

DTEK shifts high-yield restructuring options

A Ukrainian company's successful restructuring of its high-yield bonds could further boost UK schemes of arrangement as a viable alternative to the US Chapter 11 process.

Energy business DTEK initially failed to meet the voting threshold for an exchange offer on its notes (originally New York law-governed), with a UK scheme as a fall back offer.

But following a dispute with dissenting bondholders who opposed the use of the scheme, an English Court recognised jurisdiction on the basis of DTEK's notes' governing law and jurisdiction clause, which had been changed to English law to get jurisdiction for a scheme.

This alternative route in to a UK scheme may be very useful for issuers

John Houghton, partner at Latham & Watkins

The case could have a profound effect. "This alternative route in to a UK scheme may be very useful for issuers in the future as it will save considerable time and costs, at the very least," said John Houghton, partner at Latham & Watkins who advised the debtor.

Up until the DTEK case, there had not been an alternative route into a UK scheme of arrangement other than via a COMI [centre of main interests] determination.

But following the high-profile *APCOA Parking* scheme in April last year, and before that *Gallery* (2010), *Magyar* (2013) and *New World Resources* (2014), which all illustrated English courts' increasing willingness to accept jurisdiction, the DTEK case will prove another boost to companies seeking UK schemes.

The case

DTEK was seeking to restructure its high-yield notes following political instability in the country. It had undertaken an initial

exchange offer to noteholders of its 9.5% senior notes on their maturity of April 28.

The offer had a fall-back of an English law scheme of arrangement, aiming to cancel or release the existing notes and issue new ones. DTEK attempted to exchange the notes on the condition that it received tenders from at least 98% of the noteholders. Without this it would implement the deal via the scheme.

The exchange offer threshold was not met though, but DTEK still considered the scheme process was in the best interests of its creditors. So consenting noteholders were automatically deemed to have approved the change in governing law and to have voted in favour of the scheme.

According to a note by Latham & Watkins, by the time of the scheme creditors' meeting, over 75% in value had been locked up to vote in favour of the scheme. DTEK moved through the whole scheme process in record time – three and a half weeks.

A simple majority vote was required to change the governing law and jurisdiction of the notes from New York to English law. Ultimately, 88.6% of noteholders had offered their consent by April 9 2015, which allowed DTEK to enter into a supplemental indenture subject to English law.

The change of governing law was aimed at establishing the English court's jurisdiction to hear the application for the scheme. Using English law as the governing law of the debt documentation subject to the scheme's proposals provided enough connection to the English courts.

Opposition

Some investors were unhappy though. Alden Global Capital, a hedge fund investing in distressed debt initiated a challenge shortly before the scheme's convening hearing.

The fund claimed that the change of governing law needed more than 90% consent because it would impair the rights of

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Key takeaways

- The restructuring of Ukrainian company DTEK's high-yield bonds could boost the availability of UK schemes for troubled companies;
- Until now COMI determination has been the key route into a UK scheme of arrangement;
- This latest case moves the argument along from COMI determination, to high-yield governing law in the quest for granting UK schemes;
- High-yield issuers in both Europe and the US are expected to use the case as precedent for restructuring, as a wave of 2016 maturities come due.

creditors to bring enforcement proceedings.

So DTEK sought evidence from Judge James Peck (a former US bankruptcy judge, now practicing insolvency law in New York) to prove that only a bare majority vote was required.

Although Peck's evidence was sound, on the eve of the sanction hearing more votes came in which took the approval number to over 90%. This led Alden to withdraw its challenge.

Scheme benefits

The benefits of the UK process are well documented. Although companies in need of full operational restructuring and with US exposure still benefit from Chapter 11, the UK alternative is gaining ground elsewhere.

"Especially for those more succinct balance sheet restructurings, a UK scheme is an extremely efficient and generally less costly and less time consuming restructuring tool," said Houghton.

On April 27, the English High Court sanctioned a scheme of arrangement for the \$200 million 9.5% senior notes due 2015 issued by DTEK Finance, a Dutch finance subsidiary of DTEK. The scheme was approved by 91.1% of noteholders.

Latham & Watkins advised DTEK on the exchange offer and restructuring. White & Case represented the trustee. Shearman & Sterling acted for Alden.

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