Chapter 9

Moving Shifts from COMI to Change in Governing Law: Future of Financial Restructuring? DTEK Case[1]

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Abstract

This paper analyses the underpinnings and future of 'rescuing' financially distressed businesses. It is well accepted nowadays that it is far more viable in the long run for both a debtor and its creditors to avoid bankruptcy proceedings and rescue the business in order to maximize returns. Meanwhile, not all laws of different jurisdictions are well equipped with effective restructuring mechanisms to assist a company in the zone of insolvency. Therefore, there is a tendency for financially distressed companies to resort to legal solutions available in the legal systems of jurisdictions other than their home country.

Based on the *DTEK case*, this paper sheds light on a new emerging 'test' when approaching the financial restructuring of high-yield notes by a foreign company in England. It demonstrates that in cases where the English law is not the governing law of initial choice, a COMI-test is not necessarily the only option available to invoke the English courts' jurisdiction over the foreign company in order to take advantage of an English scheme of arrangement to implement a restructuring. Unlike *Magyar Telecom* and *Zlomrex International* cases where it was precisely a COMI shift that was utilized to avail the foreign companies of the English scheme of arrangement, the *DTEK case* is the first reported case of the financial restructuring of the high-yield notes implemented by way of changing the original governing law of the finance documents, which, of itself, served as a gateway for the English jurisdiction and its scheme of arrangement.

In this nexus, this paper reopens the debate as to whether by opting for a change of the original governing law to English in order to establish a 'sufficient connection' with the English jurisdiction, which allowed for cramming down of the dissenting

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creditors outside the formal insolvency proceeding via the English scheme of arrangement, the fundamentals of private international law, namely 'party autonomy principle' have been diminished. Such a 'double twist' on the dissenting creditors may not serve the parties' original choice of law expectations.

The paper further pushes the envelope and discusses the possible 'real' underpinnings and the future of the effective cross-border financial restructurings. It poses a question as to whether it is really a 'sufficient connection' test or the old common law Gibbs principle that ultimately stands behind many cross-border financial restructurings. The Gibbs principle (that proved to be 'still alive' in the recent *Bakhshiyeva v Sberbank of Russia, 2018* case) purports to be an interesting 'jurisdictional hook'. Under this principle, the English court will 'protect' the party autonomy, if the choice is made in favour of English law, and will not recognize the 'primacy' of *lex fori consursus* of the foreign proceeding. It will deny recognition of a discharge of the English law governed contractual rights rendered in a foreign insolvency proceeding (provided the creditor did not submit to the jurisdiction of the foreign court). However, at the same time, it will give effect to the alteration of the contractual rights, governed by a foreign law, and restructured in the English jurisdiction, as was done in *Magyar Telecom* and *Zlomrex International* cases. Following this, voluntarily or not, it makes the debtor bound by the English jurisdiction for the purposes of effecting a cross-border financial restructuring. Such a 'one-door play', when English is the governing law, limits the possibilities of utilizing other preferred jurisdictions, except for the English one, creating an obstacle to the *bona fide* forum shopping. As a result, it poses an impediment to effective cross-border restructuring, undermining international comity and ultimately the principle of modified universality.

1 Preface – A Glance Back

To 'rescue' a foreign company in England by availing itself of the benefits of the effective English financial restructuring mechanism (the scheme of arrangement), has not been a particular problem for overseas companies, subject to certain conditions. The initial English governing law of the finance documents used to satisfy the 'sufficient connection' test for the jurisdiction of the English court's scheme of arrangement. The classic examples are the *Drax Holdings*[2]*, Rodenstock*[3]*, PrimaCom*[4] and *Vietnam Shipbuilding*[5] cases.

2 *Drax Holdings Ltd* [2003] EWHC 2743 (Ch).
3 *Rodenstock GmbH* [2011] EWHC 1104 (Ch).
4 *PrimaCom Holdings GmbH* (No 1) [2011] EWHC 3746 (Ch).
5 *Vietnam Shipbuilding Industry Group* [2013] EWHC 2476 (Ch).

Since 2013, the situation has changed with *Magyar Telecom*[6] and *Zlomrex International*[7] cases. The 'English governing law' test as a gateway for the English scheme jurisdiction was no longer employed in those cases as the debt had been governed by a New York law. To this end, a COMI shift to England was utilized to establish the English scheme jurisdiction.

