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

THIRD 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 Plc (the "**Plan Company**") to give my further expert 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 "**CT3**". Unless indicated to the contrary, references to page numbers in this expert report are to the pages of this exhibit.
4. This is my third expert opinion in these proceedings, further to my opinions dated 20 February 2023 and 23 March 2023 (respectively, "**Thole 1**" and "**Thole 2**"). Capitalised terms used but not defined herein will have the meanings ascribed to them in Thole 1 and Thole 2.

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.

III. Questions Addressed in this Expert Opinion

7. I have been asked to reply to the Expert Report of Professor Thomas Pfeiffer dated 16 March 2023 (the "**Pfeiffer Report**").

8. The Pfeiffer Report expresses the view that the issuer substitution clause in § 12 of the SUN Notes Terms and Conditions is invalid (Section 1). It also expresses the view that if sanctioned, the Restructuring Plan would not be effective in Germany (Section 2).
9. I have considered the conclusions at which the Pfeiffer Report arrives and the analysis that Professor Pfeiffer undertakes which leads him to those conclusions. For the reasons set out below, I disagree with those conclusions.
10. I therefore remain of the view that Thole 1 (and for the avoidance of doubt, Thole 2) is correct in all respects. In this report, I will neither restate those reports nor modify them. I incorporate them by reference, including as to the issues that were addressed, and the documents, statutory or other authorities relied upon.

IV. Documentation Reviewed

11. For the purposes of preparing this expert opinion, I have been provided with and have reviewed, the documents listed in **Appendix 1**. I have been assisted by White & Case in preparing the appendices to this report, in view of the limited time available to me.

V. General Remarks on the Outline of this Report/Summary

12. I strongly disagree with the legal premise of the Pfeiffer Report on the requirement of transparency. The issuer substitution clause in the SUN Notes Terms and Conditions is transparent as it clearly and unambiguously allows an issuer substitution "at any time". The Pfeiffer Report tries to argue that it would have been required to include a (non-exhaustive) list of potential circumstances for the issuer substitution clause (paras. 32, 33), but that is not convincing, not least since the argument is based on irrelevant case law, misquotations of German legal literature and it ignores the special rules applicable to notes under German law.
13. In particular, I believe it is clear that the proper interpretation of the SUN Notes Terms and Conditions should not be approached as if the SUNs were consumer contracts, as the Pfeiffer Report suggests (see, e.g., the Pfeiffer Report at paras. 27, 78, 101). Pursuant to the applicable German rules of interpretation, the SUN Notes must be construed as (and indeed are) a commercial contract between sophisticated commercial entities and thus the question should be how they would be understood looked at from the perspective of a reasonable and well-informed, sophisticated investor.

14. Any proper interpretation of the SUN Notes Terms and Conditions must have regard to market practice and to the need for a proper functioning of the capital markets. This is mandated by § 3 of the German Act on Notes of 2009 (*Schuldverschreibungsgesetz*) ("**SchVG**") [**CT3/41]** which as a matter of German law supersedes the general contract law provision of § 307 para. 1 sentence 2 BGB (**[CT3/43]**), on which the Pfeiffer Report relies. I further disagree with Professor Pfeiffer's conclusion that any transparency requirement requires the relevant clause (in this case, § 12 of the SUN Notes Terms and Conditions) to set out in detail potential future scenarios pursuant to which a substitution may occur. On the contrary, structuring a clause in this way, which would require the drafter to attempt to foresee these future scenarios – as the Pfeiffer Report seems to require – may even lead to a lack of clarity of the term, and undermine the transparency requirement as it would be difficult (if not impossible) to describe all future scenarios with sufficient definiteness ex ante.

15. I also disagree with Professor Pfeiffer's assumption that a presumption of unfairness under § 307 para. 2 no. 1 BGB applies because, with regard to SUN Notes Terms and Conditions, there is no clear statutory model from which the substitution clause deviates; as I previously explained in para. 5.28 of Thole 1, notes are essentially formed by their terms and conditions (including terms on issuer substitution).

16. Further, while Professor Pfeiffer refers to several BGH cases in support of the propositions set out in the Pfeiffer Report, by failing to outline their factual background, he obscures the fact that the cases he cites are distinguishable from this case. In other words, when Professor Pfeiffer refers to BGH cases allegedly dealing with substitution clauses, he omits to mention that none of these cases refer to the substitution of an issuer of notes (and for notes, § 3 SchVG is the *lex specialis*).

17. Instead, the case law relied upon by Professor Pfeiffer mostly relates not to a substitution of one of the parties, but to unilateral adjustments to the substituting parties' contractual obligations (whereas in this case, the obligations to which the new issuer is substituted are precisely the same as the obligations owed to the original issuer). In case it is helpful to the Court, there is at **Appendix 2** to this report a summary of those cases and their subject matter. Most strikingly to me, the judgment BGH NJW 2010, 3708 (**[CT3/37]**) to which the Pfeiffer Report refers at paras. 37 and 38 expressly held a clause allowing a substitution (of a landlord) "at any time" as valid, and did not call the transparency of

the relevant clause into question (even in the context of a rental agreement). Professor Pfeiffer fails to acknowledge this and the limitations the context places on his analysis.

18. Further, I strongly disagree with the allegation of the Pfeiffer Report that the issuer substitution right provided for in the SUN Notes Terms and Conditions is not in accordance with general statutory principles of German contract law (paras. 17). Whereas the Pfeiffer Report tries to rely on general principles of judicial control of the use of standard terms and conditions (*Allgemeine Geschäftsbedingungen*) under general contract law, it neglects the specific legal literature[1] and discussion on notes. In this way the Pfeiffer Report disregards the fact that corporate notes, which are only rudimentarily regulated in the BGB, are primarily governed by a special Act, the SchVG and formed by their specific terms and conditions, as opposed to ordinary sale of goods or employment contracts which are highly regulated. On the basis that the SchVG envisages a restructuring by way of an issuer substitution (§ 5 para. 3 SchVG, even without the approval of some noteholders)[2] and that the substantive rights and obligations of notes are determined by their terms and conditions (as is implied by § 2 SchVG)[3], a clause providing for the substitution of the issuer is not in conflict with general principles of relevant contract law.

19. As explained in Thole 1, it is widely accepted that an issuer may, at its discretion, retain unilateral rights. I accept that the inclusion of such a right may impair the economic attractiveness of the note for noteholders in search of a good investment. This, however, is unrelated to the question of its legal validity. To further illustrate that point, the offering of an unattractive rate of interest would, in the same way, not constitute a breach of the purpose or the nature of the contract (within the meaning of § 307 of the BGB).[4]

20. As already indicated in Thole 1, I also strongly disagree with the conclusion of the Pfeiffer Report that the Parent Company Guarantees do not equivalently compensate for the economic consequences that may be associated with an issuer substitution. There is no increase in risk. The Noteholders have gained a further debtor. It is generally recognized that an unreasonable disadvantage can be avoided by the provision of an

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[1] It may be worth noting that among its few references to the law of notes and the SchVG, the Pfeiffer Report frequently cites the second edition 2022 of the Frankfurter Kommentar zum Schuldverschreibungsgesetz (e.g. in fn. 25, 26). There is no such second edition. It has not been published yet.

[2] **[CT3/42]**.

[3] **[CT3/40]**.

