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Case No: CR-2024-000187

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

7 Rolls Building
Fetter Lane, London,
EC4A 1NL

Date: 1 February 2024

Before:

THE HONOURABLE MR JUSTICE HILDYARD

IN THE MATTER OF TELE COLUMBUS AG

AND IN THE MATTER OF THE COMPANIES ACT 2006

Tom Smith KC and Adam Al-Attar (instructed by Freshfields LLP) for the **Applicant** (Tele Columbus AG)

Hearing date: 17th of January 2024

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APPROVED JUDGMENT

Remote hand-down: This judgment was handed down remotely at 10:30 on 1st of February 2024 by circulation to the parties or their representatives by email and by release to The National Archives.

The Honourable Mr Justice Hildyard:

Scope of this judgment

1. At a hearing on 17 February 2024 I determined that I should accede to an application seeking an order convening a single meeting of creditors of a company called Tele Columbus AG (the **Company**) to consider and, if thought fit, approve a scheme of arrangement (the **Scheme**) proposed by the Company pursuant to Part 26 of the Companies Act 2006 (**CA 2006**). I provided short reasons for that determination orally but indicated that I would elaborate these reasons in writing, as I now do.

The Company and background to the Scheme

2. The Scheme itself is relatively straightforward. However, a less commonplace feature is that the Company not only is a public company incorporated and having its centre of main interest (COMI) in Germany, but it also has no business or presence in this jurisdiction. The Tele Columbus group (which comprises of the Company and its direct and indirect subsidiaries) (the ***Group***) is a leading fibre-optic network operator in Germany, headquartered in Berlin.

3. The Company is majority owned by Kublai GmbH (***Kublai***) (95.39%). Kublai GmbH is ultimately owned by Morgan Stanley Infrastructure Partners Inc. ("MSI") (60%) and United Internet Investment Holding AG & Co. KG (***United Internet***) (40%). Shares in the Company were de-listed from the Frankfurt Stock Exchange in September 2021. A minority share of 4.61% of the Company remains in free float.

4. The Company's primary activity is holding the shares in its subsidiary companies including (directly and indirectly) the operational subsidiaries of the Group. It is the central financing vehicle within the Group.

5. Its primary financial liabilities comprise:

   (1) the €650 million senior secured notes (formerly New York law governed, but now English law governed) issued pursuant to the indenture dated 4 May 2018 by the Company, as issuer (the **Notes** or **SSNs**); and

   (2) the €1.38 billion senior facilities agreement (English law governed) originally dated 2 January 2015 (as amended from time to time) between the Company, as borrower, and the lenders thereunder (the **SFA**), of which c.€462 million is outstanding.

6. The SSNs and SFA debts are subject to the intercreditor agreement originally dated 30 July 2015 between, among others, the Company, Kroll Agency Services Limited as Senior Facilities Agreement Agent and Deutsche Trustee Company Limited as Trustee (each as defined therein) (the ***Intercreditor Agreement***).

7. A pledge has been granted in favour of the Lenders and Noteholders over the shares (or partnership interests, as applicable) of the Group entities shown in the chart annexed to the draft explanatory statement. That chart also shows the Group entities that are guarantors of the debts owed under the SSNs and SFA.

8. Both the Notes and the SFA are nearing maturity. The outstanding liabilities under the SFA mature on 15 October 2024, and the Notes are due on 2 May 2025.

9. The Group has been facing certain short-term liquidity challenges. Based on the latest available cash flow forecasts the Company will have sufficient liquidity until mid-March 2024. But it will by then urgently need further funding. Whilst its shareholders, having extended considerable lending in the past (so that approximately €65 million has been funded under the Shareholder Loans, €15 million under the shareholder loan dated 25 July 2023 and €50 million under the shareholder loan dated 30 August 2023), might be expected to make available further shareholder loans, there can be no certainty of sufficient further funding.

10. Furthermore, the Group faces certain commercial challenges due to a changing regulatory landscape:

    (1) *New legislation*. From July 2024, housing associations will not be allowed to charge cable fees through an additional payment obligation on tenants due to the abolishment of 'bulk contracts'. However, it will still be possible to offer cable TV as an ancillary cost (with the consent of the residents).

    (2) *The expiry of key contracts*. Of the Group's top 20 housing association contracts a share equal to 61% of households is expiring by 2027, which threatens to open up the housing association base to competition.

11. Over the medium to long term, the Group requires further equity investment to support the delivery of its business plan to ensure it can successfully tackle these funding and commercial challenges.

12. Thus, in order to meet its funding needs and the business challenges described above:

    (1) The Company proposes to extend the maturity of each of the SFA and the Notes along with making certain amendments to the terms of each relevant finance document.

    (2) In addition, Kublai (funded by Hilbert (as defined below) or certain of Hilbert's Affiliates) propose to make a substantial capital contribution of €300 million (including the principal of the shareholder loans already disbursed in 2023).

13. These inter-conditional components comprise the **Transaction**.

Purpose of the Scheme

14. The purpose of the Scheme is to enable the Transaction. In broad summary, the Scheme comprises an extension of maturity of the SFA and the Notes along with amendments to the terms of each finance document.

