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ARTICLE

TORM A/S – A Complex Danish Restructuring and Merger Tied Together by an English Scheme of Arrangement

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The recent restructuring of Danish tanker operator TORM A/S ('TORM') provides an instructive case study on the use of an English law scheme of arrangement to implement a complex multi-jurisdictional restructuring and merger. The TORM restructuring was noteworthy for a number of reasons. First, it utilised an innovative structure to accommodate the commercial interests of different creditor constituencies within the same class of debt. This debt restructuring was then combined with a merger transaction with the valuation automatically adjusted to account for the level of debt equitised. The transaction was implemented through the use of a novel combination of an English law scheme of arrangement and Danish corporate law. This was a first for a listed Danish company and involved the change of governing law of certain debt facilities, and was completed with the relevant Danish shareholder approvals and without the need for local bankruptcy proceedings.

This article describes the background to the restructuring, the way the deal came together, and the processes used to implement it.

Background to TORM

TORM, headquartered in Copenhagen, Denmark, is one of the world's leading owners and operators of tankers for the transport of refined oil products. TORM is a Danish limited liability company whose shares are listed on the NASDAQ OMX Copenhagen. TORM's global operations consist of commercial and technical vessel management, and the group has operations in Denmark, Singapore, the USA, the Philippines and India.

TORM had previously been through a first round restructuring in 2012. As a consequence of the global economic downturn, from 2009 onwards charter rates for tankers and dry bulk vessels collapsed, which led to a pronounced reduction in vessel values throughout the industry. This collapse resulted in TORM's loan facilities, which comprised seven separate syndicated loan facilities, with 'siloed' security pools, becoming significantly under-collateralised. Along with many operators, TORM also faced significantly reduced cashflow as a result of the reduction in charter rates. For TORM, this produced significant potential unsecured liabilities in respect of its long-term chartered vessels, many of which had become loss making.

In November 2012 TORM completed a consensual out-of-court restructuring of its loan facilities and charter obligations. Through the 2012 restructuring TORM equitised its charter liabilities and gained a new working capital facility and a payment holiday and other changes to its loan facilities. There was not, however, any reduction in the principal amount of the debt.

TORM's new working capital was provided through a new super senior working capital facility with a maturity date two years after the close of the restructuring (the 'Super Senior Facility').

In addition, for three of TORM's facilities an opt-out was provided, which allowed those lenders within the two years following the restructuring to require TORM to sell the vessels funded by those facilities. As a result of the exercise of these options, the vessels were sold to Oaktree Capital Management ('Oaktree'), with the majority of the vessels remaining under TORM management. Oaktree subsequently acquired further vessels, to create a fleet of 25 vessels, with six newbuilds on order.

Financial situation of the group before the restructuring

Following the 2012 restructuring, TORM was the borrower under four loan facilities with separate collateral pools but which were governed by an overarching Framework Agreement, as well as its Super Senior Facility. The Super Senior Facility and two of the loan facilities were governed by English law, with the remaining two loan facilities governed by Danish law.

Notes

1 Skadden, Arps, Slate, Meagher & Flom (UK) LLP acted as English counsel to TORM A/S in relation to its restructuring.

Following the 2012 restructuring, TORM's operational platform performed well but its balance sheet continued to indicate distress. TORM's debt facilities remained significantly under-collateralised: the TORM vessels that secured the company's debt totalling approximately USD 1,418 million (as of May 2015) were valued at approximately USD 821 million in March 2015. The shortfall between the value of TORM's vessels and the amount of its debt was at the core of the financial difficulties that lead to its second restructuring. TORM also needed to secure ongoing working capital funding to follow the expiry of the Super Senior Facility.

Negotiations with lenders

TORM had begun negotiations with its existing lenders in late 2013 with a view to the consensual agreement of a comprehensive restructuring to place TORM on a stable basis for future growth. As these negotiations continued through 2014 the composition of TORM's creditor group changed significantly as approximately half of the original lenders (primarily European banks) sold their positions to, mostly, U.S. based hedge funds. This change resulted in a fractured creditor base, with divergent interests. Whereas the bank lenders were largely interested in maintaining their debt at a suitable loan to value ratio, the new lenders were, mostly, interested in a debt for equity swap. These lender groups coalesced around separate ad hoc creditor committees, with separate financial and legal representation.

The third party in the restructuring negotiations was Oaktree. As the owner of a significant number of the vessels in the TORM fleet, Oaktree was a natural partner for a merger. Combining the fleet into a single owned and operated fleet would provide commercial and operational benefits, as well as a suitable vehicle for subsequent fleet expansion.

The restructuring was negotiated in a way which provided for each of these interests. As a first stage, the financial restructuring would reduce TORM's debt to not more than 65% of the value of its secured assets. This would be achieved through a two stage process, first a mandatory exchange of all debt in excess of vessel value for warrants to subscribe for TORM shares, followed by an optional exchange of additional debt for shares in TORM.