[4] **[CT3/43]**.

irrevocable and unconditional guarantee by the previous issuer.[5] Professor Pfeiffer does not dispute this. Moreover, issuer substitution clauses, including in the form contained in the SUN Notes Terms and Conditions, are standard market practice and recognised as compliant "with the general legal and economic requirements and the expectation of the investors".[6]

21. The Pfeiffer Report also appears to be based on the premise that the application of English law in general and the Restructuring Plan in particular are detrimental to the interests of the creditors, or at least "worse" than other potentially applicable laws and procedures (Pfeiffer Report at para. 49 et passim). For example, it is stated that "English law has a reputation for permitting debt restructuring or extinction of debts more easily than continental European jurisdictions" (Pfeiffer Report at para. 52 and fn. 62). I would like to note that I disagree with this proposition, for the reasons that I will explain further below.

22. The Pfeiffer Report also fails to disclose and properly discuss that it is arguing against both market standard note terms and conditions in Germany as well as the prevailing view in German legal literature (shared by the leading legal commentaries *Hopt/Seibt*,[7] and *Langenbucher/Spindler/Bliesener*).[8]

23. If the Pfeiffer Report were to be correct (*quod non*), this would mean that the vast majority of issuer substitution clauses in German law governed bonds, if not all, are invalid. As outlined in Thole 1, issuer substitution clauses such as those included in the SUN Notes Terms and Conditions are market standard and considered generally permissible. The Pfeiffer Report fails to explain why both the market in Germany and the prevailing view in German legal literature and among practitioners should is wrong.

24. The alleged increase in risk for creditors on the ground that the issuer has been substituted with a UK company which now undergoes English law restructuring proceedings (Pfeiffer Report at para. 49) also wrongly takes indirect consequences of

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[5] Hartwig-Jacob, in: Frankfurter Kommentar SchVG, 2013, § 3 para. 100 **[CT3/26]**; Bliesener/Schneider, in: Langenbucher/Bliesener/Spindler, Bankrechts-Kommentar, 3. Ed. 2020, § 5 para. 30 **[CT3/22]**; Baums, Recht der Unternehmensfinanzierung, 2017, § 48 para. 52 **[CT3/27]**.

[6] Hartwig-Jacob, in: Frankfurter Kommentar SchVG, 2013, § 3 para. 99 **[CT3/23]**; cf. also Langenbucher/Bliesener/Spindler/Bliesener/Schneider, Bankrechts-Kommentar, 3. Ed. 2020, § 3 para. 30 **[CT3/22]**.

[7] Hopt/Seibt, Schuldverschreibungsrecht, 2. Ed. 2023, § 5 para. 84.

[8] Langenbucher/Bliesener/Spindler, Bankrechts-Kommentar, 3rd edition 2020, § 5 SchVG, para 30 **[CT3/17]**.

the substitution into account and is inadmissible on other grounds, too. It would, in essence, mean that a substitution with a substitute debtor subject to the laws of England and Wales would always be invalid. That conclusion is clearly misconceived.

VI. Legal analysis

1. Part 1 of the Pfeiffer Report

a) Standard of judicial control

25. At paras. 25-28, Professor Pfeiffer argues that §§ 305-310 BGB apply to the SUN Notes Terms and Conditions. As I have made clear in Thole 1 (paras. 5.5-5.7), it is arguable that terms and conditions of notes are subject to the test of reasonableness in § 307 para. 1 sentence 1 BGB. However, while the general applicability of §§ 305-310 BGB is widely acknowledged, the details of the application of said provisions to notes requires closer analysis. I disagree with the degree of judicial control which, according to Professor Pfeiffer, the German courts will allegedly apply to the terms and conditions of notes.

26. At para. 27, the Pfeiffer Report contends that "*the non-business legal standards (consumer law standards)*" apply. It is unclear what these standards are. There is no particular "consumer law perspective" under German law, at least not in the context of §§ 305-310 BGB.[9]

27. The SUN Notes are issued in denominations of EUR 100.000 (First Expert Opinion at 5.27). Professor Pfeiffer did not and cannot refute the presumption behind art. 1(4)(c) Regulation (EU) 2017/1129 that investors acquiring securities with a denomination per unit of EUR 100.000 have considerable experience in dealing with financial instruments (contrary to the Pfeiffer Report at 81).

[9] What the Pfeiffer Report might have had in mind (which I can only speculate on because of the lack of a definition of that consumer law perspective) is that, in a business-to-business contract, the specific provisions of §§ 308-309, which establish specific reasons for an invalidity of the term, are excluded by virtue of § 310 para. 1 BGB. But that does not alter the legal assessment because none of the grounds listed in either § 308 BGB or § 309 BGB are potentially applicable to § 12 of the SUN Notes Terms and Conditions anyway. In addition, there is no higher degree of scrutiny of the terms if that is what Professor Pfeiffer is referring to. It is hard to see why a "consumer law perspective" (whatever that is supposed to mean) would alter the legal assessment of the substitution clause at hand; e.g. the guarantee that compensates for the substitution is as good for a consumer investor as for a professional investor.

28. I have also been instructed that certain of the SUN Notes were also listed on an unregulated market abroad (EUR MTF) and that the issuance of the SUN Notes was accompanied by an offering memorandum which provided that the Notes should not be sold to retail investors.[10]

29. At paras. 30-31, the Pfeiffer Report contends that § 3 SchVG does not displace the applicability of §§ 305-310 BGB and that "*both transparency provisions are applicable*". This simply does not reflect German law as it stands. § 307 BGB includes a fairness (disadvantage) test and a transparency requirement (**[CT3/43]**). While § 3 SchVG (**[CT3/41]**), which I have also discussed in Thole 1 (para. 5.6-5.7), may not necessarily replace the fairness test, it does replace and supersede the transparency requirement of § 307 para. 1 sentence 2 BGB. The reference in the Pfeiffer Report at footnote 18 is incorrect and, at best, misleading. The Printed Paper (the Official Explanations of the Draft Act) of the German Parliament does not "*expressly*" state that both the transparency requirement of § 3 SchVG and § 307 BGB apply. On the contrary, it expressly states that § 3 SchVG is specific and *lex specialis*.[11] It thus supersedes § 307 BGB with regard to requirements of transparency. This is widely and as far as I am aware unanimously acknowledged in the literature on notes.[12] § 3 SchVG replaces § 307 para. 1 sentence 2 BGB. § 3 SchVG relates to the viewpoint of a well-informed, sophisticated investor, not to an inexperienced investor.

30. Thus, with respect to the section on "*transparency in relation to the reasons for a substitution*" (Pfeiffer Report at paras. 30-35), the Pfeiffer Report is based on incorrect premises. It disregards § 3 SchVG and its superseding effect on § 307 para. 1 sentence 2 BGB. The consequent references to transparency requirements under § 307 para. 1

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[10] The Offering *Memorandums related to 2024 Notes, 2025 Notes, January 2026 Notes, November 2026 Notes and 2029 Notes* include notes as "Investing in the Notes involves certain risks" (cover page) and "The Notes are not intended to be offered, distributed, sold or otherwise made available to and should not be offered, sold or otherwise made available to any retail investor in the EEA." (p. iii).

[11] Begründung RegE, (Official Explanation of the Draft Act), BT-Drucks. 16/12814, p. 13: „Unabhängig von dieser Grundsatzfrage wird im Entwurf jedoch ein spezialgesetzliches Transparenzgebot für Anleihebedingungen hinsichtlich des Leistungsversprechens des Emittenten vorgesehen, insbesondere im Hinblick auf die teils hochkomplexen Bedingungen von sogenannten strukturierten Anleihen." **[CT3/1]**.

