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Case No: CR-20121-000681
CR-2021-000682

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMPANIES COURT (ChD)

Royal Courts of Justice
The Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 08/06/2021

Before :

SIR ALASTAIR NORRIS

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IN THE MATTER OF DTEK ENERGY B.V.
And
IN THE MATTER OF DTEK FINANCE PLC
And
IN THE MATTER OF THE COMPANIES ACT 2006

- -

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 **Enyo Law**) for **Gazprombank (Switzerland) Ltd**

Hearing dates: 13 May 2021

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APPROVED JUDGMENT

Sir Alastair Norris:

1. On 13 May 2021 I heard applications by DTEK Energy B.V. ("Energy") and by DTEK Finance PLC ("Finance") seeking the grant of sanction for their respective inter-conditional schemes of arrangement ("the Bank Scheme" and "the Note Scheme" respectively). Having reflected overnight upon those applications and upon the objections of Gazprombank (Switzerland) Limited ("Gazprombank") to the grant of sanction for the Bank Scheme, I decided to grant sanction for both schemes. I made orders on 14 May 2021 accordingly, indicating that I would give written reasons for my decision. This judgment sets out those reasons.

2. The background to each Scheme is set out in paragraphs [1] to [8] of the judgment which I delivered following the convening hearing (the neutral citation to which is [2021] EWHC 1169 (Ch)). I shall not repeat it. In this judgment I will adopt the definitions used in that convening judgment.

3. The role of the Court at the sanction hearing is well settled and frequently summarised. A further summary in this judgment would be of no benefit. It is entirely sufficient for present purposes to refer to the recent enumeration by Snowden J in Re KCA Deutag UK Finance plc [2020] EWHC 2972 (Ch) at [16]-[18] of the issues to be addressed, he having cited the well-known statement of principles by David Richards J in Re Telewest Communications plc (No.2) [2005] 1BCLC 772 at [20]-[22]. I therefore turn to those issues.

4. First, it is unnecessary to review the conclusions reached at the convening hearing concerning jurisdiction (though it will be necessary to consider further

some jurisdictional issues in the context of exercising the discretion to grant sanction).

5. Second, I find on the evidence both that the statutory requirements were satisfied and that the terms of the convening order were complied with in relation to each Scheme. No-one has suggested the contrary.

6. Third, no issue arises as to the constitution of either of the scheme meetings. In relation to the meeting of Bank Scheme Creditors Gazprombank did not continue the challenge it mounted at the convening hearing, but it deployed the same arguments in another context. In accordance with current practice I shall therefore not revisit the conclusion I reached at the convening hearing: Re New Look Financing Plc [2020] EWHC 3613 (Ch) at [14].

7. Fourth, it is clear that the statutory majorities were achieved at each meeting. Those attending each meeting voted unanimously in favour of the respective Schemes.

8. Fifth, I find that each meeting was fairly representative of those entitled to vote. The meeting of the Bank Scheme Creditors was attended (by proxy) by 20 out of the 21 entities entitled to vote. The non-attendee was Gazprombank (which opposes the Bank Scheme). Those attending were 95% by number and 95.83% by value of the Bank Scheme Creditors. The Note Scheme Meeting was attended by 256 Noteholders representing 89.99% by value of the Notes.

9. Sixth, I find that I can properly rely upon the outcome of each meeting. There is no suggestion of any deficiency in the information provided to scheme creditors, such that they were not fully informed upon the issues for decision.

There was no challenge to the bona fides of those voting: and the vote at each meeting being unanimous no question of oppression of a minority arises. But there is one issue which I must squarely address.

10. The scheme which I am asked to sanction differs slightly from that presented to the scheme meetings. The scheme document itself anticipates that modifications may be required. Paragraph 34 authorises the scheme company to assent on behalf of scheme creditors to any terms which the Court may think fit to approve which are necessary or desirable for the implementation of the scheme, provided that they do not themselves constitute modifications that could reasonably be expected to have (directly or indirectly) a materially adverse effect on the interests of any scheme creditor. Quite apart from that, the grant of the Court's sanction is a matter of discretion, and the Court will be concerned to question whether the modifications proposed undermine the assent given by the scheme creditors.