Nevertheless, nothing prevents from reinventing the wheel, especially in cases where COMI shift might not always be the best viable option to utilize straightaway. The two most recent judgments in the *Apcoa*[8] and *DTEK* cases are the bright examples thereof.

In this paper, the main attention is given to the DTEK case as the first successful example of the financial restructuring of the high-yield notes (unlike *Apcoa* case, which dealt with restructuring of the loan facilities).

2 The DTEK Case[9]: Nothing Is Impossible

2.1 The DTEK Case: Background

The DTEK Finance BV ('the DTEK'), incorporated in the Netherlands, was part of a group that carries on an energy business involving mining coal, generating power and the distribution and selling of electricity to its main customers in the Ukraine but also in Europe and elsewhere. The DTEK's function within the group was to raise finance in the capital markets and distribute it to the group.[10]

Performing its functions, in 2010 the DTEK issued high-yield debt in the form of notes, initially governed by New York law, maturing in April 2015 ("2015 Notes"), and guaranteed by English law governed guarantees, issued by some group companies, *inter alia*, Ukrainian-operating companies.

As a result of various problems in Ukraine, generated mainly by the devaluation of the Ukrainian currency against the US dollar, the group ran into financial difficulties. It became problematic to service its dollar denominated debt obligations, while earning its revenue in Ukrainian currency. In addition, the general unrest in Ukraine due to Russia's military invasion affected the DTEK's financial and operational condition. Against this background, the DTEK faced an immediate problem that the company did not have sufficient funds to repay the 2015 Notes maturing in

6 *Magyar Telecom BV* [2013] EWHC 3800 (Ch).
7 *Zlomrex International* [2013] EWHC 3866 (Ch).
8 *Apcoa Parking Holdings GmbH* [2014] EWHC 3849 (Ch).
9 *DTEK Finance BV* [2015] EWHC 1164 (Ch), para 2.
10 *DTEK* (n 9) para 3.

April 2015. Absent an effective financial restructuring scheme, there would have been an event of default under the 2015 Notes that would have triggered cross-defaults under other agreements and would likely have caused the DTEK and some or all of the guarantors to enter into insolvency proceedings.[11]

With this in mind, for the DTEK it was viable either to restructure the debt on a voluntary basis with the noteholders' support *or* forum shop for a 'convenient' restructuring alternative to effect the proposed restructuring, enabling the cramming down of dissenting creditors outside of formal insolvency proceedings in order to avoid the negative stigma of insolvency.

The anticipated restructuring scheme purported to be as straightforward as possible:

(1) The existing 2015 Notes were to be acquired by the DTEK and then cancelled;

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

(3) For the remaining 20 per cent of the par value, the noteholders would receive cash.[12]

2.2 The DTEK Case: 'Double Twist' Strategy

For the DTEK to implement the proposed restructuring scheme outside of formal insolvency proceedings there were two possible options to undertake: a) either on a voluntary basis get approval of the new 'material' terms of 2015 Notes from the noteholders without the need for a court approval, provided 98 per cent of noteholders agree to such new terms[13] ('exchange offer'); or b) apply to a 'convenient' jurisdiction, that would facilitate the adoption of the same terms contained in the 'exchange offer', but on a slightly lower threshold requirement to allow for its approval outside of formal insolvency proceeding ('back-up' plan).

In any case, the effect of either option purported to be identical; the only difference was the 'adoption method' to achieve the desired outcome.

As the first option failed in the DTEK case (only 91.1 per cent of the noteholders agreed to the new proposed terms), the company proceeded with the 'back-up' plan, which purported to take advantage of the English scheme of arrangement (the adoption threshold requirement was 50% in number constituting 75% in value

11 *idem,* para 6.

12 *DTEK* (n 9) para 7.

13 *idem,* para 12.

of those present and voting at the meeting of creditors).[14] To make it happen, the DTEK had to establish a 'sufficient connection' with the English jurisdiction. Having this in mind, the implementation strategy that was chosen was similar to the *Apcoa case*, favouring the change of the initial governing law to the English one (which required only a simple majority vote for the change of governing law, in contrast to the 98 per cent of the needed consent for the change of 'material terms' of the contract).