[12] BeckOGK/Vogel, 1.1.2023, § 3 para. 55 [**CT3/2]**; Arbeitskreis Reform des Schuldverschreibungsrechts ZIP 2014, 845 f. [**CT3/3]**; Baums ZHR 177 (2013), 807, 810 [**CT3/4]**; Hartwig-Jacob, in: Frankfurter Kommentar zum SchVG, 2013, § 3 para. 3 [**CT3/5]**; Hopt/Seibt/Artzinger-Bolten/Wöckener, Schuldverschreibungsgesetz, § 3 para. 29 [**CT3/6]**; Horn BKR 2009, 446, 453 [**CT3/7]**; Leuering/Zetsche NJW 2009, 2856, 2857 [**CT3/8]**; Otto WM 2010, 2013, 2015 [**CT3/9]**; Preuße/Dippel/Preuße, 2011, § 3 SchVG para. 23, 65 [**CT3/10]**; Schlitt/Schäfer AG 2009, 477, 485 f. [**CT3/11]**; Schmidt/Schrader BKR 2009, 397, 400 [**CT3/12]**; Veranneman/Oulds, § 3 SchVG para. 20 [**CT3/13]**.

sentence 2 BGB and the further remarks on an (alleged) requirement of definiteness, which Professor Pfeiffer seems to draw from § 307 para. 1 sentence 2 BGB (Pfeiffer Report para. 32), are therefore misleading.

b) No need for an enumeration of potential substitution scenarios

31. I consider the arguments put forward by the Pfeiffer Report at para. 32 f. unconvincing. The Pfeiffer Report relies heavily on selected BGH cases. However, it does not outline these specific cases and their factual backgrounds. As one can see from Appendix 2, none of these judgments cover a case which is comparable to the case at hand. Instead, they dealt with contract clauses in rent contracts,[13] in a franchise agreement,[14] and in a contract for a prepaid mobile phone.[15] Further, all of the said judgments refer to standard terms and conditions which allow one party to the relevant contract to put a particular burden on the other party, e.g. to unilaterally block the mobile phone account of the customer. This is diametrically different to the issuer substitutions clauses in the SUN Notes Terms and Conditions. The latter include the requirement of a guarantee by the original issuer, the whole point of which is ensure that there is no burden that is being put on the noteholders by an issuer substitution. Therefore, the judgments cited by Professor Pfeiffer are not relevant for the case at hand.

32. The Professor states that an "*unconstrained discretion*" for the user to decide whether to apply the clause is unacceptable and it assumes a requirement that clauses must be sufficiently defined. The Pfeiffer Report tries to argue that "*under the principle that a clause should be as definite as possible, it must enumerate typical cases*".

33. I disagree for various reasons. While it may be accepted that terms need to be sufficiently clear and unambiguous, there is no conclusive link to a requirement of enumeration.[16] It is not mandatory to enumerate and this proposition is not supported by the prevailing authorities. Such a requirement is nowhere to be found in § 307 para. 1 BGB or § 3 SchVG or the legal literature or case law relating to notes.

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[13] BGH, 3 March 2004, case VIII ZR 151/03, juris para 18.

[14] BGH, 26 October 2005, BGHZ 165, pp. 12-28, para 23.

[15] BGH, 9 June 2011, NJW-RR 2011, pp. 1618-1624, at paras 27-29 **[CT3/29]**.

[16] I note that at para. 33 (fn 24) of the Pfeiffer Report, the Professor cites Birke (from Gleiss Lutz), who states that issuer substitution clauses are valid if, they cite their "rationale" (Anlass), but without framing this as an explicit requirement, giving any more background or detail.

34. It is important to note here that I strongly disagree with the commentator *Hartwig-Jacob*, upon whom the Professor relies, and who states that issuer substitution clauses should contain a (non-exhaustive) list of reasons that entitle them to exercise the replacement authorisation. I believe it is impossible to reconcile the two statements which appear at the paragraph in question (103) of *Hartwig-Jacob*. It is said, on the one hand, the conditions of bonds and certificates do not usually contain a list of reasons that entitle them to exercise the replacement authorisation (and therefore, when and for what reason the debtor decides on its own replacement is left to it). On the other hand, it is said that the transparency requirement in § 3 SchVG requires lists to be as detailed as possible.[17]

35. The preferred leading commentary, which I think reaches the correct view on this question, can be found in *Hopt/Seibt*[18] and *Langenbucher/Spindler/Bliesener*.[19] Both support the view that no detailed list of reasons needs to be stated in a substitution clause for it to be valid. This is because bond law in Germany is formed and developed from market practice. And, for the avoidance of doubt, a clause such as § 12 of the SUN Notes Terms and Conditions is absolutely market practice.

36. Further still, Professor Pfeiffer (in fn. 21) cites a BGH case (NJW 2010, 3708), in which it is explicitly stated that substitution clauses which allow a landlord to assign his position to a substitute landlord "at any time" (*jederzeit*), without a list of scenarios, is valid (**[CT3/37]**). As mentioned, the SUN Notes Terms and Conditions use exactly the same (clear and unambiguous) wording.

37. The German legislator expressly stated in the explanatory notes to the SchVG, that the transparency of contractual terms and the conditions of notes requires the terms to be "*clear and unambiguous*" (*eindeutig und klar*).[20] However, nowhere did the German legislator provide for a need to enumerate any relevant and potential scenarios in which the clause may be relied upon. Under German law on moveable and immoveable property, a similar transparency test applies. In respect of this test, the BGH has previously held that a reference to "all" goods in a pledge agreement is sufficiently

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[17] Hartwig-Jacob, in: Frankfurter Kommentar zum SchVG, 2013, § 3 para. 103 **[CT3/14]**.

[18] Hopt/Seibt, Schuldverschreibungsrecht, 2. Ed. 2023, § 5 para. 84; see also Langenbucher/Bliesener/Spindler/Bliesener/Schneider, Bankrechts-Kommentar, 3. Ed. 2020, § 5 para. 30 **[CT3/17]**; Wilken/Schaumann/Zenker, Anleihen in Restrukturierung und Insolvenz, 2. Ed. 2017, para. 176 , cf. Seiler, in: BeckOGK AktG, 1.7.2022, § 221 AktG para. 186.

[19] Langenbucher/Bliesener/Spindler, Bankrechts-Kommentar, 3rd edition 2020, § 5 SchVG, para 30 **[CT3/17]**.

[20] Begründung RegE (Official Explanation of the Draft Act), BT-Drucks. 16/12814, p. 17 **[CT3/15]**.

transparent (which I referred to at Thole 1, at para. 5.43[21] contrary to what the Pfeiffer Report suggests at para. 91). The BGH case provides guidance here, too. The basic assumption of the BGH was that, where the agreement refers to "all" goods, no doubts remain. The same holds true if a clause like § 12 of the SUN Notes Terms and Conditions refers to an issuer substitution "at any time". This term is equally all encompassing.

38. Conversely, trying to predict future scenarios and describe them with the purported level of "definiteness" (as per Pfeiffer Report at para. 32) would add to the complexity of the term. A definitive list of reasons is neither necessary, nor would it be helpful, as there will be grounds for replacing the debtor arising from events beyond the issuer's control and not to be anticipated at the time the contract is agreed.[22] It is unlikely that the issuer would be in a position to describe the future scenarios of issuer substitutions exactly at the time of issuance of the notes. Thus, questions would inevitably arise as to whether the specific situation falls under the scenarios enumerated in the term. The German legislator has highlighted the problem of such an approach. The legislative materials which explain the transparency requirement provide that terms and conditions are often, "especially in the case of supposedly precise descriptions" of complex concepts, not sufficiently transparent.[23] Therefore, the concept set forth by the Pfeiffer Report would give rise to less (rather than more) transparent.

