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If at First You Don’t Succeed: English Court Approves Aggregate’s Restructuring Plan at Second Attempt, Following Initial Refusal

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At a Glance

The English Court today approved the amended restructuring plan of a company in the Aggregate group, having refused to sanction its original plan.

The plan originally sought to release €245 million subordinated debt for zero consideration. Following the Court of Appeal's landmark decision in *Adler*, the company modified its plan, offering subordinated creditors a pro rata share of a token payment of €200,000.

The Court held it did not have jurisdiction to sanction the plan at the first sanction hearing. Instead, it convened a further plan meeting and disenfranchised the subordinated creditors from voting at that meeting (on the basis they were 'out of the money'). The Court then sanctioned the amended plan at a second sanction hearing.

The plan faced major opposition from certain subordinated creditors, on multiple grounds.

Aggregate group also faced hostile petitions in Luxembourg, including an attempt at a creditor-led Lux. restructuring plan.

- The Court held as follows.
- **'Compromise or arrangement'; modification of plan:**
  - The Court did not have jurisdiction to sanction a plan which compromised stakeholders' rights for zero consideration; nor did it have jurisdiction to amend the plan to remedy this defect; nor did it have jurisdiction retrospectively to disenfranchise the out-of-the-money subordinated creditors.
  - Instead, it convened a further plan meeting of senior creditors only, to vote on the amended plan. Paying subordinated creditors a share of €200,000, although 'modest', was sufficient to constitute the requisite compromise or arrangement.
- **Relevant alternative:** The correct relevant alternative to the plan was liquidation, in which subordinated creditors would receive nothing. The Court rejected arguments from an opposing creditor that the relevant alternative was a Lux. restructuring plan.
- **'Fair share':** Since subordinated creditors would be entirely out of the money in the relevant alternative, it was "none of their concern" how senior creditors chose to share the benefits of the restructuring among themselves or with others.
- **COMI shift / 'forum shopping':** The plan company had shifted its centre of main interests (**COMI**) from Lux. to England, creating the requisite 'sufficient connection' to promulgate the plan. The Court attached relatively little significance to the perceived 'artificiality' of the COMI shift: debtors are free to choose where they carry on the administration of their business, including for reasons that might be characterised as 'self-serving'.
- **See Key Takeaways on next page.**

"I consider that if I exercise, or purported to exercise, an inherent jurisdiction to amend the Plan I would be turning it from something that the court has no power to sanction into something that the court can sanction.

I consider that to be a material amendment that either falls outside the scope of my power or would be an improper exercise of it."

"I consider that the sums payable to [the subordinated creditors] under the Amended Plan are indeed modest, but are not so small that they can be ignored altogether."

Extracts from first sanction judgment, 4 March 2024

Key Takeaways

Complex restructuring plans akin to major commercial litigation, as in *Adler* and *McDermott* – cross-examination of multiple witnesses; hostile proceedings in Lux. as well as challenges to UK plan

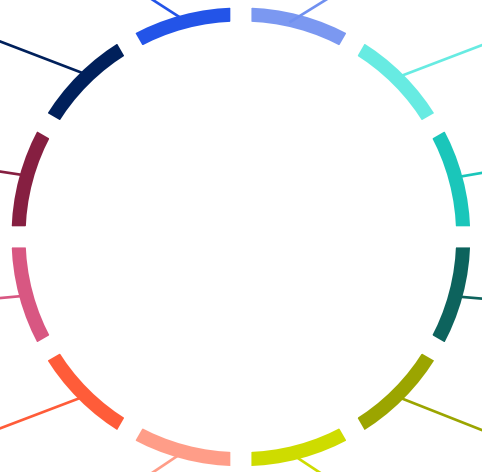
Refusal to sanction the original plan, given lack of 'compromise or arrangement' with subordinated creditors; proposal must constitute a 'compromise or arrangement' with **every** class involved