Given the above, the chosen implementation strategy can be called a '*double twist'*. This refers to a situation of cramming down the dissenting creditors twice: 1) at deciding to change the initial New York governing law to the English one so as to create a 'sufficient connection' to the English jurisdiction in order to use its scheme of arrangement; and 2) by imposing the altered terms of finance documents on those dissentient creditors to further implement the restructuring.

In both instances, the dissenting creditors were *de facto* ultimately 'forced' to be bound by the decision of the requisite majority.

2.3 The DTEK Case: 'Double Twist' v Party Autonomy

Flashing back to the preceding cases, like *Drax Holdings*, *Rodenstock*, *PrimaCom* and *Vietnam Shipbuilding*, it is clear that the initial choice of the English governing law for the finance documents, which served as a 'sufficient connection' test to English jurisdiction with either exclusive English jurisdiction clause (*PrimaCom* case) or asymmetric/ non-exclusive English jurisdiction clause (*Rodenstock* and *Vietnam Shipbuilding* cases) reflected the clear observance of the party autonomy. It constituted a legitimate choice of the parties to subject their contractual rights under finance documents to potential alteration and discharge under English law, including the English scheme of arrangement. It casts no doubt that by choosing English governing law as the initial choice, the parties, citing Professor Paulus in *PrimaCom* case:

> "subjected to the English law not only the formation but also the extinction and restructuring of those debts, be it by fulfilment, settlement or by a scheme of arrangement".[15]

However, in the DTEK case the initial collective choice of law was different from the one they ended up with. The original New York law in the DTEK case was intentionally changed to English governing law to avail itself of the English scheme

14 Companies Act 2006, part 26.

15 *PrimaCom* (n 4).

of arrangement. Moreover, there was opposition to such a change of the initial governing law and further implementation of the restructuring scheme thereunder.

Logically, it raises a concern as to whether such a 'double twist' strategy, which in fact crammed down the dissenting noteholders twice, was just and fair in relation to the noteholders that had relied on their initial choice of proper law to govern the formation, extinction and restructuring of the debt. Had they all consented to the change of governing law – that would have been perfectly fine to impose on them the altered terms of the notes under the new governing law. Otherwise, it raises the issue of legitimacy and fairness to bind them where they did not consent thereto. Afterall, it poses a question as to whether such a 'strategy' does not diminish one of the fundamental principles of private international law: party autonomy, and the expectations the creditors had had when entered into contracts.

The Rome I Regulation 593/2008 on the law applicable to contractual obligations[16] enables the parties to a contract dealing with obligations 'in civil and commercial matters' to change the governing law – it is a freedom of choice. However, it is yet not clear whether the party autonomy rule is still satisfied in the situation where there is an opposition to the change of the initially collectively chosen governing law.

In the *Apcoa case* the opposition to the change of original governing law and its further application submitted 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 scheme) was 'a step too far'."[17] Nevertheless, *Hildyard J* in the *Apcoa case* concluded 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."[18]

In the DTEK case the indenture governing the 2015 Notes included a provision for the possible change in governing law.[19] Specifically, the terms of the 2015 Notes provided for a potential change to the governing law to be agreed by a majority

16 Rome I Regulation 593/2008 on the Law Applicable to Contractual Obligations, para 2, art 3.

17 *Apcoa* (n 8) para 69.

18 *idem,* para 69.

19 *DTEK* (n 9) para 16.

and to bind everyone whether they agreed or not.[20] In this connection, Rose J accepted the legitimacy of changing the initial governing law, opining that "it was, therefore, part of the bargain that the noteholders signed up to".[21]

2.4 The DTEK Case: The Future of Financial Restructuring of the High-Yield Notes?

The DTEK case proved to be the first reported case of a successful financial restructuring that implemented the 'double twist' strategy to restructure the high-yield notes, where the initial governing law of the debt was changed to the English law to take advantage of the English scheme of arrangement. It would be fair to say that the judgment in the DTEK case could be a good precedent for future financial restructurings of high-yield notes, regardless of the COMI location and the initial governing law of the finance documents. However, if the finance documents had provided for a unanimous noteholders' consent threshold to affect the change of the governing law, the prospect of implementing the 'double twist' restructuring strategy would have been absent. Therefore, potential noteholders and debtors should draft the contract carefully, paying particular attention to the amendment provision allowing for the change of governing law and its threshold requisite.

