KIRKLAND & ELLIS

Adler: English Court Approves Contested Restructuring Plan

Notwithstanding challenge from longer-dated noteholders on valuation, fairness and other grounds

24 APRIL 2023

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At a Glance

The English Court handed down its 164-page judgment approving Adler's restructuring plan on Friday, 21 April, binding a dissenting class of 2029 noteholders. The plan was opposed by an ad hoc committee of 2029 noteholders (the **2029 AHG**) over the course of a three-day sanction hearing, in the **first fully-contested valuation challenge in an English restructuring plan**.

The 2029 AHG contended that creditors' treatment under the plan **diverged from the "*pari passu*" treatment** which creditors would receive in the liquidation alternative to the plan, in which all plan creditors would have been entitled to a *pro rata* share of recoveries.

- **Valuation battle:** The case involved a major battle as to the future value of the Group's property assets.
  - The Court must be satisfied that no member of a dissenting class is any worse off under the plan than in the relevant factual alternative, which requires valuation of stakeholders' likely recoveries in both scenarios.
  - Ultimately, the Court preferred the evidence of the Group's property and financial advisors. Its detailed consideration of the methodology applied by both sets of advisors will be critical reading for parties instructing valuation experts and financial advisors preparing comparator reports.
  - The Court made specific findings as to the value of the Group's property assets and the appropriate insolvency discount. It found (on a balance of probabilities) that the 2029 Noteholders would be repaid in full under the plan, although it accepted that this was "ambitious" given "future forecasts of property prices are inherently uncertain". Even if the Group did not repay creditors in full, creditors would still be better off under the plan than in the relevant alternative.
  - We anticipate further valuation disputes in future contested restructuring plan cases, involving cross-examination of competing valuation experts under a compressed timetable if necessary. It is clear that compelling valuation evidence will be required in order to mount any such challenge.
- ***Pari passu* rule:** The Court ultimately held that:
  - the preservation of staggered maturity dates did **not** involve a departure from the *pari passu* rule, based on the Court's finding that it was likely that all plan creditors would be repaid in full;
  - instead, the preservation of staggered maturity dates reflected the commercial risks which the 2029 Noteholders assumed when they purchased them – though the Court found no compelling reason had been advanced to preserve the staggered maturity dates rather than harmonise them;
  - it is not the Court's role to consider whether the plan was the "best plan" or the only fair arrangement available. Although the plan was the only one to command the support of the Group and its creditors, this was a "weak reason" to sanction it; and
  - the best judge of whether creditors were better off under the plan is the plan creditors themselves, who had voted overwhelmingly in favour of the plan (*see quote, top right*).
- **Retention of 77.5% equity by existing shareholders:** The Court found this the most challenging aspect of the plan, given shareholders had provided no additional funding. However, the appropriate question was whether this was so unfair that the Court should refuse to sanction the plan, which (on the evidence) would have led to insolvency proceedings in which all creditors would have been worse off (*see quote, right*). Ultimately, it was not so unfair.
- The case involved disputes as to **major issues of German law**, including:
  - **Issuer Substitution:** the validity of the substitution of the original issuer of the German law-governed Notes (for an English newco, which proposed the plan); and
  - **Partial Acceleration:** the validity of a purported partial acceleration of the 2029 notes.

  The Court held that neither of these ongoing disputes precluded it from sanctioning the plan.
- **Ongoing Dispute:** The 2029 AHG is seeking **permission to appeal**, in another first for restructuring plans; the permission hearing will be heard on 25 April. Separately, litigation is ongoing before the Frankfurt court as to the validity of the issuer substitution and certain 2029 noteholders have purported to accelerate their notes, the effect of which is disputed. Accordingly, the status of the restructuring remains uncertain.
- **See Key Takeaways on next page.**

