Neutral Citation Number: [2019] EWHC 1917 (Ch)

Case No: CR-2019-004293 and CR-2019-004294

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 July 2019

Before
THE HON MR JUSTICE NORRIS

- - - - - - - - - - - - - - - - - - - -

IN THE MATTER OF NN2 NEWCO LIMITED
- and -
IN THE MATTER OF POLITUS BV
- and -
IN THE MATTER OF THE COMPANIES ACT 2006

- - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - -

Daniel Bayfield QC, Georgina Peters and Lottie Pyper instructed by **Freshfields Bruckhaus Deringer** for the NN2 Newco Limited and by **Clifford Chance** for Politus BV

Hearing dates: 4 July 2019

- - - - - - - - - - - - - - - - - - - -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

Mr Justice Norris :

1. The Nyrstar Group is a global multi-metals business prominent in the zinc and lead markets. It conducts its mining, smelting and other activities through operating companies in Europe, the USA, Canada and Australia; it employs approximately 4200 people. A major customer of the Nyrstar Group (and owner of a minority interest) is the Trafigura Group.

2. The head of the Nyrstar Group is Nyrstar NV ("NNV") a company incorporated in Belgium and with its corporate offices in Zurich, Switzerland. The ordinary shares of NNV are traded on the Brussels exchange.

3. Until recently NNV's direct subsidiary (now indirect subsidiary) was Nyrstar Netherlands (Holdings) BV ("NNH"). NNH is a Dutch company which functions as the holding company for most of the operating subsidiaries. One of its subsidiaries is Nyrstar Sales & Marketing AG ("NSM"), a Swiss company.

4. Funding for the Nyrstar Group was achieved through several financial arrangements. Chief of those with which I am concerned are

   (a) two series of notes issued by NNH maturing respectively in 2019 and 2024 ("the 2019 Notes", "the 2024 Notes" and together "the Existing Notes");

   (b) some convertible bonds issued by NNV due for payment in 2022 ("the Existing Bonds");

   (c) a €600 million multi-currency revolving structured commodity trade finance facility governed by English law maturing in December 2021, available to NSM ("the Trade Facility");

   (d) a €150 million loan ("the Politus Loan") by Politus BV ("Politus") to NSM under an agreement dated 24 April 2018 and later amended and restated ("the Politus Agreement") which was itself funded by Politus

under an arrangement ("the Politus Facility") with a syndicate of six lenders ("the Politus Lenders").

I will return to deal with each in some greater detail (describing their present form) after dealing with the trading background.

5. In the second half of 2018 the Nyrstar Group's trading position became seriously affected by a deterioration in commodity prices accompanied by inflationary cost pressures (particularly in relation to energy costs) and adverse currency movements. These were compounded by operational challenges arising from the shutdown for maintenance of a main smelting facility and delayed re-commencement of some mining operations. These "headwinds" led to a halving of underlying profitability and a 49% increase in net debt. The Nyrstar Group therefore had to address those trading and short-term liquidity challenges, particularly in view of the pending maturity of the 2019 Notes. It did so in October 2018 by initiating a review of its capital structure, retaining well-known financial advisers for this purpose. This, however, generated negative press coverage which in turn led to a sudden and unexpected deterioration in the Group's liquidity as lenders suspended uncommitted credit lines or required cash collateral.

6. Some existing noteholders (now holding 65% of the 2019 Notes and 78% of the 2024 Notes) and some existing bondholders (65% by value) formed an "ad hoc group", whilst some lenders formed a "co-ordinating committee", each with a view to participating in the capital structure review. The Group obtained additional finance from Trafigura. This took the form of a $650 million secured committed trade finance framework agreement made available in December 2018 and expiring in June 2020. This averted a short-term liquidity crisis.

7. Out of these negotiations emerged a proposal for a capital and debt restructuring involving (i) the release and transfer back to NN2 of the Existing Notes and the cancellation of the Existing Bonds and their substitution (after a "haircut") with new instruments issued by Trafigura, and (ii) the elimination of the Politus Loan and its replacement by a new facility agreement arranged directly between NSM and the Politus Lenders. To achieve this end (i) variations in the terms of the Existing Notes and the Existing Bonds were made using amendment mechanisms included in their

original terms and (ii) NN2 Newco Limited ("NN2") was incorporated in England to promote a scheme of arrangement (NN2 being inserted as an intermediate holding company in the corporate structure). To provide some stability as the negotiations progressed (i) fees became payable by NSM to members of the Co-ordinating Committee as they worked on the plan (ii) work fees became payable by Trafigura to members of the ad-hoc committee as they likewise worked on the plan (iii) various "lock-up" agreements were entered into (open to all) and (iv) consent fees became payable to those who signed up promptly to the "lock-up" agreements. I shall have to return to these.