11. At the hearing I was taken through the modifications, and I was subsequently able to review them. They are entirely technical in nature – supplying (and then using) a missing definition, recording changes in the structure of the formal implementing documentation, adding a party to the list of those giving undertakings. I am satisfied that such alterations are desirable for the smooth implementation of the schemes. I am satisfied that none of them can reasonably be expected to have any materially adverse effect on the interest of any scheme creditor. In my judgment if they had been in the scheme document at the time of the scheme meeting the vote would have been no different. The

changes do not undermine the assent to the schemes given at the scheme meetings.

12. Seventh, I must assess whether each scheme is "fair" in the sense that it embodies a compromise or arrangement that might reasonably be entered into by an intelligent and honest class member addressing the issues for decision having regard to his or her ordinary class interests. I am satisfied that the Note Scheme satisfies this test: and nobody submits otherwise. But Gazprombank submits that the test is not passed in relation to the Bank Scheme.

13. Gazprombank does not say that the Bank Scheme is not an arrangement that an intelligent and honest lender might enter having regard to its ordinary class interests. It accepts that the 20 other banks might reasonably take the view that delayed payment in full is better than immediate payment of a small proportion of the due debt. But it submits that the scheme is "unfair" as regards its own position having regard to its rights, not against Energy as guarantor of borrowings by DTEK Holdings Ltd ("Holdings"), Gazprombank's customer, but as against other guarantors or sureties. Ms Stonefrost submits that the Bank Scheme (negotiated by an ad hoc committee of which Gazprombank was part) unreasonably requires Gazprombank to compromise its loan where there is no evidence to support the assertion that, absent the Bank Scheme, Gazprombank's obligors would be unable to repay the CHF21,629,302 due to it.

14. The argument runs as follows:-

    i) In respect of its lending to Holdings Gazprom bank has the benefit of four English law governed guarantees and "eleven English law

governed securities" with other Group companies ("the Gazprombank obligors").

ii) This security package is more than all but one of the other Bank Scheme Creditors.

iii) This exact security package is shared with only two other lenders whose debts are very small.

iv) Energy's evidence for the convening hearing included a report of Grant Thornton reviewing Energy's analysis of its financial situation. In that report Grant Thornton accepted the board's view and, on that basis, assumed that a failure of the Bank Scheme would result in one or more Group entities entering an insolvency process "which could realistically result in further insolvencies if inter-company debts were to be called for repayment". Thus, Grant Thornton's views are based upon an assumption and upon the satisfaction of a condition.

v) Some Gazprombank obligors are "entities that, were they to go into insolvency proceedings, could not cause a domino effect by calling for the repayment of inter company debts because they do not have inter-company loans to call on, rather they owe monies to other members of the Group". (The quotation is from Ms Stonefrost's skeleton argument).

vi) There was no specific evidence from Energy as to which of the Gazprombank obligors would face insolvency absent the schemes

although Gazprombank had sought a statement of disaggregated liabilities.

vii) Late in the day Energy and Finance had produced a schedule of the Gazprombank obligors and of their adjusted net asset position: but this wrongly showed the same contingent liabilities appearing against each Gazprombank obligor, whereas if one Gazprom obligor discharged a particular contingent liability that liability should be removed from the contingent liabilities of other Gazprombank obligors.

viii) In these circumstances the Court should be concerned to protect Gazprombank as a minority dissenter and should refuse sanction to a scheme otherwise supported by Bank Scheme Creditors holding 95.8% by value of the claims against Energy.

15. I do not accept that the impact of the Bank Scheme upon Gazprombank is so materially disproportionate and so different from that of other Bank Scheme Creditors that the scheme fails the "fairness" test; or that (if it passes that test) I should, as a matter of discretion withhold sanction.

16. The evidence shows that, because the debt burden on the Group of US$2.157bn exceeds the value of the Group assets, there is a net Group liability of US$571 million. The Group is insolvent on a balance sheet basis. The evidence (the Grant Thornton report and the witness statements of Dr. Bastin) establishes that if the inter-conditional schemes are not sanctioned the Group will also face a pressing liquidity crisis. The question is whether, in the event of a demand by a Bank Scheme Creditor or the trustee for the Noteholders, some one or more of the Gazprombank obligors (i) is insulated

from the network of inter-company primary and secondary liabilities so that it or they escape becoming "domino" insolvencies; and (ii) is solvent to such a significant degree that Gazprombank stands to recover significantly more in respect of its loans than the range of recoveries predicted upon an insolvent Group basis. The exact identity of the Gazprombank security package is relevant only in that context. The fact that, if some Gazprombank obligors entered insolvency, then they would not *themselves* cause "domino" insolvencies (because they were net debtors within the Group and would not call in inter-company debts) is, I think, immaterial.