39. § 12 of the SUN Notes Terms and Conditions is clear and unambiguous. It allows a substitution "at any time" (*jederzeit*). There is no uncertainty. It is important to understand that transparency requirements do not relate to the substantive content and the fairness of the term; that may be a different issue. The question is solely whether well-informed investors could have expected the Issuer Substitution. They clearly could have, because § 12 expressly allows a substitution at any time (subject to the further requirements which safeguard the investors' interests, e.g. the guarantee).

c) Incorrect quotation of legal literature in Pfeiffer Report

40. Further, Professor Pfeiffer relies on a statement in *Bliesener/Schneider* when he (the Professor) states that "*it is accepted amongst German legal commentators that such*

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[21] BGH NJW 1994, 133, 134.

[22] Hartwig-Jacob, in: Frankfurter Kommentar zum SchVG, 2013, § 3.

[23] Begründung RegE (Official Explanation of the Draft Act), BT-Drucks. 16/12814, p. 17 **[CT3/15]**.

clauses have to state the prerequisites to and consequences of the substitution expressly and clearly" (Pfeiffer Report at para. 33). As I have already indicated, *Bliesener/Schneider* is authority for the proposition that no detailed list is required for an issuer substitution to be valid. *Bliesener/Schneider* do not refer to the transparency requirement at the cited passage. On the contrary, they state that "*issuer substitution clauses must regulate the prerequisites to and consequences of the substitution in such a way that the economic basis of the risks borne by the creditors remains essentially unchanged and the legal position of the creditors does not deteriorate*".[24] These commentators continue to point out that these requirements are met by the typical clauses in the German market, and explicitly refer to clauses which allow a substitution "at any time",[25] just like the SUN Notes Terms and Conditions. Therefore, the issuer substitution clauses in the SUN Notes Terms and Conditions are in fact valid in the view of *Bliesener/Schneider*.

41. Furthermore, this purported requirement to enumerate definitively does not follow from any of the BGH decisions that the Pfeiffer Report refers to in footnotes 20-22. For example., in BGH NJW-RR 2011, 1618, a case that Pfeiffer Report refers to several times (in footnotes 20, 21 and 22), the BGH concluded that there has been no violation of transparency requirements with respect to a term which granted a mobile phone provider, in a services contract regarding a prepaid mobile phone, a right to suspend services under certain requirements (the circumstances in which that right may be exercised not being specifically enumerated in the term). Contrary to what Professor Pfeiffer seems to assert at para. 32, the BGH explicitly stated that it is not possible to describe all future scenarios in which the relevant suspension right would become necessary. The BGH acknowledged the risk that the attempt to describe these future events ex ante could be overtaken by reality later on. The Court considered it unreasonable to require the provider to conclusively list the relevant circumstances.[26]

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[24] *Bliesener/Schneider* in Langenbucher/Bliesener/Spindler, Bankrechts-Kommentar, 3rd edition 2020, § 5 SchVG, para 30 **[CT3/17]**.

[25] *Bliesener/Schneider* refer to the terms and conditions of the debt issuance programme prospectus by BASF SE, September 11, 2018, p. 144 and p. 162 et seqq., which read "Die Emittentin ist jederzeit berechtigt, sofern sie sich nicht mit einer Zahlung von Kapital oder Zinsen auf die Schuldverschreibungen in Verzug befindet, ohne Zustimmung der Gläubiger entweder die Garantin oder ein mit der Garantin verbundenes Unternehmen (wie unten definiert) an ihrer Stelle als Hauptschuldnerin (die "Nachfolgeschuldnerin") für alle Verpflichtungen aus und im Zusammenhang mit diesen Schuldverschreibungen einzusetzen, […]".

[26] BGH NJW-RR 2011, 1618 para. 28 **[CT3/29]**.

42. The same holds true for § 12 of the SUN Notes Terms and Conditions. Conclusively outlining all potential scenarios with a demanding degree of “definiteness” appears impossible. Any value for the investors lies in what the clause requires in terms of further safeguards, e.g. the requirement of an unconditional guarantee, but that is not a transparency issue, but an issue of sufficient compensation and thus of the substantive fairness of the term.

d) The Pfeiffer Report disregards Market Practice

43. As I set out in Thole 1, according to the legal literature on notes, § 12 of the SUN Notes Terms and Conditions is a standard term widely used in the capital markets. To the best of my knowledge, no similar clause has been found to be invalid on the grounds that it is insufficiently transparent.[27] Thus, the investors could have expected to find a clause like § 12 in the terms and conditions.

44. Also as outlined in detail in Thole 1 (in particular at 5.8, 5.22 and 5.44), issuer substitution clauses such as those included in the SUN Notes Terms and Conditions are not only permissible but are considered market standard. The Pfeiffer Report fails to acknowledge or address the fact that the Pfeiffer Report is asking the English court to accept an argument that runs counter to both market standard and the analysis of the leading experts. In practical terms: if one were to agree with Professor Pfeiffer's conclusion, this would mean that the vast majority of issuer substitution clauses in German law governed bonds, are invalid.

45. Professor Pfeiffer also says that in Thole 1, I "*did not refer to any other case law […] that permit a unilateral change of an obligation (including the substitution of the debtor)*" (Pfeiffer Report at para. 92). In my view, the lack of case law is attributable to the fact that the issuer substitution clause is market standard and widely accepted as valid as a matter of German law (as explained in Thole 1 at para. 5.8). As set out above, to the best of my knowledge, no comparable issuer substitution clause has been found to be invalid on the grounds that it is not sufficiently transparent.

46. This view is shared even by the scholars which – according to the Pfeiffer Report at para. 100 – allegedly were not cited properly in Thole 1. *Hartwig-Jacob* states that: "The

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27 This is why there have been many, many issuer substitutions based upon the basis of German law governed bonds such as Mercedes-Benz, Commerzbank, and Goldman Sachs.

wording of the terms and conditions governed by German law, which has been used in practice for years, does comply with the general legal and economic requirements and the expectation of the investors".[28]

e) No substantive invalidity and no presumption of unreasonable disadvantage

47. At paras. 36-38 of the Pfeiffer Report, Professor Pfeiffer deals with the alleged substantive invalidity of the substitution clause. He argues that there is a presumption of unfairness pursuant to § 307 para. 2 BGB (**[CT3/43]**) if the clause is not compatible with essential principles of the statutory provisions from which it deviates. The Pfeiffer Report relies on the principle of *pacta sunt servanda* stating that a change of the debtor is a deviation from the binding effect of contracts on the parties and therefore presumed to unreasonably disadvantage the parties (and is thereby invalid). However, in light of the fact that notes are brought into existence only because the noteholders freely agree and consent to a specific set of terms and conditions which give the note its shape and content (§ 2 SchVG)[29], pacta sunt servanda and the noteholders' consent rather support the binding effect of § 12.

48. Professor Pfeiffer does not address the fact that the Issuer Substitution does not lead to a replacement of the original debtor, but instead ensures that such original debtor remains liable under the guarantee in addition to the new substitute debtor. It is therefore misleading when Professor Pfeiffer states that the issuer substitution clause enables the issuer "to impose a different debtor on its creditors" (cf. Pfeiffer Report at 38).