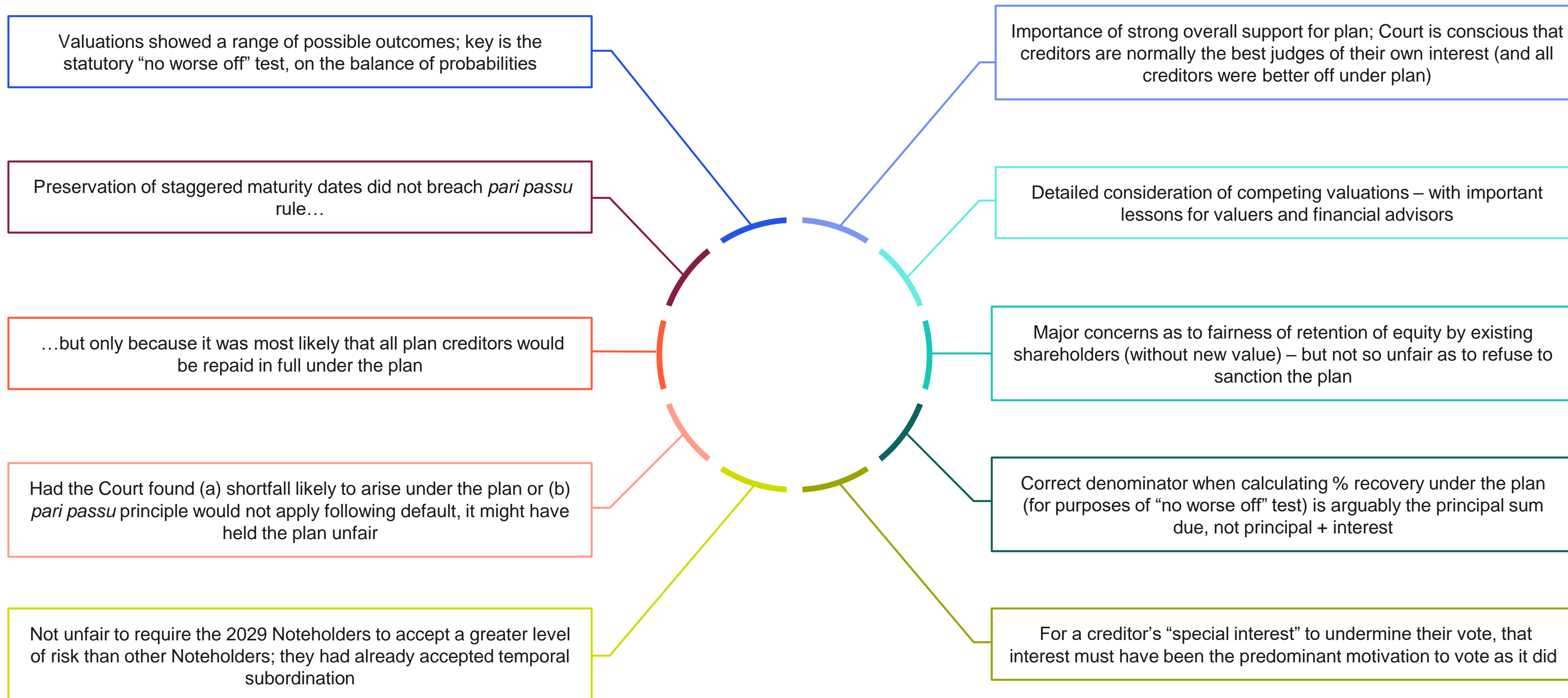
"**If the plan works… everyone is better off** and the **best judges of this are the plan creditors themselves**, who voted by the requisite majority in every class for the plan and by 62% in the dissenting class. Given the balance of risk, the right exercise of discretion is to give the management of the Group the opportunity to implement it."

"I can see **no obvious reason why the shareholders who have provided no support for the plan and no additional funding should get the upside** if the plan succeeds. ... [However] I am not satisfied that this is so unfair that I should refuse to sanction the plan. The possibility (or even likelihood) that the shareholders might receive this windfall [a 77.5% share in a restructuring surplus of €309m] is **not sufficient to justify putting the Group into insolvency proceedings at the expense of all of the plan creditors** who have voted for the plan."

Extracts from sanction judgment, 21 April 2023

The convening judgment (Mann J, 27 February 2023) is here. The sanction judgment (Leech J, 21 April 2023) is here.

