Judgments

National Joint Stock Company Naftogaz of Ukraine v Public Joint Stock Company Gazprom

[2019] EWHC 658 (Comm)

Queen's Bench Division (Commercial Court)

Sir Michael Burton (Sitting as a High Court Judge)

15 March 2019

Judgment

Mr Michael Ashcroft QC and Mr Alexander Milner (instructed by **Wikborg Rein LLP**) for the **Claimant**

Mr Alan Gourgey QC, Mr Jonathan Davies-Jones QC and Mr Bobby Friedman (instructed by **DLA Piper**) for the **Defendant**

JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

SIR MICHAEL BURTON (SITTING AS A HIGH COURT JUDGE):

1. This is a dispute between two very large corporations, Naftogaz from Ukraine (the Claimant) and Gazprom from Russia (the Defendant), arising out of two contracts between them made in 2009, relating to the sale and transit of natural gas through Ukraine. This dispute led to two arbitrations, one in respect of each contract, referred to the Arbitration Institute of the Stockholm Chamber of Commerce. By reference to the Sale Contract, Gazprom was awarded approximately US$2.1 billion in one arbitration; in the other arbitration, under the Transit Contract, Naftogaz was awarded US$4.67 billion, such that, netted off, Gazprom owes to Naftogaz the sum of US$2,560,332,6662.77 plus interest at 7.5%. Interest accrued to date is US$170 million and continues to accrue at $526,000 per day. By order of Popplewell J dated 8 June 2018, by way of enforcement of the Award, Naftogaz entered judgment for the net sum, and this has been an application by Gazprom for an adjournment of enforcement, pending an application which Gazprom has made to the SVEA Court in Sweden to set aside that Award, which the parties agree will be heard and determined between 12 and 14 months from now (subject to any appeal).

2. There are three important aspects of the background history:

(i) By Order of Phillips J on 18 June 2018, a freezing injunction was granted to freeze the assets of Gazprom in England and Wales. They effectively consist of shares in a Swiss company, Nordstream AG, with a book value of £592 million, but which are pledged to Société Générale for over five years in respect of a total outstanding amount of around €3.7 billion loaned to Nordstream AG. There are two other relatively immaterial assets totalling some £3 million. The freezing order was discharged by consent on 13 September 2018, when Gazprom undertook instead not to dispose of the Nordstream shares, and this was continued pending the conclusion of the Swedish proceedings.

(ii) The SVEA Court granted a suspension or stay of enforcement of the Award in Sweden on 13 June 2018, on Gazprom's ex parte application. Although this was effectively continued on 18 June 2018, after a further application by Naftogaz the stay was lifted by the SVEA Court on 13 September 2018.

(iii) There have been other proceedings in Switzerland and in the United States, but the significant proceedings have been in the Netherlands, where there is an attachment order made on 13 May 2018, presently subject to challenge, in respect of the Dutch assets. The attachment relates to receivables owed to Gazprom by a subsidiary, South Stream Transport BV, in the sum of €2.073 billion (approximately US$2.43 billion) and by a 50% owned subsidiary, Blue Stream Pipeline Company BV, of approximately US$16 million, and the 50% interest in the subsidiary itself, valued (though Naftogaz does not accept that the valuation is necessarily accurate) at some US$382 million.

3. The application before this Court commenced, at a time when the SVEA Court had granted the suspension or stay, as an application to set aside the English judgment, but it is now an application to adjourn, pursuant to s. 103(5) of the Arbitration Act 1996 ("the Arbitration Act") brought by Alan Gourgey QC, with Jonathan Davies-Jones QC and Bobby Friedman on Gazprom's behalf. On behalf of Naftogaz, the application to adjourn is opposed by Michael Ashcroft QC with Alexander Milner: alternatively, if an adjournment were to be granted, they seek, pursuant to s. 103(5), security in the total sum of the claim.

4. Although the discretion whether to adjourn is a very broad one ("*a court ... may if it considers proper*"), it arises as a result of Article VI of the New York Convention, and both that Article and s. 103(5) provide for a broad discretion on such an application to order "*suitable security*", there are now authorities of this Court which give substantial guidance as to the exercise of such discretion, starting with *Soleh Boneh Intl v Uganda* [1993] 2 Lloyd's Rep 208, in which, as it happens, I was counsel.