49. In any event, I disagree with Professor Pfeiffer that there is a presumption of unfairness here. First, it is doubtful whether § 307 para. 2 sentence 1 BGB applies to notes. This is because that provision applies only to situations in which there is a "statutory role model" for the relevant contract (*gesetzliches Leitbild*).[30] However, with notes, there is no such *Leitbild*. A simplistic reliance on the principle of *pacta sunt servanda* is not sufficient to show a deviation under § 307 para. 2 BGB. In fact, it dictates that the parties

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[28] *Hartwig-Jacob*, in: Frankfurter Kommentar SchVG, 2013, § 3 para. 99 [**CT3/23]**; cf. also Langenbucher/Bliesener/Spindler/*Bliesener/Schneider*, Bankrechts-Kommentar, 3. Ed. 2020, § 3 para. 30 **[CT3/17]**.

[29] **[CT3/40]**.

[30] BGH NJW 1981, 117 **[CT3/30]**; BGH NJW 1989, 1479 **[CT3/31]**; BGH NJW-RR 2005, 642, BGH WM 2004, 1187 **[CT3/32]**; BGHZ 181, 179 = NJW 2009, 288 **[CT3/33]**; *Wurmnest*, in: Münchener Kommentar zum BGB, 9th ed. 2022, § 307 para. 75 **[CT3/18]**.

should be held to the words of the contract which expressly permit the issuer substitution. Against this background, § 307 para. 2 BGB (**[CT3/43]**) simply does not apply or advance the argument Professor Pfeiffer is making.

50. In any event, if § 307 para. 2 BGB applies, it is important to note that it adds to the general rule of § 307 para. 1 sentence 1 BGB. It does not set out an independent and additional fairness test. The test remains one of unreasonable disadvantage to the addressee of the relevant clause. Contrary to what the Pfeiffer Report may try to achieve by referring to a "presumption", any presumption does not amount to a reversed burden of proof. The addressee who alleges the clause to be invalid would still have to show and prove that there is an unjustified deviation from the fundamental principles of the statutory provisions.[31] As set out above, the SUN Notes do not deviate from any *Leitbild* (and §12 of the terms and conditions is a market-standard issuer substitution clause).

51. In addition, the Noteholders agreed to the Issuer Substitution in advance pursuant to §§ 414, 415 BGB by consenting to the SUN Notes Terms and Conditions (cf. Thole 1 at 5.3, 5.10 et seq., 5.25, 5.28, 5.39).[32] Such prior consent is valid.[33] Professor Pfeiffer does not appear to dispute that there is such consent (Pfeiffer Report at para. 76), he only questions the validity of the clause to which the Noteholders gave their consent.

52. As discussed in Thole 1,[34] the SchVG deems an issuer substitution to be a standard restructuring measure, and explicitly envisages the possibility that such measure may be executed without the approval of a minority of noteholders (§ 5 para. 3 SchVG).[35] This is the basic principle for the special case of note terms and conditions, as opposed to the general rules applicable to other, less sophisticated contracts to which Professor Pfeiffer is referring (cf. Thole 1 at 5.2, 5.10, 5.27, contrary to, for example, Pfeiffer Report at para. 47).

53. I would also like to point out that none of the references in para. 37 of the Pfeiffer Report support the finding that § 12 of the SUN Notes Terms and Conditions constitutes an

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31 *Wurmnest*, in: Münchener Kommentar zum BGB, 9th ed. 2022, § 307 para. 70 **[CT3/19]**.

32 Begründung RegE (Official Explanation on the Draft Act on the Introduction of Electronic Securities), BT-Drucksache 19/26925, p. 46; *Leber*, Der Schutz und die Organisation der Obligationäre nach dem Schuldverschreibungsgesetz, 2012, p. 274; *Bliesener/Schneider*, in: Langenbucher/Bliesener/Spindler, Bankrechts-Kommentar, 3. Ed. 2020, § 5 para. 28 **[CT3/23]**.

33 Cf. BGH, NJW-RR 1996, 193, 194, juris, para. 24 [**CT3/34]**; NJW-RR 2019, 977, 979 para. 26 [**CT3/35]**; *Röh*, in: BeckOGK, German Bond Act, § 5 para. 75 **[CT3/36]**.

34 Thole 1, para 5.8.

35 **[CT3/42]**.

unreasonable disadvantage within the meaning of § 307 para. 1 BGB (**[CT3/43]**). The opposite is true. Again, Professor Pfeiffer has not explained the factual background of the decisions on which his arguments are based, which are clearly distinguishable.

54. As mentioned above, in BGH NJW 2010, 3708 (cited by Pfeiffer Report in fn. 21), the BGH found that substitution clauses allowing a landlord to assign his position to a substitute landlord "at any time" (*jederzeit*) are valid. The BGH did not set up a requirement of enumeration (as indicated by the Pfeiffer Report). The BGH stated that, by law, tenancy relationships lack a strictly personal nature, which would have made a substitution of the landlord more difficult. Similarly, there is no "strictly personal" relationship between issuer and noteholder apparently meaning a relationship that goes beyond the ordinary degree of closeness between the parties to a contract. Furthermore, the BGH made clear that § 307 para. 2 BGB is not violated simply because the substitution clause replaces the necessary consent by the other party to the contract. The Court stated that landlord and tenant law is rather open for such a substitution.[36] So even this case, upon which Professor Pfeiffer purports to rely, contradicts the contention that a presumption of unfairness arises under § 307 BGB by virtue of pacta sunt servanda.

55. Thus, in my opinion, the BGH case cited by Professor Pfeiffer clearly supports my conclusion that § 12 of the SUN Notes Terms and Conditions neither violates requirements of transparency nor constitutes an unreasonable disadvantage.

56. The case BGH NJW 2008, 360 (cited by the Pfeiffer Report at fn. 29) related to a paid TV streaming contract. The relevant clause gave the provider a right to adjust prices. In that case, the BGH did not deal with a substitution clause. The specific provision of § 308 no. 4 BGB applied (which would not apply to the SUN Notes).

57. The case of BGH NJW-RR 2008, 134 (cited by the Pfeiffer Report at fn. 30) dealt with unilateral rights to adjust the pricing of an internet service provider agreement. Again, and apart from the fact that these kinds of contracts are in no way comparable to note obligations, there is plainly a major difference between unilaterally amending prices on the one hand and a substitution of this sort on the other. This is particularly true if, as in the present case by virtue of § 12(1)(a) of the SUN Notes Terms and Conditions, the substitute debtor (i.e. the Plan Company) assumes all obligations unaltered and the former issuer remains an obligor *qua* guarantor.

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[36] BGH NJW 2010, 3708 para. 24 **[CT3/37]**.

58. Finally, the Pfeiffer Report at para. 87 footnote 104 also cites the case of BGH NJW 1985, 53 which, according to Professor Pfeiffer, allegedly shows that there is a need to include “limiting criteria” in the substitution clause. The BGH case he cites does not support this proposition. That case related to a contract for the placement of fruit machines in a restaurant. Contrary to the assertion in the Pfeiffer Report, in that case, the BGH confirmed its earlier decision of 10 March 1976 (WM 1976, 308). In that earlier judgment, the BGH had assumed the validity of a substitution clause in a beer delivery contract. The BGH put emphasis on the fact that the delivery obligation of the brewery remained unchanged by the substitution with a different party.[37] This is similar to the facts at hand because the note obligations were fully assumed by the Plan Company without any amendment.

f) The Pfeiffer Report inaccurately portrays the OLG Frankfurt’s statements

59. I will not restate my discussion in Thole 1 of the judgment of the OLG Frankfurt, to which the Pfeiffer Report refers at para. 41. However, it seems necessary to point out that assuming the judgment “*would be considered as relevant authority by the same court if it is required to decide this issue in the future*” is entirely speculative. There is no such rule of precedence in German procedural law. In fact, the judgment has been described by critics as "astonishing"[38] and suitable to drive "[...] parties capital seeking into the 'safe harbour' of foreign legal systems."[39]

60. In any event, as outlined in Thole 1 (at para. 5.21-5.23), the decision concerned a completely different factual background, and its major findings were indeed overturned by the BGH in a parallel case.