17. Gazprombank did not itself identify which Gazprombank obligor or obligors might be so insulated and significantly solvent. It argued that it was for Energy to prove that no Gazprombank obligor was outside the network of inter-company primary or secondary liabilities and/or that no Gazprombank obligor was so significantly solvent as to make Gazprombank's prospects of recovering its loan much greater than that of other Bank Scheme Creditors in respect of their loans.

18. As Gazprombank is advancing the case that the Bank Scheme operates so unfairly as regards Gazprombank that the Bank Scheme should not be sanctioned I consider that it is for Gazprombank to make out its case, having regard to the material available to it and having regard to the response of Energy to requests for information (and the inferences that might be drawn from those responses). But this case does not turn upon the burden of proof, but upon an assessment of the entirety of the evidence available to the Court.

19. That evidence may be summarised as follows:-

i) Dr Bastin's Second Witness Statement at paragraphs 55 and 67 states that if the schemes are not implemented it is "highly likely" that disordered "domino" insolvencies would occur across the Group and that each of Energy and Finance and the other Group Companies would go into insolvency proceedings.

ii) Dr Bastin further states that Grant Thornton had confirmed that this was the most likely immediate outcome (though it appears that this did not take the form of a separate confirmatory written report, but was advice tendered during the course of the preparation of his Second Witness Statement).

iii) The Group has a net deficit of US$571 million, its primary assets consisting of illiquid assets (such as coal mines and thermal power stations) and receivables (including intercompany receivables of US$6 billion). The Group is balance sheet insolvent.

iv) Holdings (Gazprombank's primary obligor) is balance sheet insolvent to extent of some US$936.1 million even ignoring its contingent liabilities as guarantor.

v) Energy guarantees the loan to Holdings. Energy is itself insolvent.

vi) The Group holds unrestricted cash at bank of US$54.4 million but has an immediately payable liability of US$234 million in respect of unpaid bank interest (at present the subject of an informal standstill agreement expiring at the end of May 2021). In addition to unpaid bank interest there is unpaid interest due under the Notes which (together

with payments of principal accelerated by default in interest payments) amounts to US$1.55 billion. Finance is primarily liable on the Notes, but each of the Gazprombank obligors (save one) is secondarily liable.

vii) In consequence the directors of Group companies would (upon expiration of the standstill agreement and absent the Bank Scheme and the Note Scheme) be obliged to place them in an insolvency process.

viii) The schedule of Gazprombank obligors prepared immediately before the hearing shows that no Gazprombank obligor is entirely insulated from the network of primary and secondary liabilities relating to Bank Scheme Creditors (and also to what I called in the convening judgment "Excluded Liabilities"), though not every Gazprombank obligor is exposed to every element of those other liabilities. In particular Miners Light JSC is not secondarily liable in respect of the Notes (though it is liable in respect of the US dollar and euro lending).

20. The position therefore is that the Group does not have sufficient cash to cover its liabilities as and when they fall due. If Group members enter insolvency on that account, then the Group does not have sufficient assets to cover all of its liabilities. There is a shortfall of at least US$571 million. All of the Gazprombank obligors are liable to contribute towards these liabilities (though not every such obligor is bound to contribute to the same extent to every element of those liabilities). From the evidence it does not appear that any Gazprombank obligor is insulated from the liabilities of the Group. In looking at the Gazprombank obligors as a collective it is broadly correct (though perhaps not arithmetically accurate) to treat each member as exposed to the

same contingent liabilities. A liability will only cease to exist if it is discharged in full. The point of the lately produced schedule of Gazprombank obligors is to demonstrate that if any lender or Note trustee sought to recover a liability against one Gazprombank obligor, then that liability would not be discharged in full because each Gazprombank obligor is insolvent and all that would be recovered is a dividend in insolvency. The remainder of the liability would have to be recovered from a co-obligor (upon whose balance sheet the contingent liability properly appears): and all co-obligors are also insolvent. There is not one Gazprombank obligor that could safely pay in full a demand from Gazprombank for a payment of interest and principal due on the Gazprombank loan.

