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ARTICLE

The Restructuring of DTEK Group: A Challenge to the International Effectiveness of a Scheme of Arrangement in a Post-Brexit Era

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Synopsis

The restructuring of DTEK group (the 'Group') by way of two inter-conditional schemes of arrangement and the related convening and sanctioning judgments of the High Court of Justice in England (the 'Court') has provided guidance as to the approach the Court will take in considering the international effectiveness of schemes of arrangement in a post-Brexit era.

This is a landmark restructuring that faced opposition by a scheme creditor to one of the schemes of arrangement on various grounds, including that the Court could not be satisfied as to its international effectiveness in certain key jurisdictions and thus any grant of sanction would be an act in vain.

Background

DTEK Energy BV is the parent company of the Group, an integrated energy supplier headquartered in Ukraine. The Group's funding had comprised of: (i) loans from banks advanced to DTEK Energy BV's subsidiaries; and (ii) bonds issued by its wholly owned subsidiary DTEK Finance PLC. In May 2021, the Group sought to restructure in excess of US$2 billion of its indebtedness by means of two inter-conditional schemes of arrangement:

- DTEK Energy BV promoted a scheme of arrangement with lenders in relation to certain banking facilities (the 'Bank Scheme'); and
- DTEK Finance PLC promoted a scheme of arrangement with noteholders of 10.75 per cent. Senior PIK Toggle Notes due 31 December 2024 (the 'Notes Scheme').

The sanction hearing was held on 13 May 2021. Sir Alastair Norris handed down judgment on 14 May 2021, sanctioning the two inter-conditional schemes of arrangement.

The restructuring completed on 17 May 2021, pursuant to which: (i) restructured lenders received new notes issued by DTEK Finance PLC in exchange for the release and discharge of certain banking facilities, and (ii) restructured noteholders received new notes issued by DTEK Finance PLC and NGD Holdings BV.

Significance

Whilst both schemes of arrangement received the support of significant majorities of the lenders and noteholders (i.e. over 95 per cent), a scheme creditor, Gazprombank (Switzerland) Ltd ('Gazprombank'), opposed the Bank Scheme on grounds relating to: (i) the proposition for a single class meeting, and (ii) its effectiveness in key foreign jurisdictions. This is the first instance post-Brexit that the Court had considered a challenge to the international effectiveness of a scheme of arrangement.

Class composition

At the convening hearing held on 16 April 2021, Gazprombank submitted that it had certain security rights that other Bank Scheme creditors did not. These rights comprised: (i) a Cypriot *ex parte* freezing injunction against DTEK Energy BV, and (ii) leave to levy Dutch conservatory attachments over certain assets belonging to DTEK Energy BV's parent. Accordingly, Gazprombank sought treatment as the sole member of a separate class, which would have effectively granted it a veto right on the Bank Scheme and, by virtue of its inter-conditional nature, the Notes Scheme.

The Court did not accept Gazprombank's submission that its rights are so dissimilar from those of other Bank Scheme creditors that it should be placed in a separate class, noting that the 'creation of small classes with veto rights should where, in justice, possible, be avoided'.

In further support of its argument, Gazprombank alleged that the identity of the obligors against whom it had enforceable rights was different to that of other Bank Scheme creditors. The Court did not accept this, noting that 'Rights against third parties may conceivably enter into the "fairness" assessment: but they are not relevant to class analysis'. Gazprombank's

subsequent challenge to the fairness of the Bank Scheme at the sanction hearing was rejected.

International effectiveness

At the sanction hearing, the Court considered whether was a 'blot' on the Bank Scheme, such that there was no point in granting sanction. Gazprombank had submitted that the Court could not be satisfied as to its effectiveness in key jurisdictions (including the European Union and Singapore) and so 'any grant of sanction would be an act in vain'.

As a starting point, Sir Alastair Norris highlighted the following relevant principals derived from case law:

- The Court will not generally make an order that has no substantial effect and thus will need to be satisfied that a scheme of arrangement will achieve its purpose.
- The Court will therefore need to be satisfied that the scheme of arrangement will achieve a substantial purpose in the key jurisdictions in which the scheme company has liabilities or assets.
- The Court does not need certainty as to the position under foreign law but instead requires credible evidence that it will not be acting in vain.
- Such credible evidence must show that the scheme of arrangement will have a reasonable prospect of being recognised and given effect.

A key element of Gazprombank's case relied upon the argument that as consequence of Brexit, the EU Regulation 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the 'Judgments Regulation') no longer applied and thus the Court was now 'in entirely novel territory'. Gazprombank also submitted that its ongoing claim against the Group before the arbitration tribunal in Singapore may result in the Bank Scheme not being effective in that key jurisdiction.

The Court rejected Gazprombank's arguments and noted the following:

1. Whilst there has always been uncertainty, even pre-Brexit, as to whether schemes of arrangement would be automatically recognised in the European Union on the basis of the Judgments Regulation, the unavailability of the Judgments Regulation post-Brexit was not by itself a sufficient ground upon which to assess international effectiveness. The Court will continue to consider expert evidence that demonstrates alternative bases for recognition, such as under private international law and Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (the 'Rome I Regulation') etc., as it had done pre-Brexit.
2. The Court will regard a scheme of arrangement as substantially effective if it has very solid support amongst scheme creditors (i.e. over 95 per cent in this case).
3. Regarding Gazprombank's argument concerning its ongoing claim against the Group before the arbitration tribunal in Singapore, the Court held that there was a reasonable prospect that the arbitral tribunal would, when applying English law in the arbitration, give effect to the Bank Scheme (which would effectively vary and discharge Gazprombank's claim).
4. There was no dispute that the Bank Scheme would be recognised in the key jurisdictions of Ukraine and Switzerland.
5. The Court was satisfied that the expert evidence adduced by the Group in relation to the recognition of the schemes in the key jurisdictions of the Netherlands and Cyprus demonstrated that there was a reasonable prospect that the Bank Scheme and the variations and discharges which it implemented would be effective in those jurisdictions on the basis of private international law and Rome I Regulation.

The Court was therefore satisfied that there was a reasonable prospect that the Bank Scheme would be given substantial effect and both the Bank Scheme and the Notes Scheme were sanctioned.

The Court's judgment indicates that a challenge to the international effectiveness of a scheme of arrangement will only prove successful where there is clear evidence that there is no reasonable prospect that it will have substantial effect in key jurisdictions.

Concluding remarks

Whilst the Judgments Regulation is no longer applicable following Brexit, the Court has highlighted that it will consider other avenues to the international effectiveness of schemes of arrangement, such as private international law or Rome I Regulation, as it had done pre-Brexit. In practice, the Court will likely place a greater emphasis on the expert evidence adduced by a scheme company (or challenger) regarding the effectiveness of a scheme of arrangement in the key jurisdictions in which the scheme company has liabilities or assets. Such expert evidence will not need to provide the Court with certainty but instead demonstrate that the scheme of arrangement will have a reasonable prospect of being recognised and given effect in such jurisdictions.

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