IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

INSOLVENCY AND COMPANIES LIST (CHD)

IN THE MATTER OF AGPS BONDCO PLC

AND

IN THE MATTER OF THE COMPANIES ACT 2006

SECOND EXPERT REPORT OF PROFESSOR DR. CHRISTOPH THOLE

I. Introduction

1 I, Professor Dr. Christoph Thole, have been instructed by White & Case LLP ("**White & Case**") on behalf of AGPS BondCo Plc (the "**Plan Company**") to give my expert further opinion on certain matters of German law set out below. I understand that this further opinion shall be submitted to the High Court of Justice of England and Wales (the "**English Court**") in the context of a proposed restructuring plan between the Plan Company and its creditors under Part 26A of the UK Companies Act 2006 (the "**Restructuring Plan**").

2 I am currently a professor of law at the University of Cologne, Germany. Since 2016, I have been the Managing Director of the Institute of Procedural Law and Insolvency Law and the Institute of European and International Insolvency Law. My professional experience is set out in full at paragraph 1.2 of Thole 1, and my CV is included at Appendix 1 of Thole 1.

3 I exhibit copies of materials on German [and European Union law] to which I refer in this report (with English translations) in Exhibit "**CT2**". Unless indicated to the contrary, references to page numbers in this expert report are to the paginated pages of this exhibit.

4 On 20 February 2023, I provided to the Plan Company an expert opinion ("**Thole 1**") concerning certain principles of German law applicable to the Restructuring Plan. I understand that Thole 1 was submitted to the English Court. I believe that Thole 1 is correct in all respects. I will neither restate it nor modify it. I incorporate it by reference, including as to the background of the Restructuring Plan. Capitalised terms used but not defined herein will have the meanings ascribed to them in Thole 1.

II. Background Facts

5 This opinion is provided in the context of the restructuring of the Group. As noted above, the Plan Company has initiated restructuring plan proceedings pursuant to Part 26A of the Companies Act 2006 in England and Wales.

6 The background to the Restructuring Plan is outlined in full in Section 2 of Thole 1 and I do not propose to repeat it here. However, I have been instructed and understand that there have been certain subsequent developments which are of relevance to my analysis.

7 Namely, since the Plan Company initiated these proceedings and filed its evidence (including Thole 1) on 20 February 2023, certain SUN Noteholders (specifically holders of 2025-2029 SUN Notes) have issued notices (the "**PTNs**") to the Plan Company and the Parent Company purporting to accelerate their respective SUN Notes. These SUN Noteholders purported to accelerate their respective SUN Notes on the basis that the Plan Company's initiation of the Part 26A procedure constitutes the commencement of an insolvency proceeding within the meaning of § 10(1)(e) of the SUN Notes Terms and Conditions and therefore an Event of Default under § 10(1).

8 Furthermore, the ad hoc group of certain holders of €800,000,000 2.25% unsecured SUN Notes due in 2029 (referred to in these proceedings as the "**AHG**") have since filed evidence in opposition to the Restructuring Plan. In particular, the AHG rely upon the First Witness Statement of Christian Halàsz dated 16 March 2023 (the "**Halàsz Statement**"), which, among other things, asserts at paragraph [26] that the initiation of these proceedings constitutes an insolvency proceeding and an Event of Default on a proper interpretation of the SUN Notes Terms and Conditions under German law.

III. Questions Addressed in this Expert Opinion

9 I have been asked to provide my expert opinion on the following:

a. The correctness of the statements of German law and the application of German law in the Halàsz Statement, in particular, his conclusion at paragraph 23 that "*the initiation of the [Restructuring Plan] by the Plan Company on 20 February 2023 would constitute an insolvency proceeding within the meaning of with § 10(1)(e) of the [SUN Notes Terms and Conditions] such that an Event of Default will have occurred and be continuing*"; and otherwise

b. Whether the purported termination of the relevant SUN Notes was valid and effective in accordance with § 10(1)(e) of the SUN Notes Terms and Conditions?

IV. Documentation Reviewed

10 For the purposes of preparing this expert opinion, I have been provided with and have reviewed, the documents listed in **Appendix 1**.

V. The Halàsz Statement

11 In its paragraph 23, the Halàsz Statement claims that "*the initiation of the [Restructuring Plan] by the Plan Company on 20 February 2023 would constitute an insolvency proceeding within the meaning of §10(1)(e) of the SUN Notes Terms and Conditions, such that an Event of Default will have occurred and be continuing*". No reason is given in the Halàsz Statement for this conclusion. For the reasons set out below, I do not agree with this statement. I note that the Halàsz Statement does not cite any case law, judgments or legal publications in support of this view.

VI. Legal analysis

1. Interpretation of § 10(1)(e) of the SUN Notes Terms and Conditions

a) Preliminary remarks

12 It is essential, first, to refer to the exact wording of § 10(1)(e) of the SUN Notes Terms and Conditions. The clause which sets out what amounts to an Event of Default provides, in the English language version, that an Event of Default occurs when:

"*….insolvency proceedings against the Issuer are instituted and have not been discharged or stayed within 90 days, or the Issuer applies for or institutes such proceedings*".

13 It is important to have regard to the fact that, according to § 18 cl. 2 of the SUN Notes Terms and Conditions, only the German version of the SUN Notes Terms and Conditions is legally binding. The interpretation of these terms is governed by German law, § 17(1). Consequently, when construing and interpreting the SUN Notes Terms and Conditions, the German law on the interpretation of such clauses applies. The German version of § 10(1)(e) refers to the institution of an "*Insolvenzverfahren*".

14 The legally relevant question is therefore twofold. The first and most important question is whether the initiation of English Part 26A proceedings qualifies as an "*Insolvenzverfahren*" within the meaning of § 10(1)(e). If it does not, the termination notice is invalid if no other subsisting Event of Default as defined in § 10 has occurred (and I am not aware of any other Events of Default having been relied

upon) and if no statutory termination rights apply (or have been relied upon). If the Part 26A proceedings do qualify as an "*Insolvenzverfahren*", the second question would be whether: (i) § 10(1)(e); and/or (ii) the termination notice, is invalid on other grounds.

b) Rules on interpretation

15 Before turning to the relevant termination notices in the present case, it is important to emphasise that the general rules on the interpretation of terms and conditions of bonds and notes apply, as developed and established by the German Federal Court of Justice (*Bundesgerichtshof*) ("**BGH**"). The BGH held, in a decision given on 16 January 2020, that the general principles and methods of construing parties' declarations and contracts under German law also apply to notes.[1] Terms and conditions are, however, to be interpreted in an abstract manner and objectively and with a view to the functionality of the capital markets and the collectivity of the notes. This entails that no regard is to be had to the particularities of an individual noteholder or to how a particular noteholder understood the terms and conditions.[2]

16 The starting point of every legal interpretation of such terms and conditions is the wording of the clause. If the wording is unclear or doubts remain, the courts will consider how the wording is reasonably understood from the perspective of the relevant interested parties and the capital markets.[3] That is to say that an interpretation is sought that is in line with commercial common sense, assessed from the perspective of a prudent and reasonable commercial party.