15. Ordinary course trade creditors of the Company (and the Group) will not be impacted by the Scheme, as the ongoing supply of the Group's trade creditors is critical to the continuity of the business of the Group.

16. The Scheme will also not affect the shareholder loan agreements originally dated 25 July 2023 and 30 August 2023 entered into between the Company as borrower and Hilbert Management GmbH, an affiliate of Morgan Stanley Infrastructure Partners Inc. (**MSI**), (**Hilbert**) as lender, pursuant to which up to €97 million has been committed to provide further funding to the Group (the **Shareholder Loans**).

17. Conditional on the Equity Commitment (as defined below), pursuant to the Scheme the Company proposes to:

    (1) amend the SFA in its entirety (the **Amended SFA**), on inter alia the following terms:

        (a) to extend the maturity date to 1 January 2029;

        (b) to increase the interest under the Amended SFA to EURIBOR (subject to a floor of 6%) plus a margin of 4% p.a. (including a minimum cash pay of 50 bps) (not to be exceeded), which subject to a floor of 8.00% p.a., shall be reduced by 0.5% p.a. for every €25,000,000 of equity contribution provided in addition to the Equity Commitment (i.e. after the Equity Commitment is satisfied in full) and if not applied for purposes of building capacity to incur super senior Indebtedness under the credit facility basket or the contribution debt basket; and

        (c) to apply an exit fee of 2.5% payable after three years from the Transaction Effective Date, increasing to 4.0% four years from the Transaction Effective Date, payable on an Exit Event (as defined in the Term Sheet which includes refinancing, mandatory or voluntary prepayment, change of control, and sale of substantially all assets);

        (d) to tighten the baskets and permissions in line with the covenants incorporated from the Amended Notes (as further set out in paragraph (c) below) and to add certain additional events of default,

    (2) amend the Indenture and the Notes (the **Amended Notes**), with inter alia the following terms to be set out in the indenture governing the Amended Notes (the **Amended Indenture**):

        (a) to extend the maturity date to 1 January 2029;

        (b) to increase the interest under the Amended Notes to 10.00% p.a. (payable in kind) subject to a floor of 8.00% p.a., to be reduced by 0.5% p.a. for every €25,000,000 of equity contribution provided in addition to the Equity Commitment (i.e. after the Equity Commitment is satisfied in full) and if not applied for purposes of building capacity to incur super senior Indebtedness under the credit facility basket or the contribution debt basket;

        (c) to apply an exit fee of 2.5% payable after three years from the Transaction Effective Date, increasing to 4.0% four years from the Transaction Effective Date, payable on an Exit Event (as defined in the Term Sheet which includes refinancing, mandatory or voluntary prepayment, change of control, and sale of substantially all assets);

(d) to tighten the baskets and permissions under the Amended Notes as compared to the Notes and to add certain additional events of default,

(3) replace the covenants under the SFA with the covenants under the Amended Indenture (as defined below) and include the following new covenants which will apply to both the Amended SFA and the Amended Notes:

(a) the following minimum liquidity covenants:

(i) a first covenant set at a minimum liquidity threshold of €35 million, a breach of which will result in additional reporting obligation to the New Noteholders and lenders under the Amended SFA; and

(ii) a second covenant set at a minimum liquidity threshold of €20 million, a breach of which will result in an event of default under the Amended Indenture and Amended SFA, respectively,

in each case, compliance will be measured by monthly forward and backward-looking liquidity tests and a 13-week forward-looking cash flow forecast (based primarily on cash, cash equivalents and other available liquidity headroom measurements) and will be subject to customary equity cure rights; and

(b) a performance covenant requiring quarterly director statements on and from the date falling three years after the Transaction Effective Date, confirming that the Company's performance remains on track with the Restructuring Opinion, a breach of which would result in additional reporting obligations to the creditors (but is not an event of default).

18. The Company also proposes to make certain changes to the Intercreditor Agreement to permit implementation of the Transaction.

The likely alternative would be an insolvency process

19. The supervisory board and management of the Company consider that the implementation of the Transaction through the Scheme is the only option presently available to the Company to avoid a value-destructive insolvency process. The objective of and need for the Transaction is to prevent the need for the Company to enter into formal insolvency proceedings and to provide the Company and the Group with a stable platform to deliver on its business plan.

20. The supervisory board and management of the Company believe that the recoveries for Scheme Creditors in a formal insolvency would be materially lower than those which are likely under the Transaction which are expected to result in repayment in full of Scheme Creditors' debt with increased interest rates. The Group has commissioned analysis from PricewaterhouseCoopers GmbH on the estimated outcome for Scheme Creditors in an insolvency scenario to evidence this (the **PwC Report**). The key conclusion that can be drawn from the PwC Report, insofar as it affects the Scheme Creditors, is that the Lenders and the Noteholders would receive a recovery representing between 66.7% (in the low case) and 76.5% (in the high case) of their claims in the Counterfactual Scenario modelled in the PwC report.

