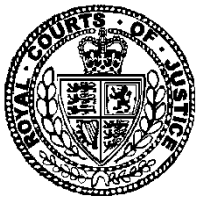

Neutral Citation Number: [2015] EWHC 1164 (Ch)

Case No: No. 2569 of 2015

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/04/2015

Before :

MRS JUSTICE ROSE DBE

- -

IN THE MATTER OF DTEK FINANCE B.V

AND IN THE MATTER OF THE COMPANIES ACT 2006

- -
- -

Tom Smith QC and Charlotte Cooke (instructed by Latham & Watkins LLP) for DTEK Finance BV

Hearing dates: 24 and 27 April 2015

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE ROSE

Mrs Justice Rose :

1. This is an application by DTEK Finance B.V ('DTEK') for an order under s 899 of the CA 2006 sanctioning a proposed scheme of arrangement between DTEK and holders of the 2015 Notes (as defined below) (the 'Scheme Creditors'), (the 'Scheme'). It is to implement a financial restructuring of DTEK which has run into financial difficulties and is the first step in the proposed restructuring of the wider group of companies.

The background to the Scheme

2. DTEK is incorporated in the Netherlands and is part of a group which carries on an energy business involving mining coal, generating power and distributing and selling electricity. Its customers are mainly residential and industrial customers in Ukraine but also in Europe and elsewhere.

3. DTEK's function within the group is to raise finance in the capital markets and distribute that finance to the group. The loan notes which are held by the Scheme Creditors were issued by DTEK and the proceeds were then lent by DTEK to other companies in the group. DTEK's liabilities are therefore limited to its obligations under the notes and its assets are the debts owed to it by the other companies in the group.

4. The notes which are the subject of the Scheme (the '2015 Notes') were issued in 2010. They bear interest at a rate 9.5 per cent per annum and they mature on 28 April 2015. They are unsecured but are guaranteed by other group companies. The principal amount of 2015 Notes originally issued was $500 million but this was reduced in 2013 to $200 million by DTEK buying back $300 million worth of the 2015 Notes in the market. The 2015 Notes as originally issued were governed by New York law but are now governed by English law, as I describe below.

5. The group has run into financial difficulties as a result of problems in the Ukraine. Its main problem has been generated by the devaluation of the Ukrainian currency against the US dollar and the Euro. Between 1 January 2014 and 21 April 2015, the Ukrainian currency, the Hryvnia, depreciated by over 62 per cent against the US dollar. The group earns its revenue in Ukrainian currency but has to service its borrowings in either dollars or euros. It has also suffered as a result of the unrest and violence in Ukraine, leading to disruption of its operations and poor market conditions.

6. The group intends in due course to undergo a much wider restructuring to put it back on stable footing. Discussions with its bank lenders to achieve this are currently underway. But DTEK faces the immediate problem that the 2015 Notes mature on 28 April 2015 and the company will not have funds to pay them. Absent the Scheme, therefore, there will be an event of default for the purposes of the 2015 Notes and that will in turn trigger defaults under other agreements. This is likely to cause DTEK and some or all of the guarantors to enter into insolvency proceedings.

7. DTEK has therefore sought to restructure the 2015 Notes with the support of the holders. The Scheme is relatively straightforward:

i) The existing 2015 Notes will be acquired by DTEK and then cancelled.

ii) In return for that, the noteholders will get new notes for 80 per cent of the par value of the 2015 Notes with a 2018 maturity date and same interest rate.

iii) For the remaining 20 per cent of the par value, the noteholders will receive cash.

8. Permission to convene a single meeting of Scheme Creditors was granted by Nugee J at a hearing on 14 April 2015. That Scheme Creditors meeting was held on 23 April 2015 at 10 am. I have seen the report by the Chairman of DTEK, Maksym Timchenko. He records that 289 Scheme Creditors present or voting by proxy voted for approving the Scheme and none voted against. The value of the 2015 Notes voted in favour was $184,468,000 and none against. The total value of the 2015 Notes is now $200 million. Thus the value voting in favour is either 92.2 per cent or 91.1 per cent, depending whether the votes of noteholders who are affiliated companies are taking into account.

9. Mr Smith QC appearing for DTEK addressed five topics in his submissions; the court's jurisdiction to sanction the Scheme; whether it was appropriate to convene a single meeting of Scheme Creditors; whether the statutory requirements have been satisfied; whether the meeting convened properly represented the class and whether the Scheme should be sanctioned in the court's discretion.

Jurisdiction

10. This issue was not addressed at the convening hearing but was addressed fully by Mr Smith before me. DTEK is incorporated under the laws of the Netherlands. The jurisdiction of the court to sanction a scheme of arrangement under section 26 of the Companies Act 2006 arises in respect of a 'company'. A company for this purpose is any company liable to be wound up under the Insolvency Act 1986. A foreign company can be wound up under the Insolvency Act as an unregistered company. The court must in addition be satisfied, before exercising its discretion to approve a scheme, that the company has a sufficient connection with England: see *Re Drax Holdings* [2004] 1 WLR 1049 per Lawrence Collins J at paragraphs 29 – 30.

