Neutral Citation Number: [2022] EWHC 781 (Ch)

Case No: CR-2022-000533

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

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

Date: 04/04/2022

Before :

MR JUSTICE ADAM JOHNSON

- -

IN THE MATTER OF SAFARI HOLDING VERWALTUNGS GMBH
AND IN THE MATTER OF PART 26 OF THE COMPANIES ACT 2006

- -

Tom Smith QC and William Willson (instructed by **Latham & Watkins (London) LLP**) for the **Company**

Hearing date: 30 March 2022

- -

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to BAILII and the National Archives. The date and time for hand-down is deemed to be 10am on Monday 4 April 2022

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Mr Justice Adam Johnson :

Introduction

1. On 30 March 2022, I heard an application by Safari Holding Verwaltungs GmbH (the "*Company*") for an Order under s.896 Companies Act 2006 convening a meeting of creditors for the purpose of approving a proposed scheme of arrangement (the "*Scheme*").

2. At the conclusion of the hearing, I indicated that I would make the Order sought but would give reasons separately in writing. These are those reasons.

3. The Company is incorporated in Germany. It operates a gaming arcade business in Germany and the Netherlands. The evidence is that its operations and financial performance have been severely impacted by a combination of two factors, namely (1) the COVID-19 pandemic, and (2) regulatory changes in Germany which have had the effect of curtailing gaming and restricting the operation of arcades.

4. The Company is a wholly-owned direct subsidiary of Safari Beteiligungs GmbH (the "*Parent*"), which is also a German limited liability company.

5. The Parent is wholly owned by Big Five Mid S.A. ("*Big Five*"), a public limited liability company (*société anonyme*) incorporated under the laws of the Grand Duchy of Luxembourg. In turn, the shares in Big Five are held ultimately by four funds referred to as the "*Existing Sponsors*".

6. Together with the Parent and its subsidiaries, the Company is part of a group of companies (the "*Group*") which includes other operating companies such as Löwen Play GmbH and Löwen Play Grundstücks GmbH.

The Company's Indebtedness

7. The Company has a number of different sources of indebtedness, but its principal indebtedness is as issuer of certain notes (the "*Existing Notes*"), being €350 million 5.375% fixed rate senior secured notes due 30 November 2022. The Existing Notes are issued pursuant to an indenture dated 15 December 2017 (the "*Existing Notes Indenture*"). It is this debt which is sought to be compromised by virtue of the Scheme, and the holders of Existing Notes (the "*Existing Noteholders*") are therefore the *Scheme Creditors*.

8. The Existing Notes benefit from English law guarantees (the "*Guarantees"*) entered into by the Parent, the Company, Löwen Play GmbH and Löwen Play Grundstücks GmbH (the "*Obligors*"). They also benefit from security over (a) shares in the Obligors, granted by their relevant holding companies and (b) receivables owed to Big Five by the Parent under a shareholder loan and receivables owed to the Obligors under intercompany loans (the "*Shared Collateral*").

9. Although the Existing Notes Indenture, the Existing Notes and the Guarantees originally provided for New York law and jurisdiction, there has been a recent amendment, the broad effect of which is that:

    i) subject to a point which I will mention below at [58], the governing law has been changed from the law of the State of New York to the law of England and Wales; and

ii) the jurisdiction provisions have changed so as to confer non-exclusive jurisdiction on the Courts of England and Wales.

10. The Company also has the benefit of a credit facility (the "*Revolving Credit Facility*") originally entered into in 2017. On 22 March 2022, the amount outstanding under the Revolving Credit Facility was €40,250,556 (comprising outstanding principal and accrued interest). The Revolving Credit Facility was amended on 26 August 2021 as a result of which its maturity date was extended to 31 October 2022.

11. Pursuant to the terms of an English law intercreditor agreement dated 15 December 2017, the lenders under the Revolving Credit Facility are entitled to receive the proceeds from any enforcement of the Shared Collateral in priority to the holders of the Existing Notes.

12. The Revolving Credit Facility is not directly affected by the Scheme, but is affected indirectly in the sense that one of the purposes of the Scheme is to raise new funds which will allow the Revolving Credit Facility to be repaid.

The Proposed Restructuring

13. The immediate financial pressure on the Company comes about because of the factors I have already mentioned which have impacted its operations and financial performance, together with the fact that the Revolving Credit Facility will terminate on 31 October 2022 and the Existing Notes mature on 30 November 2022.