21. By contrast, the evidence on behalf of the Company (provided in the first witness statement of Mr Markus Oswald on behalf of the Company's management board) is that the Scheme will enable the Group to continue in business and to deliver its business plan. Although there is no absolute certainty, this is expected to result in repayment in full of Scheme Creditors' debt, including the interest due under the increased interest rates.

Preparatory steps to facilitate the Transaction

22. Discussions in relation to the Transaction have been ongoing for a number of months. The Company worked with its advisers, an Ad-Hoc Group of its Lenders and Noteholders (the **AHG**) and the AHG's advisers, and its largest indirect shareholder, MSI, and MSI's advisers to prepare a draft commercial proposal on the terms of the Transaction.

23. After circulation to the AHG's advisers (on 16 October 2023) of an initial draft, a lock-up agreement dated 22 November 2023 (the **Lock-Up Agreement**) was entered into with the AHG appending an agreed form term sheet (the **Term Sheet**) setting out the steps to be completed to implement the Transaction.

24. Certain terms of the Lock-Up Agreement became binding on the date of that agreement (22 November 2023). The remaining terms became binding on or around 16 January 2024, after notification to all parties that, among other things, (a) consenting Lenders whose consenting SFA debt constituted more than 66.66 per cent of the liabilities under the SFA then outstanding; and (b) consenting Noteholders who represented more than 50 per cent of the liabilities under the Notes then outstanding had acceded to its terms.

25. In return for providing their early support to the Scheme and in order to compensate Scheme Creditors for the time and administrative costs spent considering and responding to the Lock-Up Agreement, it was agreed that an Early Consent Fee or Late Consent Fee (each as defined below), would be paid to each Consenting Creditor or Abstaining Creditor (each as defined below, together the **Locked-Up Creditors**) that acceded to the Lock-Up Agreement, by reference to the principal amount of the Notes and/or SFA debt held by such Locked-Up Creditor being the **Locked-Up Debt** or **Abstaining Debt**). More particularly, it was provided that any Locked-Up Creditor who acceded to the Lock-Up Agreement:

    (1) on or before 11:59 p.m. (London time) on 12 December 2023 (or such later date determined by the Company) (the **Early Consent Deadline**), would receive an amount equal to 0.125% of the principal amount of Locked-Up Debt beneficially held by such Locked-Up Creditor at the Early Consent Deadline, to be capitalised and paid as an allocation of the Amended Notes and/or participation in the SFA on the Transaction Effective Date (the **Early Consent Fee**); and

    (2) on or before 11:59 p.m. (London time) on 30 January 2024 (or such later date determined by the Company) (the **Late Consent Deadline**), would receive an amount equal to 0.125% of the principal amount of Locked-Up Debt beneficially held by such Locked-Up Creditor at the Late Consent Deadline, to be capitalised and paid as an allocation of the Amended Notes and/or participation in the SFA on the Transaction Effective Date (the **Late Consent Fee**).

26. Certain Locked-Up Creditors (the **Consenting Creditors**) agreed, among other things, promptly to take all actions which are necessary to support, facilitate, implement, consummate or otherwise give effect to the Transaction, including to vote in favour of the Consent Solicitation and the SFA Consents and to vote in favour of the Scheme.

27. Certain other Locked-Up Creditors were unable to vote in favour of the Scheme as a result of the proposed extension of maturities of their debt, for constitutional, governance or legal reasons, and have acceded to the Lock-Up Agreement as abstaining creditors (the **Abstaining Creditors**). The Abstaining Creditors instead undertook pursuant to the Lock-Up Agreement to use reasonable endeavours to support and facilitate (to the extent legally permissible) the implementation of the Transaction.

28. The percentage and number of the Scheme Creditors who have entered into or acceded to the Lock-Up Agreement to date are in excess of the statutory majorities required for the Scheme, being (approximately, by value):
    (1) as a percentage by value of the total debt under the Notes and the SFA:
        (a) 83.2% Consenting Creditors; and
        (b) 8.3% Abstaining Creditors;
    (2) as a percentage by value of the debt under the Notes:
        (a) 84.4% Consenting Creditors; and
        (b) 6.1% Abstaining Creditors;
    (3) as a percentage by value of the debt under the SFA:
        (a) 81.6% Consenting Creditors; and
        (b) 11.4% Abstaining Creditors.

Outline of principal provisions of the Scheme

29. In broad summary, therefore, the Scheme comprises an extension of maturity of the SFA and the Notes along with amendments to the terms of each finance document.

30. Conditional on those amendments, Kublai (funded by Hilbert or certain of Hilbert's Affiliates) will provide the Company with a capital contribution in an amount of €300 million (including amounts already provided pursuant to the Shareholder Loans), provided to the Company by way of common or preferred equity (*Vorzugsaktien*) and/or subordinated debt, with:

    (1) €180 million to be provided on closing of the Transaction; and

    (2) €120 million to be provided within 12 months of the Transaction Effective Date,

    together the ***Equity Commitment***.