17 In this respect, § 3 SchVG, a special provision dealing with the transparency of the relevant issuer's obligations (which I referred to in Thole 1 at para 5.6), provides that transparency is assessed with regard to an investor on the primary market "who is well-informed with respect to the relevant type of notes".[4]

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1 BGH, 16.1.2020, IX ZR 351/18, NJW 2020, 986 para. 24 **[CT2/12]**.

2 BGH, 18.7.2007, VIII ZR 227/06, WM 2007, 2078, para. 23 **[CT2/13]**; BGH, II ZR 172/91, BGHZ 119, 305, 313 = NJW 1993, 57, 58 **[CT2/14]**; BGH, 28.6.2005, XI ZR 363/04, NJW 2005, 2917, 2918 **[CT2/18]**; Langenbucher/Bliesener/Spindler/*Bliesener/Schneider*, Bankrechts-Kommentar, 3rd. 2020, § 3 SchVG para. 6 **[CT2/5]**; FK-SchVG/Hartwig-Jacob/*Friedl/Hartwig-Jacob*, SchVG, 2016, § 3 para. 136 **[CT2/15]**; Reinhard/Schall/*Schall/Simon*, SchVG, 2020, § 3 para. 19 **[CT2/16]**; *Sester*, AcP 209 (2009), 628, 648 **[CT2/17]**.

3 BGH, 28.6.2005, XI ZR 363/04, NJW 2005, 2917, 2918 **[CT2/18]**; BGH, 30.6.2009, XI ZR 364/08, BKR 2009, 513 para. 21 **[CT2/19]**.

4 See BeckOGK/*Vogel*, 1.1.2023, SchVG § 3 para. 27 **[CT2/1]**.

18 As the BGH made clear as early as in its judgment of 23 October 1958,[5] and has made clear ever since,[6] the interpretation of the wording of a contract setting out the terms and conditions of notes must be based on the relevant understanding of contract *at the time of the issuance* of the notes. This is because contracts (and, in essence, the notes form financial contracts similar to loans) are based on the notion of party autonomy and on the contractual will of the parties as it was uttered at the time of the conclusion of the contract. The reliance on the time of the issuance when interpreting the meaning of a particular clause of the terms and conditions also guarantees a common understanding of the rights and obligations under the notes. It would be wrong in principle and lead to inconsistent results to distinguish between notes held by one noteholder and notes of the same series held by another.

19 Further, it is accepted by the courts that if, the term in question which is included in general business terms and conditions is a technical term, the basic rule is that the technical meaning applies.[7] If this is the case, there is in principle no doubt about the meaning of the relevant term and, thus, in principle, no room for a different interpretation.

20 Thus, under § 10(1)(e), the relevant question is what the term "*Insolvenzverfahren*" typically means under German law (as the governing law). Only if uncertainties remain, is one required to interpret the wording by determining how that wording is understood by a sophisticated, reasonable and well-informed investor at the time of issuance. In this case, the relevant standard to measure against is an investor who is experienced in the specific type of notes in issue. This is set out expressly in section 3 of the SchVG 2009: *„der hinsichtlich der jeweiligen Art von Schuldverschreibungen sachkundig ist*" (**[CT2/34]**).[8]

21 The need to focus on the perspective of an experienced investor is highlighted by the €100k denomination of the SUN Notes, the fact that the SUN Notes are listed on an unregulated exchange and that distribution of the SUN Notes to retail investors is expressly prohibited in the respective offering memoranda which were used to place them with the investors. The relevant standard is an experienced bond

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[5] BGH, 23.10.1958, II ZR 4/57, BGHZ 28, 259, 264 = NJW 1959, 31 **[CT2/20]**.

[6] BGH, 30.6.2009, XI ZR 364/08, BKR 2009, 513 para. 21 **[CT2/19]**.

[7] BGH, 29.4.2014, II ZR 395/12, NZG 2014, 661 para. 24 **[CT2/21]**; 2.12.2021, IX ZR 110/20, NZG 2022, 458 Rn. 18 **[CT2/22]**.

[8] i.e. "*who is knowledgeable about the specific type of notes"*

investor. An experienced bond investor is able to understand the technical / legal meaning of "insolvency".

22 In any event, the term "*Insolvenzverfahren*" needs to be interpreted in a way that reflects both business common sense and how well-informed investors would have understood that wording at the time of the issuance.

23 For the sake of completeness, I should make clear that if there is a doubt in the proper interpretation of § 10(1)(e), that doubt is interpreted *against* the issuer (305c para. 2 BGB)[9]. However, I do not think there is any uncertainty in this case as to what the term "*Insolvenzverfahren*" means.

c) Reference to German insolvency proceedings ("Insolvenzverfahren")

24 In general, against the aforementioned background of the governing law and the German language, it is fair to conclude that, when drafting the SUN Notes Terms and Conditions, the references to particular legal instruments and/or proceedings such as the reference to an "*Insolvenzverfahren*" in § 10(1)(e) were intended to be primarily understood with a view to their common understanding under German law. That does not mean that the initiation of insolvency proceedings in a jurisdiction other than Germany would be excluded from the scope of said provision (see para. 54). However, the common "German understanding" of the relevant wording of the SUN Notes Terms and Conditions, i.e. the understanding of what in Germany is an *Insolvenzverfahren* within the meaning of § 10(1)(e), prevails.

aa) Definition of "*Insolvenzverfahren*"

25 The principal question I am asked to opine upon necessitates the determination of what constitutes an *Insolvenzverfahren* as a matter of German law. I will therefore highlight the key characteristics of *Insolvenzverfahren*.

26 As a matter of first principles, it is important to note that, starting with the wording of the clause and the common understanding of that wording, the reference to insolvency proceedings/*Insolvenzverfahren* has a strict procedural meaning. An *Insolvenzverfahren* under German substantive law is strictly confined to the

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9 **[CT2/37]**

proceeding that is provided for under, and governed by, the Insolvency Code *(Insolvenzordnung*) ("**InsO**"). Insolvency proceedings in German law are regulated by the InsO. Thus, e.g., the so-called StaRUG proceedings are not *Insolvenzverfahren* simply because they are not by law labelled as *Insolvenzverfahren* and are regulated by a different Act (see infra, para. 36).

