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Case No: CR-2021-000681
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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
INSOLVENCY AND COMPANIES LIST (ChD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5th May 2021

Before :

SIR ALASTAIR NORRIS

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IN THE MATTER OF DTEK ENERGY BV
and
IN THE MATTER OF DTEK FINANCE PLC

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Tom Smith QC and Georgina Peters (instructed by **Latham & Watkins LLP**) for **DTEK Energy BV and DTEK Finance plc**
David Allison QC (instructed by **Hogan Lovells International LLP** for the **Banks' Ad Hoc Committee** and by **Dechert LLP** for the **Noteholders' Ad Hoc Committee**
Hilary Stonefrost (instructed by **Ivanyan & Partners**) for **Gazprombank (Switzerland) Ltd**

Hearing date: 16 April 2021

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APPROVED JUDGMENT

Sir Alastair Norris:

1. DTEK Energy BV ("Energy") is a company incorporated in the Netherlands and is the parent company of the DTEK Group ("the Group"). It is itself a sub-subsidiary of the ultimate holding company of a larger group of enterprises. The Group operates as an integrated energy supplier in the Ukraine, mining coal, generating thermal electricity, and distributing and selling that energy on wholesale, business and retail markets. It has ancillary operations in the manufacture and supply of mining equipment and plant. It produces about 1/5 of Ukraine's electricity.

2. The Group's funding is provided (a) by loans from various banks advanced to Energy's subsidiaries and (b) by bonds issued by its wholly owned subsidiary DTEK Finance plc ("Finance"), a company incorporated in England for the specific purpose of raising capital to be utilised within the Group by means of intragroup loans.

3. The third-party loans can be grouped into three categories. First, loans totalling US$353,842,215 and totalling €149,623,858 advanced by various banks at rates varying between 5% and 5.75%. These are all unsecured, all governed by English law, all (as the result of recent amendment) subject to the exclusive jurisdiction of the English courts and all repayable on 30 June 2023. Second, a loan of CHF21,693,253 to Energy's subsidiary, DTEK Holdings Ltd ("Holdings"). Under an Amended and Restated Facility Agreement made in November 2019 Gazprombank (Switzerland) Ltd ("Gazprombank") is now the sole lender. This facility matures on 18 November 2024. This facility is governed by English law, but it incorporates an exclusive Singapore-seated

SIAC arbitration clause. Energy was originally a guarantor of all these facilities, but it became a primary obligor as the result of entering into a Deed of Contribution on 12 April 2021 with the specific object of promoting this scheme. Third, there are some loans provided by Ukrainian banks and guarantee obligations to a Russian bank ("the Excluded Liabilities") the details of which do not matter for present purposes.

4. The Notes consist of an original issue of US$1.275 billion senior notes at 10.75% interest; there was a supplemental issue and accrued interest which brings the total outstanding up to US$1.5 billion. The Notes are due to mature on 31 December 2024, are governed by New York law and provide for the resolution of disputes under an arbitration with its seat in New York. They are supported by a guarantee from Energy, which is itself governed by New York law and also contains the like arbitration provisions. There are also guarantee and suretyship obligations entered into by other companies in the Group. The issue of Notes is secured by an assignment of receivables due under inter-company loan agreements to Energy from the DTEK Oil and Gas Group ("the DOG Receivables"), part of the wider collection of enterprises to which I referred.

5. The borrowers have been in default in respect of their debt service payments on the loans and the notes for about one year. The projected cashflow until 2024 demonstrates an inability to service the loan and note debt until their respective maturities. Energy and Finance seek to restructure some (but not all) of their financial obligations by means of two inter-conditional schemes of arrangement under Part 26 of the Companies Act 2006. First, Energy

promotes a bank scheme with lenders other than the providers of the Excluded Liabilities ("the Bank Scheme Creditors"). It has been negotiated with an independently advised ad hoc committee whose members represent 95% of the outstanding debt, and who have entered into a "lock-up" agreement. Second, Finance promotes a note scheme with the holders of the senior notes ("the Note Scheme Creditors"). It has been negotiated with an independently advised ad hoc committee representing 22% by value of the Notes; 35.6% of the Note Scheme Creditors have entered into a "lock-up" agreement. It is the object of these schemes to extend the duration and amend the terms of the arrangements, but to retain the total current indebtedness (which it is anticipated will be repaid in full on the extended maturity dates).