5. Four grounds (framed as seven) are relied upon in the SVEA Court and before me as the basis for the application to set aside the award, which will in due course require to be dealt with by the SVEA Court pursuant to the provisions of the Swedish Arbitration Act 1999, ss. 31.1 (1) (2) (4) and (6). I was given some guidance as to these provisions, but, on the basis of the limited consideration that has been sufficient for the purposes of this application, they do not appear greatly, if at all, to differ from the restrictive approach of this Court to challenges to arbitration awards, pursuant to ss. 67, 68 and 69 of the Arbitration Act and the jurisprudence in respect of those sections.

6. The grounds are as follows:

(A) A challenge to the award on the basis that, contrary to the express agreement by the arbitrators that the Administrative Secretary (a law professor) would play no role in adjudication, she wrongfully and inappropriately was the author of a material part of the award (grounds 6 and 7).

(B) A challenge to the Arbitrators for failing to allow a late amendment to put forward an Alternative Defence under s. 36 of the Swedish Contracts Act (ground 1).

(C) A case that the Arbitrators failed to consider the expert evidence, and reached an impermissible decision on it, by 'splitting the difference' between the experts' figures (grounds 2/3 and 5).

(D) A challenge to the conclusion of the Arbitrators in respect of the construction and effect of Article 3.2 of the Transit Contract, when there was not an issue put before them to consider (grounds 4 and 5).

7. There is clear guidance from the authorities, from ***Soleh Boneh*** onwards, that the merits of the challenge to the award are a factor within what Gross J in *IPCO Nigeria Limited v Nigeria National Petroleum Corporation* [2005] 2 Lloyd's Rep 326 at [15] called a *sliding scale,* by reference to the exposition by Staughton LJ in ***Soleh Boneh*** at [212]. Accordingly, I indicated at the outset of the application, having read the detailed skeletons and the evidence, that I had formed the provisional assumption that Gazprom had only a slim chance of success on these grounds, and certainly so on grounds B to D. So I invited Mr Gourgey and, in due course, Mr Ashcroft to address me first on the issues of adjournment, prejudice and security on that basis, whilst preserving the right of Mr Gourgey (and, if so, Mr Ashcroft) to address me further on the merits, if that arose. In the event, while not accepting the assumption, Mr Gourgey did not challenge it, and Mr Ashcroft, while preserving his position that the grounds were without any foundation, did not challenge it either.

8. I shall therefore say just little about the merits, causing me to make that assumption, which will fall to be decided by the SVEA Court at a nine-day hearing to be fixed early next year.

Ground A

9. This is the one that is likely to be of most substance. There is no dispute that, after an objection by Gazprom to the proposed appointment of a law professor as an Administrative Secretary, the Tribunal guaranteed that she would in no way be involved in the reasoning or any legal research, and in particular would have no role in drafting the award (save for recitals). In the event, Gazprom has presented substantial reports by two international linguistic experts opining, after consideration of the Award, that the Administrative Secretary did draft material parts of the Award, and in particular substantial parts of the reasoning which was central to the determination of the Award. The opinion of the two experts is that there is a 93.5% chance that the Administrative Secretary drafted 57.6% of the reasons sections of the Award.

10. This is vigorously contested by Naftogaz, who, although they have not yet received their own expert's report, due this month, assert that the case is hopeless, by virtue of the witness statements which they have presented from the Chairman and the Administrative Secretary, who both state that the Administrative Secretary played no role in the drafting (nor indeed participated in any of the Tribunal's discussions), and there are two short statements from the other two arbitrators confirming the contents of the Chairman's statements. All four state that they are prepared to give testimony under oath, and that will be the procedure at the hearing by the SVEA Court. Mr Ashcroft submits that it is wholly unlikely, if not impossible, that all four distinguished figures should be disbelieved on their oath, whatever the expert evidence may say. Further, whereas Mr Gourgey submits that this may not apply to the credibility of the other two Arbitrators, who may not have known of the involvement by the Administrative Secretary in the drafting by the Chairman, Mr Ashcroft points out that it appears from the Chairman's statement that the reasoning section was divided up between the three Arbitrators, and since the other two Arbitrators concur in the Chairman's statement that the Administrative Secretary was not present at any of their discussions, such presence presumably would have been necessary before she could carry out any drafting.