14. Anticipating this confluence of events, the Company began to take steps during 2021 to effect an overall restructuring of its indebtedness (the "*Restructuring*"), of which the present Scheme forms part. The steps taken by the Company included discussions with an ad hoc committee of the Existing Noteholders (the "*Ad Hoc Committee*"), and on 23 December 2021 the Company entered into a *Lock-Up Agreement* with certain Existing Noteholders (including all the members of the Ad Hoc Committee) to facilitate the implementation of the Restructuring. The Lock-Up Agreement was amended on 26 January 2022. Existing Noteholders executing the Lock-Up Agreement are entitled to a Consent Fee, described further below at [46].

15. As at the present date, the Lock-Up Agreement (and the amendments to it) have been signed or acceded to by Existing Noteholders representing 98.53% of the Existing Notes. It remains open for signature by further Existing Noteholders, and will continue to remain open until the *Restructuring Effective Date* (as defined), which is expected to be after the proposed meeting of Scheme Creditors I am invited to convene.

16. It was as part of this process of engagement with creditors that the governing law and jurisdiction provisions relating to the Existing Notes were amended, in the manner I have described above. The relevant consent solicitation was approved by 99.55% of the Existing Noteholders and the amendments were consequently given effect in February 2022.

17. I should say I am also informed that no Scheme Creditor has objected to the Scheme.

18. I should now briefly describe the Restructuring and the position of the Scheme within it.

19. The aims of the Restructuring include the deleveraging of the Company's balance sheet, the provision of new money facilities to the Group, and the extension of the Group's debt maturities.

20. The Company's evidence is that absent the Restructuring, the Obligors (including the Company) would have no choice but to file for entry into insolvency proceedings under German law. PwC have produced a report assessing the effect of any such insolvency process (referred to as the "*Counterfactual Scenario*"), which they estimate would lead to a recovery for the Scheme Creditors of between 48.5% (low case) to 63.7% (high case).

21. In very broad terms what is intended is that: (1) the Existing Notes will be cancelled and all the Existing Noteholders will receive instead two replacement sets of Notes, on different terms and with different maturity dates – this will ease the immediate pressure; (2) Existing Noteholders will be given the option of subscribing for an entirely fresh set of Notes – this will raise new money which will assist in allowing the Revolving Credit Facility to be paid off; and (3) Existing Noteholders will also acquire a majority (95%) shareholding in the Parent (and therefore in the Company), by means of a new shareholding structure.

22. To amplify that description a little, the Restructuring involves the following broad steps.

23. To begin with, the shares in the Parent will be sold to a new special purpose vehicle incorporated in Germany ("*New AcquiCo*"), which is ultimately owned by a special purpose holding vehicle incorporated in Luxembourg ("*New HoldCo*").

24. As to the treatment of the Existing Notes, the following is proposed:

    i) The Existing Notes will be cancelled in full and the claims of the Existing Noteholders against the Obligors and all related liabilities, including the Guarantees and the Shared Collateral, insofar as it relates to the Existing Notes, will be released in exchange for the issuance of €220 million (plus the total amount of any accrued and unpaid interest on the Existing Notes) of 7.75% senior secured notes due 15 December 2025 to be issued by the Company to the Existing Noteholders on a *pro rata* basis relative to the principal amount of Existing Notes held by the Existing Noteholders as at the Voting Record Time (the "*Reinstated SSNs*"). The Reinstated SSNs allow the Company, subject to certain conditions (including liquidity) to elect, in respect of the 15 June 2022, 15 December 2022 and 15 June 2023 interest payment dates to pay a combination of 4% cash interest and 4% in-kind interest instead of 7.75% cash interest.

    ii) Some €130 million of 12.5% limited recourse Payment in Kind ("*PIK*") notes due 30 September 2026 will be issued by a wholly owned subsidiary of New HoldCo incorporated in Luxembourg ("*New MidCo*") on a *pro rata* basis relative to the principal amount of Existing Notes among the Existing Noteholders (the "*New MidCo PIK Notes*") on terms including that:

        a) Interest will be payable semi-annually in arrears at a rate of 0.5% in cash and 12% in kind.

b) The New MicCo PIK Notes will be structurally subordinated to the Reinstated SSNs and New SSNs and will not benefit from guarantees or other credit support from any subsidiaries of New MidCo.

iii) The Existing Noteholders will be entitled to participate, on a *pro rata* basis relative to the principal amount of Existing Notes held by them, in €30 million 7.75% new senior secured notes due 15 December 2025 to be issued by the Company (the "*New SSNs*"), in addition to and pursuant to the same indenture governing the Reinstated SSNs, on terms including that:

a) The New SSNs will form a single class and be fully fungible with the Reinstated SSNs (including for US federal income tax purposes).

b) The New SSNs will include a 4% original issue discount from face value.

c) The issuance of the New SSNs has been backstopped by members of the Ad Hoc Committee (the "*Backstop Providers*").