21. Looking at the evidence as a whole, it does not appear to me to show that Gazprombank is in a significantly stronger position as regards repayment of its loan than any other Bank Scheme Creditor, such that the Bank Scheme operates unfairly by compelling it to compromise recovery rights which are materially better those of other Bank Scheme Creditors, thereby depriving it of a right to recover its loan now or at contractual maturity which is not enjoyed by other lenders.

22. I therefore reject the “fairness” challenge.

23. I should note one argument that is not pursued at the sanction hearing. At the convening hearing Gazprombank argued that it was in a position different from that of other banks because it had obtained a freezing order in Cyprus (which it accepted conferred no proprietary rights sufficient to fracture the intended class but argued would be relevant to a “fairness” assessment) and a

conservatory attachment in Amsterdam (which it argued did entitle it to be placed in a separate class and would in any event weigh in any "fairness" assessment). These orders no longer feature. The Cypriot freezing order was discharged on 7 May 2021 upon the Group paying CHF 26,853,622 into court in Cyprus to abide the outcome of Singapore arbitration. The conservatory attachment was lifted by the Amsterdam Court on 12 May 2021. Gazprombank does not now maintain that its position differs from that of other lenders.

24. I can therefore turn to the final matter for consideration: is there a "blot" on either the Bank Scheme or the Note Scheme such that there is no point in granting sanction?

25. No such suggestion is made in relation to the Note Scheme, and (subjecting it to scrutiny) none is apparent. The Notes are governed by New York law. Finance has filed a petition in the Bankruptcy Court for the Southern District of New York for recognition of the Note Scheme under Chapter 15 of the US Bankruptcy Code. Finance has adduced the opinion of Daniel Glosband that this is likely to lead to recognition of the Note Scheme as a foreign main proceeding. It is the experience of this Court that such relief is customarily granted.

26. But a challenge is raised by Gazprombank in relation to the Bank Scheme. Gazprombank puts in issue the recognition of the Bank Scheme in the EU and in Singapore and submits that the Court cannot be satisfied as to its international effectiveness so that any grant of sanction would be an act in vain.

27. The relevant principles are, I think, clear although the language in which they have been expressed has occasionally differed. But the words of a judgment are not to be treated in the same way as the words of a statute: and the concepts behind the modes of expression are clear. The principles seem to me to be these:-

i) The Court will not generally make an order which has no substantial effect and will therefore need to be satisfied that the scheme will achieve its purpose: Re Magyar Telecom BV [2014] BCC 448 at [16] per David Richards J.

ii) The Court will therefore need to be satisfied that the scheme will achieve a substantial purpose in the key jurisdictions in which the scheme company has liabilities or assets: Sompo Japan Insurance Inc v Transfercom Limited [2007] EWHC 146 (Ch) at [18]-[26] per David Richards J.

iii) The English court does not need certainty as to the position under foreign law, but it does require some credible evidence that it will not be acting in vain: Re van Gansewinkel Groep BV [2015] Bus LR 1046 at [71] per Snowden J.

iv) Such credible evidence must show that the scheme is "likely, or at least will have a real prospect, of having substantial effect" or "at least a reasonable prospect that the scheme will be recognised and given effect" : Re Codere Finance 2 (UK) Limited [2020] EWHC 2683 (Ch) at [34] per Falk J, Re KCA Deutag UK Finance plc [2020] EWHC 2977 (Ch) at [32] per Snowden J. This is not the "real prospect"

standard that it is applied in procedural applications for striking out or for the grant of summary judgment or permission to appeal. Rather it is the degree of persuasion of which Hoffman J spoke in Re Harris Simons Construction Limited [1989] 1 WLR 368 at 370-371 and is now regularly applied (for example) in the administration context in relation to paragraph 11(b) of Schedule B1 to the Insolvency Act. "Reasonable prospect" captures it without further elaboration.

28. It is Gazprombank's case that, as a consequence of Brexit, this modest standard can no longer be met, and that I should on that account refuse sanction to the Bank Scheme (and, since the two are inter-conditional, to the Note Scheme also). It relies upon legal opinions (to which I will come). I do not accept this submission.