Initial refusal to sanction the plan as amended, given the Court's lack of jurisdiction to effect such an amendment itself

Court instead ordered further meeting of senior creditors to vote on amended plan (at short notice) – and subsequently sanctioned plan

Second successful application to disenfranchise out-of-the-money stakeholders (following first use in *Smile Telecoms*, in which Kirkland represented the company)

Plan followed enforcement by senior creditors under share pledge, with replacement of directors



Correct relevant alternative was liquidation, not a Lux. restructuring plan outlined by an opposing creditor

Views of out-of-the-money stakeholders are not relevant when determining "fairness" of allocation of benefits under the plan (following *Virgin Active* and *Adler*)

One class treated as a dissenting class, despite apparent vote in favour (as class was not fairly represented at the plan meeting)

Extensive challenge to COMI shift and "abusive" forum shopping – ultimately dismissed

Challenge on likelihood of recognition in Germany and Lux. – again, ultimately dismissed

Elevation of €2 existing debt for every €1 super-senior new money provided by senior creditors

Background and Terms of the Plan

- *Plan Company:*
  - Project Lietzenburger Straße Holdco S.à r.l. – a Lux. holding company
  - The only material asset within the group was a half-completed commercial real estate development project in Berlin (the Development)
  - Moved COMI to England for the purposes of promulgating the plan
- *Purpose of plan:* To restore the Group to solvency by:
  - restructuring three tranches of secured debt (governed by German law; see right); and
  - enabling the provision of €190 million super senior new money to allow completion of the Development
- *Relevant alternative:* The plan company provided evidence that the relevant alternative to the plan was insolvency proceedings (in England, Lux. and Germany), though this was disputed; see 'What was the relevant alternative to the plan?'
- *Opposition:* The plan was opposed by:
  - Safra, a representative of c.€71 million Tier 2 noteholders, on wide grounds; and
  - Chapelgate, a holder of c.€25 million Junior Debt, on a more narrow basis

		CREDITOR CLASSES	TREATMENT UNDER PLAN	EST. DIVIDEND IN RELEVANT ALTERNATIVE	APPROVALS (BY VALUE, OF THOSE VOTING)
Senior Creditors	1	**€775 million Senior Debt** (secured)	Amend & extend (to November 2025) Opportunity to participate in €190 million super senior financing, with "elevation" incentive for those that do so (for every €1 new money provided, €2 of existing Senior Debt elevated)	43.5%	97%
Subordinated Creditors	2	**€150 million Tier 2 Debt** (subordinated; secured)	*Original proposal:* cancelled for no consideration *Modified proposal:* €150,000 payment (shared rateably) – 0.1% of claim	0	94% - *however, only 11% of the class voted (i.e. those with cross-holdings in Senior Debt)* *Plan Company accepted this class was not fairly represented – therefore class treated as if it were a dissenting class*
Subordinated Creditors	3	**€95 million Junior Debt** (subordinated; secured)	*Original proposal:* cancelled for no consideration *Modified proposal:* €50,000 payment (shared rateably) – 0.05% of claim	0	0% (with zero turnout)

The Tier 2 Debt was contractually subordinated to the Senior Debt; the Junior Debt was both contractually and structurally subordinated to the Tier 2 Debt.

See also Annex A: Timeline and Annex B: Indicative Structure.