8. The likely alternative to the capital restructuring which has emerged is group insolvency in multiple jurisdictions: that effectively means liquidation in one form or another because of the absence of restructuring procedures in other jurisdictions. The evidence includes Estimated Outcome Statements prepared by Alvarez & Marsal Europe Limited on a liquidation basis and on both "low case" and "high case" assumptions. The "low case" assumes a liquidation in which there is an immediate cessation of trade and an immediate realisation of assets: the "high case" assumes a funded insolvency process in which trading continues whilst a more extended sales process is undertaken. In NN2 the holders of Existing Notes and Existing Bonds might recover between 0.9% and 11.6% of their claims. In Politus the Politus Lenders might recover between 0.5% and 1.6% of their claims.

9. Against that background I can now describe the obligations which are the subject of the proposed scheme.

10. Both the Existing Notes and the Existing Bonds have been issued in global form, where the legal owner is a fiduciary holding on behalf of the relevant clearing system (within which book entries record the underlying beneficial entitlements). The terms of the Existing Notes and the terms of the Existing Bonds contain provisions which enable the owner of a book entry interest to require the delivery of definitive notes or definitive bonds in identified circumstances. It is established at first instance that in such cases the person who has the economic interest in the debt is properly regarded as a contingent creditor of the company: see for a recent example Re Magyar Telecom BV [2014] BCC 448 at [5] per David Richards J.

11. The 2019 Notes consist of €350 million of 8.5% unsecured senior notes issued by NNH with a final maturity date of 15 September 2019, under which NN2 is now co-issuer. The aggregate principal amount of €340 million is currently outstanding. They are now governed by English law (in place of New York law). Clause 12.06 of the governing Indenture now reads:-

> "The courts of England and Wales shall have jurisdiction to settle any disputes that arise out of or in connection with the Indenture, the Notes and the Guarantees, and accordingly any legal action or proceedings arising out of or in connection with the Indenture the Notes and the Guarantees ("Proceedings") may be brought in such courts. The courts of England and Wales shall have exclusive jurisdiction to settle any Proceedings instituted by [NNH or NN2]… in relation to any Holder or the Trustee on behalf of the Holders ("Issuer Proceedings"). [NNH and NN2], each of the Guarantors, the Trustee and each Holder (each, "a Party") irrevocably submit to the jurisdiction of such courts and agree that the courts of England and Wales are the most appropriate and the most convenient courts to settle Issuer Proceedings and accordingly no party shall argue to the contrary. Notwithstanding the foregoing, this section 12.06 shall not limit the rights of… each of the Holders to institute any Proceedings against [NNH and NN2] in any other court of competent jurisdiction, nor shall the taking of Proceedings in one or more jurisdictions preclude the taking of proceedings in any other jurisdiction…. ".

This is an asymmetric jurisdiction clause. The English Courts have jurisdiction over all disputes and the parties agree that they are the most convenient forum and submit to the jurisdiction of the English courts. NNH and NN2 are bound to use the English courts if they sue the Holder of a Note, because the English courts have exclusive jurisdiction in such a case. But the Holder of a Note can also sue NNH and NN2 in any Court that otherwise has jurisdiction, so the English courts have a non-exclusive jurisdiction in such a case.

12. The 2024 Notes consist of €500 million of 6.875% unsecured senior notes issued by NNH with a final maturity date of 15 March 2024 under which NN2 is now co-issuer. The aggregate principal amount of €500 million is currently outstanding. The 2024 Notes rank *pari passu* with the 2019 Notes. They are now governed by English law (in place of New York law). The same asymmetric jurisdiction clause applies.

13. The Existing Bonds consist of €115 million senior guaranteed unsecured convertible bonds issued by NNV with a coupon of 5% and a final maturity date of 11 July 2022. They are guaranteed by some NNV subsidiaries. The whole issue is currently

outstanding. With the assent of 97.57% of the holders of the Existing Bonds NN2 is now co-obligor. The original governing law of the Existing Bonds was English law. But the holders voted to amend the jurisdiction clause in the Trust Deed to provide:-

> "The courts of England and Wales shall have exclusive jurisdiction to settle any disputes that arise out of or in connection with the Trust Deed and the Bonds, and accordingly any legal action or proceedings arising out of or in connection with the Trust Deed and the Bonds ("Proceedings") may be brought in such courts. [NNV and NN2] and the Trustee (in its own capacity as such and on behalf of the Bondholders) irrevocably submit to the jurisdiction of such courts and waive any objection to Proceedings in such courts whether on the ground of venue or on the ground that the Proceedings have been brought in an inconvenient forum. Notwithstanding the foregoing, Belgian courts have exclusive jurisdiction over matters concerning the validity of decisions of the Board of Directors of NNV of the general meeting of shareholders of NNV and of the general meeting of Bondholders."

This is a symmetrical jurisdiction clause with a "carve out" for specific proceedings.

14. The Politus Loan arises in this way. Politus is a Dutch company incorporated for the specific purpose of entering into a particular financing arrangement. It is not part of the Nyrstar Group. On 24 April 2018 (using the Politus Facility) Politus borrowed €150 million from six lenders (viz. the Politus Lenders). The Politus Facility was from the outset governed by English law. Clause 43.1 said that the courts of England had exclusive jurisdiction to settle any dispute and that the parties agreed that the courts of England were the most appropriate and convenient courts to settle disputes arising out of or in connection with the Politus Facility. It went on to provide:-

> "This clause 41.3 is for the benefit of [the Politus Lenders and their agents] only . As a result [none of them] shall be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction."