27 This can also be derived from the statutory text of the StaRUG Act itself, which at some points also refers to *Insolvenzverfahren*, for example at § 33 para. 1 no. 1 StaRUG.[10] By that, reference is indisputably not made to the StaRUG itself, but to the insolvency proceedings under the InsO. Thus, German substantive law does itself differentiate the StaRUG from *Insolvenzverfahren*.

28 More specifically, there is only one single insolvency proceeding under the InsO. It is an "umbrella" proceeding, as I will explain in more detail below, in the sense that it can be conducted in a number of ways to achieve different outcomes, but it is a single proceeding.

29 German substantive law knows only one single, uniform insolvency proceeding, i.e. the one under the InsO. While that proceeding may be conducted in different ways, e.g., with a debtor remaining in possession, and it may lead to different outcomes (liquidation, sale or continuation of the business), it is characterised as one single proceeding which is regulated by the InsO. Thus, this is what is referred to when a German lawyer speaks of an *Insolvenzverfahren*.

30 Turning to substantive criteria, some key characteristics of an *Insolvenzverfahren* can be identified. Insolvency proceedings within the meaning of the substantive insolvency law can be characterised as collective proceedings automatically encompassing all creditors. They aim at a collective satisfaction of the creditors (§ 1 InsO).[11] The ordinary German *Insolvenzverfahren* under the InsO is based on the model procedure in which typically an insolvency administrator is appointed. The proceedings start when either the debtor or a creditor files for insolvency and thereby applies for the opening of proceedings. Before the formal opening of the insolvency proceedings, there is a preliminary, provisional proceeding in which, usually, a provisional insolvency administrator is appointed (§ 21 InsO).[12]

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[10] **[CT2/49]**.

[11] **[CT2/40]**

[12] **[CT2/43]**

31 The InsO implicitly assumes as the underlying standard scenario that the insolvency proceedings will lead to the dissolution of corporate debtors with the entire assets of the debtor being sold and the proceeds distributed to the creditors. Thus, an *Insolvenzverfahren* regularly (but not invariably) leads to a liquidation of the legal entity pursuing the business (but not necessarily a closure of the business – the legal entity can be dissolved but its business can be continued by an acquirer).

32 That is not to say that the InsO does not facilitate a restructuring of the debtor. There is no clear distinction between administration and liquidation within the single German *Insolvenzverfahren* and no need to formally decide between administration aimed at saving the company and/or business, on the one hand, and liquidation aimed at a sale of the assets, on the other. The *Insolvenzverfahren* under the InsO does include so-called insolvency plan proceedings (§§ 217 et seq. InsO)[13] as well as debtor-in-possession proceedings (§§ 270 et seq. InsO),[14] subject to certain requirements. These provisions and options form variants of ordinary, "classical" insolvency proceedings. However, although the InsO therefore encompasses legal procedures that aim to facilitate a restructuring, it is important to understand that this restructuring by way of an insolvency plan and/or with the debtor remaining in possession would be an integrative part of the *Insolvenzverfahren*, which is a full collective procedure automatically encompassing all creditors of the debtor. The debtor may not select the classes of creditors that are affected by the abovementioned proceedings. This feature is critical when distinguishing *Insolvenzverfahren* from the English Part 26A procedure. I am advised that under the Part 26A procedure, a debtor is free to choose which creditors to include or exclude in the restructuring plan. This choice is not possible under *Insolvenzverfahren* under the InsO. *Insolvenzverfahren* encompass all creditors (employees, unsecured creditors, secured creditors, trade creditors and others) and all obligations of the debtor. It is not open to the debtor to select a particular class of creditors to whom an *Insolvenzverfahren* applies.

33 Furthermore, in order to qualify as *Insolvenzverfahren*, the relevant company must be in a state of insolvency, for example, because it is unable to pay its debts (*Zahlungsunfähigkeit*). Usually, although not necessarily, an insolvency

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13 **[CT2/44]**

14 **[CT2/45]**

administrator is appointed and at the end of the proceeding, the administrator conducts a sale of assets and distributes the proceeds.

34 In addition, it is important to have regard to the fact that applications to open an *Insolvenzverfahren* may be filed by a creditor, cf. § 14 InsO (**[CT2/41]**). In that way, an *Insolvenzverfahren* may be forced upon the debtor by the creditor once the debtor has entered into a state of insolvency. As mentioned, within the *Insolvenzverfahren*, the debtor's affairs are generally managed by the insolvency administrator. This is a major difference to, e.g., StaRUG proceedings or other preventive, pre-insolvency restructuring proceedings where the only person entitled to initiate the proceeding is the debtor itself which remains in charge of the day-to-day business.

35 This is reflected in a judgment of the Higher Regional Court of Frankfurt ("**OLG Frankfurt**") of 17 September 2014.[15] In this judgment, the court dealt with the terms and conditions of notes which included "general debt settlement offers" as an Event of Default (see infra, para. 50). The court held that this reference to general debt settlement offers is not confined to state-run proceedings which may be forced upon the debtor (the court speaks of "*Zwangs-Verfahren*"). But, according to the court, the provision would have been confined to state-run proceedings with an element of force, if the headline would have read "*Insolvenzverfahren*". Thus, the court linked the term *Insolvenzverfahren* to proceedings that may potentially be forced upon the debtor. Therefore, it can be established that *Insolvenzverfahren* are state-run and have such an element of potential force which means that they are not necessarily entered into by the debtor on a voluntary basis or at least that they are not necessarily driven by the debtor. Furthermore, it is important to keep in mind that under German law, there is also a duty to file for insolvency once the debtor becomes unable to pay or over-indebtedness is shown, cf. § 15a InsO (**[CT2/42]**).

bb) StaRUG restructuring plan is not an *Insolvenzverfahren*

36 The insolvency proceedings under the InsO are to be clearly distinguished from the new preventive restructuring framework which has also been implemented in Germany. The German lawmaker, by implementing the EU directive 2019/1023 on preventive restructuring frameworks ("**Directive 2019/1023**"), introduced a semi-collective pre-insolvency procedure allowing the implementation of a restructuring

[15] OLG Frankfurt, 17.9.2014, 4 U 97/14, juris, para. 56 **[CT2/23]**.

plan, the so-called StaRUG proceedings (StaRUG being the Stabilisation and Restructuring Framework for Businesses Act). The StaRUG provisions came into effect on 1 January 2021.

37 The StaRUG restructuring plan proceedings are – most clearly and without doubt – not covered by the wording *Insolvenzverfahren*. The StaRUG proceedings (restructuring plan proceedings) are not insolvency proceedings/*Insolvenzverfahren* within the meaning of German substantive insolvency law. They aim at preventing the entry into insolvency proceedings/*Insolvenzverfahren* and at avoiding a state of insolvency.