All debt remaining after the mandatory and optional exchanges would be rolled over into a new secured term facility, and a new secured working capital facility would also be provided by certain of the bank lenders at completion. The final step was that Oaktree would contribute its fleet to the recapitalised TORM group in exchange for a proportionate interest in the equity of TORM.

It was agreed that the restructuring would be implemented through four main steps.

Step 1: Mandatory exchange for warrants

The total amount of TORM's existing debt was to be written down from USD 1,418 million to USD 873 million, which was the estimated asset value of the TORM group, composed of USD 50 million for non-vessel assets and USD 823 million for vessels. In consideration for the write down, existing lenders would each receive a proportionate share of warrants representing the right to subscribe for 7.5% of the issued share capital of TORM as at the restructuring completion date, at a strike price of 110% of the notional share value at completion. These warrants would be exercisable between 1 and 5 years after the restructuring completion date.

Step 2: Optional exchange for shares

Following the mandatory exchange, existing lenders would be able to elect to exchange an additional amount of TORM's debt (between 5% and 100% of their outstanding claims) in return for shares in TORM. Up to 50% of TORM's outstanding debt following the mandatory exchange (USD 436 million) was able to be written down under this optional exchange. The issuance of new shares was completed pursuant to Danish law and with shareholder consent. The newly issued shares comprised 98% of the share capital of TORM (prior to the Oaktree merger), meaning that existing shareholders retained 2% of the equity in the company.

Following the optional exchange, all remaining outstanding debt of TORM under the existing loan facilities was rolled over into a single new term facility, which would enjoy first priority security (alongside the new working capital facility) over a collateral pool composed of vessels previously owned by TORM and certain of the vessels contributed by Oaktree.

Step 3: Oaktree asset contribution

Following the debt restructuring, Oaktree was to contribute its vessels to the TORM group. Oaktree's vessels were contributed in return for a proportionate share of TORM's equity equivalent to the proportion that the Oaktree vessels formed of the vessels in the combined group. This resulted in Oaktree holding approximately 62% of TORM's equity following the completion of the restructuring.

Step 4: Provision of new working capital facility

A USD 75 million new working capital facility would be provided by certain of the lenders. The new working capital facility would benefit from first priority security over a collateral pool composed of vessels previously owned by TORM and vessels contributed by Oaktree

equally to the new term facility although. Pursuant to a new intercreditor agreement, the new working capital facility would rank in priority with respect to the proceeds of enforcement of the security.

The aggregate of the new term facility and the new working capital facility following the restructuring was to be no more than 65% of the value of the assets over which they were to be secured.

Implementation

Although it was available as a back-up if necessary, it became apparent early in the process that the Danish restructuring procedure would not be a viable option for implementing the TORM restructuring. The terms which were to be offered to the lenders required unanimous lender approval under the terms of each facility, so in order to implement the deal there would need to be a mechanism to bind any dissenting secured creditors. The Danish restructuring procedure does not allow for separating creditors into distinct voting classes, so there was little prospect of using it to bind any non-consenting secured lenders.

Instead, in order to achieve the necessary lender approvals, TORM looked to an English law scheme of arrangement. As described above, two of TORM's loan facilities were governed by English law and subject to English jurisdiction and two were governed by Danish law and subject to Danish jurisdiction. In addition, all loan documents were subject to overriding amendments pursuant to an English law 'Framework Agreement' which implemented the terms of the 2012 restructuring.

It has become established law in the line of cases following *Re Rodenstock*[2] that the English court has sufficient jurisdiction to sanction a scheme in relation to a foreign company whose debt is governed by English law. While a scheme of arrangement could not be used to amend the terms of the two Danish facilities in their existing form, under the terms of the Framework Agreement certain terms of those facilities, including in particular the governing law clause, could be amended by majority consent. Changing the governing law of the Danish facilities was considered to be a viable, if untested, way to enable the deal to be implemented through a scheme of arrangement. During the course of negotiation of the TORM deal the High Court delivered judgment in *Re Apcoa Parking (UK) Limited*,[3] confirming that a scheme could be implemented even where the governing law had been changed expressly for the purpose of enabling the scheme jurisdiction.

The change to the governing law of TORM's Danish law facilities was made relatively simple because the loan documentation was written in English and followed English precedents closely. Beyond the change to the governing law clause itself, relatively few changes were necessary in order to make the document function properly as an English law agreement. This approach may be more problematic in deals where the loan documentation is written in a language other than English and does not follow English precedent documentation.