Key Takeaways



Background –Adler's Restructuring Plan

- *Business:* development of, and investment in, multi-family residential real estate in Germany
- *Debt:* six series of *pari passu* senior unsecured notes (the **Notes**), in an aggregate amount of €3.2 billion, with maturities ranging from 2024 to 2029; all governed by German law; originally issued by Adler Group S.A. See indicative structure in Annex
- *Plan company:* AGPS Bondco Plc, incorporated in England, which was substituted as the issuer of the Notes pursuant to a contractual substitution procedure under the terms and conditions of the Notes (the **Issuer Substitution**), for the purposes of proposing the plan
  - The 2029 AHG disputed the validity of the Issuer Substitution as a matter of German law
  - A member of the 2029 AHG has issued proceedings in Germany for declaratory relief that the Issuer Substitution is invalid
- *Purpose of the plan:* to amend the Notes (including an extension of the maturity of 2024 Notes) and permit new money funding
- *Financial difficulties:* the Group has been significantly and adversely affected by the German domestic and global economic downturn; it faced a critical liquidity shortage as a result of an impending debt maturity on 27 April 2023[1], with impending cross-defaults
- *Relevant alternative:* formal insolvency of key Group entities by end April 2023

	CREDITOR CLASSES[2]	TREATMENT UNDER PLAN	EST. DIVIDEND IN RELEVANT ALTERNATIVE	APPROVED?
		All plan creditors were offered the option to participate in €937.5m new money (with pro rata share of 22.5% post-issuance equity)[3]		
1	**€400m 2024 Notes**	Maturity extended by c.12 months; granted priority over other series of Notes (but behind new money); no haircut	63% for all classes (*pari passu*) However, the 2029 AHG's advisors produced evidence adopting a lower figure of 56% recovery in the relevant alternative	✓
2	**€400m 2025 Notes**	**No maturity extension or haircut: repaid at par in accordance with original maturity dates (or earlier)** *All Notes amended: (i) to permit the refinancing of existing debt on a secured basis; (ii) to permit the injection of the new money financing; (iii) to vary the coupon on the Notes to provide for an interest payment holiday and uplift; and (iv) to vary the financial reporting covenants*		✓
3	**€700m January 2026 Notes**			✓
4	**€400m November 2026 Notes**			✓
5	**€500m 2027 Notes**			✓
6	**€800m 2029 Notes**	*Group plans to dispose of all development assets by 4Q25 and all yielding assets by 4Q26; all Group entities to be liquidated in 2027*	*62% approved, but requisite 75% consent threshold not met*	X

2029 AHG asserted their recovery could be as low as 10.6% under the plan, given deteriorating real estate markets

Across all 6 classes, the plan was supported by c.84% of those voting

1. The relevant debt – €500m senior unsecured notes issued by Adler Real Estate AG – was unamended by the plan and will be repaid in full out of new money.
2. The plan excluded certain categories of debt, including: senior unsecured notes issued by Adler Real Estate AG, in an aggregate amount of €1.1bn (Kirkland advised the ad hoc committee of these notes); €165m convertible notes; unsecured promissory notes in an aggregate amount of €24.5m; and €261m of secured debt owed by Consus Real Estate AG and its subsidiaries.
3. New money terms: €937.5m secured, super-senior term loans maturing 30 June 2025; PIK interest at 12.5% p.a.; pro rata entitlement to new shares in parent company, Adler Group S.A., representing 22.5% of post-restructuring equity; backstop fee of 3% to Steering Committee who backstopped the new money; early bird fee of 1%; ticking fee of 5% on committed but undrawn commitments; original issue discount fee of 1% (financed via increase in nominal amount of new money).

2029 AHG's Principal Objections

Differential Treatment

- The 2029 AHG characterised the plan as a "liquidation plan", given it provides for the realisation of the Group's assets and the distribution of the proceeds to creditors over time. The plan was proposed as an alternative to formal liquidation in which the noteholders would rank *pari passu* and be entitled to a *pro rata* share of recoveries.
- By contrast, according to the 2029 AHG, the plan sought to substitute a different scheme of liquidation distribution under which the 2029 Notes would not be treated on a *pari passu* basis with the other Notes. Instead:
  - they would be temporally subordinated to all other Notes (with maturity in 2029 i.e. falling to be paid last) – noting that existing differences in maturities in the Notes cease to be relevant in the insolvency alternative to the plan (given all Notes would be effectively accelerated);
  - they would be subordinated to the 2024 Notes (among others), which would be granted prior-ranking security; and
  - they would rank behind €1,465m of debt (increasing to €1,650m over time by the accrual of interest).