38 Indeed, the StaRUG Act itself differentiates the proceedings under its realm from insolvency proceedings/*Insolvenzverfahren* (see above, para. [●]). Further, the German lawmaker expressly intended to avoid any reference to the wording of the InsO, despite some technical similarities between a restructuring plan (under the StaRUG) and an insolvency plan (under the InsO). For example, the competent court for StaRUG proceedings is the "*Restrukturierungsgericht*" (restructuring court), whereas insolvency proceedings are run by the "*Insolvenzgericht*" (insolvency court).

39 StaRUG proceedings are not regulated by the InsO, but by an independent Act (i.e. StaRUG). When drafting the StaRUG, the lawmakers debated whether the preventive restructuring framework should be integrated into the InsO, but explicitly chose not to integrate this preventive procedure into the InsO. This would have severed the demarcation line between insolvency proceedings on the one hand and restructuring proceedings aiming at preventing insolvency on the other for the purposes of German substantive law.[16]

40 The StaRUG proceedings are designed as semi-collective proceedings. Their features are in line with the provisions of the Directive 2019/1023. They allow a company to select the creditors that shall be affected by the restructuring plan (§ 8

[16] Cf. *Begründung RegE*, BT-Drucks. 19/24181, S. 89 **[CT2/2]**.

StaRUG).[17] Not all trade creditors, financial creditors, secured creditors etc. will necessarily be affected by the restructuring plan, whereas these kinds of creditors would always be affected by an *Insolvenzverfahren*. Thus, as opposed to insolvency proceedings, StaRUG proceedings do not have the feature of a full collective proceeding that automatically encompass all creditors. The StaRUG proceedings are run as debtor-in-possession proceedings, whereas insolvency proceedings are usually run by a court-appointed insolvency administrator. StaRUG restructuring requires a *likelihood* of insolvency (imminent inability to pay), but is, in general, excluded where the debtor is already insolvent (cf. § 33 para. 2 StaRUG).[18] In addition, there is no duty for the company and its directors to initiate StaRUG proceedings (as opposed to *Insolvenzverfahren* under the InsO in a state of insolvency). A creditor lacks standing to apply for the opening of StaRUG proceedings (as opposed to *Insolvenzverfahren* under the InsO) which means that such proceedings cannot be forced upon the company by the creditors as required by the OLG Frankfurt for a characterisation as *Insolvenzverfahren* in note terms and conditions.

41 Thus, under German substantive insolvency law, *Insolvenzverfahren* were, and still are, confined to ordinary insolvency proceedings as provided for by the InsO.

42 StaRUG proceedings may, of course, be characterised as insolvency-related proceedings and, indeed, for the purposes of private international law and cross-border effects, which lack express provisions on the treatment of preventive restructuring proceedings, it may become necessary to include preventive restructuring frameworks into the scope of the provisions on the recognition of (foreign) insolvency proceedings (see infra, para. 65). I deal with this to some degree in response to Question D in Thole 1. But that is different from saying that, from the perspective of German substantive law, StaRUG proceedings are an *Insolvenzverfahren*. They clearly are not. StarRUG proceedings may be treated as an equivalent to an *Insolvenzverfahren* in some respects, but they are not insolvency proceedings under German substantive law.

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17 **[CT2/47]**

18 **[CT2/49]**

43 In particular, it is considered one of the major advantages of StaRUG proceedings that the negative implications that may be aligned with the initiation of an *Insolvenzverfahren*, i.e., the so-called "stigma of insolvency" may be avoided.[19] Thus, it is the very aim of StaRUG proceedings to avoid the legal consequences associated with an *Insolvenzverfahren*. This statutory aim would be contradicted if one were to consider the StaRUG proceedings as *Insolvenzverfahren* under § 10(1)(e).

44 Against this background, it can be established that the wording of § 10(1)(e) does not refer to German preventive restructuring proceedings.

45 In addition, it is worth mentioning that some of the SUN Notes were issued before 2021. Before 2021, German law did not offer a formal restructuring procedure in the pre-insolvency arena. The StaRUG came into effect on 1 January 2021. As pointed out, the interpretation of the terms and conditions requires one to determine how the terms would reasonably have been understood at the time of issuance. Consequently, even if one were to assume any remaining uncertainty with respect to the wording *Insolvenzverfahren* (*quod non* – the wording is clear), it is without doubt that at least the SUN Notes Terms and Conditions issued before 2021 were not drafted with a view to the new, modern StaRUG preventive restructuring frameworks which, at the time of issuance, did not exist. Obviously, the German courts would conclude that what the issuer expressed in the wording of the term in § 10(1)(e) was a reference to the classical *Insolvenzverfahren* under the InsO. For the SUN Notes issued after the introduction of the StaRUG proceeding, it can therefore be assumed that they may not be interpreted as to include StaRUG proceedings since the wording was *not* changed (compared to the SUN Notes that were issued before introduction of StaRUG); despite the (publicly communicated) introduction of the StaRUG, § 10(1)(e) also refers (only) to *Insolvenzverfahren*, not StaRUG proceedings.

46 Attention also needs to be given to a judgment of the BGH of 8 December 2015.[20] The reasoning of this judgment supports the interpretation that the wording *Insolvenzverfahren* does not include StaRUG proceedings.

47 This judgment concerned a situation that was largely similar to the present situation. The terms and conditions and the events of defaults described in these terms and

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19 *De Bruyn/Ehmke*, NZG 2021, 661, 671 **[CT2/3]**.

20 BGH, 8.12.2015, XI ZR 488/14, BKR 2016, 171 **[CT2/24]**.

conditions closely resembled the SUN Notes Terms and Conditions, although with slight but distinct differences.

48 An event of default in that case would occur (translated from the German original reported in the case):

49 *„if a court opens insolvency proceedings against the Issuer … or the Issuer … applies for or institutes such proceedings or offers or makes an arrangement for the benefit of its creditors generally (allgemeine Schuldenregelung)"*.

50 Thus, the clause in that case not only referred to the commencement of insolvency proceedings, but also expressly covered arrangements for the benefit of the creditors generally ("*allgemeine Schuldenregelung*"). The latter ground ("*allgemeine Schuldenregelung*") was the ground on which the noteholder based its termination notices. The issuer had initiated a restructuring procedure under the German Act on Notes of 2009 (*Schuldverschreibungsgesetz*) ("**SchVG 2009**") and summoned a noteholders' meeting on the amendment of the terms and conditions of the notes. Restructuring under the provisions of the SchVG is neither an insolvency procedure nor in a strict sense a preventive restructuring proceeding within the meaning of the Directive 2019/1023; it offers a special (optional) restructuring procedure for bonds and notes (only). The restructuring procedure under the SchVG 2009 amounted to an arrangement for the benefit of creditors generally ("*allgemeine Schuldenregelung*"), as was clearly stated by the OLG Frankfurt[21] in the lower instance; this finding was maintained by the BGH in the appeal proceeding.