31. It is not necessary for the purpose of this stage of the process to detail the amendments. In summary:

    (a) the maturity dates of both the SFA and of the SSN (presently 15 October 2024 in the case of the SFA and 2 May 2025 in the case of the SSN) are extended to 1 January 2029;

    (b) interest payable under the Amended SFA will be increased to EURIBOR (subject to a floor of 6%) plus a margin of 4% p.a. (including a minimum cash pay of 50 bps) (not to be exceeded), which subject to a floor of 8.00% p.a., reduced by 0.5% p.a. for every €25,000,000 of equity contribution provided in addition to the Equity Commitment (i.e. after the Equity Commitment is satisfied in full) and if not applied for purposes of building capacity to incur super senior Indebtedness under the credit facility basket or the contribution debt basket;

    (c) interest payable under the SSN will be increased to 10.00% p.a. (payable in kind) subject to a floor of 8.00% p.a., to be reduced by 0.5% p.a. for every €25,000,000 of equity contribution provided in addition to the Equity Commitment (i.e. after the Equity Commitment is satisfied in full) and if not applied for purposes of building capacity to incur super senior;

    (d) in both the SFA and the SSN an exit fee of 2.5% will be payable after three years from the Transaction Effective Date, increasing to 4.0% four years from the Transaction Effective Date, payable on an Exit Event (as defined in the Term Sheet which includes refinancing, mandatory or voluntary prepayment, change of control, and sale of substantially all assets); and

    (e) additional covenants are incorporated as to (i) minimum liquidity cover and (ii) performance.

32. In addition, pursuant to the Scheme, and subject to certain restrictions and provisions for down-scaling or pro-rating, each eligible Lender and Noteholder will have the right (but not the obligation) to elect to convert their SFA commitments and Notes (as applicable) into an equivalent principal amount of the Amended SFA or Amended Notes at the Transaction Effective Date (subject to applicable caps, floors and apportionment as set out in the Term Sheet) (the **SSN/SFA Election**).

33. On the closing of the Transaction, the principal amounts outstanding under the Shareholder Loans are intended to be repaid. Accrued and unpaid interest on the Shareholder Loans will not be repaid. The Company and Hilbert intend to enter into an amendment and restatement agreement (the **Shareholder Loan Amendment and Restatement Agreement**) to amend the terms of the Shareholder Loans in order to capitalise the accrued and unpaid interest on the Shareholder Loans as at the date on which all conditions precedent to the Shareholder Loan Amendment and Restatement Agreement are satisfied and to extend the maturity of the Shareholder Loans to beyond 1 January 2029.

Issues for determination at this stage

34. The procedure for a convening hearing in relation to a scheme of arrangement is governed by the Practice Statement issued by the Chancellor of the High Court on 30 June 2020. The authorities in relation to the previous practice statement continue to be applicable under the new Practice Statement: see *Re ColourOz Investment 2 LLC* [2020] BCC 926 at [39]

35. The function of the court at the convening stage is '*emphatically not*' to consider the merits or fairness of the proposed scheme, which will arise for consideration at the future sanction hearing if the scheme is approved by the statutory majority of creditors*: Re Telewest Communications plc (No.1)* [2004] BCC 342 at [14] *per* David Richards J.

36. Rather, the only issues that are generally appropriate for consideration at the convening hearing are the proper class composition of the scheme meetings, together with any other essential issue which, if decided against the scheme company, would mean that the court simply had no jurisdiction or would unquestionably refuse to sanction the scheme, sometimes referred to as a jurisdictional 'roadblock': *see Re Noble Group Limited* [2019] BCC 349 *per* Snowden J; and *Re Indah Kiat International Finance Co BV* [2016] BCC 418 *per* Snowden J.

37. Accordingly, the following matters fell to be addressed at the convening stage in this case:
    (1) Whether the convening hearing was properly notified to interested parties;
    (2) Whether to accept the Company's proposal for a meeting of a single class of creditors to consider and vote on the Scheme;
    (3) What directions should be given in respect of the Notice, timing and conduct of the Scheme Meeting;
    (4) Whether the Explanatory Statement to be sent appears to be adequate; and
    (5) Whether there is apparent, at this stage, any jurisdictional road-block to prevent the Court sanctioning the Scheme.

38. I turn to address each in turn.

(A) *Notification of interested parties*

39. The Practice Statement states (at [8]) that the Practice Statement Letter should be distributed:

    '*…in sufficient time to enable them to consider what is proposed, to take appropriate advice, and, if so advised, to attend the convening hearing. What is adequate notice will depend on all the circumstances. The evidence at the convening hearing should explain the steps which have been taken to give the notification and what, if any, response the applicant has had to the notification*.'

40. No specific notice period is prescribed by the Practice Statement. The authorities are clear that the sufficiency of the notice period given will depend on the facts of the case. In *Re NN2 NewCo Ltd* [2019] EWHC 1917 (Ch) at [22], Norris J identified three relevant factors in deciding whether the period of notification is adequate: (a) the complexity of the scheme; (b) the degree of consultation with creditors prior to the launch of the

scheme; and (c) the urgency of the scheme having regard to the financial distress of the company.

41. In the present case, the requisite Practice Statement Letter notifying the convening hearing (the **PSL**) was issued on Friday, 29 December 2023. Although there were therefore 18 days between the issue date and the hearing date, it is also, in my view, relevant to consider the time of year, and in this case the fact that notice was given just before the New Year holiday weekend, which reduced the period of notice in terms of business days.