15. The money borrowed under the Politus Facility was on-lent to NSM. As between Politus and NSM the advance was to be treated as a prepayment of sums due under a supply contract by which NSM would supply zinc to Politus. There was a back-to back contract under which Politus would sell the zinc so supplied to Trafigura. Payments made by Trafigura to Politus would then be used to repay the Politus Lenders. In reality these formal arrangements were short circuited. NSM acted as the

agent of Politus for the purpose of supplying zinc directly to Trafigura; and Trafigura made payments directly to a collection account maintained by the Politus Lenders. The commercial object was to provide liquidity to NSM by a means which isolated NSM and its general commercial activities as much as possible, but which provided the Politus Lenders with a hypothecated income-stream.

16. For present purposes what it is important to note is that (i) the Politus Loan was supported by a guarantee from NNV and (ii) the Politus Loan was non-recourse i.e. Politus could only be liable to the extent that it received money under the zinc supply contract or from the NNV guarantee. The Politus Lenders were therefore dependent upon the continued trading of NSM and the continued solvency of NNV. Any restructuring of the affairs of NNV or NSM would accordingly have an impact upon the Politus Lenders. Thus, if NN2 promoted a scheme of arrangement in relation to the affairs of NNV and NSM there had also to be a scheme of arrangement relating to Politus absent a consensual restructuring of the Politus Facility.

17. An NN2 scheme and a Politus scheme are before me for directions as to the convening of meetings. This is emphatically not the occasion to examine the merits of the scheme itself (per David Richards J in Re Telewest Communications plc [2004] BCC 342 at [14]): but it is the occasion upon which to consider matters which go to the jurisdiction of the Court or which might present "roadblocks" in the way of the Court sanctioning the scheme even if it has jurisdiction, although those matters will only finally be determined at the sanction hearing itself: Re Apcoa Parking [2014] Bus. LR 1358 at [15]-[17] per Hildyard J. For those purposes it is necessary to outline the NN2 scheme and the Politus scheme.

18. Under the NN2 scheme (i) NN2 and NNH will be released from their obligations under the Existing Notes (ii) NN2 and NNV will be released from their obligations under the Existing Bonds (iii) the various guarantees will be released and (iv) noteholders and bondholders will receive new replacement instruments issued by Trafigura in respect of a proportion of their existing claims against NNV or NNH. The new replacement instruments to be issued by Trafigura (it is unnecessary to distinguish between the various entities) will consist of (i) New Perpetual Notes in the sum of €262.5 million in minimum denominations of €100,000 (ii) New 2023 Medium Term Notes in the US dollar equivalent of €80.6 million in minimum

denominations of US$200,000 and (iii) some new "commodity linked amortising instruments" in the US dollar equivalent of €225 million in minimum denominations of US$200,000. Because the entitlement of an individual scheme creditor may be less than the minimum denominations trust structures will be put in place (to which I will briefly return). The broad picture is that the holders of Existing Notes and Existing Bonds will receive value equivalent to between 46% and 51% of their existing claims. (The liquidation comparator is 0.9%-11.6%).

19. Under the Politus scheme (i) the Politus Lenders will release Politus from its €150 million obligation to them (ii) the Politus will release NNV from its guarantee obligations to it (together with the supporting security) (iii) in return the Politus Lenders will have their debts re-instated as to US$44.457 million under a debt obligation to be entered into by NSM (iv) the Politus Lenders will have the right (along with others) to participate in a share of up to €60 million of a new 4-year revolving credit facility of up to €160 million ("New Money") and (v) if all of the Politus Lenders do so participate then the aggregate amount of their reinstated debt would rise from US$44.457 million to US$64.4 million. The broad picture is that the Politus Lenders will receive value equivalent to 29.65% of their existing claims: and the effect of the reward for participating in the New Money would be to increase that to 42.4%. (The liquidation comparator is 0.5%-1.6%).

20. Outside the schemes themselves other transactions have been undertaken or are planned (in order to complete the capital restructuring). Under an asset transfer and share purchase agreement NN2 has acquired the assets of NNV so that NN2 is now an intermediate holding company for most of the operating subsidiaries. An agreement has been reached under which (in return for Trafigura issuing the replacement instruments) Trafigura will be issued with 98% of the shares in NN2 (leaving 2% to be issued to NNV). The effect of that is that the existing shareholders (who because of the group insolvency have no economic interest) will retain a 2% interest in the recapitalised group (in respect of which there will be a put option in the sum of €20 million). Consideration of class issues may well require the Court to look at the restructuring as a whole, and not simply at that part of it contained in the scheme of arrangement itself. This does not require a consideration of every other transaction or

arrangement occurring at the same time as the scheme is promoted, but only those where there is a clear nexus between the scheme and the other transaction.