51 Thus, the case of the BGH shows that when an event of default is supposed to rely on a procedure that is not a formal insolvency procedure the issuer would be required to expressly add an express reference to such a restructuring procedure (as the issuer in that case did by including the reference to the general debt settlement offer/*allgemeine Schuldenregelung*). The decision of the OLG Frankfurt was ultimately clear on this: it rejected the argument that the *allgemeine Schuldenregelung* did not cover restructuring procedures under the SchVG by stating that if that term were to be understood to be confined to state-run and compulsory insolvency proceedings, the headline of the term would have been expected to refer to *Insolvenzverfahren*. ("*Hätte die Regelung ausweislich ihrer Überschrift auf staatliche (Zwangs-) Verfahren eingegrenzt werden sollen, hätte die*

21 OLG Frankfurt, 17.9.2014, 4 U 97/14, juris, paras. 53 ff **[CT2/25]**.

Überschrift „Insolvenzverfahren u.ä.“ lauten müssen."). *E contrario,* it is obvious that in a scenario where no reference to a general debt settlement offer is made, the provision is indeed confined to such state-run and compulsory insolvency proceedings (as defined supra, para. 34).

52 In the present case, no such reference is made. The clause in § 10(1)(e) is strictly confined to insolvency proceedings, and there is no mention of a more broadly understood general settlement or arrangement of the issuer's obligations to the noteholders. Thus, there is no room for a wide interpretation of the term *Insolvenzverfahren*.

d) Are Part 26A proceedings *Insolvenzverfahren* within the meaning of § 10(1)(e)?

53 The Plan Company did not initiate StaRUG restructuring plan proceedings but Part 26A restructuring plan proceedings. This leads to the question whether Part 26A proceedings would qualify as *Insolvenzverfahren* within the meaning of the SUN Notes Terms and Conditions.

54 As a matter of first principles, it is reasonable to assume that despite the German language being the legally binding language of the SUN Notes Terms and Conditions, and despite German law being the law governing the SUN Notes, the wording of § 10(1)(e) is not necessarily restricted to *Insolvenzverfahren* that are initiated in Germany. From the noteholders' perspective, it is irrelevant whether such an *Insolvenzverfahren* was initiated in Germany. At least under the EIR, the jurisdiction depends, i.a., on the COMI of the debtor.

55 However, as set out above, despite the § 10(1)(e) being capable of encompassing non-German insolvency proceedings, the relevant question is whether the Part 26A proceedings constitute an *Insolvenzverfahren* within the meaning of the SUN Notes Terms and Conditions.

56 It is clear that they do not. The Part 26A proceedings share the major features of the StaRUG proceedings and, therefore, the Part 26A proceedings are not *Insolvenzverfahren* just like the StaRUG proceedings are not. The StaRUG restructuring aims at preventing a state of formal insolvency and the need for fully-fledged insolvency proceedings. A StaRUG restructuring can be initiated once the debtor is likely to become unable to pay its creditors.

57 Both Part 26A proceedings and the StaRUG proceedings lack an element of force. There is no duty to enter into such proceedings whereas, under German law, a debtor

would be obliged to file for insolvency once a state of insolvency has occurred (§ 15a InsO).[22] Thus, both StaRUG and Part 26A proceedings are initiated on a voluntary basis and with the aim of saving the company's business as a going concern. In particular, it is not necessary to include all creditors, the restructuring can be confined to selected classes of creditors, e.g. financial creditors. Both proceedings are semi-collective only, which, as pointed out above, is a major difference to *Insolvenzverfahren*. They do not automatically encompass each and every creditor of the company (as, from a German perspective and as a general principle, *Insolvenzverfahren* would). [Instead, both Part 26A proceedings and the StaRUG allow debtors to exclude or include creditors in the proceedings.]

58 The sanction order under § 67 StaRUG gives effect to the content of the plan which is binding on all creditors affected by the plan (**[CT2/51]**). That is similar to the effect that the sanction order in Part 26A proceedings has. Furthermore, the StaRUG allows a cross-class cram-down (§ 26 StaRUG).[23] All these features are similar to those of the Part 26A proceedings.

59 Part 26A proceedings may be initiated only if the company has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern.[24] This refers to a state of likelihood of insolvency and is comparable to the imminent inability to pay (*drohende Zahlungsunfähigkeit*) that forms part of the relevant criterion under the StaRUG proceedings.

60 The fact that Part 26A proceedings can be initiated where a company is insolvent or liable to be wound up does not materially change the comparison with StaRUG proceedings. Both Part 26A proceedings and StaRUG proceedings may be initiated as early as on the appearance of financial difficulties, which, under German law, would regularly qualify as an imminent inability to pay. In addition, although StaRUG proceedings are generally terminated when the debtor has become unable to pay, there are exceptions to this general rule (§ 33(2) no. 1 StaRUG).[25] With the leave of the court, the StaRUG proceedings may be continued where, despite the

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[22] **[CT2/42]**

[23] **[CT2/48]**

[24] Section 901A(2),Companies Act 2006.

[25] **[CT2/49]**

occurrence of an inability to pay the creditors, the envisaged restructuring plan is considered to have good chances of success.

61 Thus, from the German perspective (which is the relevant perspective when interpreting the SUN Notes Terms and Conditions due to their German language version being solely authoritative and German law being the governing law as outlined above), Part 26A proceedings would be considered as the English equivalent to German StaRUG proceedings. StaRUG proceedings are – without a trace of doubt – not *Insolvenzverfahren*.

62 The similarities are not surprising, as the introduction of Part 26A of the CA 2006 was initiated by the Directive 2019/1023 and thus, despite Brexit, by European law. To the best of my knowledge, the UK Government introduced the Part 26A proceedings with a view to that directive, which, inter alia, mandates the introduction of provisions on the cross-class cram down (art. 11 of the directive). It seems clear that both the German StaRUG proceedings and the Part 26A proceedings are in line with the directive and thus are comparable to each other (and both are commonly described as a "restructuring plan").

63 In light of all of these similarities, Part 26A proceedings, just like StaRUG proceedings, do not fall within the scope of §10(1)(e). In essence, Part 26A proceedings are not insolvency proceedings as a matter of German law.