42. That said, it is also relevant to take into account that (a) the Transaction and Scheme are not unduly complex; (b) the Transaction was, in effect, notified to interested persons when the Company sent out the lock-up agreement (on 22 November 2023) and invited participation in it; (c) in the event, over 90% of scheme creditors acceded to the lock-up agreement, suggesting active engagement with a summary term sheet annexed; (d) the parties to the SFA are likely to be banks and financial institutions, and although there was no evidence before me of the nature of the Noteholders, the minimum denomination of an SSN is €100,000, suggesting both on that basis and by reference to the nature of the terms the likelihood of a financially sophisticated cohort; and (e) there has been no complaint of inadequate notice from any scheme creditor. Having regard also to concerns about deteriorating cash flow and the need to put in place a solution by March 2024, I consider the notice given to be sufficient in all the circumstances.

(B) *Sufficiency of a single class meeting*

43. It is a Scheme applicant's responsibility to determine whether more than one meeting of creditors and/or members is required in relation to a scheme and, if so, to ensure that those meetings are properly constituted (Practice Statement, at [2]). Further, the court will consider whether more than one meeting of members and/or creditors is required, and if so, the appropriate composition of those meetings (*ibid.,* at [11]).

44. The principles relating to class composition are well known. The basic principle is that a class '*must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest*': see *Sovereign Life Assurance v Dodd* [1892] 2 QB 573 at 583 *per* Bowen LJ; *Re Hawk Insurance Company Limited* [2001] 2 BCLC 480 at [30] to [33] *per* Chadwick LJ; *Re UDL Holdings Ltd* [2002] 1 HKC 172, 179 Lord Millett NPJ; and *Re Apcoa Parking Holdings GmBH* [2015] BCC 142, [46] to [55] (Hildyard J).

45. As Chadwick LJ said in Re Hawk Insurance Co Ltd [2002] BCC 300 at [30]:

> '*In each case the answer to that question will depend upon analysis (i) of the rights which are to be released or varied under the scheme and (ii) of the new rights (if any) which the scheme gives, by way of compromise or arrangement, to those whose rights are to be released or varied.*'

46. For these purposes, it is the legal rights of creditors or members, and not their separate commercial or other interests, which determine whether they form a single class or separate classes. Conflicting interests can be taken into account when considering whether, as a matter of discretion, to sanction the scheme. In *Re UDL Holdings Ltd* [2002] 1 HKC 172, 184 Lord Millett NPJ held:

'*The test is based on similarity or dissimilarity of legal rights against the company, not on similarity or dissimilarity of interests not derived from such legal rights. The fact that individuals may hold divergent views based on their own private interests not derived from their legal rights against the company is not a ground for calling separate meetings … **The question is whether the rights which are to be released or varied under the scheme or the new rights which the scheme gives in their place are so different that the scheme must be treated as a compromise or arrangement with more than one class.***' (emphasis added).

47. In proposing that in this case it is appropriate for the Scheme Creditors to vote in a single class, Mr Tom Smith KC (for the Company) emphasised the following:

    (1) the Liabilities under the Notes and SFA rank *pari passu* under the Intercreditor Agreement;

    (2) the Notes and SFA both benefit from the same security and guarantee package;

    (3) if the Company was to enter into an insolvency proceeding (likely to be in Germany), each Scheme Creditor would be treated the same way in that proceeding; and

    (4) although there are differences between the economic terms and maturities as between the Notes and SFA, these differences do not represent differences in rights in the most likely alternative to the Scheme which is an insolvency of the Company followed by an accelerated distressed sale of the Group (other than the Company) or alternatively any differences in rights are not so material so as to require the class to be fractured.

48. The Company also considers that the rights of the Scheme Creditors under the Scheme are not such as to prevent them from consulting together with a view to a common interest as:

    (1) the liabilities of the Scheme Creditors will continue to rank *pari passu* under the Intercreditor Agreement (as amended pursuant to the Scheme);

    (2) both the Lenders and Noteholders will have the maturities under their respective instrument extended to the same date such that the rights of the Scheme Creditors coming out of the Scheme in respect of maturity dates are identical;

    (3) the Scheme Creditors will benefit from similarly enhanced (although not identical) economic terms as each other once the Scheme is implemented:

        (a) while the Amended SFA will receive 0.5% cash interest, which the Amended Notes will not receive (being entitled to receive PIK interest only), the Transaction has been designed to equalise the rights under the Scheme as far as practicable having regard, in particular, to the identical rates of interest and fees;

        (b) each Scheme Creditor has the same right to elect (subject to the minimum Amended Note and minimum and maximum Amended SFA debt) for Amended Notes and/or Amended SFA debt, thus minimising the potential effect of any difference in rights by reason of 0.5% cash interest under the Amended SFA,

which the Amended Notes will not receive (being entitled to receive PIK interest only);

(c) in addition, each eligible holder of the Amended Notes will receive an amount of cash equal to interest accruing on the Notes, for the period from 3 October 2023 up to and including 2 December 2023 on such New Noteholder's aggregate principal amount of Notes and/or participations in the SFA;

(d) if the Scheme is sanctioned, the expectation is that Scheme Creditors will be paid in full in due course; and

(e) the Noteholders and Lenders will receive accrued but unpaid interest up until 2 October 2023 in cash at the Transaction Effective Date; and

(4) the Scheme Creditors will benefit from identical covenant packages, security and guarantees across both the Amended Notes and the Amended SFA.