Decision: ‘Compromise or Arrangement’; Modification of Plan

ISSUE	CHALLENGE	JUDGMENT
1 Was the plan a **‘compromise or arrangement’** (within s.901A(3) of the Companies Act 2006)?	► Safra argued that the plan was not a compromise or arrangement with the Subordinated Creditors (as it was an expropriation) and that the proposed modification was ineffective. ► Chapelgate argued that the plan meetings of Subordinated Creditors were invalid because the modification had not yet been made at the time of the plan meetings (i.e. the plan was not, at that stage, a compromise or arrangement). ► To counter these arguments, the Plan Company also applied for an order (under s.901C(4) of the Companies Act 2006) dispensing with meetings of the Subordinated Creditors, on the basis that those classes did not have a ‘genuine economic interest in the company’.	► The Court followed the Court of Appeal’s *obiter* view in *Adler*, finding it had no jurisdiction to sanction the restructuring plan as voted upon because the plan provided for an expropriation of rights for no compensation (and was therefore not a ‘compromise or arrangement’ as required by the legislation). ► *At the first sanction hearing*: – The Court refused to make amendments to the plan as requested by the Plan Company. Although the court has some inherent power to effect amendments to a plan (post-voting, pre-sanction), it was not appropriate to turn the plan “from something that the court has no power to sanction into something that the court can sanction”. That would be “a material amendment that either falls outside the scope of [the Court’s] power or would be an improper exercise of it”. – The Court refused to make an order (under s.901(C)(4)) **retrospectively** disenfranchising the Subordinated Creditors and, having done so, sanction the unamended plan. It lacked jurisdiction to make such an order for the same reason it lacked jurisdiction to sanction the plan. – The Court instead convened a further meeting to vote on the amended plan. It made an order that the Subordinated Creditors be disenfranchised from voting on the basis that they had no genuine economic interest in the Plan Company. Since >97% of Senior Creditors had indicated continued support for the amended plan, the meeting was convened on short notice (three business days). ► *At the second sanction hearing*: The Court sanctioned the Amended Plan. Although judgment is awaited, the Court indicated in the first sanction judgment that sums payable to Subordinated Creditors under the **amended** plan would be sufficient to render the plan a ‘compromise or arrangement’; €200,000 was “indeed modest, but … not so small that they can be ignored altogether”. The sum was not unfair, in light of the Court’s findings that the Subordinated Creditors were ‘out of the money’.

Decision (cont.): COMI Shift and Relevant Alternative

	ISSUE	CHALLENGE	JUDGMENT
2	Had the Plan Company **moved its COMI** to England?	▸ Safra asserted that there were reasons to doubt that the COMI shift had taken effect, as: – relevant steps were taken at the last minute and did not demonstrate any commitment to carry on business in England; and – the steps were 'false' and the Plan Company intended to relocate to Lux. if/once the plan were sanctioned.	▸ The Plan Company had shifted its COMI from Lux. to England, effective upon notice to plan creditors in October 2023. ▸ Safra's allegations that the Plan Company had engaged in 'window-dressing' lacked force. The Court was not persuaded that the COMI shift was merely temporary. ▸ The fact that certain of the Plan Company's documents remained in Lux., as required by Lux. law, said little about the location from which the Plan Company administered its business interests. ▸ The COMI shift did not involve a breach of the Plan Company's articles of association.
3	What was the **relevant alternative** to the plan?	▸ Safra argued that the relevant alternative was not a formal insolvency but was instead a restructuring plan under the new Lux. restructuring law, on the terms of a term sheet and proposal document provided by Safra. ▸ The Plan Company argued that Safra's proposal was wholly unworkable and premised on flawed assumptions (for example, the company argued that the Senior Creditors would take enforcement action if the plan failed, and that only the company itself could propose a Lux. restructuring plan); it was difficult to see how insolvency filings could be avoided.	▸ The most likely alternative outcome if the plan were not sanctioned was liquidation (in England, in respect of the Plan Company, and in Lux., in respect of two other Group companies). ▸ In that scenario, neither Safra's proposal nor any variant on it would be implemented. Accordingly, the Court declined to compare recoveries under the plan with recoveries under Safra's proposal. ▸ For various reasons, Safra's proposal was unrealistic. In particular, the proposal could likely be vetoed by any single Senior Creditor; even if that were wrong, it would require the support of (at least) 50% of the Senior Creditors (subject to class constitution in the Lux. process).[1] ▸ Other criticisms of Safra's proposal included: – insufficient funding to complete the Development; – uncertainty as to whether Safra's proposal would produce the amount of new money that it claimed; – insufficient explanation of how Senior Creditors were to be repaid; and – Senior Creditors would be unwilling to extend further money and would likely prefer a liquidation over an uncertain negotiation that sought to remedy deficiencies in Safra's proposal – such deficiencies were found to be "fundamental and not susceptible to an easy fix".