11. It cannot be ruled out, though it does seem unlikely, that, in the light of Gazprom's linguistic evidence, one or more or all of the four will be disbelieved by the SVEA Court after hearing them. The chance may be slim, but it cannot be wholly discounted.

Ground B

12. There was an inter partes dispute before the Arbitrators about whether a late amendment should be granted, which has been repeated before me, primarily in the second witness statement of Mr Sidklev for Gazprom at paragraphs 28 to 78, and the first witness statement of Mr Johansson for Gazprom at paragraph 79 to 116. If this were an application for permission to challenge the Award before me under the Arbitration Act, I would have concluded that the decision to refuse the amendment was one well within the Arbitrators' discretion, and not a basis for challenge to the Award. There may be a different view taken by the SVEA Court by reference to the equivalent Swedish arbitration law (though I understand challenges are not often successful), but I suspect that such result would be unlikely.

Ground C

13. Again, applying English Arbitration Act spectacles, this ground also seems unlikely to succeed. The Arbitrators fully explained their approach to the rival figures put forward by the experts as to fuel gas saved, at paragraphs 4004 to 4014 of the Award; and in particular I note that the 'splitting of the difference' was in fact part of an "*additional model being an average of the two experts' models*", which was actually suggested by Naftogaz's expert, though not considered appropriate by Gazprom's (paragraph 4006).

Ground D

14. The basis for ground D is said to be by reference to the Award at paragraphs 3951 to 3956, and in particular the Arbitrators' construction of Article 3.2 of the Transit Contract at paragraphs 3953 to 5. It does appear, however, that this was a point raised by Naftogaz (Award paragraph 1994) and thus not, as Gazprom submits, ex improviso by the Arbitrators.

15. This provisional analysis, in the circumstances which I have described, constituted the "*brief consideration*" to which Staughton LJ referred in ***Soleh Boneh*** at [212], where he articulated the sliding scale referred to by Gross J:

> *"In my judgment, two important factors must be considered on such an application, although I do not mean to say that there may not be others. The first is the strength of the argument that the award is invalid, as perceived on a brief consideration by the Court which is asked to enforce the award while proceedings to set it aside are pending elsewhere. If the award is manifestly invalid, there should be an adjournment and no order for security; if it is manifestly valid, there should either be an order for immediate enforcement, or else an order for substantial security. In between there will be various degrees of plausibility in the argument for invalidity; and the Judge must be guided by his preliminary conclusion on the point."*

16. So, for example, I said in *Dowans Holding SA v Tanzania Electric Supply Co Ltd* [2011] Lloyd's Rep 475 at 489:

> *"My conclusion of its prospects is that they are not fanciful, and hence real, but that those prospects are such that, if security is otherwise appropriate, this would be a case towards the lower end of the sliding scale, such as to justify an adjournment being coupled with an order for security if I so conclude."*

17. I thus concluded that I should approach this application on the basis, as indicated to counsel, that the prospects of success for this challenge are slim and "*towards the lower end of the sliding scale",* as I found in **Dowans**.

18. Before I turn to address Staughton LJ's second *important factor*, I must address as a significant aspect in this case the fact that the SVEA Court has not now granted a stay of enforcement or suspension in Sweden. Though there are no assets in Sweden to enforce against, Mr Ashcroft has shown that the parties' submissions for the SVEA Court made it clear that there would be and were enforcement proceedings abroad, and that the context of the application was not, he submits, limited to enforcement in Sweden where there were known to be no assets. Unfortunately, the SVEA Court gave no reasons for its decision refusing a stay.