25. I should mention that in return for their (effectively) underwriting the issue of the New SSNs, the Backstop Providers will be paid a backstop fee (the "*Backstop Fee*"). This is payable (broadly) upon issuance of the New SSNs in an aggregate amount equal to 4% of the total principal amount of the New SSNs. From the Company's point of view, the evidence is that the backstop arrangement is necessary so that it has the certainty of receiving the new funding which is essential for its ability to carry on operating.

26. The overall position as regards the Existing Notes, if the Scheme is implemented, may thus be represented as follows:

Debt to be compromised (As of 22 March 2022)		**Scheme Securities**	
Existing Notes	€355,068,924	Reinstated SSNs	€220,000,000 (plus an amount equal to the total of any accrued and unpaid interest on the Existing Notes as at the Restructuring Effective Date)
		New SSNs	€30,000,000
		New MidCo PIK Notes	€130,000,000
Total	€355,068,924	**Total**	€380,000,000 (plus an amount equal to the total of any accrued and unpaid interest on the Existing

			Notes as at the Restructuring Effective Date)

27. The effect is that the Reinstated SSNs and New MidCo PIK Notes, together totalling €350 million plus an amount equal to the total amount of any accrued and unpaid interest on the Existing Notes as at the Restructuring Effective Date, will equal the amount owing to the Scheme Creditors under the Existing Notes. In addition, Existing Noteholders are given the option of subscribing for New SSNs on the terms summarised above, if they wish to.

28. As to the proposed shareholding structure:

    i) The Existing Noteholders will be given equity interests in New HoldCo. They will be entitled to elect to take either of class A voting Shares in New HoldCo ("*Class A Shares*") or class B non-voting Shares ("*Class B Shares*"). The Class A and Class B Shares together are intended to have in aggregate a portion of New HoldCo's Share capital equivalent to 95% of the economics of New HoldCo. Holders of Class A Shares will also be required to hold Shares in the General Partner of New HoldCo ("*New HoldCo GP*").

    ii) The remainder of the equity interests in New HoldCo will be allocated to the Existing Sponsors (referred to above at [5]), who will receive a combination of Class C non-voting shares in New HoldCo ("*Class C Shares*") and preferred shares.

29. Thus, the overall intention, as will be apparent, is to seek to stabilise the Group and to continue to permit it to trade, with a view to producing a better overall outcome for its creditors. Mr Schwenkedel, a Managing Director of the Company, has said in his written evidence to the Court that although no assurances can be given as to future events, the hope is that the Company should in due course be able to discharge its liabilities under the Reinstated SSNs, the New MidCo PIK Notes and the New SSNs (together, "*the Scheme Securities*") in full.

30. Formally as to the Scheme itself, the substance of it is a series of authorisations to be given by the Scheme Creditors to empower an agent or attorney to execute on their behalf such documents as are necessary in order to give effect to the structure described above. The use of a Scheme for such a purpose is well established: see Re ColourOz Investment 2 LLC [2020] BCC 926 (per Snowden J, at [74]-[75]), and Re MAB Leasing Ltd [2021] EWHC 152 (Ch) (per Zacaroli J, at [11]).

Issues to be Addressed

31. Against that background, I can turn to the issues to be addressed at this stage.

Notice of hearing

32. The Practice Statement states that a *Practice Statement Letter* should be distributed to those affected by the proposed Scheme:

> *"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 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".*

33. In the present case, the Company sent the Practice Statement Letter to Lucid Issuer Services Limited (the "*Information Agent*") to be made available to all Scheme Creditors on the Scheme Website on 7 February 2022 (some 7.5 weeks prior to the convening hearing). Other announcements were made at the same time. The Practice Statement Letter notified the Scheme Creditors formally of the Restructuring, the Scheme, its background and the proposed date of the hearing. A supplemental Practice Statement Letter notifying certain changes to the proposed timeline for the Restructuring (including as to the date of the convening hearing) was sent to the Information Agent on 7 March. That is now over 21 days ago.

