

REDCLIFFE PARTNERS OBTAINED A BIG WIN FOR THE NORDIC INVESTMENT BANK AT THE SUPREME COURT

Redcliffe Partners has scored a courtroom victory for the Nordic Investment Bank (the "**Bank**"), the international financial institution of the Nordic and Baltic countries, at the Grand Chamber of the Supreme Court, whose ruling in this case sets one of the most resounding and important court precedents in the context of cross-border finance deals. The case concerned the recognition of the Bank's suretyship claim in the insolvency proceeding against PJSC "Dniprovsky Iron and Steel Works" ("**DMK**"), a large Ukrainian steel mill.

By way of background, in 2008, the Bank disbursed a USD 40 million term loan to a Cypriot company for the purpose of on-lending to PJSC "Alchevsk Iron and Steel Works" ("**AMK**"), both companies being affiliates of the Industrial Union of Donbass group, to finance the purchase and installation of a combined cycle gas turbine at the AMK's production facilities. The loan was secured by an English law-governed suretyship issued in favour of the Bank by AMK, DMK and several other companies of the Industrial Union of Donbass group as sureties. At some point, the Cypriot borrower stopped making interest payments and failed to repay the loan. All four sureties subsequently went into insolvency administration. The demands were served by the Bank on AMK and DMK to recover the principal and accrued interest but to no avail.

In November 2020, the Bank filed applications for recognition of its USD 59 million claim in the insolvency proceedings against AMK and DMK. While the AMK case application is still under consideration, the DMK case has quickly progressed to the Supreme Court. In the DMK case, the court of first instance and the court of appeal refused to recognise the Bank as a legitimate creditor, holding mainly that (i) no

primary evidence of the loan disbursement, in particular payment instructions, had been provided, (ii) the applicable rules of English law had not been proved so the Ukrainian rules were applicable, and (iii) the suretyship had expired as a matter of Ukrainian law.

The case was ultimately heard by the Grand Chamber of the Supreme Court, which ruled in favour of the Bank and ordered the insolvency administrator to include the Bank to the register of creditors. This decision is a landmark precedent in Ukraine relevant to all foreign lenders relying on English law-governed loan documentation: it affirms the duty of Ukrainian courts to apply foreign law as agreed by the parties in the relevant loan documents and establishes the balance of probabilities as the standard of proof for such cases.

Most notable findings of the Grand Chamber of the Supreme Court

- a) Parties to a contract involving a foreign person, can freely choose applicable law, including English law, and the courts must apply that law to all matters related to that agreement, including its duration, rights and obligations of the parties, validity, effect, limitation period, etc.
- b) It is a duty of the court to apply the foreign law rules. Thus, the court must itself undertake efforts to ascertain the contents of the applicable foreign law chosen by the parties. The parties may, but are under no obligation to, facilitate these efforts by providing expert reports, academic texts, case law and other materials. Ukrainian law should be applied only if those specific efforts by the court and the parties have failed.

- c) For the first time, the Supreme Court had an opportunity to address the difference between domestic mandatory rules and international mandatory rules. It held that the provisions of Ukrainian law applicable to suretyship, in particular its duration and the period within which a claim should be presented to a surety, are not mandatory rules of Ukrainian law of conflicts and should not override or supersede the foreign law agreed by the parties.

For example, in this case, the term of the disputed suretyship deed was formulated as lasting "until the secured obligations have been fully paid and the obligations of the sureties have been finally discharged and released by the Bank". Applying the Ukrainian legal rules on suretyship as "mandatory", the lower courts held that the DMK suretyship, which contained such wording (as is quite common for English law guarantees), did not stipulate the clear term of its validity and, as such, had expired, since no claim was made against DMK within six months following the Cypriot borrower's default. By contrast, under English law selected by the parties to govern the DMK suretyship, a creditor can present a demand or file a claim against a surety within a general limitation period of 12 years applicable to instruments executed as deed.

- d) When deciding whether a loan has been provided to the borrower, the courts should properly evaluate all available evidence based on the standard of balance of probabilities rather than that of clear and unmistakable evidence. The loan should be considered properly disbursed and received as long as the available evidence, including that of the debtor's conduct, when reviewed collectively, demonstrate that the loan was most likely disbursed and received.

Practical implications

- a) Choice of foreign law (and all concomitant benefits) to guarantees and suretyships must not be disregarded by Ukrainian courts.
- b) Expressing the suretyship to last "until the secured obligations have been fully paid" or "until the obligations of the surety have been finally discharged and released by the beneficiary", if it is permissible under governing law, is perfectly valid and enforceable in Ukraine. From a practical perspective, however, expressing the duration of the suretyship by reference to a number of days, months or years, or until a specific expiration date, may help avoid any potential dispute on the matter.
- c) The court should assess the evidence of debt in its entirety with particular focus on the conduct of the debtor and sureties. Nonetheless, it is still prudent to collect and preserve as many documents demonstrating loan disbursement as possible, such as utilisation requests, payment instructions, bank statements, other wire transfer documents stipulating the details of the payer, the payee, the loan amount, the loan disbursement designated account, and containing a transaction reference to a particular loan agreement and utilisation request. In addition, it can be helpful to receive a bank statement from the borrower's account and a written confirmation of the loan disbursement from the borrower after such disbursement took place, which confirmation form can be included as schedule to the loan agreement and required to be delivered as an undertaking or condition subsequent.
- d) Law expert reports which were introduced as recently as in 2018 are confirmed to be valuable and potent instruments in Ukrainian litigation. They may not be ignored at a whim.

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