61. Professor Pfeiffer also does not accurately portray the OLG Frankfurt's crucial statement concerning the general admissibility of issuer substitution clauses in general terms and conditions in its decision of 27 March 2012 (cf. Pfeiffer Report at paras. 40, 97 et seqq.). The OLG Frankfurt did not state "that substitution clauses *deviate* from the principle *'pacta sunt servanda'* and, therefore, are invalid under § 307 para. 2 no.1 BGB" (contrary to Pfeiffer Report at para. 40, emphasis added, also at para. 98). The wording of the

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[37] BGH, 10.3.1976, VIII ZR 268/74, WM 1976, 308 **[CT3/38]**.

[38] *Bliesener/Schneider*, in: Langenbucher/Bliesener/Spindler, Bankrechts-Kommentar, 3. Ed. 2020, § 3 para. 30 **[CT3/17]**.

[39] Hartwig-Jacob, in: Frankfurter Kommentar zum SchVG, 2013, § 3 para. 99 fn. 199 **[CT3/23]**.

decision unambiguously shows that the OLG Frankfurt did not intend to make any statement concerning the (alleged) inadmissibility of issuer substitution clauses *in general* and also not *in particular* concerning the clause underlying the decision.

62. The OLG Frankfurt stated: "*The substitution of the debtor, however, may be considered a deviation from essential basic premises of contract law (§ 307 (2) no. 1 BGB), which is not sufficiently compensated by the continued existence of the guarantee*."[40]

63. With this, the OLG Frankfurt merely found that the issuer substitution *in question* could *possibly* be considered a deviation from basic premises of contract law (Thole 1, para. 5.21). I have explained the facts of the case in more detail in Thole 1 – 5.20. It is only with regard to the exceptional circumstances of the particular case (cf. Thole, at para. 5.23) that the OLG Frankfurt held that the continued existence of an *existing* guarantee by the *parent company* of the original issuer could *possibly* be considered an insufficient compensation.[41] This situation is not comparable with the *previously non-existent* guarantee provided by the Parent Company as *original issuer* in the course of the Issuer Substitution. The OLG Frankfurt did not make any further determinations on the admissibility of the issuer substitution clause at issue as there was no issuer substitution at all.

64. At the same time, the OLG Frankfurt assumed that, in general, any potential deviation from the premises of contract law *can be compensated*. If there is sufficient compensation, issuer substitution clauses are, as a matter of principle, valid (Thole 1, at para. 5.21), which Professor. Pfeiffer does not appear to dispute (Pfeiffer Report at para. 43 et seqq., 46).

g) Noteholders are put in the same economic position than prior to the substitution

65. At paras. 43-44 of the Pfeiffer Report, Professor Pfeiffer appears to accept that the provision of a guarantee may have the effect of making the substitution clause valid (para. 43) and even refers to one of his own publications in support of the proposition that an unreasonable disadvantage caused by a clause may be compensated by other clauses (cf. footnote 41 of the Pfeiffer Report). He explicitly accepts that a guarantee

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[40] OLG Frankfurt, 27.3.2012, 5 AktG 3/11, para. 31: "Die Schuldnerersetzung *dürfte* von wesentlichen Grundgedanken des Vertragsrechts aber abweichen (§ 307 Abs. 2 Nr. 1 BGB), was durch den Fortbestand der Garantie *nicht ausreichend abgemildert* wird." (emphasis added). See also Thole 1 at para. 5.21.

[41] OLG Frankfurt, 27.3.2012, 5 AktG 3/11, para. 31.

provided by the original debtor with an equal value to the original obligation could be sufficient compensation (para. 44).

66. As §12 of the SUN Notes terms and conditions requires the original issuer to provide an unconditional and irrevocable guarantee, it provides sufficient compensation for any unreasonable disadvantage caused by the substitution, and is therefore valid. It was therefore legally permissible to substitute the Parent Company with the Plan Company as the issuer under the SUN Notes (Thole 1, at para. 3.1 et seqq., contrary to Pfeiffer Report at para. 24 et seqq.). Indeed, the Pfeiffer Report largely confirms that issuer substitution clauses are generally valid if (i) the creditor agrees to the issuer substitution clause (and therewith to the substitution following subsequently which – in my view – the SUN Noteholders permissibly did in the case at hand *ex ante* by signing up to the SUN Notes) and (ii) the creditor is economically in the same position following the issuer substitution.

67. As pointed out in Thole 1 (at para. 5.52), the Parent Company Guarantees are of economically equal value to the obligations of the Parent Company under the SUN Notes prior to the substitution. In fact, the SUN Noteholders gain an additional debtor. For these investors it makes no difference whether their claim against the Parent Company is based on the repayment obligation under the SUN Notes or on the Parent Company Guarantee.

68. Professor Pfeiffer denies the equivalence of the guarantees and concludes that there is an increase in risk. At paras. 44 and 45, he refers to § 309 no. 10 BGB, but does not add that this provision does not apply to notes, neither directly nor analogously. This is unanimously acknowledged.[42] § 309 no. 10 BGB applies to sales, loan agreements (which according to the BGH, notes are not[43]), services contracts and work contracts.

69. Thus, the reference to § 309 no. 10 BGB does not have any implications at all for the question of whether there is an increase in risk (*quod non*, given the unconditional and irrevocable guarantee).

70. At para. 44, Professor Pfeiffer tries to support his assertion that the SUN Holders are in an economically worse position by referring to the EU Directive 93/13 on Unfair Terms

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[42] Cf. *Fest*, Anleihebedingungen 2022, p. 300 **[CT3/24]**; *Masusch*, Anleihebedingungen und AGB-Gesetz, 2001, p. 217 **[CT3/25]**.

[43] BGH, 31.5.2016, XI ZR 370/15, NZI 2016, 709 para. 30 **[CT3/39]**.

in Consumer Contracts. However, regulations relating to consumer contracts do not apply here. The SUN Notes are issued in denominations of EUR 100.000. As I already mentioned in Thole 1, European financial regulation treats persons acquiring securities with a denomination per unit of EUR 100.000 as having considerable experience in dealing with financial instruments, which is why, for example there is no requirement to draw up a prospectus (art. 1(4) Regulation (EU) 2017/1129[44]). As a matter of German law, when scrutinizing a potential disadvantage or unfairness of contractual clauses for the purpose of § 307 BGB (**[CT3/43]**), the required level of protection varies and is, *inter alia*, dependent on the commercial sophistication of the counterparty. The commercial sophistication of the SUN Noteholders is clearly high.