34. In Re Swissport Fuelling Ltd [2020] EWHC 1499 (Ch), at [24], Miles J observed that "*it is customary to provide 14-21 days' notice of the convening hearing in cases of this type*". In the present case, although there are some complexities and Existing Noteholders will understandably have required time to take advice and reflect carefully on their respective positions, I am satisfied that the Practice Statement Letter was made available in a timely manner and that adequate notice was accordingly given of the convening hearing.

Class Composition

35. The test is well known. The essential question is whether the rights of the creditors are so dissimilar as to make it impossible for them to consult together with a view to their common interest: Re Hawk Insurance [2001] 2 BCLC 480 at [26]. In the same case, the Court of Appeal amplified the point as follows (at [30]):

> *"In each case [the] answer to the questions 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."*

36. The Company's position is that there is only one class of Scheme Creditor, and that being so, there is a need only for one Scheme meeting.

37. For my own part, and looking broadly at the rights of the Scheme Creditors under the Existing Notes and their intended rights under the Scheme, I am satisfied (as a starting point at any rate) that that is correct, and that there are no overall differences which would serve to fracture the single class:

    i) The Scheme Creditors have identical *existing* rights against the Company since each Scheme Creditor who is an existing Noteholder holds its portion of the Existing Notes issued on identical terms pursuant to the Existing Notes Indenture (and the claims of the Scheme Creditors rank *pari passu* as between themselves and would have the same *pari passu* recovery in a liquidation of the Company or any of the Guarantors).

    ii) If the Scheme is approved and becomes effective in accordance with its terms, the existing rights of each Scheme Creditor will be affected in the same way, since all

> the Scheme Creditors will receive identical rights under the Reinstated SSNs, the New MidCo PIK Notes, the New Class A and Class B Shares and, to the extent that the Scheme Creditors elect to participate in the New SSNs, the New SSNs. It is true that the rights attaching to the Class A and Class B Shares are different, but that does not fracture the class because the Scheme Creditors will have an equal and unencumbered right to choose between them.

38. That being the position on the face of it, I must then consider four other specific points which the Company has drawn attention to, which have a possible bearing on class composition.

39. *Backstop Fee*: I have mentioned this above. It is a fee payable to certain Existing Noteholders, also members of the Ad Hoc Committee, who have agreed (effectively) to underwrite the issue of the New SSNs. It is payable under a document referred to as the *Backstop Letter*. The Backstop Fee is equivalent to 4% of the total principal amount of the New SSNs.

40. The existence of the Backstop Fee will mean in practice that certain Existing Noteholders, in assessing the Scheme, will be conscious that if it is approved, it will confer on them certain entitlements (i.e., the right to share in the Backstop Fee) that will not be available to others. Mr Smith QC was realistic enough to accept that the Backstop Fee had to be regarded as part of the Scheme, and not as some discrete arrangement separate from it.

41. I am not persuaded, however, that the existence of the Backstop Fee has the effect of fracturing the class.

42. The critical question is whether it results in the rights of the Scheme Creditors being so dissimilar as to make it impossible for them to consult together with a view to their common interest. I think not, essentially for two reasons.

43. First, I accept the proposition that, in the eyes of the relevant Existing Noteholders, the Backstop Fee is likely to be characterised not as a benefit or bounty accruing to them as part of the Scheme, but rather as a payment for new services rendered on commercial terms. Falk J accepted a similar submission in Re Codere Finance 2 (UK) Limited [2020] EWHC 2441 (Ch), at [78].

44. Second, I am not persuaded that the amount of the Backstop Fee is such as to make it material. As a matter of first impression, 4% may sound material; but to put it in perspective, the Backstop Fee is only 4% of the value of the New SSNs. That is only part of the overall Scheme consideration, as explained above. Expressed in absolute terms, 4% of the principal amount of the New SSNs is €1.2 million. As Mr Smith QC pointed out, that corresponds to approximately 0.3% of the total amount of Scheme consideration.

45. Taking these points together, it seems to me that the Backstop Fee is not sufficiently material to fracture the class. I agree with Mr Smith QC's submission that it is unlikely that a Scheme Creditor who considered the substantive aspects of the Scheme to be against its interests would be persuaded by payment of the Backstop Fee to vote in favour of the Scheme. I therefore do not consider that the availability of the Backstop Fee to some Scheme Creditors will mean that they are unable to consult together with other Scheme Creditors with a view to their common interest.