21. These proposals were set out in "Practice Statement Letters" (Practice Statement: Schemes of Arrangement with Creditors [2002] 1WLR 1345) to NN2 scheme creditors on 19 June 2019 (14 days before the hearing) and to the Politus Lenders on 26 June 2019 (7 days before the hearing). They were also published on relevant and easily accessible websites.

22. Mr Bayfield QC submitted that the following principles were applicable:-

    (a) the purpose of the Practice Statement Letter is to give scheme creditors adequate notice of the basic terms of the scheme and an effective opportunity to raise any concerns;

    (b) what constitutes adequate notice depends on all the circumstances of the case, including (i) the complexity of the scheme (ii) the degree of consultation with creditors prior to the launch of the scheme and (iii) the urgency of the scheme having regard to the degree of financial distress of the company;

    (c) there is no minimum notice period, but in a complex scheme involving non-financial creditors not previously notified of the proposed scheme, three weeks has been held to be enough.

    These principles were drawn from observations of Snowden J in Re Indah Kiat International Finance Company BV [2016] EWHC 246 at [28]-[29] and Re Noble Group Ltd [2018] EWHC 2911 at [58]-[59]. I agree that they are an accurate statement of the law and would emphasise that in proposition (b) the particular factors adverted to are not (and do not purport to be) definitive. The character of the scheme creditors and the nature of their claims is, for example, also of relevance.

23. Applying those principles to the facts of this case I am satisfied that it is appropriate to address the matter of convening meetings at this stage. A series of public announcements going back to 30 October 2018 has been made as the scheme has evolved. By 14 April 2019 the key terms of the restructuring had been established and

all scheme creditors were invited to accede to a "lock-up" agreement. 79% by value of the holders of the Existing Notes and 87% by value of the holders of the Existing Bonds did so: and by 8 May 2019 a majority in number holding over 87.5% by value of the debt due to the Politus Lenders had also subscribed. The need to consult the holders of the Existing Notes and of the Existing Bonds in order to obtain their consent to the use of the amendment provisions contained in their respective governing documents means that there has been both a series of communications and the convening of meetings in May 2019. There has been a series of calls with the Politus Lenders (and a specific communication with the Politus Lender who did not subscribe to the "lock-up" agreement). Each of the Politus Lenders has been individually contacted in connection with the possibility of participating in the New Money facility. The Politus Lenders are financial institutions who are already in a complex financial relationship with NNV and NSM: the scheme simplifies that relationship and can soon be assimilated by creditors of the calibre of the Politus Lenders. There is nothing to hinder consideration of directions for the convening of meetings.

24. I should mention three matters. First, the only Politus Lender who did not accede to the "lock-up" agreement ("Erste") presented a bankruptcy petition in the Netherlands with a view to placing an obstacle in the way of the progress of the scheme. On the morning of the hearing Erste informed me by e-mail that its interests in the Politus Facility (which funded the Politus Loan) had been bought out and that it intended to withdraw the petition (which it can do as a matter of right). I would not, in any event, have adjourned the hearing seeking directions for the convening of meetings. I would have given directions for the convening of scheme meetings and then left it to the Dutch insolvency judge on the first hearing of the petition to decide on the progress of the Dutch insolvency proceedings in the light of the scheme before the English court. According to the expert evidence of Dutch law filed on the morning of the hearing, in the light of the existence of the Politus scheme (offering a c.30% creditor return) it was unlikely that the Dutch court would proceed immediately with a liquidation process (offering a 1.6% creditor return on the "high case").

25. Second, the abrupt withdrawal of Erste would seem to result in all the Politus Lenders being in agreement, putting in doubt the necessity for a scheme to bind dissentients.

But the application for the convening of a Politus scheme meeting continued to be made at the hearing and there was no examination of the effect of the withdrawal of Erste upon the scheme generally. At the conclusion of the hearing I ordered the convening of meetings for both the NN2 and the Politus schemes, saying that I would give my reasons in writing (which is the purpose of this judgment). In the circumstances I thought it best (i) to leave in place the order made at the conclusion of the hearing (ii) to leave it to Politus to decide whether in fact to hold the meeting so directed (or to abandon the scheme in the light of the Erste dealing), and (iii) (if the meeting is proceeded with) to leave it to the judge at the sanction hearing to decide whether, if all Politus Lenders are agreed, it is a proper exercise of discretion to sanction the scheme. (In fact, on circulating this judgment in draft I learned that on 11 July 2019 the solicitors for Politus had correctly informed the Court that Politus no longer intended to proceed with the scheme: had I received that message this judgment would have been much shorter).