71. Professor Pfeiffer also cites a judgment of the BGH (NJW 2007, 1054, referred to at para. 44, last sentence). The judgment supposedly suggests that "*compensation may be insufficient if it brings about unreasonable consequential costs or similar obstacles*". However, this case related to delivery contract on liquid gas (again, which is not comparable to notes) and it did not deal with issues of compensation at all. In that case, the BGH dealt with a termination right granted to the buyer in the event that the seller amends its prices. The BGH concluded that the termination right must not be substantially impaired by consequential costs which were to be borne by the buyer. That has nothing do with a guarantee or other forms of compensation with respect to the substitution of the debtor of the obligation.

72. At para. 46, the Pfeiffer Report states that the Noteholders need to be placed in essentially the same commercial position as they would have been in without the substitution. I agree and believe that this is exactly what the Parent Company Guarantee achieves. In other words, an unreasonable disadvantage can in general be avoided by the provision of an irrevocable and unconditional guarantee by the previous issuer.[45] The irrevocable and unconditional guarantee provided by the Parent Company satisfies the requirements as expressed in German legal literature and generally applied in German market practice (Thole 1, at para. 5.33). The Plan Company has also assumed all

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44 **[CT3/48]**.

45 *Hartwig-Jacob*, in: Frankfurter Kommentar SchVG, 2013, § 3 para. 100; *Bliesener/Schneider*, in: Langenbucher/Bliesener/Spindler, Bankrechts-Kommentar, 3. Ed. 2020, § 5 para. 30; *Baums*, Recht der Unternehmensfinanzierung, 2017, § 48 para. 52 **[CT3/27]**.

obligations from the SUN Notes.[46] There is no increase in the commercial risk borne by the noteholders.

h) Indirect consequences of an issuer substitution in a particular case do not render an issuer substitution clause invalid

73. At paragraphs 47 and 48 of his report, Professor Pfeiffer seems to refer to the provision of § 305c para. 2 BGB. At para. 49, Professor Pfeiffer implies that all indirect economic effects of factual or legal circumstances affected by the substitution are included in the term “economic position” in § 12(1)(e). He infers that it needs to be taken into account that the notes may now be restructured under English law and there may be a cram-down which would not have been possible under Luxembourg law. This approach is plainly incorrect and inappropriate as it introduces almost limitless considerations, and it could be argued in almost any situation that a creditor’s economic position has somehow been worsened by a substitution (and that the relevant substitution clause was thereby invalid).
74. As mentioned above, Professor Pfeiffer observes that the "effect of the Substitution Clause [sic] is to permit the [Parent Company Guarantees] (or the primary debt itself) to be restructured or amended pursuant to an English law procedure more easily" and "English law has a reputation for permitting debt restructuring or extinction of debts more easily than continental European jurisdictions" (Pfeiffer Report at para. 52 and fn. 62). Professor Pfeiffer also contends that "a sufficient compensation [for the issuer substitution] would require that full payment by the substitute debtor or under the guarantee is not less probable or likely than payment by the original debtor under the Bonds" (Pfeiffer Report at para. 51).
75. I strongly disagree with these, in my opinion, rather vague contentions for the following reasons:
76. First, I have been instructed that, as a matter of English law, the Restructuring Plan provides a proper procedure which is necessary to protect the legitimate interests of the SUN Noteholders, and in particular, that the English Court does not have jurisdiction to sanction any restructuring plan which would lead to a worse outcome for plan creditors (in this case, an insolvency scenario).

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46 Cf. Assumption of Debt Substitution for the SUN Notes.

77. Secondly, as I have already explained in Thole 1 (para 47) the indirect consequences of the Issuer Substitution must be excluded when assessing the substitution clause. The validity of a substitution clause must be determined ex ante and on an abstract basis. Indirect, more remote effects of the exercise of an issuer substitution, which often are unknown and unpredictable at the time of the drafting as well as the implementation of the issuer substitution clause, must be disregarded. The treatment of the substitute debtor in its jurisdiction, for example its eligibility to pursue Part 26A proceedings, is a question of the laws applicable in that jurisdiction and not of the issuer substitution clause. Thus, any differences in the laws governing the previous and substitute debtor cannot render the validity of the contractual issuer substitution clause invalid. The latter must be determined ex ante and on an abstract basis. If one were to say that the availability of a different set of procedures of company or restructuring law for the substitute debtor were sufficient to render a substitution clause invalid, no cross-border substitution could ever happen. Conversely, as set out in Thole 1, the issuer substitution clauses included in the SUN Notes Terms and Conditions explicitly envisages cross-border substitutions, and more generally, one of the main purposes of issuer substitution clauses is to enable access to another legal system.[48]

78. Professor Pfeiffer says that the fact that the Issuer Substitution facilitated the Restructuring Plan indirectly takes away the compensatory effect generally attributed to the guarantee in an issuer substitution (Pfeiffer Report at para. 49), so as to render §12 of the terms and conditions of the SUNs invalid. In general, Professor Pfeiffer assumes that the Restructuring Plan will likely lead to a haircut for creditors (Pfeiffer Report at para. 51). However, I have been instructed that all SUN Noteholders of the SUN Notes would likely be in a worse position in insolvency proceedings. The restructuring attempt is therefore the opposite of an economic disadvantage as the proceedings are aimed at avoiding insolvency proceedings in the best interest of all stakeholders.

79. Thirdly, relying on what rules and provisions apply to restructuring proceedings which the substitute debtor undergoes after the Issuer Substitution contradicts the starting point of the legal analysis. As acknowledged by Professor Pfeiffer (at para. 79 and 86), and in accordance with my understanding, terms need to be interpreted and their validity

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47 See, e.g., paras. 5.6, 5.8, 5.17, 5.28, and 5.38.

48 Cf. *Theiselmann*, Praxishandbuch des Restrukturierungsrechts, 4. Aufl. 2020, ch. 2 para. 45.

examined objectively and in the abstract.[49] At para. 49, Professor Pfeiffer does exactly the opposite by considering specific events after the substitution, i.e. the initiation of English proceedings.

80. Professor Pfeiffer contends that the noteholders are worse off by reason of the SUNs being capable of amendment under English restructuring law, on the basis that it differs in certain respects from Luxembourg law. Professor Pfeiffer has been instructed to assume that the COMI is located in Luxembourg and thus Luxembourg law would be applicable in insolvency proceedings (cf. Pfeiffer Report at 16, 49, 94 et seqq.). However, I have been instructed that the Parent Company believed that if restructuring proceedings were to be initiated elsewhere than in the UK, StaRUG proceedings in Germany would have been initiated rather than any Luxembourg proceedings considering that, as I have been instructed, the Parent Company's COMI was in Germany rather than in Luxembourg. In any event, at the time of issuance, it was still an open question where, in a potential insolvency scenario, any proceedings were to be conducted. The COMI of the Parent Company, and any COMI of any company under the European Insolvency Regulation, may change prior to the initiation of such proceedings. The original issuer could also have moved its COMI to England to satisfy the sufficient connection test. Indeed, I have been instructed that SUN Noteholders were informed by the Offering Memorandum that a COMI shift might occur, leading to the applicability of restructuring and insolvency laws of another jurisdiction.[50]

81. To the best of my knowledge, it is never been determined (or contended) that a contractual clause was invalid solely because of events that happen after the right granted in that clause was exercised (i.e. the commencement of restructuring proceedings). In the legal literature, no such proposition can be found. But this is precisely what the Pfeiffer Report implicitly tries to argue.

82. Professor Pfeiffer blends the question whether the Issuer Substitution leads to the creditor ending up with a debtor with a greater risk of default with the implementation of amendments to the SUN Notes Terms and Conditions as part of the Restructuring Plan. The Pfeiffer Report argues that as a result of the change of jurisdiction caused by the Issuer Substitution the Noteholders are disadvantaged (as English law provides for

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[49] See, e.g., BGH NJW-RR 2011, 1144 (1145) para. 10 and BGHZ 183,299= NJW 2010, 671 = para. 22.