6. The structure of the schemes is straightforward. The existing Notes are to be cancelled. The debts due to the Bank Scheme Creditors are to be released and discharged. All guarantee and suretyship obligations are to be cancelled. In return Finance will issue "New DEBV Notes" in respect of the total principal amount outstanding under each facility plus an adjusted interest element, payable on 31 December 2027. In addition, the Note Scheme Creditors will receive "New DOG Notes" to the value of US$425 million (to reflect the value of their security rights in respect of the DOG Receivables). The "New DEBV Notes" will be issued in two pools, to facilitate a pro rata distribution between Note Scheme Creditors (according to their holdings but reflecting their right to receive "New DOG Notes") and Bank Scheme Creditors (according to their drawn commitments). The New DEBV Notes provide for the periodic mandatory redemption of specified tranches.

7. At the express request of both ad hoc committees, the New DEBV Notes contain provisions for the amendment of their terms to cope with the consequences arising from any consensual settlement relating to the Excluded Liabilities. In the conventional way it provides for material amendments to be approved by 75% by value of the holders of the New DEBV Notes.

8. The alternative to these schemes is said by the respective boards to be insolvency proceedings opened in relation to Energy and Finance (and probably other companies in the Group because of their exposure under cross guarantee or co-obligor arrangements). In such an eventuality an insolvency comparator report prepared by Grant Thornton LLP demonstrates that (a) the Bank Scheme Creditors are estimated to receive between 0.3% and 3.4% of the par value of their facilities (depending upon the realisation policies adopted within the insolvency) and (b) the Note Scheme Creditors are estimated to receive between 8.5% and 24.2% of the par value of the Notes (depending upon the policies adopted within the insolvency).

9. On 16 April 2021 I heard an application by Energy and by Finance for the making of orders convening a single meeting of creditors for each scheme. I granted those applications and said that I would deliver a written judgement setting out my reasons. This is that judgment.

10. The role of the Court at the convening hearing is so very well settled that it is sufficient simply to refer to the summary by Snowden J in Re Noble Group [2018] EWHC 2991 at paragraphs [60] to [76] and to the Practice Statement of the 26 June 2020 (and in particular paragraphs 6, 7, 11, 14 and 15). It is useful to remind oneself that it is not the function of the Court at this stage to

consider the merits or fairness of the proposed scheme: and that it is the function of the Court

i) to consider whether adequate notice of the convening hearing has been given which affords those affected by the scheme a fair opportunity to raise relevant issues at the hearing;

ii) to consider threshold issues relating to the existence of jurisdiction (leaving to the sanction hearing issues relevant to the exercise of the jurisdiction);

iii) to consider matters of class composition;

iv) to consider the arrangements for ascertaining the wishes of scheme creditors at scheme meetings; and

v) to and consider whether there exists any "roadblock", any matter that would stand in the way of sanction being given even if the scheme were approved at the scheme meeting, such that the convening of the scheme meeting is without point.

11. I will consider each of these matters in turn. Since they traverse much ground which is familiar, I will deal with matters as shortly as circumstances admit.