"No Worse Off" Test

- It is a statutory condition to the Court's jurisdiction to bind a dissenting class (here, the 2029 Notes) that no member of the dissenting class would be "any worse off" under the plan than they would be in the event of the relevant alternative.
- The 2029 AHG contended they would be better off in a formal liquidation and the Court could not be satisfied that the "no worse off" test was satisfied, given the "Differential Treatment" issues (see left) and as the 2029 AHG submitted that little confidence could be placed on the figures in the company's model.

Court's Discretion

- The 2029 AHG asserted that, even if there was power to impose a cross-class cram-down in this case, the Court should not do so.
- The plan did not comply with the basic rule of *pari passu* distribution amongst unsecured creditors in an insolvency, which is a fundamental principle of insolvency law and a rule of public policy.
- There was no proper justification for this treatment, especially since the Group was not being rescued as a going concern.

Issuer Substitution and Jurisdiction

- The plan company was a very recently incorporated company, purporting to be the issuer of the Notes pursuant to the operation of an issuer substitution clause in each series of Notes.
- The 2029 AHG disputed the validity of the Issuer Substitution on the grounds that the terms and conditions of the Notes constituted a form of standard business terms and conditions and infringed the following German laws:
  - transparency requirements, which would require that the issuer substitution clause state, with clarity, the specific circumstances in which that clause might be exercised; and
  - a requirement not to unreasonably disadvantage the counterparty.
- The Court heard evidence from competing German experts in this regard.
- A member of the 2029 AHG commenced proceedings in Frankfurt for declarations as to the invalidity of the Issuer Substitution, as noted.
- If the Issuer Substitution were invalid, the plan company would not be a debtor in respect of the Notes and therefore the Court would have no jurisdiction to sanction the plan.
- The 2029 AHG also noted that the Adler Group otherwise had no connection with England; the plan company had been incorporated for the sole reason of facilitating the proposed English restructuring plan (with the potential for "cross-class cram-down").

Partial Acceleration / "Blot"

- Certain members of the 2029 AHG had purportedly accelerated €185m of the 2029 Notes. The 2029 AHG asserted this meant there was a "blot" on the plan (i.e. a technical or legal defect, such that the Court should refuse sanction), because the plan proceeded on the incorrect premise that all the 2029 Notes were subject to their scheduled maturity dates.
- The purported acceleration also affected the question of whether the plan could reasonably be expected to have substantial effect (because the relevant noteholders could seek to enforce their accelerated debts even if the plan was sanctioned).

Inadequacy of Explanatory Statement

- The 2029 AHG asserted that the explanatory statement ("**explan**") was inadequate in various respects, principally:
  - the lack of a sensitivity analysis in the comparator report and the failure to update that report to account for material changes in interest rates; and
  - the failure to set out the benefits that a steering committee of supportive noteholders would receive under the plan.

“No Worse Off” Test: the Valuation Battle

THE “NO WORSE OFF” TEST AND THE PARTIES’ POSITIONS

- It is a statutory condition to the Court’s jurisdiction to sanction a plan binding a dissenting class (here, the 2029 Notes) that no member of the dissenting class would be “any worse off” under the plan than they would be in the event of the relevant alternative, as noted.
  - Recoveries in the relevant alternative – formal insolvency proceedings – were estimated to be 63% (by the company’s advisors) or 56% (by the 2029 AHG’s advisors), for all Notes.
- The plan envisages repaying all Notes at par i.e. 100%.[1] The par value figure was based upon a comparator report prepared by the Group’s financial and property advisors, based on estimates as to the future value of German property (using a model to predict future valuations based on historical valuations).
- The 2029 AHG submitted that the “no worse off” test was not satisfied, because:
  - little confidence could be placed on the figures in the comparator report, for various reasons examined via cross-examination of the Group’s financial advisors and substantial critique of their methodology;[2]
  - par value recovery was not credible and certainly not assured;
  - the 2029 Notes would primarily bear the risk of the comparator report being wrong, given their later maturity (temporal subordination);
  - the methodology of the comparator report and the outputs from the model were contradicted by detailed valuation work undertaken by the 2029 AHG’s financial and property advisors which indicated only a 10.6% return for the 2029 Notes (in contrast to the 100% return asserted by the company); and
  - accordingly, the company could not discharge the burden of showing that the 2029 Notes were no worse off under the plan as compared with the liquidation alternative.