Unlike the prospect of potential application of the DTEK case for future high-yield notes restructurings, the possibility of future utilization of the *Apcoa case* to restructure loan facilities is questionable. Given the developments introduced by the Loan Market Association ('LMA') in September 2012[22], which, *inter alia*, included a change to the amendment provisions, requiring unanimous lender consent for the change of the governing law and jurisdiction clause,[23] it might have become problematic to further forum shop in good faith via 'a double twist' strategy, as there will be no possibility to cram down the dissenting creditors at the stage of deciding on the matter of changing the initial governing law. To this end, the *Apcoa case* seems to have a limited practical significance in the future, although there will inevitably be examples of existing loan obligations that do not adopt the latest LMA position.

20 *idem,* para 13.

21 *idem,* para 16.

22 LMA Leveraged Facilities Agreement (Senior / Mezzanine) - September 2012 changes LMA.SFA.Sept (2012) https://www.lma.eu.com/application/files/3214/3306/9423/LMA_SFA_-_Sept_2012_update_note.pdf accessed 22 April 2019.

23 Alyson Lockett, Peter Manning, Alistair Hill, 'Restructuring High Yield Bonds: the DTEK Scheme of Arrangement' (11 June 2015) Simmons & Simmons elexica (2018) http://www.elexica.com/en/legal-topics/restructuring-and-insolvency/09-restructuring-high-yield-bonds-dtek-scheme-of-arrangements accessed 22 April 2019.

3 Real Underpinnings and the Future of Cross-Border Financial Restructurings

3.1 Behind the Curtains: 'Sufficient Connection' Test or Gibbs Principle?

It is well known that for a foreign company to avail itself of the English scheme of arrangement it has to demonstrate that it is capable of being wound up in English jurisdiction. Thus, it has to satisfy the 'sufficient connection' test, which has proven to be quite a factual one. Over the past years, the English courts have reduced the threshold and taken an expansive view of what constitutes the 'sufficient connection' test, no matter how intangible this gateway had appeared to be. And the relatively recent cases demonstrate that: either straightaway (like in *PrimaCom*, *Van Gansewinkel*[24] and *Vietnam Shipbuilding* cases) or ultimately (like in *Apcoa* and *DTEK* cases) the English governing law of the debt documents 'opened the door' for the English court jurisdiction to sanction the scheme of arrangement in respect of a foreign company, regardless of assets, COMI or creditors location. To this end, the sufficient connection test is deemed to have become more and more flexible when interpreted by English judges.

It logically poses a question as to whether the steady loosening of the sufficient connection test over the years demonstrates a clear trend of the English courts' approach in facilitating cross-border financial restructurings.[25] Or maybe there is a hidden rational behind it being a special vehicle, providing enough space for jurisdictional manoeuvring? Afterall, is it indeed the 'sufficient connection' test or maybe the old common law Gibbs principle, which stands behind many successful cross-border financial restructurings and has a real impact thereon?

According to the *Gibbs principle*, by virtue of the existence of an English governing law clause, England becomes the only appropriate jurisdiction for restructuring. In other words, via insertion of an English governing law clause into the debt documents, an English restructuring becomes, in the eyes of the English courts, the only appropriate composition worldwide, if the effects of the restructuring are to be universal.[26] Cases like *Drax Holdings, Rodenstock, Primacom* and *Vietnam Shipbuilding* proved to have acted as a jurisdictional hook that ultimately served to anchor the English courts' exercise of jurisdiction to sanction English schemes of arrangement – it was a sufficient basis, taken alone, to find the English

24 *Van Gansewinkel Groep BV* [2015] EWHC 2151 (Ch).

25 Richard Woodworth, Fiona Cumming, Duc Tran, 'Vinashin – an English Solution for an Asian Problem' (28 October 2013) Alan & Overy Publication http://www.allenovery.com/publications/en-gb/Pages/Vinashin---An-English-solution-for-an-Asian-problem.aspx accessed 22 April 2019.

26 Kannan Ramesh, 'The Gibbs Principle: A Tether on the Feet of Good Forum Shopping' (2017) 29 SAcLJ 42, 65.

court's jurisdiction to apply the scheme of arrangement. Citing Kannan Ramesh, "this is a particularly acute application of the Gibbs principle."[27] It is difficult to disagree, though.

