggressive cross-border creditor disputes, Kobre & Kim secured a significant victory for clients TMF Trustee Limited and Hunkemöller International B.V. in one of the first major English decisions to emerge from this trend. The ruling signals a willingness to defer to parallel foreign proceedings and suggests that distressed disposals at a defensible value may prove difficult to unwind.

In a significant victory for Kobre & Kim clients TMF Trustee Limited and Hunkemöller International B.V., the English High Court (Leech J, in the Financial List) stayed the *Hunkemöller* proceedings pending first instance judgment in parallel New York litigation involving the same creditor group and overlapping issues.

The decision is one of the first English rulings to arise from the wave of cross-border disputes emerging from liability management exercises (LMEs) and distressed disposals, alongside cases such as *Selecta* and *Hurtigruten*.

Why it matters

LMEs are becoming a defining feature of the distressed debt market. With a wall of high-yield and leveraged debt maturing over the coming years, disputes involving up-tiering transactions, distressed disposals and competing creditor groups are set to become more frequent and more international.

The pattern is a familiar one. Following an event of default, a majority creditor group instructs the security agent under the intercreditor agreement to release certain liabilities and sell the group’s equity, often to a bidco formed by that same majority, at a price fixed by an independent valuer applying a discount for distress. The sale proceeds are often insufficient to satisfy junior debt. Subordinated creditors may therefore receive little or no recovery and challenge the transaction across several jurisdictions at once. The *Hunkemöller* dispute alone has run across New York, England, Luxembourg and the Netherlands.

The English Court was asked to decide whether claims under an English law intercreditor agreement should proceed alongside existing New York proceedings concerning the underlying debt instruments.

Key takeaways

1. **The English court will stay its own proceedings to avoid a clash with parallel foreign litigation**

Applying the "*interests of justice*" test in *Athena*, Leech J held that the risk of inconsistent judgments was " *a strong reason*" for a stay, and that the courts should not encourage an "*ugly rush*" to judgment in competing jurisdictions. He also considered it " *far better*" for the New York court to decide the New York law issues, which the English court could then adopt.

2. **An English exclusive jurisdiction clause did not keep the case in England**

Since the claimants were beneficial rather than registered noteholders, the " *No Look Through*" principle meant they were neither parties to the intercreditor agreement nor entitled to enforce its jurisdiction clause. The nexus that clause gave to England was, in the judge's words, "*not a decisive factor*" and not " *a particularly strong one*".

3. **Distressed disposals at a defensible value will be hard to challenge**

In *Hunkemöller*, the security agent transferred liabilities with a face value of approximately €466 million to a bidco formed by the majority creditor for €86.7 million. Without deciding whether an "*Assenagon*" duty (that a majority exercise its powers in good faith and in the interests of the class as a whole) can be implied into an intercreditor agreement, Leech J indicated that where subordinated creditors are "*out of the money*", the court is unlikely to find that a security agent knew of, let alone participated in, any breach. The natural inference is that a distressed disposal at a defensible value will be hard to challenge on this basis.

Looking ahead

As LMEs continue to evolve, market participants should expect more cross-border litigation, closer scrutiny of distressed disposal structures, and growing friction between English law intercreditor agreements and New York law debt instruments. *Hunkemöller* provides an early indication of how English courts may approach these disputes.

Kobre & Kim represented TMF Trustee Limited and Hunkemöller International B.V. in the English proceedings.

About Kobre & Kim

Kobre & Kim is a conflict-free global law firm focused on disputes and investigations. The firm:

- Formulates and executes cross-border strategies across global jurisdictions, including the Middle East, Latin America, the British Virgin Islands (BVI), Cayman, Cyprus, Delaware, Hong Kong, Israel, Korea, New York, and the People's Republic of China (PRC).
- Acts on behalf of creditors to monetize high-value bonds and loans, judgments, and arbitration awards.
- Has extensive experience handling restructuring-related disputes and issues on behalf of distressed debt and private credit investors.