1. The English Court found that it was not clear whether the new Lux. restructuring law permits variations to the rights of "extraordinary" (secured) creditors who are "out of the money". "There is a respectable school of thought to the effect that, if an extraordinary creditor is owed a debt of €100 but the value of the security for that debt is only €50, a Luxembourg Plan can seek without consent to extinguish €50 of the creditor's debt. There is equally a respectable school of thought that in this example none of the creditor's debt could be extinguished under a Luxembourg Plan without consent."

Decision (cont.): No Worse Off Test; Allocation of Restructuring Surplus

	ISSUE	CHALLENGE	JUDGMENT
4	Did the plan satisfy the **'no worse off' test** in relation to the Subordinated Creditors?	▸ Safra did not submit expert evidence critiquing the Plan Company's valuations or analysis of estimated recoveries under the plan or in the relevant alternative. ▸ Instead, Safra advanced certain criticisms of the Plan Company's experts, e.g.: – they ought to have used a going concern valuation of the Development for the purposes of assessing the outcome in the relevant alternative; – the Development had been valued opportunistically at a time when there was a temporary dip in market conditions; and – the valuation did not factor in the value of claims that Tier 2 Creditors could pursue against managers of the Group for their actions in promoting the plan.	▸ The Court accepted the approach of the Plan Company's valuation experts as to the likely recoveries in liquidation and rejected Safra's arguments. "The only realistic outcome is that Subordinated Creditors would receive nil in a liquidation." ▸ Accordingly, the 'no worse off' test was satisfied. ▸ The Court placed only limited weight on Safra's arguments, given Safra put forward no valuation evidence of its own and chose not to cross-examine certain of the Plan Company's valuation experts.
5	Did the Subordinated Creditors have any basis for objecting to the **allocation of the 'restructuring surplus'** and/or other similar matters going to the fairness of the plan?	▸ Safra argued that the Plan was unfair and/or involved an unfair distribution of value post-restructuring. ▸ This argument was based on ten separate complaints about the commercial terms of the plan, including as to the "expensive" super senior financing (in which only Senior Creditors could participate) and the elevation of that super senior financing and certain existing Senior Debt above existing indebtedness.	▸ The Court accepted the Plan Company's argument that, since the Subordinated Creditors would be entirely out of the money in the relevant alternative (liquidation), they had no entitlement to share in the benefits of the restructuring. ▸ Accordingly, "it was none of their concern how the Senior Creditors chose to share those benefits among themselves or with others"; any "unfairness" in the allocation of benefits of the plan did not mean the Court should exercise its discretion not to sanction it.