46. *Consent Fees*: I have mentioned this above (see at [14]). The Consent Fee is an amount equal to 0.25% of the principal amount of the relevant Noteholder's position in the Reinstated SSNs, payable pursuant to the terms of the Lock-Up Agreement.

47. I am satisfied that payment of the Consent Fee to those who have executed the Lock-Up Agreement does not fracture the class.

48. For one thing, the Consent Fee was equally well available to all Scheme Creditors, who were all given an identical right to accede to the Lock-Up Agreement, and indeed Scheme Creditors remain at liberty to accede to the Lock-Up Agreement at any point prior to the Restructuring Effective Date. It has been held in a number of cases that where each relevant creditor has a right to obtain the fee (however it is described), then there is no difference in rights and no fracturing of the class: Re Hema UK I Limited [2020] EWHC 2219 (Ch), per Falk J at [37]; Re Codere Finance 2 (UK) Limited [2020] EWHC 2441 (Ch), per Falk J at [105]; Re KCA Deutag UK Finance plc [2020] EWHC 2779 (Ch), per Trower J.

49. Even if that is wrong, it has also been said that where a consent fee would be unlikely to exert a material influence on the creditor's voting decision (having regard to the value of the other rights conferred by the scheme), this provides a further reason for concluding that the fees does not fracture the class: Re Lecta Paper UK Ltd [2019] EWHC 3615 (Ch), at [17]-[21], per Zacaroli J; Re ColourOz Invesment 2 LLC [2020] BCC 296, [95]-[111] per Snowden J; Re Port Finance Investment Ltd [2021] EWHC 378 (Ch), per Snowden J at [84]-[86]. I consider that is the position here, having regard to the amount of the Consent Fee. The decision here for Scheme Creditors is between (1) supporting the Scheme in the hope of achieving full recovery under the Scheme Securities, and (2) not supporting the Scheme and facing the prospect (on the basis of PwC's assessment) of a 40-60% recovery only. Given the scale of the difference between the options, I am not persuaded that the position of those Scheme Creditors standing to obtain an additional 0.25% by way of Consent Fee is so different as to make it impossible for them to consult together with all other Scheme Creditors in their common interest.

50. *Advisers' Fees*: The Company has agreed to pay all costs, charges and expenses incurred by the advisers to the Ad Hoc Committee. I do not consider that such arrangements fracture the class. The fees are payable in each case directly to the advisers under distinct agreements. Such arrangements do not to my mind confer any material net benefit or bounty on the members of the Ad Hoc Group. They mean that such members are not out of pocket, but at the same time, they are not materially better off in a manner which means it is impossible for them to consult together with the other Scheme Creditors about the Scheme, in their common interest. That conclusion is consistent with the position reached in a number of earlier decisions: Re Codere Finance 2 (UK) Limited [2020] EWHC 2441 (Ch), per Falk J, at [68]-[69]; Re Port Finance Investment Ltd [2021] EWHC 378 (Ch), per Snowden J at [95]-[97]. I note that the fee arrangements with one adviser to the Ad Hoc Committee, namely PJT Partners (Germany) GmbH, include a success fee element; but that aspect is transparent and is known to all parties and so does not alter the analysis (see Re Port Finance Investment Ltd at [100]-[107]).

51. *Director Appointment Rights:* Finally, as mentioned above at [28(i)] any holders of new Class A Shares will be required to hold shares in New HoldCo GP in the same proportion as they hold Class A Shares in New HoldCo. Additionally, any shareholder holding more than 15% of the shares in the New HoldCo GP will have the right to appoint one director to New Holdco GP on an ongoing basis.

52. I do not consider that this has the effect of fracturing the class. Even if the right is properly to be regarded as one conferred by the Scheme, I am not persuaded it is a material factor in the present context. It is a right only to appoint a single director to a Board comprising a maximum of 22 directors. No power of control is conferred, only an entitlement to exert influence by having a seat at the table. That being so, the benefits associated with the right are to my mind too intangible to be material, meaning that a Scheme Creditor who considered the substantive aspects of the Scheme to be otherwise against its interests would be very unlikely to be swayed in favour of supporting it because of the existence of the appointment right alone.