3.2 The Gibbs Principle v Lex Fori Concursus

The principle set out by Lord Esher MR in *Antony Gibbs & Sons v Societe Industrielle et Commerciale des Metaux*[28] rests on the assumption that the parties have agreed to the application to the debt of all elements of the debt's proper law, including the debt or liabilities discharge. The parties had agreed that English law should govern the contracts. They had never agreed to be bound by French law, including French insolvency law. Lord Esher MR posed the rhetorical question: "Why should the plaintiffs be bound by the law of a country to which they do not belong, and by which they have not contracted to be bound?"[29] The underlying assumption behind this reasoning is that the "question of discharge ought to be characterized as a contractual issue rather than a bankruptcy or insolvency issue."[30] Accordingly, the:

> "focus is on what law the parties have agreed to apply, giving primacy to the parties' choice rather than the policy considerations that are attendant on an insolvency".[31]

Following the chain of thought in the *Gibbs case*, a discharge of any debt or liability under the bankruptcy law of a foreign jurisdiction is a discharge therefrom in England if, and only if, it is a discharge under the law applicable to the contract.[32] Thus, a foreign composition is not regarded as effective unless it operates as a discharge according to the law of the debt,[33] i.e. under the law applicable to the debt,[34] and this will demonstrate the observance of the party autonomy principle in practice.

Therefore, pursuant to the *Gibbs rule*, an English court will not recognize a foreign discharge of debt unless the insolvency proceeding takes place in the jurisdiction

27 *idem,* 64-65.

28 *Antony Gibbs & Sons v Societe Industrielle et Commerciale des Metaux* (1890) 25 QBD 399, para 405.

29 *idem,* para 406.

30 Ramesh (n 26) para 21 page 49.

31 *idem,* para 21 page 29.

32 Lord Collins of Mapesbury et al (eds), *Dicey, Morris & Collins on the Conflict of Laws*) (15th edn, Sweet & Maxwell 2012) para 31 R-092.

33 *idem,* para 31-096.

34 Riz Mokal, 'Shopping and Scheming and the Rule in Gibbs' (2017) South Square Digest 58, http://southsquare.com/articles/shopping-and-scheming-and-the-rule-in-gibbs/ accessed 22 April 2019.

of the governing law of debt. Therefore, in the *Gibbs case* it was ruled that the French liquidation did not discharge the English law debt owed by the defendant, and the plaintiff was entitled to maintain its action upon the English contracts.

It logically poses a question as to whether the application of the *Gibbs rule*, purporting to protect the party autonomy in the eyes of English courts, does not diminish the principle of modified universality (purporting to give effect to the 'primacy' of *lex fori concursus* over party autonomy), comity and judicial cooperation attained thereto.

The *Gibbs case* was decided in 1890s, in an era when insolvency law promulgated a philosophy of territorialism and operated in an 'isolated' commercial paradigm. Times have changed since then. Now companies are not restricted by borders any longer, they operate transnationally and borrow globally. A business can be located in one jurisdiction and borrow in multiple capital markets, which inevitably results in incurrence of debts governed by a variety of national laws. Therefore there is a real prospect of a disconnect between the jurisdiction of debt origination and a company's place of incorporation, listing or COMI.[35] Upon a strict *Gibbs* application, it would be impossible for such a company to find one suitable jurisdiction to commence insolvency or restructuring proceedings, where the debt is not governed by the *lex concursus*.[36]

Given that, one may question whether there is any alternative other than to commence insolvency/ restructuring proceedings in multiple jurisdictions with the view of observing the party autonomy (*Gibbs rule*) to effect the restructuring worldwide. However, would it not be a step back to territorialism, impeding the promotion of (modified) universality, which is driven by the needs of today's globalized commerce?

The ultimate concern arises as to whether there should be given a 'primacy' to *lex concursus* over *lex voluntatis*. Should a lacuna be allowed to exist in the powers of the court, properly seized of insolvency jurisdiction over the debtor, to discharge contractual debts that form part of the debtor's overall liabilities, simply because those debts are not governed by its law. There is no good reason why a party's contractual rights should not be similarly readjusted when debt restructuring is underway under a statutory regime where contractual rights are being readjusted.[37]

35 Ramesh (n 26) para 35 page 55.

36 Ramesh (n 26) para 35-36.

37 *idem,* para 26 page 51.