49. As Mr Smith KC summarised the position, under the Scheme, the economics received by each Scheme Creditor are as close to identical as possible, whether they are Lenders or Noteholders. As such, while there are minor structural differences in the manner in which these economics are delivered these differences are not so significant as to prevent Scheme Creditors from consulting together in a single class.

50. The question then is whether there is any other factor which might impede or unbalance their consultation, and in particular, whether that is or could be the effect of the lock-up agreement and/or the Early Consent Fee or the Late Consent Fee.

51. As to that, I accept the submission that the Lock-up Agreement, which binds assenting Scheme Creditors to support the Scheme in advance of the Scheme Meeting does not fracture the class, and the Scheme Creditors who have acceded to the Lock-Up Agreement need to be put into a separate class for the purpose of voting on the Scheme. In particular, and having regard to the guidance provided by the authorities, including *Re Noble Group Ltd* [2019] BCC 349 at [150]-[151] and *Re Apcoa [supra]* at [94]-[105], I accept (as Mr Smith submitted) that the Lock-up agreement should not prevent or impede the Scheme Creditors consulting together with a view to their common interest, especially since:

(a) all Scheme Creditors were given equal opportunity to accede to the Lock-Up Agreement; and

(b) the Scheme will affect the rights of each Scheme Creditor in the same way, regardless of whether a Scheme Creditor acceded to the Lock-Up Agreement.

52. Similarly, I accept that the Early Consent Fees and the Late Consent Fees are *de minims* when viewed against the difference between the amount that the Scheme Creditors would receive in the comparator to the Scheme and the amount that they would be likely to receive if the Scheme is sanctioned, and thus are most unlikely to exert a material influence on the relevant creditors' voting decisions (and see *Re Noble Group Ltd* at [150]-[151]). I agree, therefore, that Scheme Creditors who are entitled to receive the Early Consent Fee or Late Consent Fee do not need to be put into a separate class for the purposes of voting on the Scheme, particularly as:

(a) the quantum of neither the Early Consent Fee nor Late Consent Fee are material and it is very unlikely that a Scheme Creditor who considered the substantive aspects of the Scheme to be against their interests would be persuaded by the payment of the Early Consent Fee or Late Consent Fee to vote in favour of the Scheme;

(b) all Scheme Creditors were given equal opportunity to accede, before the relevant date, to the Lock-Up Agreement and therefore to become entitled to receive the Early Consent Fee or Late Consent Fee.

53. In all these circumstances, I am satisfied that it is appropriate that a single Scheme Meeting be convened for the purposes of considering and, if the Scheme Creditors think fit, approving the Scheme.

(C) *Directions in respect of the Notice, timing and conduct of the Scheme Meeting*

54. The Company proposed the following timetable:

Event	Date
Custody Instruction Deadline for Noteholders	5:00 p.m. CET on 5 February 2024
Deadline for submitting the voting instructions in the Scheme Creditor Letter	5:00 p.m. CET on 7 February 2024
Voting Record Time	5:00 p.m. CET on 7 February 2024
Scheme Meeting	11.00 a.m. CET on 9 February 2024
SSN/SFA Election Deadline	5:00 p.m. on 16 February 2024
SSN/SFA Confirmations Deadline	5:00 pm on 26 February 2024
Scheme Sanction Hearing	28 February 2024
Scheme Effective Date	29 February 2024
Transaction Effective Date	5 March 2024

55. I accept that the above timetable, whilst enabling achievement of the objective of securing necessary funding by March, provides sufficient time including for Scheme Creditors to consider the Explanatory Statement.

56. The Company also sought directions for remote meetings, as has become fairly usual since the decision of Trower J in *In re Castle Trust Direct Plc* [2021] 2 BCLC 523 at [36]-[44] [AB/16]. In that case, Trower J was satisfied that a meeting might be held by remote means. In the present case, it is proposed that the Scheme Meeting be held virtually '*in such a manner that the Scheme Creditors can hear each other, ask questions and express opinions at the Scheme Meeting*'. I was assured that Company would, of

course, ensure that the evidence for the Sanction Hearing will deal with the matters identified by Trower J in relation to the remote meeting.

(D) *Adequacy of explanatory documentation*

57. Although the Practice Statement (at [14]-[15]) requires the court to consider the adequacy of the explanatory statement, the court's function is not to approve the text of an explanatory statement. The court may, however, decline to convene the scheme meeting if it detects, or its attention is drawn to, manifest deficiencies in the document: see *Indah Kiat International Finance Co BV* [2016] BCC 418 at [42] *per* Snowden J.

58. Mr Smith confirmed to me that there was nothing to which he needed to draw my attention in the Explanatory Statement; nor (albeit on a superficial reading) did I detect any manifest deficiency.