Jurisdiction

53. The scheme jurisdiction is only available if the Scheme is a compromise or arrangement between a company and its creditors or any class of them: section 895(1)(a) of the 2006 Act. For these purposes, a "*company*" is any company liable to be wound up under the Insolvency Act 1986: section 895(2)(b) of the 2006 Act. That includes a foreign company, because a foreign company is liable to be wound up as an unregistered company under Part V of the 1986 Act.

54. Aside from the question of jurisdiction under the statute, it has also been recognised that there must be a limitation on the proper exercise of the Court's power in cases involving companies registered overseas. Thus, it is well established that the Court will not exercise its power to sanction a scheme of arrangement unless there is a "*sufficient connection*" to England and Wales: see Re Drax Holdings Ltd [2005] 1 WLR 1049 (Ch), at [29], per Lawrence Collins J (as he then was).

55. The recent approach has been to treat these questions as matters relevant to the Court's discretion at the sanction hearing, rather than as threshold issues to be determined at the convening hearing. However, it is conventional to seek to identify any obvious potential roadblocks to the Scheme being sanctioned in due course.

56. To begin with, as to the statutory language, I am satisfied that the Company is a foreign company which is liable to be wound up as an unregistered company under Part V of the 1986 Act and is therefore a "*company*" for the purposes of sections 895(1)(a) and 895(2)(b) of the 2006 Act. Further, the Scheme obviously contains the requisite elements of "*give and take*" to constitute a compromise for the purposes of the 2006 Act.

57. Turning then to the question of *sufficient connection*, two matters are relied on. The first is the recently amended choice of law provision mentioned above at [9(i)], and the second is the recently amended jurisdiction provision also mentioned above at [9(ii)]. In Re Vietnam Shipbuilding Industry Group [2014] BCC 433 David Richards J considered that a choice of English law gave rise to a sufficient connection with England and Wales, although "*for good measure*" that conclusion was bolstered by the existence of an English jurisdiction clause (see at [9]). The same result is said to follow here.

58. At this point I must say something more about the question of governing law. The relevant language is in Section 14.08 of the Third Supplemental Indenture, and is somewhat unusual. It provides as follows:

> *"(a) SUBJECT TO SECTION 14.08(b), THIS TRUST DEED, THE NOTES AND THE GUARANTEES AND ANY DISPUTE,*

> *CLAIM OR PROCEEDING (INCLUDING ANY NON-CONTRACTUAL DISPUTE, CLAIM OR PROCEEDING ARISING OUT OF OR IN CONNECTION WITH THEM OR THEIR SUBJECT MATTER OR FORMATION) ARE GOVERNED BY, AND SHALL BE CONSTRUED IN ACCORDANCE WITH, ENGLISH LAW.*
>
> *(c) Without prejudice to Section 14.08(a), if, as a matter of contractual interpretation, English law would interpret any of Section 3.11, Section 4.01, Section 4.12, Section 4.16, Section 6.08 and Section 11.01 of the Trust Deed and Clause 1 of the Notes in a manner that is less favourable to Holders than interpretation of the same Section or Clause (as applicable) in accordance with the laws of the State of New York, then the parties to this Trust Deed intend that interpretation in accordance with the laws of the State of new York should apply (without prejudice to the fact that this Trust Deed is governed by English law). For the avoidance of doubt, nothing in this Section 14.08(b) shall preclude any amendment or variation of this Trust Deed which is permitted in accordance with English law."*

59. As to the specific provisions falling within the proviso at 14.08 (b) (the "*Specific Provisions*"), in summary they are concerned with the following matters:

    i) *Trust Deed*: Section 3.11 deals with redemption at maturity; Section 4.01 deals with payment of the Notes; Section 4.12 deals with change of control; Section 4.16 concerns withholding taxes; Section 6.08 concerns the rights of Existing Noteholders to receive payment; Section 11.01 concerns the Note Guarantee.

    ii) *Notes*: Clause 1 of the Notes concerns the payment of interest on the Notes.

60. The purpose of Section 14.08 is clear. The Existing Noteholders, who were invited to agree to a change to English law, wished to ensure that by doing so they would not be any worse off as regards the interpretation of the Specific Provisions. The operation of Section 4.08 may be thought to give rise to some ambiguity, however, because it creates some uncertainty as to which law may govern contested issues of construction arising in relation to the clauses in question.