29. First, I do not accept as entirely accurate Ms Stonefrost's submission that, because of Brexit, the Court is now in entirely novel territory. Nor do I accept that, prior to 1 January 2021, the general approach was that the EU Courts would recognise a scheme sanctioned in this jurisdiction under EU Regulation 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ("the Judgments Regulation"). Certainly, English schemes were generally not approved as effective on that basis.

30. There was always uncertainty as to how schemes of arrangement fitted into the framework of the Judgments Regulation. So, for the purposes of testing whether the Judgments Regulation presented a jurisdictional bar to the English Court exercising jurisdiction over EU domiciled scheme members or creditors it was *assumed* to apply (and an appropriate gateway identified). But for the

purposes of testing international effectiveness it was *not assumed* to apply, and the English Courts looked for expert evidence which demonstrated alternative bases.

31. Because this expert evidence was generally not contentious, judgments tended not to set it out in detail. I am here concerned with (amongst other things) the position in the Netherlands: so, I will take that as an example. The judgment Re van Gansewinkel Groep BV (*supra*) does contain a summary of the Dutch expert evidence in that case at [71]-[76], effectiveness deriving from the rules of Dutch private international law. Two recent judgments addressing the effectiveness of English schemes in the Netherlands also contain summaries. In Re Hema UK 1 Ltd [2020] EWHC 2558 (Ch) at [26] Falk J referred to the Dutch expert evidence demonstrating that the scheme would be effective either under the Judgments Regulation or as a matter of private international law. The latter was probably a reference to the generally accepted principle of private international law that a variation or discharge of contractual rights in accordance with the governing law of the contract will usually be given effect. In Re Selecta Finance UK Ltd [2020] EWHC 3220 (Ch) at [17] the evidence before me established that the scheme would be recognised in the Netherlands under the Judgments Regulation, or under EU Regulation 593/2008 applicable to contractual obligations ("Rome I") or under the Lugano Convention. (This last Convention in its 2007 form has also now ceased to be applicable). For an example of this same approach being adopted in relation to Luxemburg, Spain, Italy and France see Re Lecta Paper [2020] EWHC 382 (Ch) at [40] where the various experts based their opinions upon the Judgments Regulation, principles of private international law and Rome I. English Courts have

therefore never regarded the Judgments Regulation alone as a sufficient ground upon which to assess international effectiveness: and the fact that it is no longer available has not transformed the landscape.

32. Second, the English court will regard a scheme as substantially effective if it has very solid support amongst scheme creditors. This is obviously something beyond the assent of the requisite statutory majority. It looks to the extent and degree of commitment from the scheme creditors generally; see Re Noble Group [2019] BCC 349 at [104] and Re Virgin Atlantic Airways [2020] EWHC 2376 at [72]. In the instant case the Bank Scheme is supported by 95% of the Bank Scheme Creditors. Not only did they vote in favour of the Bank Scheme, but they also entered into "lock-up agreements" which bound them to support it. A scheme which is acknowledged and recognized as binding by 95% of the creditors affected by it is "substantially effective". The fact that a single "hold-out" creditor holding 4.17% by value of the scheme claims threatens to seek to undermine it does not alter that assessment.

33. Third, the ability of Gazprombank to assert a claim notwithstanding the Bank Scheme depends upon it succeeding in its claim before the arbitration tribunal which is seated in Singapore. Ms Stonefrost submitted that it was wrong for this Court to speculate about the outcome of that process. But if the Court is assessing whether the Bank Scheme has a reasonable prospect of having substantial effect it is entitled to make a properly grounded assessment of the threatened challenges to that scheme. The Singapore tribunal will be applying English law to Gazprombank's claim. It will have to decide whether (under English law) Gazprombank's English law claim has been varied or discharged

by an English scheme of arrangement under the terms of which Gazprombank was a scheme creditor (and, incidentally, in relation to which it submitted to the jurisdiction of the English court by arguing the merits both at the convening and the sanction hearing). It is not speculation to say that according to English law a contract governed by English law can be discharged or varied by an English scheme of arrangement which complies with Part 26 of the Companies Act 2006: and that the Bank Scheme contains an irrevocable release and discharge by Gazprombank of its CHF loan in return for the scheme benefits. There is thus a reasonable prospect that the Bank Scheme will be substantially effective because Gazprombank cannot mount a successful claim to repayment of its loan before the Singapore arbitral tribunal.