19. The Claimant submits that the SVEA Court's dismissal of the stay is a matter very significantly in its favour. The SVEA Court must have concluded that there was no ground for suspending enforcement of the Award pending the challenge to it, and so at least impliedly it must have approved or permitted a foreign court's enforcement of the Award, notwithstanding the pendency of such challenge. In any event there can be no question of this Court treading on the toes of the Swedish court by in some way prejudging the result by not granting a stay of enforcement. Therefore, on grounds of comity, Mr Ashcroft submits that the English Court should follow the lead of the Swedish Court.

20. Mr Gourgey submits that if comity points anywhere, it is to leaving the decision on the challenge to the Award to the Swedish Court and not prejudging it. But in any event, he points out that, on the expert evidence before me, the Swedish Court take a far more stringent approach than the English Court to such stay applications, in that the Swedish law experts appear to agree that, in order to obtain a stay, the chances of success must be "*more likely than not*". He submits that I should apply this court's jurisprudence and approach, irrespective of the SVEA Court's decision.

21. I agree with Mr Gourgey that I should exercise my discretion in accordance with the English authorities, and the sliding scale, noting, for example, that in none of the authorities put before me was an adjournment refused, and in two of them an adjournment was granted (with security provided) where, *per* Hamblen J in *Continental Transfert Technique Ltd v Nigeria* [2010] EWHC 780 (Comm), there was no real prospect of the application succeeding (at [23]) and there was an element of delaying tactics ([24]); and, *per* Blair J in *Travis Coal Restructured Holdings Llc v Essar Global Fund Ltd* [2014] 2 Lloyd's Rep 494, the application was "*at the bottom of the sliding scale in terms of prospects of success*" and again could "*properly be described as delaying tactics in the face of what is likely to be an unimpeachable award"* (at [62]).

22. I do not conclude that there are delaying tactics involved here, and the Claimant has not alleged that the Defendant is not acting bona fide, particularly in relying on the expert evidence in relation to ground A. As to delay itself, the Award was only made on 28 February 2018, and it is common ground that the SVEA Court decision will be given in a maximum of 14 months. I do not propose to consider the impact of an appeal, first because I take the view that in relation to ground A, the major matter in issue, either way the Swedish Court will resolve this as a matter of oral evidence, and it seems to me most unlikely that there will be any permission to take it further. In any event, the question of any further stay pending an appeal can be considered in the light of, and as a result of, the SVEA Court's decision. Delay is in any event, in my view, already addressed by the fact that the interest rate of 7.5% is so high that it must both act as an incentive for the Defendant to co-operate in speedy resolution and as some substantial compensation for the claimant to set against the prejudice inevitably caused by the delay.

23. I turn then to consider prejudice, and Staughton LJ's second *important factor*:

> *"The second point is that the Court must consider the ease or difficulty of enforcement of the award, and whether it will be rendered more difficult, for example, by movement of assets or by improvident trading, if enforcement is delayed. If that is likely to oc-*

> *cur, the case for security is stronger; if, on the other hand, there are and always will be insufficient assets within the jurisdiction, the case for security must necessarily be weakened."*

24. This approach has, in my judgment, been modified and adapted in the subsequent authorities, but in general remains as firm support for the consideration of the protection needed for an award creditor. The approach in ***Soleh Boneh*** was to consider the assets within the jurisdiction in relation to an application to adjourn an English enforcement. Hence Staughton LJ refers to "*insufficient assets within the jurisdiction*." This was suggested in the Court of Appeal in ***IPCO*** [2015] EWCA Civ 1145 at [3] to be a misprint for "*sufficient*", but I for one do not think so, given that the approach was to consider the protection of the award creditor's position in correlation to preservation of assets in the jurisdiction if immediate enforcement in the jurisdiction were not permitted. However, it seems to me that this is no longer the only factor relevant to the position of the creditor who needs to be protected. In ***Dowans*** at [50] I accepted that I ought to be looking for prejudice, specifically by reference to any delayed enforcement of the award by converting it into an English judgment, but I stated that there was nothing in the authorities which limited me to considering assets within the jurisdiction; and whereas I had in mind the use of an English judgment, for example in other European Union jurisdictions, it seems to me that in later decisions, informed by the "pro-enforcement" approach of the New York Convention, a wider approach to the consequences of non-enforcement has been applied.