64 It follows that the Part 26A proceedings do not qualify as an *Insolvenzverfahren* within the meaning of § 10(1)(e) of the SUN Notes Terms and Conditions.

e) Differences to the treatment under International Insolvency law

65 It is important to note that there is no contradiction in concluding that Part 26A proceedings do not fall within the scope of the term *Insolvenzverfahren* within the meaning of § 10(1)(e) on the one hand and concluding that they do fall within the scope of the provision on recognition of foreign insolvency proceedings (§ 343 InsO)[26] on the other.

66 This is because the nature, background and purpose of these provisions is different. Under § 10(1)(e) the relevant question is in what circumstances does an Event of Default occur which gives the noteholders the right to accelerate the issuer's obligation to repay the principal amounts of the notes. That is a question of the

[26] **[CT2/46]**

interpretation of the contract. Conversely, § 343 InsO is not based on notions of party autonomy but on state interests and the question of how Germany should deal with foreign proceedings of other sovereign states under the principles of universalism and international legal cooperation and (bilateral) cross-border effects.[27] This is the domain of private international law and international procedural law. Under § 343 InsO, it is necessary to pursue a broad approach to construction in order to take account of the diversity of insolvency proceedings in different jurisdictions and thus of the fact that foreign insolvency proceedings will never be exactly like German *Insolvenzverfahren*.

67 The fact that Part 26A proceedings would be recognisable under the statutory provision § 343 InsO is a different question than the question whether they constitute an Event of Default under the SUNs. It is important to understand that in the German domestic law on recognition of foreign non-EU proceedings, there is no special provision on the recognition of modern, preventive, non-insolvency, but insolvency-related, restructuring frameworks. Of course, as I pointed out in Thole 1, § 343 InsO may be applied to such insolvency-related, preventive proceedings, but that does not mean that these proceedings are, from the perspective of substantive law, insolvency proceedings. The preventive restructuring proceedings such as the English Part 26A restructuring plan fall under the same rules on recognition as classical-style insolvency proceedings, i.e., § 343 InsO, but this is based on the specific nature, background and purpose of § 343 InsO (and different from the provision in the SUN Notes Terms and Conditions), the factual relationship between preventive restructurings and real insolvency proceedings and the lack of an additional, special provision that specifically deals with the recognition of foreign, non-EU preventive restructurings. I described this relationship in Thole 1 at paras. 8.13 – 8.25 where I pointed out that, in particular, the domestic provision of § 343 InsO would most likely be adjusted in order to accommodate (non-EU) preventive restructuring proceedings and to mirror the fact that under the EIR, i.e. within the EU, public preventive proceedings included in Annex A of the EIR are recognisable in other Member States (art. 19 EIR). Consequently, the application of § 343 InsO to Part 26A proceedings is not based on the determination that these proceedings are, in substance, *Insolvenzverfahren* but rather on the underlying dogmatic interrelationship between § 343 InsO and the rules of the EIR on recognition and on

[27] Cf. Stein/Jonas-*H. Roth*, ZPO, 23. Ed. 2015, § 328 para. 1 (for § 328 ZPO) **[CT2/4]**.

the premise that the scope of § 343 InsO is generally interpreted more widely in order to encompass new preventive restructurings in non-EU jurisdictions (but similar to the proceedings included in Annex A of the EIR).

68 Thus, applying § 343 InsO to preventive restructurings requires the courts to take the similarities of restructuring and insolvency proceedings into account and bear in mind that § 343 InsO may be interpreted widely in order to encompass the new restructuring frameworks that were introduced in many foreign states. The interpretation of a contractual term like § 10(1)(e) is a completely different matter because the interpretation of terms is based on how, from an objective perspective, a well-informed investor understands the wording of the term. A well-informed investor, with a view to the substantive German law, which is the governing law of the SUN Notes, would not consider Part 26A proceedings as *Insolvenzverfahren* because they are comparable to StaRUG proceedings which clearly are not *Insolvenzverfahren* and they do not share the key characteristics of an *Insolvenzverfahren*. Under German law, the terms and conditions of notes shall, in principle, be interpreted narrowly and strictly linked to the (exhaustive) wording of the relevant clause.[28]

69 Applying § 343 InsO to preventive restructurings and to Part 26A proceedings is not based on the determination that (preventive) restructurings are, in substance, insolvency proceedings but rather based on the necessity to apply the most suitable legal provision on recognition, given the absence of an express, special provision on the recognition of preventive, pre-insolvency and semi-collective restructuring plan proceedings in the German domestic law. The interpretation of this statutory provision has no implications for the interpretation of the contractual clause in § 10(1)(e) of the SUN Notes Terms and Conditions.

f) Result

70 In summary, preventive restructuring proceedings do not fall within the definition of *Insolvenzverfahren*. Thus, § 10(1)(e) of the SUN Notes Terms and Conditions does not cover English Part 26A proceedings. It follows that termination notices which rely on § 10(1)(e) merely where a restructuring plan has been initiated are void and of no effect.

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[28] Langenbucher/Bliesener/Spindler/*Bliesener/Schneider*, SchVG § 5 Rn. 107 **[CT2/6]**.

2. No other statutory grounds for a termination of the SUN Notes

71 It is worth mentioning that (i) as a matter of German law, there are no other statutory grounds for a termination of the SUN Notes and (ii) even if there were other potential termination rights, the exercise of these termination rights would likely be considered invalid on other grounds, too.

72 It is apparent that some restrictions on termination rights also follow from the German law on notes, i.e. general contract law and the SchVG 2009, which is the governing contract law with respect to the obligations under the SUN Notes.

73 In particular, as I will be explaining in this section, it is important to point out that noteholders, as a matter of general German contract law and/or the German law on notes, generally do not enjoy termination rights other than those specified in the terms and conditions. Thus, if and because § 10(1)(e) does not grant the SUN Noteholders a right to terminate, the termination notices remain void; they cannot be based (and, indeed, have not been based) on other statutory grounds.

a) No termination right pursuant to § 490 BGB

74 Generally, pursuant to German law, financial creditors enjoy an extraordinary right to terminate a loan agreement pursuant to § 490 BGB.[29] If there is or threatens to be a substantial deterioration in the financial circumstances of the borrower or in the value of a security given for the loan as a result of which the repayment of the loan is jeopardised even if the security is realised, the lender may give notice of termination of the loan agreement with immediate effect. However, it is well settled and was confirmed by the BGH that § 490 BGB does not apply to notes under the SchVG.[30] Notes are different from ordinary loan agreements. Thus, § 490 BGB does not apply to the SUN Notes which were issued under the SchVG.