34. It is to be noted that this conclusion does not rest upon any recognition of the Bank Scheme by the courts of Singapore. Suggestions in the evidence filed on behalf of Gazprombank that the failure to adduce expert evidence as to the likelihood of recognition in Singapore shows that the Bank Scheme will not be effective there are misplaced. In any event both the UK and Singapore have subscribed to the UNCITRAL Model Law, so that recognition presents no difficulties.

35. Fourth, the Bank Scheme will be recognised in key jurisdictions. There is no dispute that the Bank Scheme will be recognised as effective in the Ukraine. This is the key foreign jurisdiction in which the assets of Energy's operating companies are located and in which a number of guarantors and sureties are incorporated. Further, the expert evidence of Prof Dr Rodrigo Rodriguez

proves that the Bank Scheme will be substantially effective in Switzerland, the state of incorporation of a Group member. The effectiveness of the Bank Scheme derives for the most part from recognition under the Lugano Convention 1988 or under the Swiss Private International Law Act; but in the case of the Gazprombank loan, not from such recognition but from the Swiss court declining to exercise jurisdiction in view of the SAIC arbitration provision in the Gazprombank loan. Of relevant jurisdictions (being jurisdictions in which Group obligors are incorporated) that leaves the Netherlands and Cyprus.

36. Fifth, in relation to the Netherlands, Energy has adduced a report (compliant with Part 35 of the CPR) and a supplement from Vincent Vroom, Head of Restructuring at a Dutch legal firm, that the Bank Scheme would be recognised (by the Dutch court granting a confirmatory judgment without re-addressing the merits) under the provisions of Dutch private international law because the facilities granted by the Bank Scheme Creditors are all governed by English law. The governing law of the contract, in his view, provides a sufficient connection with the English legal order and is an internationally acceptable legal ground for exercising jurisdiction.

37. This evidence is supported by the report (which is compliant with Part 35 of the CPR) prepared by Prof. Dr. Christoph Paulus and Prof. Dr. Peter Mankowski as to the likelihood of the recognition of the Bank Scheme by Member States of the EU ("the Paulus/Mankowski Report"). They are of opinion that the Bank Scheme would be given effect in every Member State of the EU by virtue of Art 12(1)(d) of the Rome I. This provides that the law

applicable to a contract (in the instant case, English law) shall govern the various ways of extinguishing obligations: and that rule covers all modes of extinguishing obligations (including those operating against dissentient creditors).

38. This evidence concerning the applicability of Rome I is consistent with evidence upon which the English Court has felt able to rely in other cases: see Re Rodenstock GmbH [2012] BCC 459 at [76]; Re Magyar Telecom BV [2014] BCC at [15]; Re Selecta Finance BV (*supra*)at [17]; Re Lecta Paper (*supra*) at [41]; and Re Agrokor DD [2019] EWHC 445 (Ch) at [7] and [2019] EWHC 2269 (Ch) at [6]-[7].

39. The evidence is also consistent with what is often referred to as a generally accepted principle of private international law that a variation or discharge of a contractual right in accordance with the governing law of the contract will generally be given effect in other countries.

40. This evidence is countered by an opinion (compliant with part 35 of the CPR) from Dr Peters of Simmons & Simmons LLP dated 11 May 2021 adduced by Gazprombank, to the effect that it was likely that the Bank Scheme would not be recognised in the Netherlands or "at least that the scheme of arrangement and the [sanction judgment] do not prejudice the existing rights of [Gazprombank] to take recourse on the attached assets for the full amount of its present claim". The quoted part of the advice is no longer relevant following the discharge of the conservatory attachment. Dr Peters nonetheless concentrates upon the position of Gazprombank: he does not consider the position of the other 95% of Energy's creditors and whether the Bank Scheme

would be recognised as binding them. Dr Peters takes the view that the requirements of Dutch private international law for the recognition and enforcement of a judgment sanctioning a scheme are not met (i) because the fact that the debt over which the English court has exercised jurisdiction is governed by English law is not itself an internationally accepted connecting factor; and (ii) because Gazprombank's loan documents contain an arbitration clause. He dismisses the Paulus/Mankowski Report as requiring the sanctioned scheme to be treated "simply as part of the applicable law to the contracts, whether under the Rome I Regulation or otherwise".