THE COURT’S FINDINGS: “NO WORSE OFF” TEST SATISFIED

- **Recovery in the relevant alternative:** The Court found that, if the plan had not been sanctioned, the most likely outcome was that the Group would realise €3.288 billion in total and that the 2029 Noteholders would receive **63%** of their principal (in 2026 and 2028). This was based on the Court’s specific findings that (a) on a balance of probabilities, and in accordance with the valuations of the Group’s property advisors, the gross asset value (**GAV**) of the Group’s yielding assets was €5,277,309,700 as at 30 September 2022 and the GAV of the Group’s development assets (with one exception) was €2,298,100,000 as at 30 June 2022 and (b) the most likely outcome in an insolvency was that the Group would realise those assets subject to insolvency discounts of 25% and 23% respectively (in accordance with the estimates of the Group’s financial advisors).
- **Recovery under the plan:** The Court found, on a balance of probabilities, that the 2029 Noteholders would be repaid **in full**, although it accepted that “future forecasts of property prices are inherently uncertain especially when based on macro-economic data”, “it is perfectly possible for two highly experienced and competent property professionals to reach very different views about the value of property assets” and it would be “ambitious” for the company to repay the 2029 Noteholders in full. It held that – even if the Group failed to achieve the sales prices forecast by its advisors – the company would not miss the relevant alternative by much; the 2029 Noteholders would still be better off than in the relevant alternative. The outcome put forward by the 2029 AHG (of 10.6% recovery under the plan) was the “least likely outcome”.

IMPLICATIONS FOR FUTURE CASES

- The Court devoted 72 pages of its 164-page judgment to consideration of the “no worse off test”. Its detailed consideration of the methodology applied by both sets of advisors will be critical reading for parties instructing valuation experts and financial advisors preparing comparator reports. The Court ultimately preferred the detailed individual property valuations of the Group’s property advisors over the evidence of the 2029 AHG’s property advisors and was not satisfied that the 2029 AHG had adduced compelling evidence contrary to the valuations of the Group’s advisors.
- The “no worse off” test requires the Court to compare the returns on creditors’ claims which, the Court held, requires a comparison between the *actual sums* creditors would receive on each hypothesis, and not their contractual entitlements. Accordingly, the Court held the correct denominator when calculating percentage recovery *under the plan* is the principal sum due, not the principal sum plus interest.
- We expect more valuation disputes in restructuring plan cases in future, with the Court grappling with competing valuations under both the plan and the relevant alternative (including disputes as to appropriate insolvency discount). In particular, we expect more cases involving cross-examination of valuation experts under a compressed court timetable, as in Adler’s case.

1. In accordance with their scheduled maturities (save for the 12-month extension of the 2024 Notes) or potentially early (in the case of the 2027 and 2029 Notes).
2. The 2029 AHG’s main criticisms included: inherent uncertainty of forecasting German property values beyond the near future, given the number of variables; opacity of the financial advisors’ model used to forecast future value; unreliability of the ECB interest rate figures which were a key factor in the market model; lack of sensitivity analysis; susceptibility to error; nature of model as a statistical analysis vs professional judgment by German property expert.

Court's Discretion

The Court retains discretion as to whether to sanction a restructuring plan, even if the statutory conditions are satisfied. Specific factors relevant to the exercise of the Court's discretion include: whether the plan provides for a fair distribution of the benefits of the restructuring; the overall support for the plan; and whether the plan will be recognised in other relevant jurisdictions.