75 Even if § 490 BGB did apply (*quod non*): If the creditor relies on this right, the requirements need to be ascertained in the given case. Even before paying out the loan it is well established that in exceptional circumstances the termination might constitute a breach of the good faith requirement as provided in § 242 BGB.[31] For

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[29] BeckOK InsR/*Berberich*, 28. Ed. 15.7.2022, InsO, § 119 para. 5 with further references **[CT2/26]**; *Huber*, ZIP 2013, 493, 494 **[CT2/27]**.

[30] BGH, 31.5.2016, XI ZR 370/15, NZI 2016, 709 para. 30 **[CT2/31]**.

[31] BGH, 6.3.1986, III ZR 245/84, NJW 1986, 1928 **[CT2/31]**; BeckOGK/*C. Weber*, 15.10.2022, BGB § 490 para. 81 **[CT2/11]**.

situations after paying out the loan, pursuant to the case law of the BGH and the corresponding literature, it is required to evaluate both parties' interests and to weigh them against each other.[32] Furthermore, it is a well-established concept that the termination may not come at a "bad time", which more or less refers to a situation in which the termination catches the debtor completely off guard.[33] At the very least it would be a factor to weigh that the Group and the Plan Company are undergoing a restructuring process. Although no creditor is under an obligation to support the restructuring, it could still be a factor if the termination could endanger the whole group. Thus, it is doubtful whether § 490 BGB would grant a termination right even if it did apply to notes (which, again, according to the BGH it does not).

b) No termination right pursuant to § 314 BGB

76 § 314 BGB allows for termination under general contract law where there is a compelling reason which justifies termination. This right may apply to notes as well. However, the requirements are not fulfilled as there is no compelling reason for termination for largely the same reasons as to why § 490 BGB would likely be excluded, if it were, in general, applicable to note obligations. The requirements of § 314 BGB are even more demanding than those of § 490 BGB. A compelling reason refers to exceptional circumstances where it is justified to terminate the contract. The restructuring process and the Part 26A proceedings do not constitute a compelling reason. The noteholders are bound by the notes and must not use termination notices as an easy way of opting out of the outcome of the restructuring, i.e. the effects of the plan. In any case, the noteholders who have served termination notices have not relied on this termination right.

77 Similar to § 490 BGB, a compelling reason within the meaning of § 314 BGB needs to be ascertained by weighing both parties' interests.[34] The continuation of the contract and of the obligations under the contract is required to be unreasonable not only for the party who is willing to terminate but for the other party as well.[35] As

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[32] BGH NJW 1986, 1928, 1929 **[CT2/28]**; OLG Frankfurt a. M. BeckRS 2002, 30239943 **[CT2/29]**; LG Frankenthal, ZIP 2006, 752, 753 **[CT2/30]**.

[33] Langenbucher/Bliesener/Spindler/*Krepold*, Bankrechts-Kommentar, 3rd ed. 2020, Kap. 14 para. 201 **[CT2/7]**.

[34] Cf. § 314 para. 1 cl. 2 BGB **[CT2/38]**.

[35] Cf. Begründung RegE, BT-Drucksache 14/6040, p. 178 **[CT2/8]**; *Gaier*, in: Münchener Kommentar zum BGB, 9th ed. 2022, § 314 para. 21.

the BGH decided in its judgment of 31 May 2016,[36] in a restructuring scenario, noteholders are not permitted to terminate simply because the issuer aims at a restructuring of its obligations. Thus, irrespective of the question of the applicable restructuring law, as a matter of the German law governing the default rights, the restructuring under Part 26A forms a specific fact that requires consideration when the termination of the SUN Notes is at stake. By terminating its notes, a creditor would jeopardise the whole restructuring process which might be considered as breach of good faith and the duty to give consideration to the debtor's interests. In those circumstances, there is no compelling reason to terminate.

c) Noteholders are bound by a subsequent restructuring procedure notwithstanding the termination

78 In any event, in a case of 31 May 2016 involving a bond restructuring, the BGH held that a bondholder was not allowed to terminate on the basis of § 314 BGB if at that time the debtor was already entering into a restructuring process aiming at a formal restructuring of the bond by making use of a collective action resolution of the bondholders.[37] The restructuring in the case of this judgment (of the BGH of 31 May 2016) was to be implemented by way of a consent solicitation process under the SchVG. However, the reasoning of the judgment (which is widely referred to as the primacy of a creditor vote in a restructuring over individual terminations) can and must be applied *mutatis mutandis* to restructurings which are implemented by a preventive restructuring procedure, like the Part 26A proceedings (not least since such procedures also depend on a creditor vote and are, thus, structurally similar).[38]

79 As the Plan Company is undergoing Part 26A proceedings, there is therefore no compelling reason (as required by § 314 BGB) why an individual noteholder should be put in a position to terminate the notes which are subject to the restructuring plan in the Part 26A proceedings. The noteholders are entitled to participate in the restructuring proceedings and can thereby influence the course of the restructuring by participating in the voting process, regardless of whether they will likely be part of the minority or the majority of creditors, which is a matter to be left to the outcome

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36 BGH, 31.5.2016, XI ZR 370/15, NZI 2016, 709 **[CT2/31]**.

37 BGH, 31.5.2016, XI ZR 370/15, NZI 2016, 709 para. 36 **[CT2/31]**.

38 Cf. Lürken/Plank/Ruf in: Hopt/Seibt, Schuldverschreibungsrecht, 2. Ed. 2023, para.12.188 **[CT2/9]**; Lürken, ZIP 2021, 1305, 1306 **[CT2/10]**.

of the voting process and may depend on a variety of circumstances. In line with the judgment of the BGH of 31 May 2016, there is no legitimate interest of individual noteholders to avoid the consequences of the restructuring by simply terminating the notes.

80 As the BGH expressly pointed out in the judgment of 31 May 2016,[39] the creditor who is willing to terminate must not contradict the restructuring attempt. The noteholders are under an implicit obligation to collectively participate in the restructuring.[40] Against this background, the noteholders who are willing to terminate have no legitimate interest in exercising the (alleged) termination right (if there were such a right) because by terminating the noteholders must not achieve an "exit" from being bound by the note anyway, due to the collective nature of notes. Notes are different from simple loan agreements because the issuer's obligations are shaped by the terms and conditions and remain uniform as against all noteholders. This is clearly stated in § 4 SchVG which refers to the principle of the collectively binding effect (*kollektive Bindung*) (**[CT2/35]**).