41. It is common ground that I cannot decide between the rival Dutch views, and that the question is whether, in the light of Dr Peters' opinion (as elaborated in a further letter of 12 May 2021) it is the case that there is a reasonable prospect of the Bank Scheme having substantial effect in the Netherlands. In my judgment the evidence of Mr Vroom and contained in the Paulus/Mankowski Report cannot be simply dismissed in the light of Dr Peters' opinion. It is credible evidence. It contains coherent argument. It is in part founded upon an entirely understandable autonomous construction of Rome I as dealing with variation or extinguishment of obligations however brought about. It is consistent with other evidence upon which English courts have felt able to rely. It accords with generally accepted principles of private international law. I am satisfied that there is a reasonable prospect of the Bank Scheme having substantial effect in the Netherlands, both as regards the 95% of Energy's creditors who support the scheme and as against the sole dissentient creditor.

42. Sixth, in relation to Cyprus, Energy relies principally upon the Paulus/Mankowski Report as to the applicability of Rome I. (There was other Cypriot law evidence which principally addressed the Note Scheme).

43. The evidence concerning the applicability of Rome I in Cyprus is consistent with evidence upon which the English Court has felt able to rely in at least one other case: see Re Far East Capital [2017] EWHC 2878 (Ch) at [36]-[40]. The expert evidence there was to the effect that the courts of the Republic of Cyprus would apply Rome I, regarding a scheme as a means of varying or extinguishing liabilities under Article 3 and as not being within the "carve out" of matters of corporate governance created by Article 12(1)(f); a view which Snowden J considered constituted "an entirely coherent and persuasive analysis".

44. This evidence is countered by a letter of advice from Mr Vorkas, an eminent Cypriot lawyer. Although it does not comply with Part 35 of the CPR it cannot simply be ignored. Its tenor is that an English judgment sanctioning an English scheme cannot be recognised in Cyprus under Rome I because (i) Rome I deals only with actual consensual arrangements and does not deal with mechanisms whereby dissentient creditors can be bound to accept a variation in their contractual obligation; and (ii) it would be contrary to Cypriot public policy to permit such recognition because, under Cypriot law, the Courts of Cyprus have exclusive jurisdiction to approve any scheme of arrangement involving the debts of a Cypriot company which has its COMI or domicile in Cyprus (Ms Stonefrost told me that we were not in this case concerned with this latter COMI-based public policy consideration).

45. The question once again is whether, in the light of Mr Vorkas' opinion (as elaborated in a further letter) it is the case that there is a reasonable prospect of the Bank Scheme having substantial effect in Cyprus. For the reasons given in paragraph [41] I do not consider that the Paulus/Mankowski Report can be dismissed so that there is no such reasonable prospect. I certainly do not regard Mr Vorkas' view that an autonomous construction of Article 12 of Rome I obviously indicates that Article 12 addresses only purely consensual variations or extinguishments of contractual rights. I am satisfied that there is a reasonable prospect that the Bank Scheme will be substantially effective in Cyprus.

46. It is now necessary to emerge from the detail, to remind oneself that the matter in hand is a consideration of whether there is a "blot" on the Bank Scheme, and to re-address the true question: would the grant of sanction for the Bank Scheme be an act in vain because there is no reasonable prospect of it having substantial effect? The answer to that question is clearly in the negative. If sanctioned, the Bank Scheme will certainly be effective as regards 95% of Energy's creditors. There is a reasonable prospect that the sole dissentient creditor will be unable to mount any challenge to it. Even in the event of a challenge, uncontested evidence demonstrates that the Bank Scheme will be effective in the jurisdiction in which operations are undertaken and assets located. An examination of the contested evidence discloses that even if the sole dissentient creditor seeks to undermine the Bank Scheme in the Netherlands or in Cyprus there is, because of Rome I and/or generally applicable rules of international law, a reasonable prospect that it will be given substantial effect. There is no "blot".

47. I briefly note one other argument that was advanced. Mr Smith QC and Mr Allison QC both submitted that having regard to the fact that Gazprombank submitted to the jurisdiction in relation to the Part 26 process (which I consider it did) and to the terms of the Bank Scheme, Energy could obtain an injunction restraining Gazprombank from seeking to enforce any right discharged by the Bank Scheme. I have not found it necessary to decide that question.

48. For those reasons I granted sanction both for the Bank Scheme and the Note Scheme.