61. I was also initially concerned that the uncertainty might create an issue in the context of the present application. That is because, if a choice of law is "*floating*", it may in fact be no real choice of law at all and therefore ineffective: see *Dicey, Morris & Collins*, The Conflict of Laws (15th Edn.), at 32-054, and the cases there referred to, including in particular The Iran Vojdan [1984] 2 Lloyd's Rep. 380. That is important in this case not only because the choice of English law is relied on as establishing a sufficient connection with the jurisdiction, but also because a critical part of the analysis at the sanction stage will be the effectiveness of the Scheme abroad, and that relies on English law operating to bring about a discharge of the obligations owed under the Existing Notes (see further below).

62. I am persuaded, however, that no present problem arises that should inhibit the making of the convening Order the Company seeks. That is for at least two reasons:

i) It seems to me that, as a matter of construction, the effect of Section 14.08 is to operate as a present choice of English law, subject to the possibility that the governing law may change (at least in relation to one or other of the Specific Provisions) at some future stage, if the contingency contemplated by Section 14.08(b) arises. Mr Smith QC agreed that that was the intended effect of Section 14.08. If that is correct, then no present issue arises, because English law choice of law rules have no difficulty with the idea that the parties may elect to change the governing law of their contract: see Dicey at 32-055, and the Rome I Regulation, Art. 3(2). (The Rome I Regulation continues to have effect by virtue of the Contracts (Applicable Law) Act 1980, section 4B.)

ii) In any event, even if that is wrong and there is no effective *express* choice of English law, that would only be so in relation to the Specific Provisions. There would still, it seems to me, be a valid express choice of English law in relation to all the other provisions of the Trust Deed and the Notes. That being so, it also seems to me that there would almost certainly be an *implied* choice of the same law in relation to the Specific Provisions, by virtue of their being part of a wider set of arrangements which are expressly governed by English law (see Rome I Regulation, Art. 3(1)).

63. In light of that conclusion, I am satisfied that there is a sufficient connection with this jurisdiction, given the choice of English law to govern the key transaction documents. For good measure (following the example of David Richards J in Re Vietnam Shipbuilding), I will say that that conclusion is reinforced by the existence of the jurisdiction clause I have referred to, which confers a form of non-exclusive jurisdiction on the Courts of England and Wales.

International Effectiveness

64. This is again principally a matter for the sanction hearing, but it is conventional to make some preliminary comments about it at this stage and to identify any significant road-blocks.

65. The point is that the Court will generally not make any order which has no substantial effect and, before the Court will sanction a scheme, it will need to be satisfied that the scheme will achieve its purpose: Sompo Japan Insurance Inc v Transfercom Ltd [2007] EWHC 146 (Ch), Re Rodenstock GmbH at [73]-[77], Re Magyar Telecom BV [2014] BCC 448 at [16].

66. In the present case, a particular issue is whether the Scheme would be recognised and given effect in Germany. As to this, the Company has obtained an expert opinion on German law from Dr Stefan Sax, affirming that it would be.

67. In giving his Opinion, Dr Sax assumes that the recent change from New York law to English law which I have referred to above is effective. In light of the observations set out at [62] above, I am satisfied that that is a fair and appropriate assumption, and that Dr Sax is entitled to rely on it in reaching one of his main conclusions, which is that an English law Scheme will be regarded in Germany as effective in extinguishing the obligations owed under the Existing Notes.

68. I am not required at this stage to reach any final conclusion on the question of the expert evidence, so long as "*its existence provides sufficient support for the conclusion that the Scheme is likely, or at least will have a real prospect of having substantial effect*" (Re

Codere Finance 2 (UK) Ltd [2020] EWHC 2683 (Ch), per Falk J, at [34]; see also Re KCA Deutag UK Finance plc [2020] EWHC 2977 (Ch), per Snowden J).

69. As presently advised, I see no reason to doubt Dr Sax's conclusion, which is consistent with the principle that a variation or discharge of contractual rights in accordance with their governing law will be given effect under most (if not all) systems of private international law: see per David Richards J in Re Magyar Telecom BV [2014] BCC 448 at [15], and Rome Regulation Art. 12(1), which Dr Sax relies on as reflecting the relevant choice of law rules in Germany, and which stipulates expressly that the governing law of a contract governs the ways of extinguishing any obligations owed under it.

Overall Conclusion and Directions

70. For all those reasons, my conclusion was that it was appropriate to make the convening Order sought and to give directions for the proposed meeting of Scheme Creditors. That meeting will be held remotely via Zoom on 28 April 2022 (as to which, see the guidance of Trower J in Re Castle Trust Direct plc [2020] EWHC 969 (Ch), at [42]-[43]).