26. Third, immediately before the hearing I learned of a communication from Comimet SA, a Belgian holder of €100,000 of the 2019 Notes. It contained a request for an adjournment of the hearing until September 2019 because (i) the NNV accounts for 2018 have not been audited (ii) the shareholders' meeting of NNV on 25 June 2019 did not consider any substantial business (iii) the Belgian Companies Court has directed NNV to convene a new shareholders' meeting when the auditor's report has been received (iv) the Belgian Companies Court has ordered the disclosure to NNV shareholders of documents generated in the course of negotiations between NNV and its creditors and (v) that "fundamental questions remain unanswered" about the Practice Statement Letter (e.g. on *exactly* what date in October 2018 did representatives of the holders of the Existing Notes begin conversations about a restructuring plan?). Whilst I have considered this letter it is plain that it does not make out a case for an adjournment until September 2019. By that date the existing lock-up agreements will have expired and the Nyrstar Group's cash resources exhausted: the descent into insolvency proceedings is likely already to have occurred. The holders of Existing Notes would be in the process of receiving their anticipated return in the range of 0.9%-11.6% (instead of their anticipated return under the scheme of 46%-51%). Although Comimet is the holder of a 2019 Note its letter principally addresses the position of NNV shareholders. But as matters stand (i) the

NNV shareholders have no economic interest in the Group because of its insolvency and (ii) they are not within the scope of the scheme. If there is substance to the concerns of Comimet they are most justly addressed by allowing it to ventilate them at scheme meetings rather than by giving it an individual veto over a proposal favoured by the vast majority of the holders of Existing Notes (who have subscribed to a "lock-up" agreement).

27. There being no hindrance I turn to the questions for determination at this hearing and begin with a focus on the Court's jurisdiction over NN2 and Politus as the scheme companies. Under s.895 the Court can only consider a compromise or arrangement between "a company" and its creditors or any class of them, and by the word "company" is meant a company liable to be wound up under the Insolvency Act 1986: s.895(2)(b) of the Companies Act 2006 ("the 2006 Act").

28. NN2 is a company incorporated in England and Wales and is "liable" to be wound up by the Court in the sense that there are circumstances in which a winding up order is capable of being made (whether or not those circumstances actually obtain as at the hearing date).

29. There are three observations I would make by way of elaboration:

    (a) NN2 was specifically incorporated for the purposes of facilitating a scheme of arrangement. I do not regard this as "abusive forum shopping": compare Re Noble Group Ltd [2018] EWHC 3092 [95]-[96]. As Newey J pointed out when addressing the same issue in Re Codere Finance (UK) Ltd [2015] EWHC 3778

    > " Debtors are seeking to give the English Court jurisdiction so that they can take advantage of the scheme jurisdiction available here and which is not widely available, if available at all, elsewhere…. What is being attempted is to achieve a position where resort can be had to the law of a particular jurisdiction, not in order to evade debts but rather with a view to achieving the best possible outcome for creditors. If in those circumstances it is appropriate to speak of forum shopping at all, it must be on the basis that there can sometimes be good forum shopping."

    There is no jurisdictional bar and the circumstances do not at present suggest that at the sanction hearing the selection of this forum will present an obstacle

to the exercise of the discretion in favour of sanction (though that must depend upon scrutiny of the outcome of the scheme meetings).

(b) In order to facilitate the scheme NN2 voluntarily became co-issuer under the Existing Notes and co-obligor under the Existing Bonds, thereby assuming joint and several liability under the debt instruments. I do not regard this technique as in any sense "abusive" of the jurisdiction. The technique was used in Re AI Scheme Ltd [2015] EWHC 1233 (and in the other customer compensation scheme case referred to therein) and in Re Codere Finance (UK) Ltd [2015] EWHC 3778: and it is one of which the vast majority of the holders of the Existing Notes and the Existing Bonds approve, as demonstrated by their approval of the amendment to their debt instruments by the requisite majorities required under those instruments. Again, it does not present a jurisdictional bar.

(c) The incorporation of NN2 was a convenient but not necessary mechanism to invoke the scheme jurisdiction of the English court. By changing the governing law of the Existing Notes (which itself raised no issues: see Re Apcoa (*supra*) at [236]-[256]) and having regard to the original governing law of the Existing Bonds a "sufficient connection" with this jurisdiction is established, and NNV and NNH could themselves have promoted the scheme: see Re Vietnam Shipbuilding Industry Group [2014] BCC 433 at [9] and Re PJSC Commercial Bank ("Privatbank") [2015] EWHC 3299 at [16]-[19].

(d) An issue does arise as to whether the English court is inhibited in the exercise of its jurisdiction by EU rules relating to the allocation of jurisdiction. Since this involves a consideration of jurisdiction over creditors I will address it in that context.

30. Politus is a Dutch company. The English court has jurisdiction over it as "an unregistered company" that is "liable" to be wound up within Part V of the Insolvency Act 1986 and will exercise that jurisdiction if a "sufficient connection" is established: Re Drax [2005] 1 WLR 1049 at [29]. A sufficient connection is established by the facts that under the terms of the Politus Facility (i.e. the agreement between Politus and the Politus Lenders) (i) the governing law of the obligation whose terms are to be varied by the scheme is English law (cl.8 of the Amendment

Agreement and cl.42 of the restated facility agreement) and (ii) there is an asymmetric English jurisdiction clause (cl.43.1) about which I shall have more to say. Again, an issue arises as to whether the English court is inhibited in the exercise of the jurisdiction so established by EU rules relating to the allocation of jurisdiction.