12. First, matters relating to adequate notice of the convening hearing being given. What is sufficient notice in any given case is fact sensitive and is influenced by (amongst other things) the complexity of the scheme, the degree of consultation with creditors prior to the launch of the scheme, and the urgency of the scheme having regard to the financial distress of the company. The

Practice Statement Letter was dated 26 March 2021 and was distributed that day by posting on a dedicated scheme portal, by emailing Bank Scheme Creditors and by distribution through the normal clearing systems to noteholders. It was addressed to a financially sophisticated constituency, a significant part of which had been involved in the negotiation of the terms of scheme it outlined. The scheme itself is relatively straightforward and addressed circumstances of pressing financial distress. I consider that a period of 21 days before the convening hearing was sufficient to enable the addressees of the Practice Statement Letter to identify and to bring before the Court any relevant issues. I derive comfort from the fact that in many others cases this period has been held sufficient.

13. Second, matters going to the existence of jurisdiction. There are six.

i) Energy is a Netherlands company: as such it is a foreign company liable to be wound up as an unregistered company under the Insolvency Act 1986, for that reason falls within section 895 of the Companies Act 2006 and is able to invoke the scheme jurisdiction if it can establish "a sufficient connection" (for example seeking to compromise English law obligations or to comply with an English exclusive jurisdiction clause). This is ultimately a matter for the sanction hearing; but there is no present reason for thinking that jurisdiction cannot exist.

ii) Finance is an English company.

iii) The Bank Scheme Creditors are undoubtedly creditors whose claims can be compromised by a scheme.

iv) The beneficial owners of the Notes (which are issued in global form) are properly regarded as contingent creditors of Finance since under the terms of the Note a beneficial owner of a Note can call for the creation of a direct relationship with the issuer: see most recently Re Port Finance Ltd [2021] EWHC 378.

v) Each scheme is properly regarded as "a compromise or arrangement" with the requisite element of "give and take" which Hildyard J regarded as the fundamental requirement in Re Lehman Bros International Europe (No2) [2019] BCC 155 at [24].

vi) The fact that Energy assumed its liability as primary obligor shortly before promoting the scheme does not undermine the existence of jurisdiction (though any issues of "fairness" arising from that circumstance will need to be addressed at the sanction hearing): Re Gategroup Guarantee Ltd [2021] EWHC 304 (Ch).

14. I hold that jurisdiction to consider the schemes exists: though I must return to the matter when considering certain "roadblock" arguments.

15. Third, I turn to questions of class composition. Here again the principles are too well known to require yet another summary of them in this judgment, save that I should emphasise that strand of authority which confirms that even material difference may not amount to such a dissimilarity as to render it impossible for those meeting together to consult together with a view to their common interest: see Re Hawk Insurance Co Ltd [2001] 2 BCLC 480 at [33] and Re Primacom Holding GmbH [2013] BCC 201 at [44]-[45].

16. The applicant companies propose a single class meeting for each scheme. In respect of the Note Scheme Creditors, Finance does so on the ground that the noteholders have the same existing rights, would have the same existing rights in the alternative scenario of an insolvency, and have the same rights under the proposed scheme. In respect of the Bank Scheme Creditors, Energy does so on the ground that the banks have effectively the same existing rights, would have effectively the same existing rights in the alternative scenario of an insolvency, and have the same rights under the proposed schemes. Differences in payment dates and interest rates are immaterial in an insolvency in which all claims are accelerated, all claims are unsecured, future interest is unprovable, all claims rank *pari passu*, and where differences in guarantee and suretyship arrangements with other Group companies do not constitute differences in rights as against Energy.

17. Gazprombank challenged this analysis. It sought its own removal from the single class of Bank Scheme Creditors and treatment as the sole member of a separate class: alternatively, it sought a postponement of the intended meeting of the Bank Scheme Creditors. In seeking this relief Ms Stonefrost realistically accepted that a challenge presented at a convening hearing was necessarily constrained and she therefore fought on a narrow front.