PARI PASSU **PRINCIPLE: 3 CORE POINTS**

The 2029 AHG had contended that the plan involved a fundamental violation of the *pari passu* principle, as noted. The parties debated three core issues in this regard: 1. importance to be attached to the *pari passu* principle itself; 2. whether the Court should sanction a restructuring plan which could have been improved or could have eradicated differential treatment; and 3. whether it was open to the Court to sanction a restructuring plan which involved changing or even reversing the existing priorities between the parties (and what the Court should make of precedents in this regard).

The Court held as follows.

- Given the weight of authority, it accepted that the *pari passu* principle is a **fundamental principle of corporate insolvency law**.
- The Court should take into account the "**horizontal comparator**"[1] and will normally approve a plan if there is equal treatment between all creditors. Equal treatment will normally mean adherence to the *pari passu* principle. However, even if there are differences in the treatment of individual creditors or classes of creditors, the Court may still approve or sanction the plan provided that there is a good reason or a proper basis for departing from the *pari passu* principle and for the differential treatment.
- It is not the Court's role to consider whether the plan was the **best plan** or the only fair arrangement available.
- The company's **plan did not involve a departure from the *pari passu* principle**, because it preserved the existing maturity dates of the Notes (apart from the 2024 Notes). As the Court had found that if the plan was implemented, it was likely that the plan creditors would be paid in full, there was a significant difference between the restructuring plan in this case and other (restructuring plan and CVA) cases in which creditors would not be paid in full.
- The Court might well have been prepared to accept that the plan involved a departure from the *pari passu* principle if it had accepted the 2029 AHG's evidence and found that the most likely outcome was a significant **shortfall** even if the plan was fully implemented; it might also have found that this was unfair and a fundamental objection to the plan. But the Court did not accept that evidence.
- The Court was not satisfied that the plan involved a departure from the *pari passu* principle even if the Group failed to achieve its forecasts. In that scenario, the Court found that the **most likely outcome** would be the acceleration of all Notes, enforcement of the transaction security and **distribution in accordance with the *pari passu* principle** (subject to repayment of the secured parties). Again, if the Court had been satisfied that the *pari passu* principle would not apply if the company were to default, it might well have found that this was unfair. But, again, the Court accepted the company's evidence in relation to this issue.
- The **exercise** in which all of the valuation and financial experts were engaged was "**inherently uncertain**". The Court does not have a "**crystal ball**" and could not be certain that the 2029 Noteholders would be paid in full or even that they would recover on a pari passu basis if the company defaults. Whilst it was satisfied that this was a likely outcome, it remained far from certain.
- The plan involves a **greater risk for the 2029 Noteholders** than it does for the creditors holding earlier-dated notes. It is possible (although, in the Court's judgment, unlikely) that they might be worse off if they have to wait for the plan to be implemented than if the Group was put into an insolvency process now.
- The Court **did not need to be satisfied that the 2029 Noteholders would be paid in full**. It was **not unfair to require the 2029 Noteholders to accept a greater level of risk** than other Noteholders, for the reasons explored on the following page.

1. In which the Court compares the treatment of creditors as between each other and considers whether any differential treatment is justified. This derives from the Court's approach in claims for unfair prejudice arising out of a company voluntary arrangement, in which the Court applies both a horizontal comparator and a vertical comparator (which compares creditors' recovery under the CVA to what they would receive if the CVA were not approved, setting an "irreducible minimum" below which the return in a CVA cannot go). The Court in *Adler* held there was "no real difference" between the Court's application of the horizontal comparator in a CVA and the Court's consideration of the relative treatment of creditors when deciding whether to exercise its discretion to sanction a restructuring plan.

Court’s Discretion (cont.)