It was considered important that from an early stage full disclosure of the purpose of the change of governing law be made. Many of the lenders were closely involved in preparations for the restructuring, and the necessary consent was provided for under the terms of a Restructuring Agreement by which a majority of lenders agreed to support the restructuring. At the convening hearing for the scheme, TORM relied on Danish law expert evidence as to the validity of the change of governing law and jurisdiction of the two Danish facilities, and the recognition and enforcement of the terms of the scheme of arrangement in Denmark. The expert evidence confirmed that the proposed scheme was likely to be recognised and enforced in the Danish courts as a matter of Danish private international law.

The use of a scheme of arrangement permitted the necessary consents and amendments to be made to the loan documentation with less than unanimous consent. A scheme can be implemented where it is approved by a majority in number representing 75% in value of the members of each class of creditors voting at the scheme meeting. The TORM scheme divided the lenders into a separate class for each loan facility. The scheme did not affect any unsecured or other creditors of TORM.

An English law scheme of arrangement could not, however, vary the rights of the shareholders of TORM. As such, it was necessary for the scheme process to be run in parallel with a valid Danish law shareholder consent process pursuant to TORM's articles of association.

Given that the shareholders of TORM were to be heavily diluted through the implementation of the deal, TORM prepared a 'hive-down' implementation strategy as an alternative in case the requisite shareholder consents could not be obtained. The hive-down would have involved transferring all of TORM's business and assets into a newly formed subsidiary which would issue the new debt to the lenders pursuant to the deal, as well as all of the warrants and new shares without the need for shareholder consent. Ultimately, this option was not needed because the shareholders voted overwhelmingly to support the restructuring.

Notes

2 [2011] EWHC 1104 (Ch).
3 [2014] EWHC 997 (Ch).

Scheme process

The scheme timeline ran as follows:

Event	Date
Practice statement letter sent to scheme creditors	6 May 2015
Claim form filed at court	12 May 2015
Convening hearing and order convening scheme meetings	9 June 2015
Scheme document sent to scheme creditors	9 June 2015
Voting/proxy form deadline	24 June 2015
Scheme meetings	25 June 2015
Sanction hearing and order sanctioning scheme	30 June 2015
Scheme lodged with the registrar of companies	1 July 2015
Restructuring completion date	13 July 2015

Scheme creditors, who were the existing lenders to TORM under each of the four debt facilities, were divided into four classes, one for each debt facility. Oaktree was not a scheme creditor, but it entered into a deed of undertaking to be bound by the scheme prior to the scheme convening hearing.

Four separate scheme meetings were held sequentially on the morning of 25 June 2015 at the offices of TORM's legal advisers, Skadden, Arps, Slate, Meagher & Flom (UK) LLP. All of the 51 scheme creditors voted in relation to the scheme and all apart from one took part in the scheme meetings by submission of a proxy form in favour of the chairman of the scheme meetings, TORM's CEO Jacob Meldgaard.

Ultimately, the scheme received an overwhelming degree of support. Three of the classes of lenders voted unanimously to support the restructuring. The only votes against the scheme came from two dissenting lenders in one class. No objections to the scheme were presented to the court at the convening hearing or sanction hearing. Out of the 51 scheme creditors, 47 opted to take part in the optional exchange and thereby to exchange some of their holdings of debt for equity in TORM, indicating a strong desire amongst lenders to receive added exposure to the future growth of TORM. As a result, after the two-stage write down of TORM's debt, a total of USD 560 million was rolled over into the new term facility, compared to a pre-restructuring debt of USD 1,418 million.

Following the scheme meetings, the scheme was sanctioned by Barling J of the Chancery Division at a hearing on 30 June 2015[4] and was lodged with the registrar of companies (which was the final English law requirement for the scheme to become effective) the next day.

Comment

The TORM scheme serves as a further illustration of the utility of the English law scheme of arrangement as a tool for restructuring the debt of foreign companies, as well as an example of how a flexible restructuring designed to accommodate divergent interests can win the support of a broad group of creditors. The flexibility of a scheme in being able to apply to selected creditor groups only, to bind dissenting creditors based on a majority vote, and, importantly, to do so in coordination with local corporate or restructuring procedures is amply demonstrated by the TORM deal. The TORM scheme, along with the schemes in *Apcoa Parking Ltd*[5] and *Re DTEK Finance*[6] appears to have established, although admittedly without significant opposition in court, the viability of a valid change to the governing law as a basis for the jurisdiction of the English courts to sanction a scheme.

Notes

4 [2015] EWHC 1916 (Ch).
5 *Supra.*
6 [2015] EWHC 1164 (Ch).

International Corporate Rescue

International Corporate Rescue addresses the most relevant issues in the topical area of insolvency and corporate rescue law and practice. The journal encompasses within its scope banking and financial services, company and insolvency law from an international perspective. It is broad enough to cover industry perspectives, yet specialized enough to provide in-depth analysis to practitioners facing these issues on a day-to-day basis. The coverage and analysis published in the journal is truly international and reaches the key jurisdictions where there is corporate rescue activity within core regions of North and South America, UK, Europe Austral Asia and Asia.

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