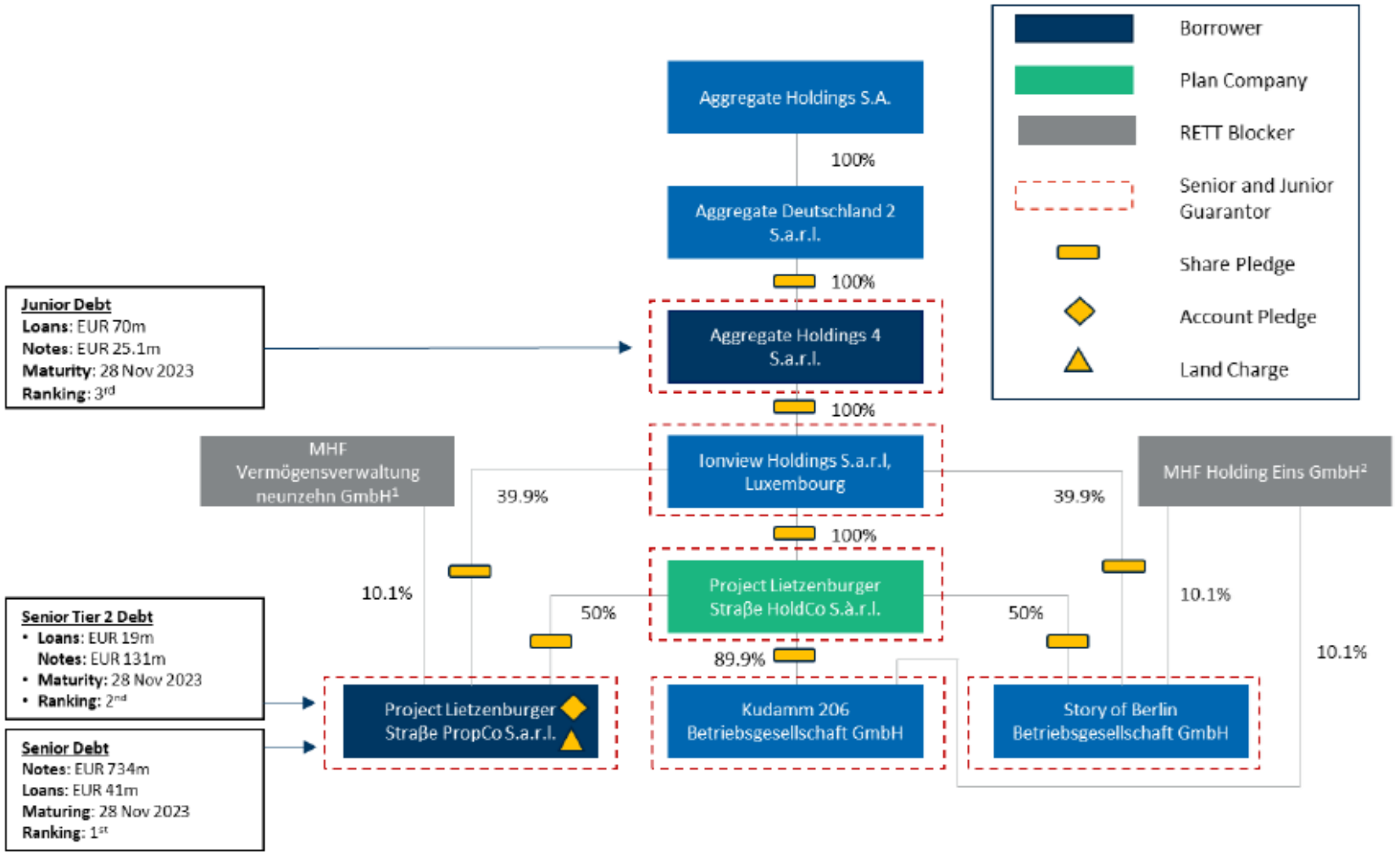
Decision (cont.): Sufficient Connection, Forum Shopping and Recognition