18. Ms Stonefrost's first point was that the evidence did not establish that there was a sufficiently high likelihood of the insolvency of Energy to demonstrate that insolvency was the correct comparator for the purposes of analysing the scheme. She pointed out that the Practice Statement Letter said only that there would be "an insolvency process of *one or more of the Group entities* which

could result in further insolvencies" (emphasis supplied). She further pointed out the evidence in support of the application (the witness statement of Mr Bastin) said only that it was "highly likely" that intercompany debts would be accelerated and there would be "a very real prospect" of domino insolvencies. Finally, she drew attention to a passage in the statement of Mr Bastin which said

> "Given the significance of the Group's share in the country's electricity generating capacity and the potential economic damage the disruption of its production might cause, the Group would not necessarily be subject to an insolvency process customary for commercial companies."

She submitted that this did not constitute the requisite proof that Energy itself faced imminent insolvency.

19. I do not accept this submission. In reply, Mr Smith QC was able to draw attention to other passages in the evidence of Mr Bastin which directly addressed the imminent insolvency of Energy: and he correctly characterised the quoted passage as making the point, not that Energy could avoid insolvency, but that the type of insolvency process to which it would be subject would not necessarily be that customary for commercial companies, but it might resemble a special insolvency regime such as is frequently encountered in relation to infrastructure companies, or health services, or banking or insurance businesses, not necessarily involving differential treatment of creditors within the class of unsecured finance creditors. The evidence of Gazprombank did not seek to suggest what the alternative to an insolvency process was: on the other hand, the tenor of the evidence of Energy was that insolvency was unavoidable. I am satisfied that for the purpose of

analysing rights for the purpose of establishing class composition, creditor rights in insolvency are the correct comparator.

20. Ms Stonefrost's second point was that Gazprombank had rights in the nature of security rights which other Bank Scheme Creditors did not have, and on that account must be treated differently. The rights relied on arose in this way.

21. Some two weeks after the circulation of the Practice Statement Letter, on 8 April 2021, Gazprombank obtained from the District Court of Nicosia in Cyprus an *ex parte* freezing injunction against Energy, apparently in support of an intended arbitration to be commenced in Singapore. It is not clear what evidence was relied upon to establish a serious risk of dissipation of assets, given the existence of the Practice Statement Letter. There was a return date for an *inter partes* hearing on 20 April 2021.

22. On 12 April 2021 the District Court of Amsterdam, on a "without notice" application, gave leave to Gazprombank to levy a conservatory attachment over certain assets belonging to Energy's parent (which are said to include the shares in Energy) or Energy itself (which are said to include all movable property owned by Energy, the sums standing to the credit of Energy at specified Dutch banks and all claims which Energy has against third parties).

23. Ms Stonefrost submitted that these orders placed Gazprombank in a position different from that of the other Bank Scheme Creditors. She acknowledged that a freezing order did not (according to English law) create a security: and there was no expert evidence of Cypriot law to say otherwise. So, she relied principally upon the Dutch attachment. According to a memorandum of Dutch law submitted by the applicants immediately before the hearing,

levying a conservatory attachment confers no immediate proprietary interest in the assets attached: the party with the benefit of the attachment must initiate proceedings on the merits in order to obtain an enforceable title, success on the merits giving him the right to enforce against the assets by means of an executory attachment. In that respect the conservatory attachment is similar to a freezing order. Although there is no automatic *inter partes* hearing, the conservatory attachment is liable to be set aside at any time upon a summary application by any interested person. The present Dutch order has not been served upon Energy (for which it appears the leave of the Dutch court would be required) and so its current effectiveness as against Energy is in doubt. The relevant proceedings on the merits (the Singapore arbitration) have now been commenced, and they may in due course lead to an award which Gazprombank could apply to the Dutch court for leave to enforce (which leave might not be granted if there is an intervening insolvency).