In this connection, it is deemed fair to promote the overriding effect of *lex concursus* over *lex voluntatis*. To this end, Professor Fletcher made a crucial point, opining that "the principle of collectivity in insolvency law demands the transformation of contractual entitlements in discrete pre-insolvency contractual relationships into the rights of creditors to participate in the distribution of the debtor's estate under the governing insolvency law. Once insolvency or restructuring is underway, a creditor no longer has any basis to insist on the satisfaction of the full range of his pre-insolvency entitlements."[38] In other words, party autonomy is subjugated to a broader policy imperative.[39] A similar idea was expressed by Look Chan Ho stating that:

> "the claimants' pre-insolvency entitlements arising from contracts are properly the subject-matter of party autonomy, but the post-insolvency treatment of the claimants' pre-insolvency entitlements cannot be exclusively the subject-matter of party autonomy".[40]

Hence, a party who enters into a contract should reasonably expect that his contractual counterparty may be subject to insolvency proceedings at some point, and that such proceedings may adversely impact on the contractual bargain.[41]

Notwithstanding the above scholarly input, the *Gibbs principle* proved to be alive still in *Bakhshieva*[42] *(2018) case* and consistently applied. The case dealt with a restructuring procedure in relation to OJSC International Bank of Azerbaijan, which had been approved by a substantial majority of its creditors in Azerbaijan on 18 July 2017. However, the two respondents, who had not voted or participated in any way in the meeting in Azerbaijan to approve the plan, argued that their debt contract was governed by English law and that they were therefore not bound by the restructuring procedure, relying on the '*Gibbs rule'*. Justice Hildyard in that case once again reinforced that he was bound by the *Gibbs principle* and held that the Court had no power to grant a permanent stay or moratorium in support of foreign insolvency proceedings to prevent creditors from exercising their rights under an English contract. To make such an order would amount to varying or discharging substantive rights by the expedient of procedural relief.[43]

38 Ian F Fletcher, *Insolvency in Private International Law* (2nd edn, Oxford University Press 2005) para 1.08.

39 Ramesh (n 26) para 24 page 50.

40 Look Chan Ho, *Cross-Border Insolvency: Principles and Practice* (Sweet & Maxwell 2016) para 4-098.

41 Ramesh (n 26) para 25 page 50.

42 *Bakhshiyeva v Sberbank of Russia* [2018] EWHC 59 (Ch).

43 *idem,* para 146.

Moreover, some concerns have been expressed with regard to its strange 'double standard' application fashion. Defending the party autonomy by refusing to recognize the discharge mandated by foreign insolvency law of debts governed by English law, English courts have consistently demonstrated a willingness to compromise debts owed under foreign law following English insolvency or composition proceedings.[44] Cases like *Magyar* and *Zlomrex International* are good examples thereof, when the English court did not find the foreign debt to be an obstacle to sanction the scheme, opining that:

> "there was an obvious logic in treating a scheme approved under English law as effective to alter the rights of creditors, even though those right were governed by the law of a different country".[45]

Such a 'double approach' to the discharge of debt signals the inconsistency in declared English 'standards'. Nevertheless, it serves a brilliant example of the implicit recognition of the 'primacy' of insolvency/ restructuring law over the contractual freedom in the jurisdiction that purports to deny it due to the *Gibbs rule*. Professor Fletcher expressed an opinion in this regard that "the English discharge must be complemented by a recognition that foreign discharge of English debt has equivalent effect".[46] It goes without saying, that there is an obvious logic and need to achieve such consistency between the legal effect of local and foreign insolvency proceedings on an issue of the discharge of debts.

It casts no doubt that once a court is properly seized of an insolvency jurisdiction, it is its insolvency law that should determine whether and to what extent creditors may draw from the pool of available assets. This is the exact description of the American approach, which emphasizes the importance of respecting of a foreign insolvency proceeding as a requirement of international comity. In its view, international comity mandates judicial recognition of discharge of debts following foreign insolvency, as was observed in the *Oui Financing LLC v Steven Dellar and Oui Management SAS*[47] case, where Judge R. Abrams opined that there was a:

> "well-established practice of the US courts to decline to adjudicate creditor claims that were the subject of foreign bankruptcy proceedings, on the basis of international comity, thus recognizing that there was a need to ensure that all claims were assembled in

44 *Magyar Telecom BV* [2013] EWHC 3800 (CH), [19].