11. DTEK relies on four circumstances here that satisfy the requirement for a sufficient connection between DTEK and the jurisdiction of this court. The first is that the governing law of the 2015 Notes is English law. There is authority holding that where English is the governing law of the debt instruments that are compromised by the proposed scheme, that is a sufficient connection for the purposes of establishing jurisdiction: see for example *Re Primacom Holding GmbH* [2011] EWHC 3746 (Ch) per Hildyard J at 63 – 64 and *In Re Vietnam Shipbuilding Industry Group* [2013] EWHC 2476 (Ch). In *Re Magyar Telecom BV* [2013] EWHC 3800 (Ch) David Richards J explained the significance of this link when he noted that under generally accepted principles of private international law, a variation or discharge of contractual rights in accordance with the governing law of the contract will usually be given effect in other countries.

12. In the instant case, the governing law of the 2015 Notes was changed from New York law to English law by a collective decision of the noteholders earlier this month. This

came about in the following way. On 23 March 2015, DTEK launched an exchange offer and consent solicitation to the 2015 Note holders. In the exchange offer, DTEK invited the noteholders to agree to terms in line with the provisions of the current Scheme. If 98 per cent of the noteholders had agreed, the exchange could have taken place on a voluntary basis without the need for court approval. In fact only 91.1 per cent of the noteholders agreed – hence this application to the court. The consent solicitation invited the noteholders to agree to certain changes in the terms of the 2015 Notes including a change of the governing law to English law. There is some debate about whether New York law requires a 50 per cent or 90 per cent approval before the change is binding on all noteholders but this does not matter since consent was given to the change by over 90 per cent of the noteholders.

13. The terms of the 2015 Notes provided for a potential change to the governing law to be agreed by a majority and to bind everyone whether they agreed or not. According to the then governing New York law, therefore, the governing law of the 2015 Notes was changed to English law. According to DTEK's submissions, this occurred pursuant to a supplemental indenture on 9 April 2015, being the date by which over 50 per cent of holders of 2015 Notes had consented to the change to governing law.

14. Mr Smith showed me the exchange offer documents sent to the noteholders making clear that the purpose of changing the governing law was to create a link with the English court so as to seek approval for a scheme of arrangement under Part 26 of the Companies Act in the event that they failed to win the 98 per cent support needed for the voluntary exchange to come into effect.

15. Is the connection created with this court by the governing law any less 'sufficient' because it was made for this purpose only shortly before the sanction hearing? A similar situation was considered by Hildyard J in *Re APCOA Parking Holdings GmbH* [2014] EWHC 3849 (Ch). In that case the governing law had been changed from German to English law by a decision of the majority of creditors where that majority did not include those who opposed the scheme at the sanction hearing. It was submitted to the learned judge that to bind creditors who have not given their consent and who have not chosen English law as the basis of their relationship (and hence the basis for the court's jurisdiction to sanction the imposition of the scheme) was a step too far. Hildyard J concluded however that the submissions did not justify refusing sanction. He noted that the validity of the change of governing law was not questioned. He also noted that the parties to the loan instrument were experienced business people rather than consumers and could be taken to know the implications of including in their contract a provision allowing future changes to the governing law. Hildyard J went on:

> "250 The question then is whether some different respect is to be accorded to a choice of governing law made pursuant to a change from an earlier (and especially perhaps the original) choice of law, where that choice of law is the foundation for access to the processes and provisions of the new law chosen, and those processes and provisions enable the same minority parties/creditors as objected to the change of law to be once more placed under compulsion to accept some further change in their existing contractual rights and obligations.

> 251 I do not accept that it is, although I do accept that the court invited to sanction such compulsion will be particularly careful in giving it. Indeed …; it seems to me that the onus placed on the court in exercising its jurisdiction to make an order which will be given recognition elsewhere may well require it to be especially wary if, for example, the new choice is of a law which appears entirely alien to the parties' previous arrangements and/or with which the parties had no previous connection; or if the change in law has no discernible rationale or purpose other than to advantage those in favour at the expense of the dissentients; or even more generally, where in its discretion the court considers that, in the places in which the parties are, the extent of the alteration of rights between the parties for which sanction is sought would be considered a "step too far"."