31. I turn next to focus upon jurisdiction questions in relation to scheme creditors (which involves a consideration of any inhibition on the exercise of jurisdiction over the scheme companies).

32. I here follow a well-trodden path with one short digression. It is settled that Council Regulation (EU) 2015/848 ("the Recast Insolvency Regulation") *does not* apply to English schemes of arrangement. It is not settled whether Council Regulation EU 1215/2012 ("the Recast Judgments Regulation") *does* apply to English schemes of arrangement or whether schemes fall into a gap between the two Regulations. An extensive citation of well-known decided cases in which the arguments are rehearsed is unnecessary: there are concise summaries in Re Vietnam Shipbuilding (*supra*) at [10]-[12] and in Re Magyar Telecom (*supra*) at [28]-[31]. The conventional approach is to assume that the Recast Judgments Regulation does apply, because the Recast Insolvency Regulation and the Recast Judgments Regulation "dovetail" so that there is no gap, and because schemes are not excepted from the scope of the Recast Judgments Regulation by the "carve-out" of insolvency proceedings in Art 1.2(b)).

33. Article 4 of the Recast Judgments Regulation provides that persons domiciled in a Member State shall be sued in the courts of that Member State. Exceptions to that rule are to be found in Article 8 and Article 25.

34. The Article 8 exception covers cases where there are a number of defendants. In such cases proceedings can be brought

> "in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

There remains some controversy about the precise application of the proviso. One view is that the presence of one creditor in England suffices because the very nature of a scheme means that there is a risk of irreconcilable judgments if creditors domiciled elsewhere seek to enforce their claims in the courts of their domicile. The jurisdiction is thereby established, and the question is whether it should be exercised

in the given case. The other view is that the test of "expediency" is only satisfied, and jurisdiction established, if the number of creditors in England is "sufficiently large". The controversy is noted in Re DTEK Finance plc [2016] EWHC 3562 at [18]-[25].

35. It is unnecessary to enter upon the controversy for the purposes of this case. As regards NN2, the probability is that there are at least four scheme creditors domiciled in England holding in aggregate some 9.96% by value of the principal amount of the Existing Notes and some 22.7% by value of the principal amount of the Existing Bonds. That would meet the "sufficiency" test as hitherto applied. As regards Politus Article 8 is of no avail because there is not a single scheme creditor domiciled in England.

36. The Article 25 exception applies

> "If the parties, regardless of their domicile, have agreed that… the courts of a Member State are to have jurisdiction to settle any disputes which have arisen… in connection with a particular legal relationship… Such jurisdiction shall be exclusive unless the parties have agreed otherwise."

37. As regards NN2

    (a) the Existing Notes contain English jurisdiction clauses;

    (b) the Existing Bonds contain an exclusive English jurisdiction clause.

38. As regards Politus the Politus Facility contains an English jurisdiction clause.

39. I must here make the slight digression from the well-trodden path. The English jurisdiction clauses in the Existing Notes and the Politus Facility are asymmetric: the borrowers must use the English jurisdiction, but whilst the lenders agree to use the English jurisdiction (and agree that it is the most convenient) they are also free to use any alternative court that has jurisdiction. It has been suggested (Re Global Garden Products Italy SpA [2016] EWHC 1884 at [31] per Snowden J *obiter*) that an asymmetric jurisdiction clause cannot be relied on as providing jurisdiction under Article 25 because they apparently do not bind the lender. The point had, in fact, been decided by Popplewell J in Re Mauritius Commercial Bank Ltd v Hestia Holdings Ltd [2013] EWHC 1328; but that decision was not cited in Re Global Garden.

40. In Mauritius Commercial Bank the lender sued the borrowers in England under a loan agreement which contained an asymmetric jurisdiction clause in almost identical terms to that in the Politus Facility. (The wording is different from that used in the English jurisdiction clause in the Existing Notes, but is for present purposes relevantly similar). The borrowers said the English court did not have jurisdiction. They argued that the asymmetric jurisdiction clause conferred no rights on the borrowers (because the freedom of the lender to litigate in any forum applied regardless of whether the lender was suing or was being sued). But Popplewell J held:-

> "Clause [43].1(c) refers to the lender taking proceedings. Clause [43].1 is for the benefit of [the lender] in the sense that [the borrowers] are obliged to sue in England but [the lender] is not. But that does not disapply clause [43].1(a) to [the lender] completely. Where it is [the borrower] which brings suit against [the lender] in England clause [43].1(a) is not disapplied by the operation of clause [43].1(c). [The lender] is thereby agreeing to be sued in England subject to the liberty conferred by clause [43].1(c). In those circumstances [the lender] has agreed to be subjected to the exclusive jurisdiction of the English court, subject to its right to bring claims… abroad pursuant to clause [43].1(c). Were it otherwise clause [43].1(a) would be superfluous: if clause [43].1(c) permitted [the lender] to insist on suing or being sued anywhere, or anywhere of competent jurisdiction, that would include England (given that this is an English law agreement and *forum conveniens* is conclusively determined by sub-clause (b)" [In this extract I have altered the judgment references to the MCB loan to refer to the relevant clauses in the Politus Facility].