59. I am content with the manner and means of transmitting the Explanatory Statement provided for in the Convening Order.

(E) *Is any jurisdictional road-block apparent?*

60. I have noted at the beginning of this judgment the one unusual feature of the Scheme: that its proponent, the Company, is incorporated in Germany, is based and operates there, and has no office or operations or public 'face' in this jurisdiction.

61. The jurisdiction of the English Court to approve a Scheme has been held to be broad, and to apply to an unregistered company, including a foreign body corporate, if "liable to be wound up" under the Companies Act: and see especially *In re Drax Holdings Ltd* [2004] 1 WLR 1049. It is not necessary for the Company to have assets in this jurisdiction; and Lawrence Collins J also clarified in *Re Drax* that it is not a precondition of the exercise of the Scheme jurisdiction that the English Court would consider that it had a legitimate interest sufficient to justify winding up the relevant company here in the event of its insolvency. Thus, only a 'sufficient connection' must be demonstrated; and the two further core requirements to be fulfilled where what is sought is a winding up of a foreign company (being (a) that there is a reasonable possibility, if a winding up order is made, of benefit to those applying for the winding-up order and (b) that one or more persons interested in the distribution of the assets of the company must be persons over whom the court can exercise jurisdiction) need not be satisfied in order to trigger the Scheme jurisdiction.

62. However, the jurisdiction is not, of course, unlimited; and it is important that it should not be exercised in a manner which might be considered contrary to international comity. The *Apcoa* case is, I think, often regarded as the high-water mark of the exercise of the Scheme jurisdiction: but in that case, the Apcoa company concerned had a substantial business here. The question, which is of some interest and may have to be considered at greater length at the hearing to sanction the Scheme, is whether sanction of this Scheme would extend the jurisdiction beyond its proper bounds, given that the Company as such has no presence in this jurisdiction, and its only connection is by dint of its borrowing arrangements.

63. Mr Smith submits that those arrangements, all now governed by English law, do indeed provide the sufficient connection necessary. English law has always governed the SFA.

The Notes were originally governed by New York law; but pursuant to a provision in the constituting Deed that has been changed to English law. The Company has instructed an expert who has opined affirmatively as to the validity of this change for the purpose of New York law. I have previously considered the acceptability of such a change as the basis for establishing a sufficient connection in *Re Algeco Scotsman PIK SA* [2018] BCC 82, [21]-[22] and [49]-[58], applying *Re Apcoa Parking Holdings GmbH* [2015] BCC 142 [AB/5] where I accepted that a change in jurisdiction clause for the purpose of opening the gateway to the English scheme jurisdiction was appropriate.

64. In *Apcoa*, I noted certain cases in which a change of governing law might be thought objectionable at [251]:

> '*[I]t seems to me that the onus placed on the court in exercising its jurisdiction to make an order which will be given recognition elsewhere may well require it to be especially wary if, for example, the new choice is of a law which appears entirely alien to the parties' previous arrangements and/or with which the parties had no previous connection; or if the change in law has no discernible rationale or purpose other than to advantage those in favour at the expense of the dissentients; or even more generally, where in its discretion the court considers that, in the places in which the parties are, the extent of the alteration of rights between the parties for which sanction is sought would be considered a "step too far".*'

65. In this case, there does not appear to be any such objectionable feature or circumstance. Mr Smith submits that the Scheme is beneficial relevant to the relevant alternative, confers no special advantage on one set of Scheme Creditors at the expense of the other and is changed to ensure all debt is governed by English law, thus simplifying the route to effective recognition of the Scheme without the added cost of a parallel StaRUG and Chapter 15 recognition application.

66. Mr Smith submits in the round on this issue that the focus in the cases is on the contractual arrangements sought to be modified, and the fact that these (and the Intercreditor Agreement) are all now governed by English law provides the 'sufficient connection.' He added to this the *Re Gibbs* principle, that under English law contracts governed by English law can only validly be altered in accordance with English law, including in a process such as this or insolvency; and he submitted that it is, therefore, not necessary to establish any corporate presence, recognition or other affinity with this jurisdiction.

67. This is not the proper stage of the process to decide this definitively: as I say, it may have to be revisited. For the present, however, it suffices to say that it is not apparent to me, adopting (as it were) the spectacles of English law, that the Scheme is bound to fail on this ground.

68. A more general point, but one having the same source in the Company's COMI and connections not being in this jurisdiction is whether a foreign court would give effect to the Scheme if sanctioned by this Court. If its effectiveness would be substantially negated for want of such recognition, that itself would be a potential roadblock: for it is well established that the court will be astute not to act in vain may be engaged where the failure to satisfy conditions means that a scheme would have no effect at all: see *Re Smile Telecoms Holdings Limited* [2021] EWHC 685 (Ch) at [52]-[53]. In a sense this requires me to adopt the lens of any foreign court within whose jurisdiction the Scheme may need to be given recognition and effect.