24. I do not accept the submission that these events confer upon Gazprombank rights so dissimilar from those of other Bank Scheme Creditors that it should be placed in a separate class. There are four reasons.

i) The Cypriot freezing order certainly does not, and the Dutch conservatory attachment apparently does not, confer upon Gazprombank any immediate security interest: and it is not clear that either will be in place at the date of the scheme meeting or that a conservatory attachment could survive an intervening insolvency process.

ii) 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.

iii) The creation of small classes with veto rights should where, in justice, possible, be avoided. The justice of the case is assessed by asking whether there is more to unite than to divide potential class members in respect of the key issues for decision. The key issue here is: imminent insolvency? or delayed payment in full?

iv) Sufficient doubt attends the prospect of Gazprombank obtaining a successful executory attachment for the Court to find that its *present* rights are not so dissimilar from the other Bank Scheme Creditors as to make it impossible for them to consult together with a view to their common interest (their common interest being whether to prove for their full claim in an insolvency or to accept the negotiated scheme terms).

25. Ms Stonefrost's third point was that the identity of the obligors against whom Gazprombank had enforceable rights was different from the groups of obligors against whom other Bank Scheme Creditors had enforceable rights (by way of joint obligation, guarantee or suretyship). If (as she said the evidence suggested) not all of the Group companies would enter insolvency, then the

identity of the solvent entities and Gazprombank's rights of enforcement against them might be materially different.

26. I do not accept that this is a sufficient ground upon which to constitute Gazprombank the sole member of a different class, for two reasons. First, for the purpose of analysing class composition one is concerned to compare the rights of class members *against Energy*. Rights against third parties may conceivably enter into the "fairness" assessment: but they are not relevant to class analysis. Second, it is not enough for Gazprombank to show that its obligors are not identical to those of other banks. For the point to have weight, the Gazprombank would have to show that it had rights against an obligor who did not owe direct (borrower) or indirect (guarantee or suretyship) obligations to any other Bank Scheme Creditor; and that such an obligor was solvent. Otherwise Gazprombank is in the same situation as other Bank Scheme Creditors; it has the benefit of promises from members of an interconnected network of Group companies liable to suffer from a domino insolvency.

27. I am not persuaded that Gazprombank should have separate treatment for scheme meeting purposes.

28. As to other possible grounds upon which the single class might be fractured:-

    i) Payment of a "transaction fee" in return for entering a "lock-up agreement" does not fracture the class where it is openly available to all creditors and where it is not at a level where it is likely to exert a material influence upon a voting decision (both conditions being satisfied in the instant case).

ii) Payment of a "work fee" which is not disguised consideration, which reflects in broad terms the true value of the work undertaken and the detriment suffered by the creditors undertaking negotiation, which is available to all those who wish to participate in that way, and which is not dependent upon sanction being given to the scheme, does not in general fracture the class; those conditions being satisfied it does not do so here.

iii) Payment of fees to financial and legal advisers to the ad hoc groups pursuant to engagement letters which predate the scheme, which are not dependent upon sanction being given to the scheme, and which are paid directly by the applicant companies to the advisers for services actually rendered (as is the case here), will not fracture the class.

iv) A "success fee" *is* payable directly to the financial adviser to the bank ad hoc committee (of which full disclosure will be made in the Explanatory Statement). This does not fracture the class of Bank Scheme Creditors because it does not amount to differential treatment of class members: it cannot constitute some form of disguised additional consideration which members of the ad hoc committee receive but others do not.

29. For these reasons I agree that a single meeting be held of the scheme creditors in each scheme. It is well to record that the fact that a particular matter has been held not to fracture the class does not necessarily preclude that matter being reviewed as part of the "fairness" assessment once the outcome of the scheme meeting is known.

30. Having considered the matter of class composition I can turn to consider the arrangements contemplated for ascertaining the views of the scheme creditors. I can deal with this shortly.

31. It is not my role to approve the terms of the Explanatory Statement: but it is my role to consider whether there is any glaring deficiency and to receive the comments of any scheme creditor aware of its terms. Immediately before the hearing I received a red-lined copy of latest version of the Explanatory Statement. I have had the opportunity following the hearing to consider it. There are to my eye no obvious deficiencies: but the Explanatory Statement will be scrutinised at the sanction hearing in the light of comments made by scheme creditors at or before the scheme meeting or in the light of subsequent disclosures.