25. This appears to me to be especially so where, as in this case, enforcement of the Award is being sought in other proceedings in other jurisdictions, and whether the creditor can be and is being protected from the risk of dissipation can be considered more widely. Not only is there the continuing freezing order in this jurisdiction, but there are the Dutch assets which are presently frozen. Just as the SVEA Court may have looked at the position in other jurisdictions when considering whether to grant its own stay, so this Court, when considering the question of security to eliminate or minimise prejudice to the creditor, can look at and take into account the position in other jurisdictions. This is consistent with the dicta in ***IPCO*** in the Court of Appeal, although there too (at [19] of the judgment of Christopher Clarke LJ) the concentration was on whether there were sufficient assets "*in this country or any other country in which an English judgment may be enforced to ensure that it can swiftly receive the fruits of any judgment in its favour."*

26. The concentration was inevitably on potential enforcement, prior to the SVEA Court decision against assets that are known, and that may be amenable to enforcement, and thus, apart from the frozen pledged assets in this jurisdiction, the approximately $3 billion-worth of assets in Holland. Gazprom pointed to other potential sources of enforcement by Naftogaz: Russia, where there was contested evidence as to the chances of enforcement, about the difficulties of which I felt myself entitled to be informed in the light of the case recently before me in *Maximov v OJS Novolipetsky* [2017] EWHC 1911 (Comm); in Ukraine itself, where I was not persuaded that there was any commercial reality in the possibility of enforcement; in Switzerland, where the proceedings appear to have run to ground. Like Mr Ashcroft, I was unimpressed by reliance on the part of the Defendant upon their having made a provision for the debt in their accounts, or by their statements as to their bona fide intent to pay if their challenge is unsuccessful.

27. The case put by Mr Ashcroft was straightforward: either there should be no adjournment; or, if an adjournment, then only on the basis of full security in cash or by way of a copper-bottomed bank guarantee. The justification for total security in the event of an adjournment was the prejudice caused by delay, and the divergence from the pro-enforcement predisposition reflected in the New York Convention, (see Gross J in ***IPCO*** at [11]). He referred to **Born: International Commercial Arbitration** at 26.06:

> *"It is particularly important to be circumspect in suspending recognition proceedings, given the underlying purposes of the arbitral process - being to resolve disputes efficiently, without the jurisdictional and other complexities attending the international litigation process. Delaying recognition and enforcement of an award directly frustrates this objective."*

28. He says that this more than justifies a stringent approach, as does the SVEA Court's decision, though, in the absence of their reasons, it cannot be seen why the Svea Court did not address the question of security,

which would have been an important element if a stay were granted, and as to which the **UNCITRAL Secretariat Guide on the New York Convention** states:

> *"47. The purpose of this provision is threefold. First, it seeks to avoid dissipation and concealment of assets pending the setting aside proceedings in the country where the award was rendered and thus guarantees that the award may be successfully enforced if the setting aside action is dismissed. Second, it provides an incentive to the party opposing enforcement to proceed with its application to set aside or suspend the award 'as expeditiously as possible', thereby preventing delays. Third, it provides the party seeking to enforce the award with adequate assurances of prompt payment once the dispute is resolved."*

29. Mr Ashcroft does not accept the approach put in the forefront of his argument by Mr Gourgey that the Court's approach on an application under s. 103(5) should be to consider the deterioration in the position of the creditor if an order were made in favour of the debtor. He refers to the judgment in ***Continental*** by Hamblen J at [16]:

> *"The relevant principles under section 103(5) are helpfully set out in the judgment of Gross J in the IPCO case. In that case NNPC was seeking a stay of enforcement in England of a Nigerian award on the basis that challenge to the award had been submitted to the Nigerian courts. A stay was granted by Gross J on terms requiring NNPC to pay the sum that was indisputably due to IPCO, around US$30million, and to provide appropriate security in London for the sum of US450 million. Gross J summarised the relevant principles at paragraphs 11 to 16 of his judgment. So far as relevant to the present application, they are as follows:*
>
> *1. Section 103 embodies a pre-disposition to favour enforcement of New York Convention Awards – see paragraph 11.*
>
> *2. Section 103(5) is a compromise between (1) the concern that enforcement should not be frustrated merely by the making of an application in the country of origin; and (2) the concern that, pending proceedings in the country of origin, it should not necessarily be pre-empted by rapid enforcement of the award in another jurisdiction – see paragraph 14.*
>
> *3. The court is unfettered when considering the exercise of its discretion. Ordinarily relevant considerations will include the following: (a) whether the application before the court in the country of origin is brought bona fide and not simply by way of delaying tactics; (b) whether the application before the court in the country of origin has at least a real (ie, realistic) prospect of success; and (c) the extent of the delay occasioned by an adjournment and any resulting prejudice – see paragraph 15."*

30. However, I am satisfied that protection from deterioration, albeit not omly in the jurisdiction, is still the appropriate question, starting with Staughton LJ's second *important factor* quoted above:

> (i) In Dardana Ltd v Yukos **[**2002] 2 Lloyd's Rep 326, the need for security is addressed by Mance LJ at [35] to [37] by reference to the risk that enforcement of the award will be made more difficult by an adjournment.
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> (ii) In ***IPCO***, while Gross J did set out the principles recited by Hamblen J in ***Continental***, he repeated at length Staughton LJ's second *important factor* at [15], as indeed did Hamblen J in ***Continental*** at [18].
>
> (iii) I concluded in ***Dowans*** at [49]:

> *"The comparison must be between the position of the would-be enforcing party if he were allowed to enforce immediately, and his position if any steps by way of enforcement were delayed as a result of the grant of an adjournment."*
>
> This was followed by Blair J in ***Travis*** at [66] (and at [37]) and cited in ***IPCO*** in the Court of Appeal at [66]. Effectively, as used to be said in the context of conditional leave to defend, the award debtor at the bottom of the sliding scale should 'put its money where its mouth is' if there was likely prejudice to the creditor from the adjournment.

31. Mr Gourgey sought to submit that there could be some prejudice to Gazprom if there were no adjournment, and if the award were enforced, but then successfully set aside in the SVEA Court. However:

> (i) the slim chance of success which I presently anticipate does not make this very likely;
>
> (ii) there does not seem to me to be a high chance of the present steps being spoken of in the current Ukrainian election campaign, of "*unbundling*" or even liquidating Naftogaz, being effected prior to the hearing and while the present commercial arrangements with Gazprom continue;
>
> (iii) in the event of refusal of an adjournment, an order or undertaking would be capable of being arrived at in this Court or the Netherlands or both to provide for repayment in such an eventuality. As for enforcement in this jurisdiction, although that is unlikely given the fact that the assets are pledged - although Mr Ashcroft suggests that an active threat of enforcement might create a risk of default on the long-term loan, and hence persuade or pressurise a result of some payment - Naftogaz indicates that it would undertake to pay into court, or otherwise preserve, any recoveries made within the jurisdiction prior to the SVEA Court hearing.

32. Mr Gourgey in any event points out that there is no specific evidence of any "business impact" on Naftogaz by virtue of the delay and relies upon the interest provisions.

33. I have concluded, after careful consideration of all the authorities, and notwithstanding the fact that the SVEA Court did not grant a stay, that it is appropriate to grant an adjournment of enforcement, but applying Staughton LJ's sliding scale, with the result that there must be security provided to protect Naftogaz from deterioration in its position over the next 12- to 14-month period. There is no reason, such as there was in ***IPCO***, for any differentiation to be made as to any amount, or for there to be security granted by reference to any other amount than the total claim. Mr Ashcroft submits that any security granted should be in, or by reference to, cash, such as was ordered in the other cases where security was granted: ***IPCO***, ***Continental***, ***Dowans*** and ***Travis***. But there is a difference in this case, and that is that there is available, and on offer for me to consider, whether it is *suitable* security within s. 103(5), a set of undertakings. Those undertakings consist of the undertakings already given to the Court with regard to the freezing of the assets within England and Wales, and additionally three undertakings which have now been offered during the course of this hearing to the Court by Mr Gourgey, acting as counsel in this respect, not only for Gazprom but also for the two subsidiaries, South Stream and Blue Stream, not no deal with or diminish the value of the assets attached in the Netherlands other than in the ordinary and proper course of business, and not to challenge the prejudgment attachments.

