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English Court's Judgment in DTEK's Schemes of Arrangement Offers Guidance on International Effectiveness Post-Brexit

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At a Glance

In an important judgment concerning the international effectiveness of schemes of arrangement, the English court has outlined its reasons for sanctioning the schemes of companies within the DTEK group. This case was the first challenge as to the prospects of international recognition of a scheme (or restructuring plan) post-Brexit.

DTEK's scheme was opposed by a scheme creditor, Gazprombank, including on the basis that it would not be effective in other key jurisdictions. The court's judgment illustrates that the court will decline sanction on international effectiveness concerns only if there is no reasonable prospect of the scheme having substantial effect, such that sanction would be in vain.

Whilst this judgment is not a panacea for the uncertainties of international recognition of restructuring/insolvency proceedings post-Brexit, it provides welcome comfort that the English court will not require certainty of international recognition when deciding whether to sanction schemes (or restructuring plans).

In a helpful, pragmatic approach, the court will also take account of the degree of creditor support: a scheme (or restructuring plan) with very solid support amongst relevant creditors — >95% in DTEK's case — will be substantially effective.

Background

Two companies within the DTEK group proposed two interconditional schemes of arrangement. The scheme of DTEK Energy B.V., in respect of English law bank debt, was opposed by Gazprombank. That scheme was approved by 100% of scheme creditors voting; Gazprombank, holding c. 4% of the bank debt, did not vote. The relevant jurisdictions for recognition purposes are listed at the end of this alert.

Key Takeaways

Class composition

Gazprombank unsuccessfully argued, at the convening hearing, that it should be in its own class because it had certain rights that other creditors did not. Placing it in a separate class would effectively have given it a veto right on the scheme.

Gazprombank had obtained a Cypriot freezing order and a Dutch "conservatory attachment" over certain assets, both without notice. The court observed that "successful restructuring proceedings are dependent upon a collaborative approach by affected creditors. Just as insolvency processes are designed to avoid a scramble for assets, so a court should be cautious about giving effect to an *ex parte* scramble for rights out of which a separate class can be reverse-engineered for the purpose of obtaining a veto right". The court also emphasised the importance of avoiding the creation of small classes with veto rights.

Gazprombank further argued that its guarantee rights against other entities within the DTEK group ought to put it in a separate class. The court rejected this, holding that rights against third parties are not relevant to class analysis, but could be relevant when considering fairness at the sanction hearing. However, Gazprombank's arguments as to fairness at the sanction hearing were also unsuccessful.

International effectiveness

Gazprombank unsuccessfully argued, at the sanction hearing, that there was a "blot" on the scheme in respect of the bank debt, in that the court could not be satisfied as to the scheme's international effectiveness (i.e., any grant of sanction would be an act in vain).

The court disagreed, on the following grounds:

1. It is a generally accepted principle of private international law that a variation or discharge of contractual rights in accordance with the **governing law** of the contract will usually be given effect in other jurisdictions.
2. **The court cannot decide between rival expert reports** (this was common ground between the parties); instead, the question is whether there is a reasonable prospect of the scheme having substantial effect in key jurisdictions.
3. Brexit has not totally transformed the landscape: The English court **did not rely upon the EU Judgments Regulation *alone*** as the basis of international effectiveness pre-Brexit; rather, it also looked for an alternative basis, e.g., private international law or the EU Rome I Regulation.
4. The court will regard a scheme as **substantially effective** if it has "very solid support" amongst scheme creditors — here, >95%.
5. **Rome I**: DTEK had provided an expert report as to the likelihood that EU member states would give effect to the scheme of the English law bank debt, by virtue of Art. 12(1)(d) of the EU Rome I Regulation (which provides that the law applicable to a contract shall govern the various ways of extinguishing obligations under that contract). The court was unconvinced by Gazprombank's rival (Cypriot) expert's argument, that Rome I covers only purely consensual variations or extinguishments of contractual rights. Ultimately, the court was satisfied that there was a reasonable prospect that the scheme would be substantially effective in Cyprus and other relevant jurisdictions.
6. The court was satisfied as to international effectiveness notwithstanding a **Singapore arbitration proceeding** (commenced by Gazprombank), because the bank debt was governed by English law and would be discharged/varied by the English scheme, Gazprombank had submitted to the jurisdiction of the English court and recognition of the scheme could be sought in Singapore under the UNCITRAL Model Law.

Accordingly, the court was satisfied that there was a reasonable prospect of the schemes having substantial effect and granted sanction for the schemes.

Convening judgment available here; sanction judgment available here.

The relevant jurisdictions for international recognition of the schemes were: the Netherlands (jurisdiction of incorporation of scheme company); Cyprus (location of freezing order obtained by Gazprombank; jurisdiction of incorporation of obligors); the European Union (as a whole, including the Netherlands and Cyprus); Singapore (seat of arbitration, commenced by Gazprombank); Switzerland (jurisdiction of incorporation of

borrower/guarantor); Ukraine (location of major operating assets and jurisdiction of incorporation of guarantors/sureties); and the United States (notes governed by New York law; the company sought recognition under Chapter 15 of the U.S. Bankruptcy Code).

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