41. The same construction of a similarly worded asymmetric jurisdiction clause (viz. that both borrower and lender are both bound, though in different ways) was adopted by Cranston J in Commerzbank Aktiengesellschaft v Pauline Shipping Limited [2017] EWHC 161. I would follow those decisions. I hold that an asymmetric jurisdiction clause of that type is an agreement between the parties that the courts of England are to have jurisdiction, exclusive in respect of proceedings commenced by the borrower and non-exclusive in the case of proceedings commenced by the lender. By its own terms Article 25 covers both exclusive and non-exclusive agreements. For completeness I would add that (on the footing that schemes are within the scope of the Recast Judgments Regulation) an application to the Court for approval of a scheme in my view constitutes a "dispute" for the purposes of such a jurisdiction clause. If the Regulations are to be read as extending to schemes, then contractual provisions

obviously designed to engage with the Regulations must be read in accordance with the same interpretative approach.

42. The last matter to address on jurisdiction is to consider whether any order sanctioning the scheme is likely to be effective or whether it is apparent even at this stage that the scheme will not be recognised in other relevant jurisdictions even if sanctioned. As regards the NN2 scheme an application is to be made for recognition of the scheme as a foreign main proceeding for the purposes of Chapter 15 of the United States Bankruptcy Code: this is a familiar route well-canvassed in earlier schemes, and its consequences in this case will be addressed in expert evidence before the sanction hearing. There is nothing to suggest that this case differs from the many others that have preceded it, though ultimately it is a matter for the judge hearing the sanction application. As to the Politus scheme, the expert evidence of Prof Veder on Dutch law is already before the Court and its terms do not foreshadow a "roadblock", though again it is a question for the sanction hearing.

43. Apart from jurisdictional issues this hearing must review the class composition proposals advanced by the scheme companies. The relevant principles are very well settled and there is no advantage in my repeating them. I have been referred to Re Hawk Insurance Co [2001] 2 BCLC 480, Re UDL Holding Ltd [2002] 1 HKC 172 (and the particularly helpful judgement of Lord Millett NPJ) and Re Lehman Brothers International (Europe) [2018] EWHC 1980 (especially at [44]-[45]). The essential question is whether a presumptive single class must be fractured because the rights of class members are so dissimilar as to make it impossible for them to consult together with a view to their common interest: the "impossibility" of consultation is a high threshold. Of course, a scheme company may propose to the Court separate meetings even whether that test of "impossibility" of common consultation might not be satisfied, and the Court (if persuaded that that is a pragmatic and equitable solution to what might otherwise be a contentious issue) will not insist upon combining meetings: Re SAB Miller [2017] Ch 173 at [44]-[45].

44. In the instant case the questions (in relation to each of the NN2 and the Politus schemes) are (i) is there a fundamental dissimilarity between the rights which particular scheme creditors would have on an insolvency of NN2 or of Politus (as the case may be)? and (ii) is there a fundamental dissimilarity between the rights which

particular scheme creditors receive under the terms of the NN2 scheme or the Politus scheme (as the case may be)?

45. For NN2 it is proposed that (i) there be a meeting of the holders of Existing Notes and (ii) there be a meeting of the holders of Existing Bonds. I agree that this satisfies the relevant tests, for the following reasons:-

    (a) The position of the holders of Existing Notes in an insolvency is identical, each having unsecured claims ranking *pari passu*. Differences in interest rates affect the calculations of the amounts for proof, but that does not constitute a material difference. Rights against guarantors are likewise identical.

    (b) The position of the holders of Existing Notes under the scheme is identical.

    (c) The new instruments are to be issued in large denominations, and holders of existing notes with a value below the denomination will receive interests under trusts instead of issued new instruments. This does not fracture the class into large holders and small holders because under the terms of the trusts such holders are able without significant charge (i) freely to deal with their fractional interests by way of sale or transfer of the whole (ii) to withdraw their interests in the event that they acquire fractional interests from others and thereby become entitled to interests equal to the minimum denomination (iii) to combine with the holders of other fractional interests to require a sale of a new instrument of the minimum denomination and (iv) to receive a rateable distribution upon a sale of all assets in the fund. They are thereby placed as nearly as may be in the position of the holder of Existing Notes to a value exceeding the minimum denomination, and they can certainly confer with such persons upon the fundamental question whether to prefer the scheme over insolvency, and whether to accept the new instruments in place of the Existing Notes.

    (d) NN2's decision to propose a separate meeting of the holders of Existing Bonds is a pragmatic one, but one which the Court can readily accept. Whilst in economic terms both the Existing Notes and the Existing Bonds represent unsecured claims against NN2 ranking *pari passu* the rights under the Existing Bonds against the original issuer (NNV) are different from the rights

under the Existing Notes against the original issuer (NNH) and it is simpler to avoid debate about the materiality of those differences.