9 REASONS IT WAS NOT UNFAIR TO REQUIRE THE 2029 NOTEHOLDERS TO ACCEPT A GREATER LEVEL OF RISK THAN OTHER NOTEHOLDERS

1. The plan **preserves the existing maturity dates** of the Notes (apart from the 2024 Notes). This **reflects the commercial risks which the 2029 Noteholders assumed when they purchased** them. The plan did not involve a significant change to the balance of those risks.
2. It was **most likely that the 2029 Noteholders would be paid in full** but - if the plan’s primary purpose were to fail - it was likely that the maturity dates would be accelerated and that the 2029 Noteholders would **recover more than if the Group goes into insolvency measures**. Equally importantly, it was likely that they would **not be treated differentially** and that the *pari passu* principle would be respected.
3. Even if the Group did not achieve either of these outcomes, the Court was satisfied that the Group would not miss the “relevant alternative” by very much (the **“near miss” point**).
4. It was unrealistic to assert that the 2029 Noteholders would be unable to **exercise their legal rights** under the plan to **accelerate** the 2029 Notes and even less realistic to assume that they would not attempt to do so.
5. A **majority (62%)** of the 2029 Noteholders clearly took the same view. Their **view of their own interests** is a relevant factor to which the Court may (and did) attach weight – especially as a number of 2029 Noteholders did not have holdings in the 2024 Notes (which were granted priority over other series of Notes under the plan).
6. As a matter of law, the **Court does not have to be satisfied that the plan is the best plan available or that it could not be fairer**. The plan involved **detailed and lengthy negotiations** and was ultimately the **only restructuring plan which commanded a significant measure of agreement** between the Group and the plan creditors.
7. Nevertheless, the Court considered this (reason 6.) to be a **weak reason** for sanctioning the plan and the Court did not attribute much weight to it. The Court had **not received a compelling reason why the plan creditors wished to preserve the maturity dates and not to agree to harmonise them** at the outset. “If they had agreed to this, **a great deal [of] time and intellectual effort might have been saved** in demonstrating to the Court why a default would result in a *pari passu* distribution.”
8. Avoidance of a **“debt wall”** was a good reason for preserving the staggered maturity dates. **But this would not by itself justify** the Court sanctioning an arrangement which was otherwise unfair, and the company’s evidence accepted that the plan itself involved a debt wall of sorts in 2025. It was therefore clear that this was **not the most important reason** for preserving the existing maturity dates; the Court gave it limited weight.
9. Ultimately, the Court was persuaded by the company’s final submission: **if the plan works, “everyone is better off and the best judges of this are the plan creditors themselves, who voted by the requisite majority in every class for the plan and by 62% in the dissenting class. Given the balance of risk, the right exercise of discretion is to give the management of the Group the opportunity to implement it”**.

OTHER FINDINGS

- **Retention of 77.5% equity stake by existing shareholders:** this was the point on which the Court had the “**greatest concern about approving** the plan” – it could see “no obvious reason why the shareholders who have provided no support for the plan and no additional funding should get the upside if the plan succeeds”. However, it was not appropriate to decline sanction on this basis, for various reasons, including that the new money providers were those most affected by the retention of equity and it was not suggested that their approach was not commercially rational. “**The possibility (or even likelihood) that the shareholders might receive this windfall [a 77.5% share in a restructuring surplus of €309 million] is not sufficient to justify putting the Group into insolvency proceedings at the expense of all of the plan creditors who have voted for the plan.**”
- **Priority granted to the 2024 Notes:** the appropriate question was **whether this priority meant the plan was so flawed that the Court should not sanction it.** The Court held it was not so flawed for several reasons, including:
  - the existing temporal seniority of the 2024 Noteholders;
  - the fact that there was no imbalance in the steering committee’s holdings across the series of Notes so as to suggest they were motivated by a desire to prefer the interests of the 2024 Noteholders above the interests of other classes; and
  - as this factor did not have any causative effect on the outcome of the plan meetings.
- **Exclusion of other debt:** it was not unfair to exclude certain other debt (namely, convertible notes and promissory notes) from the plan, because:
  - the face value of such debt represented a **small amount** (c.€190 million) of the Group’s overall debt (c.€6 billion);
  - such debt would mature in 2023 therefore had **temporal seniority** (and certain such debt also had **structural seniority**); and
  - these were **good reasons why an honest person could approve** the plan – but even if that were wrong, the Court was satisfied the terms of the plan were still not unfair.
- **Priority granted to new money:** the Court rejected the 2029 AHG’s submissions that the purpose of the new money was to elevate its own debt and extract unreasonable fees from the Group at the expense of other creditors. Instead, the new money served a **genuine purpose** which was of **benefit to plan creditors** – namely, to refinance notes issued by Adler Real Estate (which rank highest and mature first) to enable the Group to wind down and realise its assets in an orderly fashion.