81 In addition, in the further judgment of 8 December 2015, while the BGH in that case left open whether the termination notice as such was valid, it did conclude that despite its (for the purpose of the appeal assumed) validity the termination would have no effect on the collective nature of the note as mandated by § 4 cl. 1 SchVG (**[CT2/35]**). The notes (in the relevant series) must have uniform conditions binding on each and every noteholder. Thus, according to the BGH, noteholders are bound by subsequent restructurings of the notes regardless of their prior termination notice. This is because otherwise any attempt to restructure the notes would be futile in the first place as noteholders would terminate and thus would have an easy exit option prior to the final decision or sanctioning of the restructuring.[41] Consequently, even if the termination notices against the Plan Company were valid on grounds other than § 10(1)(e), this would not hinder the restructuring of the notes in the Part 26A proceedings. All Noteholders would be bound by the restructuring in these proceedings.

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[39] BGH, 31.5.2016, XI ZR 370/15 para. 34 **[CT2/31]**; OLG Köln, 9.7.2015, 3 U 58/12 – juris **[CT2/32]**.

[40] BGH, 31.5.2016, XI ZR 370/15 para. 40 **[CT2/31]**.

[41] BGH, 8.12.2015, XI ZR 488/14, BKR 2016, 171 para. 25 **[CT2/24]**.

82 Consequently, there is neither a right to terminate the SUN Notes based on § 10(1)(e) of the SUN Notes Terms and Conditions nor a right based on other statutory rights such as § 314 BGB. Even if there were a termination right, whether based on § 10(1)(e) of the SUN Notes Terms and Conditions or on a statutory termination right pursuant to § 314 BGB, the SUN Noteholders would not have a legitimate interest in exercising it because (i) the termination could not hinder the binding effect that the Part 26A proceedings in England have on the respective SUN Noteholders and (ii) the reasoning of the judgment of the BGH of 8 December 2015 that individual noteholders shall not be entitled to block restructuring efforts supported by the relevant majority of noteholders, even if that individual noteholder has a valid termination right, applies. From the perspective of German law, the Part 26A proceedings in England are binding and effective on all holders Plan Creditors, including those who purportedly terminated their notes in light of the initiation of this process.

3. Invalidity under German law (§ 44 StaRUG)

83 Finally, I would like to add that in the context of domestic proceedings, German insolvency and restructuring law would likely consider § 10(1)(e) to be invalid, by virtue of § 44 StaRUG. I should add that in this case, I think the application of private international law would mean that § 44 StaRUG is very unlikely to apply here. But I mention this provision by way of context, and to illustrate the German Court's tendency to render invalid these types of termination provisions.

84 § 44 StaRUG imposes restrictions on creditors seeking to exercise contractual default rights. According to § 44 para. 1 StaRUG, the fact that the restructuring matter is pending or that tools of the preventive framework are used by the debtor does not "as such" (*ohne Weiteres*) constitute cause for the termination of contract, for the acceleration of performance, for a right by the other party to refuse performance owed or to demand adjustments to the relevant contract (**[CT2/50]**). Any contrary contractual agreements are invalid, § 44 para. 2 StaRUG (**[CT2/50]**).

85 The invalidity of ipso facto clauses is therefore well established in German law. The § 44 StaRUG does not only lead to the invalidity of the termination notice, but also

to the invalidity of the contractual clause. This applies to clauses that allow a termination on the grounds of the insolvency proceeding or restructuring case.[42]

Thus, if the relevant finance documentation includes such a clause within the scope of § 44 StaRUG, i.e., a clause that is based on the pendency of restructuring or insolvency proceedings, the clause is, from a German law perspective, invalid. Although no German insolvency or restructuring proceedings have been initiated, as a matter of German law and assuming for the purpose of this report the applicability of § 44 StaRUG, the clause in § 10(1)(e) and the exercise of the termination notice would most likely be considered invalid on this basis.

VII. Conclusions

86 It is clear from the wording of § 10(1)(e) of the SUN Notes Terms and Conditions that this clause is not triggered by the initiation of English Part 26A restructuring proceedings or any other pre-insolvency preventive restructuring proceedings aimed at avoiding insolvency. This conclusion applies regardless of the fact that the Part 26A proceedings may be treated as equivalent to insolvency proceedings within the meaning and for purposes of the provision of § 343 InsO on the recognition of foreign proceedings.

87 Even if the termination right under § 10(1)(e) of the SUN Notes Terms and Conditions generally would apply to Part 26A proceedings (*quod non*), it remains doubtful whether both the clause and the exercise of the termination right were valid under German restructuring law and under the German law on notes. There are no other statutory termination rights. In any event, all SUN Noteholders would be bound by the restructuring plan despite a prior termination notice, as a termination right must not and does not grant an individual noteholder a right to exit the collective nature of the notes (as it is mandated by § 4 SchVG).

VIII. Expert Declaration

88 I understand that my overriding duty is owed to the English Court on matters within my expertise and I have complied with that duty. I understand that this duty overrides any obligation I may have to those instructing me. I am aware of the requirements of Part 35 of the Civil Procedure Rules, the Practice Direction to Part

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[42] BGH, 15.11.2012, IX ZR 169/11, ZIP 2013, 274, para. 19 **[CT2/33]**.

35 and the Guidance for the Instruction of Experts in Civil Claims. This report has been produced independently and I have not been influenced by any other party in its production. I have attempted to consider all material facts including those which might detract from the opinions I hold.

89 I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Cologne, 23 March 2023

(Prof. Dr. iur. Christoph Thole)

Appendix 1 Documents Reviewed

In addition to the documents referred to in Appendix 2 to Thole 1, I have been provided with the following documents by White & Case:

a) The Order of Sir Anthony Mann dated 27 February 2023 in Claim No. CR-2023-000936

b) The Judgment of Sir Anthony Mann dated 27 February 2023 in Claim No. CR-2023-000936

c) The Halàsz Statement

d) Expert Report of Professor Thomas Pfieffer in the matter of AGPS BondCo Plc. and in the matter of the Companies Act 2006, dated 16 March 2023

e) The Expert Report of Bradley S Ritter in the matter of AGPS BondCo Plc. and in the matter of the Companies Act 2006, dated 16 March 2023

f) Purported termination notices dated 21 February 2023 issued by certain members of the AHG (various affiliate companies of Strategic Value Partners and DWS Investment GmbH) in respect of relevant SUN Notes held by them (the "**PTNs**")

g) Rejection notices dated 27 February 2023 issued by the Plan Company and the Group in respect of the PTNs

h) Purported termination notices dated 7 and 9 March 2023 issued by certain members of the AHG (affiliate companies of Strategic Value Partners and DWS Investment GmbH) in respect of relevant SUN Notes held by them (the "**Second PTNs**")

i) Rejection notices dated 16 March 2023 issued by the Plan Company and the Group in respect of the Second PTNs