69. In *Re Smile Telecoms Holdings Limited* [2021] EWHC 685 (Ch), Trower J reviewed the relevant authorities on conditions to the effectiveness of a scheme of arrangement and summarised his conclusions at [52]-[57]:

> '52. The first is that the court will always wish to ensure that it does not act in vain…
>
> 54. The second principle is that the court will be unlikely to sanction a scheme if the condition is one which gives a discretion to a third party as to whether or not they will take some step necessary to render the scheme effective. Henderson J made this clear in the passage from *Lombard Medical* that I have already cited. In my view what he said was consistent with sound principle. If the satisfaction of a condition to the effectiveness of the scheme as a whole is left to the ultimate discretion of a third party, it is capable of cutting across the requirements of creditor approval, court sanction (in which the court not any other person is required to exercise a discretion) and registration, which are the three steps for plan effectiveness for which the statute provides.
>
> …
>
> 57. The third important principle of more general application is one of clarity and certainty. Provided that clarity and certainty are present on the face of the scheme or plan and no further decision-making process is required, in other words it is self-executing without the further intervention of an interested third party, there is much less likely to be a problem.'

70. In *Re All Scheme Ltd* [2022] EWHC 1318 (Ch), at [72]-[77], Trower J further held as follows:

> '[72] The second question raised by Mr Isaacs relates to issues of conditionality. In Re Smile Telecoms Holdings Ltd [2021] EWHC 685 (Ch) at [52]ff, having reviewed a number of the authorities, I explained that sufficient certainty is required so that the court will not act in vain. But this principle is normally applicable where failure to satisfy a condition means that the Scheme has no effect at all. It has less relevance where the scheme is effective, but the actual outcome may differ depending on the occurrence of a future event. In that type of case the issue has more to do with whether the scheme creditors have been properly informed as to what may or may not occur than it does with whether the court may have acted in vain.
>
> [73] In any event, the court does not require certainty that any conditions will be satisfied and it is clear that the degree of assurance that the court requires will depend on the circumstances of the case. It seems to me that the point which normally matters is what I expressed as the third principle in Smile Telecoms [2021] EWHC 685 (Ch) at [57]:
>
>> 'The third important principle of more general application is one of clarity and certainty. Provided that clarity and certainty are present on the face of the scheme or plan and no further decision-making process is required, in other words it is self-executing without the further intervention of an interested third party, there is much less likely to be a problem.''

71. I am content to adopt this approach. I agree that in the context of the international recognition of a scheme of arrangement the court does not need to decide whether the scheme of arrangement is certain to be given effect in every relevant jurisdiction. Rather, the question for the court is whether there is a reasonable prospect that the scheme will be recognised internationally so as to bind creditors in relevant jurisdictions and give full

effect to the scheme: see *Re DTEK Energy BV* [2022] 1 BCLC 260 at [27] *per* Sir Alastair Norris. He said:

> '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 Hoffmann 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.'

72. Put another way, the court needs to be satisfied that it would not be acting in vain in sanctioning the scheme of arrangement before it.

73. In the present case:

(1) The Company has instructed Prof Dr Christoph Thole to prepare a report on the prospect of recognition of the Scheme in Germany. Prof Thole has previously provided such opinions in connection with schemes of arrangement and restructuring plans: see e.g. *Re APGS Bondco plc* [2023] EWHC 916 (Ch), at [331]-[332] *per* Leech J. Other cases have also held that a UK scheme of arrangement in respect of English law debt is likely to be recognised and given effect in Germany, even post-Brexit: see, for example, *Re Safari Holding Verwaltungs GmbH* [2022] EWHC 1156 (Ch) at [10] *per* Adam Johnson J. In that case the judge found:

> 'Having dealt with those four core points, since this is a Scheme having an international dimension, I should also deal with the question of its effectiveness overseas, in particular in Germany. In my view, this presents no issue, in effect for the reasons already given in the Convening Judgment at [64]-[69]. The Company has obtained an expert opinion from Dr Stefan Sax, a German law expert and partner in the Clifford Chance law firm. His view, given on the basis that English law governs the obligations sought to be compromised by the Scheme, is that the compromise effected by the Scheme will be regarded as effective in Germany, in the sense that the obligations owed under the Existing Notes will be regarded as extinguished if the Scheme is given effect. I have no reason to doubt that view, which is consistent with international practice generally, and, indeed, consistent with the terms of Rome I Regulation, Article 12(1), which is the relevant choice of law provision applicable to such matters in Germany.'

(2) Although strictly a matter for sanction, the Court can take notice at this stage of past cases in forming the view that 'no roadblock' exists to effective recognition in Germany. Previous decisions on foreign law are admissible evidence of foreign law: Dicey, Morris and Collins, On the Conflict of Laws at 3-004 fn16 and 3-020 fn 109, referring to the Civil Evidence Act 1972 s.4(2).

74. This is not the proper occasion to consider the matter at greater length. For the purpose of this stage of the process, I accept Mr Smith's submission that although it will be required to revisit the above questions at sanction, the Court, at this stage, has sufficient reason to think that there is a realistic basis for the view that the Scheme is likely to be effective in the real-world and that its jurisdiction will not be invoked in vain.

Conclusion

75. In all the circumstances, and for all these reasons, I was content to make the convening order sought. The Order was sealed accordingly.