34. I have concluded that the chances of success of the challenge in the SVEA Court is towards the lower end of the sliding scale, but nevertheless that there is perhaps, unlike ***Continental*** and ***Travis***, some prospect of success.

35. I must now exercise my discretion. Gazprom has offered a bank guarantee by a European bank for the full amount of the Award, but only if all the other attachments or undertakings are lifted, and other methods of enforcement stayed, pending the SVEA Court hearing. This was not accepted by Naftogaz.

36. I was left at the close of submissions, if I were to grant, as I then announced I would, an adjournment, with three options. Option 1 was the acceptance of the package of undertakings by Gazprom. To this, Mr Ashcroft added an alternative, which he called Option 1AQ, namely the acceptance of those undertakings together with a cash security of, he suggested, $750 million. Option 2, namely the provision of the bank guarantee, but only if there were no other undertakings and all other enforcement proceedings were abandoned or stayed, is, as set out above, not viable, or at any rate is not available. Option 3, formulated by Mr Ashcroft, was for the provision of the full bank guarantee, instead of the undertakings in England and Wales, and with no undertakings in the Netherlands, but without any agreement by Naftogaz not to continue with the attachments and pursue enforcement, on the basis that, as and when recovery was made, whether in the Netherlands or elsewhere, credit would be given and the bank guarantee would be reduced.

37. I am entirely satisfied that this third option is not viable or "*suitable*":

> (i) It would be a complicated, continuing and costly exercise, because proceedings would continue, whereas ordinarily the provision of security is intended to save the parties the costs of continuing proceedings until the outcome in respect of which security is given;
>
> (ii) It creates, at least for the time being, what Mr Gourgey has submitted to be double recovery, i.e. until there was payment made there would remain assets frozen as well as the bank guarantee;
>
> (iii) It would be effectively the case that there was no adjournment: and enforcement would be taking place prior to the SVEA Court hearing contrary to the intention of the balance of the order and the provision of security. Although Mr Ashcroft submits that it would be open to the Dutch Court to release the attachment in the light of the existence of the bank guarantee, it would be apparent from the very order I would be making that there would be nothing to stand in the way of the Dutch Courts not only continuing the attachment but allowing enforcement, with credit being given against the bank guarantee, as provided for in the Option 3 arrangement.

38. I am of the clear view that it is only Option 1 which is a conceivable answer, although I must consider Mr Ashcroft's suggestion of Option 1A, whereby the present undertakings would be supplemented by a top-up guarantee of, say, $750 million. The problem is that no persuasive evidence has been produced, as it might have been by the Claimant, that the valuation of Blue Stream is not supportable, or that the recoverables are not going to retain their value, despite the undertakings that have been given.

39. Although the undertakings rule out the kind of action, which Naftogaz has pointed out that Gazprom has, in certain respects, already admitted, by way of steps to reorganise in order to avoid sanctions, Mr Ashcroft submits that within a group whereby subsidiaries owe monies to their parent, and in the light of commercial uncertainties, any such assets can diminish in value without deliberate dissipation or disruption. Anything can happen in 14 months. Mr Gourgey accepted in argument that the offering of the undertakings may or may not amount to full security.

40. I conclude that, taking into account my wide discretion, and the authorities to which I have been referred, the right course is to grant the adjournment on the basis of the giving of security by Gazprom by way of the continuation of the undertakings in respect of the English assets, the fresh undertakings in respect of the Dutch assets, and additional security of a cash payment into escrow of $200 million. That seems to me to be the most appropriate way of protecting, while not improving, the position of Naftogaz without penalising Gazprom or preventing them from pursuing their challenge, as well as avoiding the continuing necessity for the expenditure of costs, particularly in the Netherlands, in the period leading up to the decision of the SVEA Court.