46. I should give separate consideration to "lock-up" agreements, "work fees" and "consent fees", which cut across these class compositions. A small group of NN2 creditors agreed to enter a "lock-up" agreement and formed an "*ad hoc*" group for the purpose of participating in the restructuring negotiations. As a reward, members of this "*ad hoc*" group will receive a fee equal to 1.5% of the principal of the Existing Notes or Existing Bonds held by them, to be paid by Trafigura (not out of scheme assets) conditionally upon the NN2 scheme receiving sanction and being implemented (but not dependent upon how the particular member of the "*ad hoc*" group votes). This entitlement does not, in my judgment, fracture the class. The enhancement on recovery is not some extra benefit received under the scheme which is not open to other scheme participants. It is a commercial reward for detriment suffered by the "*ad hoc*" group that was not suffered by other scheme participants. Not only did the "*ad hoc*" group put in time and effort in assisting to formulate the scheme, but (of perhaps greater importance) by becoming the recipients of "insider" information they disabled themselves from dealing with their holdings, notwithstanding the precarious position of the Nyrstar Group, for the duration of the negotiations and until public announcement of the eventual scheme. The level of reward for that detriment is not disproportionate. There has been full disclosure of the arrangements and no objection taken so far, no doubt because, whilst the reward undoubtedly arises in connection with the scheme, it has an independent commercial justification and is earned however "*ad hoc*" votes are cast at the scheme meeting. On an objective view the "reward" is not material to a decision whether to support the scheme: compare Re Noble Group [2018] EWHC 2911 at [149]-[150].

47. Once the outline of the scheme had been settled a further "lock-up" agreement was made available to all NN2 scheme creditors, with a "consent fee" payable to those who subscribed to it by 7 May 2019. In general, a modest "consent fee" open to all scheme creditors in exchange for early support will not fracture a class because it is unlikely to determine the behaviour of a member of the class: see Re Primacom Holdings GmBH [2013] BCC 201 at [57]. So unless the limitations on the availability of the "consent fee" or the size of the benefit are such as to enable the

Court even at the convening stage to see that there is a real issue such as to prevent consultation together, the better course is to preserve class unity and to address the question of the materiality of the reward at the sanction stage once the votes have been cast: see, for example, the observation of David Richards J in the "Privatbank" Case (*supra*) at [26]. In the instant case there is nothing to suggest that the "consent fee" raises any class issues.

48. For Politus it is proposed that there be a single scheme meeting at which Trafigura will not vote. The rights of each Politus Lender under the Politus Facility are identical. Their expectations of recovery in a liquidation of Politus are the same. The fundamental question (whether to support the scheme or to prefer insolvency) does not differ as between individual Politus Lenders. The Politus scheme has provisions which enable some Politus Lenders to enhance their returns, but those provisions do not require the class to be fractured.

49. I should expand upon that last observation. The standard return to a Politus Lender will be 29.65% receivable from NSM. That may be increased to 42.4% if the Politus Lender agrees to advance New Money (and even more for a Politus Lender who agrees to take up an available New Money offer rejected by another Politus Lender). The New Money will yield interest at LIBOR/EURIBOR+1.25%: this is a relatively low rate, and the commercial reality is that part of the return on New Money is the enhancement of the return on existing debt. All the Politus Lenders are banks or financial institutions whose business includes lending money: so the "New Money" offer is as real for one as for another, and the simple question is whether any given Politus Lender accepts the commercial terms (i.e. enhanced recovery on old money, the risk on new money, and the yield) on offer. Four of the six Politus Lenders (representing 86.67% by value of the Politus Facility) have done so: two have declined, one of which was Erste. The offer will remain open until after the scheme meeting.

50. The fact that Erste (which intended to object to the scheme) would have received a lower return than some other Politus Lenders did not result from any difference in the rights accorded to it under the scheme documentation (which were in reality the same as those accorded to every other Politus Lender) but from its individual commercial interests and the judgment it made upon the investment opportunity open to it. A

difference in interests (as opposed to a difference in rights) does not in general fracture the class and does not do so in this case. The difference in interests does not create two schemes either. The principles are well established but I was referred to Re Bibby Offshore [2017] EWHC 3402 and Re Noble Group [2018] EWHC 2911 at [104].

51. I must finally address one matter of detail. I mentioned the existence of a “co-ordinating committee” of lenders. NSM agreed to pay a monthly fee to each of its members for the work undertaken. It is, on the evidence, comparatively low (when compared with the “going rate”) and it is very small when compared with the level of indebtedness of those represented. One of those voting on the Politus scheme is entitled to such a fee (and has received it up to June 2019). They are so entitled to any future payment irrespective of how the votes of the creditor they represent are cast at the scheme meeting. This certainly does not call for any fracturing of the class.

52. For these reasons I directed the convening of scheme meetings in the terms of the orders made.