Other Takeaways

ISSUER SUBSTITUTION

- The validity of the Issuer Substitution was disputed as a matter of German law and a member of the 2029 AHG had issued proceedings in Germany for declaratory relief that the Issuer Substitution was invalid, as noted.
- The Court held that:
  - the clause of the Notes which governed issuer substitution was a typical substitution clause and was valid as a matter of German law because it complied with the transparency provision under the German Bond Act (which required it to be possible for an experienced investor in the Notes to determine the circumstances in which a substitution would be permitted);
  - the Issuer Substitution complied with all conditions imposed by the relevant clause; and
  - the transparency requirement under the German Bond Act displaced the more general transparency requirements under the German Civil Code (under the general principle of "*lex specialis*" under German law) – but in any event, compliance with the issuer substitution clause (including the provision of a guarantee by the original issuer) provided the necessary compensation for the substitution of the plan company so as to satisfy requirements under the German Civil Code.
- Accordingly, the Court held that the Issuer Substitution was valid and effective and that the Court had jurisdiction to sanction the plan.

PARTIAL ACCELERATION / NO "BLOT"

- As noted, the 2029 AHG contended that the plan was defective because it did not account for the purported acceleration of €185 million of 2029 Notes and proceeded on the incorrect premise that such Notes would not mature until 2029.
- The company:
  - disputed the validity of the acceleration, adducing German law expert evidence to the effect that restructuring plans did not constitute "insolvency proceedings" *(Insolvenzverfahren)* under the relevant clause in the Notes and therefore the purported acceleration was invalid; and
  - argued that the purported acceleration did not constitute a "blot" (technical or legal defect) in the plan.
- The Court noted that it would have been "extremely reluctant" to decide this point unless it had been absolutely necessary to do so, given (a) it was a German law question and (b) the potential that the German court might later reach the opposite conclusion might undermine the Court's decision to sanction the plan.
- The Court ultimately held it was unnecessary for the Court to determine the validity of the acceleration as it had concluded that the acceleration (if upheld) would not make the plan unlawful or inoperable – although it did express certain reservations in this regard.

ADEQUACY OF EXPLANATORY STATEMENT

The Court held that:

- it was not satisfied that the company's explan failed to include sufficient information to enable the plan creditors to make an informed decision;
- plan creditors who understood the company's very detailed analysis estimating likely returns (under insolvency proceedings and under the plan) "would not have been misled about the balance of risk for them";
- it was not satisfied that it was necessary for the company to include any sensitivity analysis or to update the market model to take into account interest rates;
- it was satisfied that the explan contained sufficient information about the fees which the steering committee would obtain under the plan;
- even if there were serious deficiencies in the explan, the Court was not satisfied that they would have had any effect on the votes cast at the plan meetings; and
- in any event, the terms of an explan are of less relevance to a dissenting class (implicitly: because the dissenting class is bound by virtue of the Court exercising its "cross-class cram-down" powers, instead of by reason of the class's assenting votes).

INTERNATIONAL RECOGNITION

- The Court requires credible evidence that there is at least a reasonable prospect that a plan will be recognised and given effect in other relevant jurisdictions, where important. The Court accepted that this was satisfied by expert evidence as to the likelihood of recognition of the plan in:
  - Germany, where the Group is headquartered and its underlying assets are located – based on s.343 of the German Insolvency Code (although there is no German precedent for this); and
  - Luxembourg, where the parent company is incorporated – based on principles of Luxembourg private international law.
- Both expert reports turned on the characterisation of restructuring plan proceedings as "insolvency proceedings" (in accordance with *gategroup* – see our *Alert*).

SPECIAL INTERESTS

The Court held that:

- "for a special interest to undermine the representative nature of a vote the Court must be satisfied not only that the special interest was adverse to the interests of the class as a whole but also that it was the predominant motivation for the creditor to vote as it did"; and
- "there must be a "strong and direct causative link" between the creditor's special interest and its decision to support the restructuring".

Annex: Indicative Structure