16. Taking the points made by Hildyard J in turn, I accept Mr Smith's submissions that the change of governing law to English law should be treated as a sufficient connection with this court. The indenture governing the 2015 Notes has always included provision for the possible change of governing law. This was, therefore, part of the bargain that the noteholders signed up to. There is no dispute between the legal experts who have given their opinions in this case that it is possible under New York law to effect this change. DTEK has also obtained the advice of the leading New York law firm Cravath, Swaine & Moore LLP confirming that the change from New York to English law is effective as a matter of New York law. English law is not alien or indiscriminate in this case but is commonly used in debt obligations in the capital markets. Some of the noteholders are based in England and some of the 2015 Notes have been listed on the London Stock Exchange.

17. I am therefore satisfied that the fact that the 2015 Notes are now governed by English law creates a sufficient connection to confer on this court jurisdiction to approve the Scheme.

18. I also accept that the three other circumstances also provide a sufficient connection. These are as follows.

    i) The fact that some of the guarantees given by Ukrainian operating companies within the group are and have always been governed by English law. It is well established that a scheme of arrangement can release guarantee obligations relating to the principal debt which is the subject of the scheme: see *Re Lehman Brothers International Europe* [2009] EWCA Civ 1161 at para 63 and *Re La Seda de Barcelona SA* [2011] 1 BCLC 555 at paras 12-23.

    ii) DTEK has moved its centre of main operations (COMI) to England. The witness statement of Mr Timchenko dated 10 April 2015 describes the steps that the company has taken to move its COMI to England – by carrying out all the company's functions from its sole office in London; by arranging for the day to day management of the company to be conducted by a London based company; by holding two recent meetings of the board of directors in London; and holding its cash in a London based bank account. Mr Timchenko acknowledges that this move was entirely motivated by the wish to establish a

COMI here so that a court sanctioned scheme could be approved. However, as is clear from David Richards J's decision in *In Re Magyar Telecom B.V* [2013] EWHC 3800 (Ch), this does not prevent the sufficient connection arising.

iii) DTEK has substantial assets in the jurisdiction, namely the cash in its London bank account.

19. I am also satisfied that the Scheme will have effect in the sense that any attempt by noteholders in other courts to enforce their rights under the 2015 Notes inconsistently with the terms of the Scheme will be defeated by reliance on the Scheme approved by this court. As David Richards J noted in *Magyar Telecom* although in theory a winding up order against a foreign company has as a matter of English law worldwide effect, the courts have always recognised that in practice its effect will be confined to the United Kingdom. The courts have therefore always needed assurance that the Scheme will have a practical effect. In this regard, DTEK has obtained legal opinions as to the effectiveness of the Scheme in the Netherlands where DTEK is incorporated and in the various jurisdictions where the guarantors are situated. So far as the New York courts are concerned, the legal advice received by DTEK is that relief to prevent actions in conflict with the terms of the approved Scheme will be readily obtainable either as a matter of comity or because it is DTEK's intention to register the Scheme under Chapter 15 of the US Bankruptcy Code. That Chapter implements the UNCITRAL Model Law on Cross-Border Insolvency into United States law.

Classes

20. As I have said, Nugee J ordered a single meeting of creditors. In this case the existing rights of the Scheme Creditors against DTEK that will be discharged by the Scheme are the same and the rights conferred on them by the Scheme are also the same for all Scheme Creditors. Mr Smith drew my attention to the fact that this is a case where the noteholders were offered a payment as an incentive for giving an early indication that they supported the Scheme. However I am satisfied that this does not create an issue as to the nature of the class.

The statutory requirements

21. I am satisfied from the evidence of Johan Bastin who is a member of the Supervisory Board of the parent company of DTEK and from the Chairman's Report of the Scheme Creditors meeting that notice of the Scheme Meeting ordered by Nugee J was properly given to all Scheme Creditors and that the meeting was duly convened. The necessary statutory requirements in section 899(1) of the Companies Act as to voting have been fulfilled, namely a majority in number of those voting agreed to the Scheme and they represented 75 per cent or more by value of the 2015 Notes. Given the very large majority voting in favour of the Scheme I am satisfied that the majority fairly represented the interests of the class. There is nothing to suggest that they were not acting bona fide or that they were coercing the minority to promote interests adverse to those of the class whom they purport to represent.

Overall fairness and the exercise of the court's discretion

22. Finally I turn to consider whether in the exercise of my discretion I should sanction the Scheme. There were two features of this application to mention in this regard.

The first is that at the hearing to convene the Scheme Creditors' meeting, an opposing party ('Alden') appeared who claimed to hold the beneficial interest in a number of the 2015 Notes. According to Mr Smith, Alden is a hedge fund specialising in distressed debt investment. The first indication DTEK received of Alden's opposition was shortly before the hearing, although if Alden is indeed a noteholder then it should have received the Practice Statement letter that was sent out by DTEK on 2 April 2015.