	ISSUE	CHALLENGE	JUDGMENT
6	Did the Plan Company have a **sufficient connection** with England?	► Safra argued that the Plan Company lacked the requisite sufficient connection to England (in particular, as at the date of the convening order).	► The Plan Company did have a sufficient connection with the UK. ► The extent of the Plan Company's links to England is a factor relevant to the Court's discretion when deciding whether to sanction the plan and is closely related to the question whether the plan, if approved, will have a substantial effect. ► There is no 'test' that requires the Court to asses a plan company's COMI at any particular time.
7	By moving its COMI to England, had the Plan Company engaged in **abusive forum shopping?**	► Safra asserted that the COMI shift constituted abusive and artificial forum shopping, principally because a restructuring under Lux. law would require unanimous consent from every secured creditor.	► The Court attached relatively little significance to the perceived 'artificiality' of the COMI shift: debtors are free to choose where they carry on the administration of their business, including for reasons that might be characterised as 'self-serving'. ► Earlier authorities (*Codere*, *gategroup*) should not be read as formulating a test of what constitutes 'good' or 'bad' forum shopping. Instead, the relevant question is whether the Court should decline to sanction the plan based on arguments of 'forum shopping'. ► Although the restructuring pursuant to the plan could not be achieved under Lux. law, the result was not "at odds with fundamental matters of public policy in Luxembourg". The better view was that Lux. courts would accept that the COMI shift properly conferred jurisdiction on the English courts. ► Given there were sufficient prospects of recognition in Lux.(and Germany) and the plan was not contrary to principles of comity or public policy in Lux. (or Germany), it was appropriate to sanction the plan.
8	Was there a reasonable prospect that the plan would be **recognised in Germany and Lux.?**	► Safra produced expert evidence to the effect that the plan would be unlikely to be recognised in Germany and Lux.	► Following evaluation of competing expert evidence, the Court held that: – there was (at least) a reasonable prospect that the plan would be recognised in Germany and Lux.; and – the Lux. courts would not decline recognition on the basis that the Lux. courts have exclusive jurisdiction in relation to a winding-up of the Plan Company or a restructuring of its debt. ► The Court also drew comfort from the fact that >97% of the Senior Creditors had submitted to the jurisdiction of the English courts pursuant to a restructuring support agreement.

Annex A: Timeline

- **January 2023:** Construction of the Development halted - numerous events of default followed
- **June 2023:** Purported notices of acceleration from certain Tier 2 Creditors
- **July 2023:** Lux. bankruptcy petition served by Safra, a Tier 2 Creditor; dismissed for lack of standing
- **August 2023:** Senior Creditors enforced share pledges and changed directors of certain Group companies
- **September 2023:**
  - Unsecured interim liquidity facilities advanced by Senior Creditors' committee
  - Second wave of Lux. bankruptcy petitions served by Chapelgate, a Junior Creditor; partially stayed and partially dismissed
- **October 2023:**
  - Plan Company (as guarantor of secured debt) entered deed of contribution in favour of the borrowers/issuers of the secured debt
  - Restructuring Support Agreement entered into with certain Senior Creditors
  - COMI shift steps (including notice given to plan creditors)
- **November 2023:**
  - 1 November: Convening hearing of UK restructuring plan
  - 2 November: Third Lux. petition by a Tier 2 Creditor, seeking appointment of a trustee to organise a competitive sale process of the Group's assets under the new Lux. restructuring law - stayed (in respect of the Plan Company) pending the decision of the English Court at the restructuring plan sanction hearing
  - 27 November: Restructuring plan meetings
  - 28 November: All three tranches of secured debt fell due for repayment (>€1 billion); debt remains unpaid
- **January 2024:**
  - Conditional termination and enforcement notice from senior creditors (as to their intended enforcement actions if the plan were not sanctioned)
  - Following the Court of Appeal's decision in Adler (which expressed a 'provisional view' to the effect that the court does not have jurisdiction to approve a restructuring plan which extinguishes a party's rights for zero consideration), the plan was modified to provide a modest payment to the Subordinated Classes (funded by group of Senior Creditors)
- **2-7 February 2024:** Four-day sanction hearing of UK restructuring plan
- **27 February 2024:** Order convening further plan meeting of Senior Creditors only - disenfranchising out-of-the-money Tier 2 Creditors and Junior Creditors
- **1 March 2024:** Plan meeting (Senior Creditors only)
- **4 March 2024:** First sanction judgment handed down, with reasons for refusal to sanction the plan
- **7 March 2024:** Second sanction hearing, sanctioning the plan; judgment awaited

Annex B: Indicative Structure



¹ *Formerly known as Elleke Vermögensverwaltung neunzehn GmbH*
² *Formerly known as Elleke Holding Eins GmbH*