45 *idem,* [31].

46 Ian Fletcher, *The Law of Insolvency* (4th edn, Sweet & Maxell 2009) paras 29-037, 29-063, and 29-069.

47 *Oui Financing LLC v Steven Dellar and Oui Management SAS* [2013] US Dist LEXIS 146214.

> a single set of proceedings binding all creditors, or the plan of reorganization would fail."[48]

3.3 The Gibbs Principle v Bona Fide Forum Shopping

In cases where a business raises finance in different capital markets, the debt is often governed by a law other than that of the insolvency jurisdiction. Should that business suffer financial distress, it will likely be searching for the best legal option to restructure its debt, if not available in the state of its incorporation, in other foreign jurisdictions for the benefit of a debtor and its creditors, thus being engaged in the *bona fide* forum shopping. Observing the growing acceptance of inevitability of the *bona fide* forum shopping in cross-border insolvency on the one hand, and the *Gibbs principle* on the other hand, one cannot but see a potential clash between these two. The bona fide forum shopping justifies the application of *lex fori concursus* and the Gibbs principle defends *lex voluntatis*. Opposition is at hand.

However legitimate the *bona fide* forum shopping may be, the *Gibbs principle* is deemed to impede all the good. English courts will deny recognition of the foreign discharge of debt or liabilities, if it is governed by English law and compromised in a foreign insolvency proceeding. At the same time, they will discharge or compromise a debt, governed by a foreign law, should an English court be properly seized of the insolvency jurisdiction. To this end, Look Chan Ho correctly noted that:

> "English courts espouse forum shopping in the context of opening English insolvency proceedings but effectively reject forum shopping in the context of recognizing foreign insolvency proceedings".[49]

Such an 'English approach' limits the possibilities of utilizing other preferred jurisdictions for effective cross-border restructurings. Moreover, it frustrates the 'unity' of the restructuring/ insolvency process and observance of *pari passu* principle.

The ultimate question can be posed as to why should good forum shopping become bad forum shopping simply because the law of the debt is not the law of the forum?

48 Ramesh (n 26) para 18 page 48.

49 Chan Ho (n 40) Preface vii.

Cases like *Bakrie*[50], *BTA Bank*[51] and *Bakhshieva*[52] proved to serve an example of the continuous acceptance of the *Gibbs principle*. Though the subject matter of those cases was not identical and did not cover exactly the question of application of *Gibbs*, the outcome was all the same – no relief was granted from English courts to facilitate the foreign restructuring plan due to existence of an English law governed debt that could not be discharged by a foreign insolvency proceeding.

Hence, it suggests an assumption that being bound by the Gibbs principle, England will still remain a main cross-border financial restructuring hub, suggesting sticking to a 'one-door play' towards English courts, unless English law is not the governing law of the debt.

4 Takeaways

The *DTEK case* has proved to have given the high-yield notes issuers much better access to a very powerful rescue tool – the English scheme of arrangement. In going the extra mile, in comparison to the *Apcoa case*, the *DTEK case* undoubtedly pushed the envelope and served as an incredibly useful precedent.

Meanwhile, the sufficient connection test is deemed to be a technical vehicle designed to serve the *Gibbs principle* behind it. That is why English courts are so open to manoeuvre when justifying the jurisdiction of their scheme.

Whether good or bad, what is evident at hand, is that the *Gibbs principle* nowadays poses a certain impediment to effective cross-border restructurings, by limiting the *bona fide* forum shopping and undermining ultimately the principle of modified universality and comity.

Therefore, a major takeaway is that the law should be playing catch-up and keep pace with the dynamic and fast-changing reality that it is intended to govern.

50 *Global Distressed Alpha Fund 1 Limited Partnership v PT Bakrie Investindo ("Bakrie")* [2011] EWHC 256 (Comm).

51 *JSC BTA Bank v Ablyazov* [2012] EWCA Civ 1411, [2013] 1 WLR 1331.

52 *Bakhshiyeva* (n 42).