23. Alden filed an expert opinion on New York law and at the hearing on 14 April 2015 asked for an adjournment of the hearing. That adjournment was refused but Nugee J indicated that any issues that Alden wanted to raise about jurisdiction or class matters could be raised at the sanction hearing. For that reason 2 days were initially set aside for the hearing before me. Given that the maturity date for the 2015 Notes is 28 April 2015, this meant that the hearing was rescheduled to start earlier on, 24 April 2015, so that the two day hearing would be concluded before 28 April 2015.

24. On 22 April 2015 Alden wrote to DTEK asking for all DTEK's witnesses attend the sanction hearing for cross-examination. DTEK agreed that one of its experts on New York law would attend and that expert changed his travel plans to make himself available. The other expert was unable to attend at short notice for personal reasons. DTEK refused to agree that the factual witnesses should attend since there was no real basis on which their evidence could be challenged. Alden made an application in the interim applications list for an order for the witnesses to be cross-examined and that application was dismissed on 23 April 2015.

25. At about 5:30 pm on 23 April 2015, the solicitors for Alden notified DTEK's solicitors that they withdrew their opposition to the sanctioning of the Scheme; they did not require the expert witness to attend for cross-examination and they would not be attending court. Mr Smith therefore informed me that the time estimate for the hearing scheduled to start at 2 pm on 24 April 2015 was 2 hours rather than 2 days.

26. However, at about 11 pm on 23 April 2015, Deutsche Bank (the debt manager in relation to the Scheme) received a letter purporting to come from a company called Callaway Capital Management LLC. I say 'purporting to come' from them because apart from the logo and the company name at the top of the first page there was no other indication of the nature or contact details of the company. The letter, covering 9 pages, made serious allegations of deceit, bad faith, self-serving manipulation and coercion against DTEK and was phrased in extravagant terms. It concluded with the following:

> "For the reasons described above, CCM strenuously objects to the Scheme and urges DTEK to abandon it immediately. Should DTEK choose to proceed with its petition to the Court to sanction the Scheme, CCM intends to raise its objections before the Court at the Sanction Hearing on April 27, 2015.
>
> Should you wish to discuss our objections or any other issues related to this matter please don't hesitate to contact me at [US phone number] or [email address]."

27. It was signed William H Weir. The other curiosity about the letter was, as Mr Smith pointed out, if Callaway were really noteholders and really opposed the Scheme it is surprising that no votes are recorded at the Scheme Creditors meeting as having been cast against the Scheme.

28. Early on the morning of 24 April 2015, those acting for DTEK informed Callaway that in fact the sanction hearing was due to take place that afternoon and not on 27 April 2015. No one appeared from Callaway at the hearing on 24 April 2015. In the light of that letter Mr Smith proposed and I agreed that I should hear his submissions on the application but refrain from actually deciding the application until this morning (Monday 27 April 2015) in case Callaway did want to appear and make representations. Mr Smith took me through the letter that Callaway had written, pointing out various factual inaccuracies and explaining why the points raised were misconceived. We therefore concluded the hearing last Friday afternoon but adjourned the hearing over to this morning in case Callaway wished to make representations.

29. I have seen this morning the email chain between Latham & Watkins and someone called Daniel Freifeld at Callaway. The email from Latham & Watkins of 24 April 2015 says:

> "Daniel
>
> The Honourable Mrs Justice Rose heard the case today and reserved judgment on whether to sanction the Scheme until Monday. However, the Judge indicated that the court was minded to sanction the Scheme.
>
> Please could you confirm by 6pm DC time today:
>
> 1. your holding of the 2015 Notes (we understand that it is in the region of US$ 500,000 which equates to approximately 0.25% of the principal)
>
> 2. whether you will be represented at the court hearing on Monday which is due to commence at 10.30 am in the Rolls Building, Fetter Lane, London
>
> Our client reserves its rights to hold you fully responsible for any additional costs incurred as a result of any opposition to the Scheme which is ultimately found by the Judge not to be well founded."

30. Mr Freifeld responded that he needed to see DTEK's skeleton argument and, once that had been sent, he later wrote –

> "Hi John,
>
> Thank you for sharing this.
>
> At this stage, we are satisfied that the points raised in the letter

will receive due consideration from the court and therefore do not see much to be gained by having counsel appear on Monday.

Thank you for reaching out today.

Best,
Danny"

31. At the hearing on 28 April 2015 therefore, no one appeared for Callaway.

32. I am satisfied that there is nothing in this opposition and there is no reason not to sanction the Scheme. I therefore made the order sanctioning the Scheme.

33. The order reserved the costs of the application. Unsurprisingly, DTEK wish now to consider whether to apply for some order for costs against Alden and/or Callaway to reflect the additional costs incurred in preparing at short notice for a 2 day contested sanction hearing when the opposition to the meeting was abandoned shortly before the hearing and for an additional hearing on the morning of 28 April 2015 which proved unnecessary despite Callaway's asserted intention strenuously to oppose the grant of sanction.