32. I am also satisfied with the arrangements made for the convening and conduct of the meetings themselves. It is unnecessary to descend into detail, beyond saying that what is proposed is a webinar (with participation instructions set out in the Explanatory Statement) to be conducted in accordance with the guidance given by Trower J in Re Castle Trust Direct plc [2020] EWHC 969 (Ch).

33. I must finally consider whether there exist any "roadblocks" that would prevent the grant of sanction even if the schemes were approved at the scheme meetings. There are three matters.

34. First, the fact that the New DEBV Notes may be amended after the sanction of the Court has been given to the schemes does not present a fundamental difficulty. In the Re Cape plc [2007] Bus LR 109 at [71] David Richards J

held that the Court did have jurisdiction to sanction a scheme which contains a provision for future amendments to the scheme (or to documents made pursuant to the scheme) but cautioned (at [73]) against the exercise of the jurisdiction. Here the provision has been included at the express request of those affected by the scheme, has a clear commercial purpose, and replicates the approval that would be needed were the amended term to have formed part of the original scheme presented to the Court for sanction (albeit not exactly because (a) it treats those affected as a single class and (b) it lacks the element of court scrutiny of the meeting and its outcome).

35. Second, the fact that the schemes contain releases of third party guarantees and liabilities does not present an insuperable obstacle to approval. The Court has jurisdiction to release the claims of scheme creditors against third parties where such a release is necessary in order to give effect to the arrangement and is ancillary to the arrangement between the company and its own creditors: in relation to guarantees see Re Noble Group *op.cit.* at [24]-[28], and in relation to those concerned in the preparation of the scheme and their advisors see Re Lecta Paper UK Ltd [2020] EWHC 382 (Ch) per Trower J.

36. Third, although the international effectiveness of the schemes is a matter for the sanction hearing, on preliminary view there is no reason to think that the Court will ultimately feel unable to grant sanction for lack of recognition in the key foreign jurisdictions in which it must have effect. The Bank Scheme is a restructuring of English law debt by the English court (which in all but one case has exclusive jurisdiction) and which is already supported by 95% of the Bank Scheme Creditors. The Note Scheme is a restructuring of New York

law governed debt by an English court which is intended to be the subject of an application to the Bankruptcy Court for the Southern District of New York under Chapter 15 of the US Bankruptcy Code (a procedure which in the experience of the Court regularly results in recognition of the scheme as a foreign main proceeding). There are other jurisdictions in which recognition is highly desirable (the Netherlands, Ukraine, Switzerland, Cyprus and the European Union). There the evidence is that the scheme companies intend to file expert evidence which it is anticipated will demonstrate a real prospect of substantial effect.

37. The initial stance of Gazprombank was that it was necessary for the scheme companies to establish, in order to obtain a convening order, that the schemes would be effective in the relevant foreign jurisdictions. But Ms Stonefrost realistically accepted that such a stance was not maintainable, and the matter fell to be dealt with at the sanction hearing. But she maintained that the absence of the relevant expert reports at the convening hearing (and the absence of any intention to produce one relating to Singapore) meant that the Court could not make a provisional assessment and ought to adjourn the convening hearing until such was obtained, there being no compelling urgency. With respect, I think that this looks at the matter through the wrong end of the telescope. The present question is not whether the court at the sanction hearing is likely to be satisfied upon the question of international effectiveness: it is whether the court at the convening hearing is satisfied that the Court will ultimately feel unable (upon the grounds of lack of international effectiveness) to grant sanction. There is no evidence to suggest that that *will*

be the case (such that holding scheme meetings is without point): and there is some evidence to suggest that it will not be. In my judgment that is sufficient.

38. For these reasons I directed the holding of single scheme meetings in the case of each scheme.