[50] Offering Memorandum, p. 35.

the possibility of amending the SUN Notes Terms and Conditions via the Restructuring Plan).

83. The contradiction in the Pfeiffer Report can also be seen at para. 50 where Professor Pfeiffer refers to the risk for noteholders at the time of the substitution took place. But the correct question to assess the validity of the clause is whether the clause, *at the time of issuance*, led to an unreasonable disadvantage by virtue of the issuer substitution clause (which it clearly did not).

84. It is inadmissible to conclude from later events that the clause itself is invalid. I do not accept that the substitution clause can be invalid simply because: (i) it may be possible for the substitute debtor to be a UK company; (ii) that UK company may initiate an English restructuring proceeding in the near or distant future and (iii) at that time the UK restructuring might be more restructuring-friendly than Luxembourg law (if Luxembourg law were otherwise applicable, i.e. the COMI of the previous issuer (Adler Group S.A.) were in Luxembourg (which has not been determined yet)).

85. If one were to follow the line of reasoning of Professor Pfeiffer, one could apply the same argument to conclude that any substitution clause would be invalid provided that it allowed for substitution of a debtor subject to the laws of a differing jurisdiction on the grounds that the restructuring law of that jurisdiction is more restructuring-friendly than Luxembourg law. It would be absurd to argue that substitution clauses are valid only if they allow for a substitution with a substitute debtor that comes from a jurisdiction which has an even less restructuring-friendly law than (allegedly) the Luxembourg law. Of course, this assumes that the place of incorporation of the debtor dictates where it can be restructured, which is not necessarily the case. For example, I understand that Luxembourg incorporated companies have promoted schemes of arrangement in England and Wales, for example, where they have had their COMI in the UK or where the liabilities which are the subject of the scheme are governed by English law.[51]

86. The relevant question is simply whether at the time of issuance the substitution clause is valid. This simply cannot reasonably depend on the details of the insolvency law of either Luxembourg and/or any other potential company or insolvency law of any

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51 White & Case have directed me to several examples, including *Hellas Telecommunications (Luxembourg) V, Re [2010] EWHC 3295 (Ch); Algeco Scotsman PIK SA [2017] EWHC 2236 (Ch);* and *Gallery Capital SA [2010] 4 WLUK 287*.

potential substitute debtor. Besides, the insolvency law of the original debtor may change over the course of time. Even after the substitution, the original debtor may validly change its COMI (within the meaning of art. 3 EIR)[52] to another Member State and file for proceedings there.

87. Thus, in essence, when evaluating the clause, which is to be done in the abstract (see above para 77, objective perspective and from the viewpoint of the time of issuance, it is inappropriate to take into account any considerations on whether the substitute debtor will undergo restructuring proceedings upon the substitution.

88. One simply cannot tell how things will or might develop after a substitution is implemented. There may be restructuring or insolvency proceedings or other procedures. The guarantor or the new issuer or none of them may file for insolvency. The substitute debtor may cease business, may change its COMI and so forth. These hypothetical developments are, in essence, ordinary risks that the noteholders bear. With the Parent Company Guarantee it is made sure that the SUN Noteholders can still enforce their claim, now based on the guarantee, against the original issuer. All elaborations on the current state of the insolvency law in the UK, in other European states or elsewhere are missing the point.

89. I also disagree with the contentions of the Pfeiffer Report at para. 52 that the fact that the Substitution Clause may indirectly facilitate the restructuring of the Parent Company Guarantees pursuant to English law renders the clause invalid. The restructuring measures set out in the Restructuring Plan could, prior to the Issuer Substitution, have been implemented via a StaRUG procedure. Under StaRUG, a cross-class cram-down is possible.[53] The StaRUG procedure also allows encroachment on intra-group third-party-collateral (contrary to Pfeiffer Report at para. 52).[54] In the Restructuring Plan, the SUN Noteholders are not treated any differently than they would have been treated under a StaRUG procedure and cannot therefore be in an economically worse position than they were prior to the Issuer Substitution as a result.

90. In any event, it is wrong to contend that the amendment of the SUN Notes pursuant to the Restructuring Plan is a direct effect of § 12 of the SUN Notes Terms and Conditions.

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[52] **[CT3/47]**.

[53] Cf. § 26 StaRUG ("gruppenübergreifende Mehrheitsentscheidung") **[CT3/46]**.

[54] Cf. § 2 (4) StaRUG **[CT3/45]**; Westpfahl/Dittmar, in: Flöther, StaRUG, 2021, § 2 para 64 et seqq **[CT3/28]**.

It is an effect of English restructuring or insolvency law. The effect of the substitution clause is that, if the clause is relied upon, a guarantee is granted and comes into existence. But how the claim under guarantee is dealt with later on is a different question, which is irrelevant for the purposes of determining whether the clause is valid.

2. Part 2 of the Pfeiffer Report

91. The Issuer Substitution is and has been effective since the fulfilment of the requirements set forth in § 12 of the terms and conditions of the SUN Notes, i.e. as of 11 January 2023. The effectiveness of the Issuer Substitution does not depend on it being declared valid by any court (contrary to the Pfeiffer Report at 20, 64 et seqq., 62, 68).

92. Under German law, the Issuer Substitution was executed in accordance with § 12 of the terms and conditions of the SUN Notes qualifies as a debt assumption agreement between the old and the new issuer. The validity of a debt assumption agreement only requires the approval of the SUN Noteholders (which can be given ex ante, cf. Thole 1 at 5.2, 9.9 et seqq., 5.27). The SUN Noteholders consented ex ante to any issuer substitution executed in accordance with § 12 of the terms and conditions of the SUN Notes by subscribing to the SUN Notes and thereby accepting the bond terms.

93. A decision in the declaratory action brought against the Parent Company before the Frankfurt Regional Court by a SUN Noteholder of a SUN Notes 2029 is no prerequisite for the effectiveness of the Issuer Substitution. There is neither a statutory nor a contractual requirement that the issuer substitution or any documents relating to it be confirmed by a court before it can have effect. The declaratory action does not have suspensive effect. Save for a specific provision in the relevant contract, declaratory actions under German law do not have any suspensory effect. Under German law, the Issuer Substitution is therefore considered effective until declared invalid by a final and unappealable judgment.

94. In any case, decisions in declaratory actions under German law only have inter partes effect. German law does not recognise a judgment having a binding effect on third parties or outside of a particular legal proceeding. In contrast to what is known from the *stare decisis* doctrine or doctrine of precedent prevailing in common law, German courts are not bound in their decision making by any preceding case law of the Federal Supreme Court or other courts in comparable cases based on the same facts or when applying the same legal provisions. If the Frankfurt Regional Court were to decide that the Issuer

Substitution was invalid, such decision would only concern the legal relationship between the respective claimant and the Parent Company. Only in relation to the claimant in the respective declaratory action would the Issuer Substitution be considered invalid. A decision with regard to the declaratory action brought forward by a single Noteholder of a single SUN Notes 2029 would have no immediate or direct legal effect on all or any of the other SUN Notes or other Noteholders. On the contrary, a court in another proceeding could come to a different conclusion as to the validity and effectiveness of the Issuer Substitution.

95. As I explained in Thole 1 (at 8.1 et seqq.) and – notably – confirmed by the Pfeiffer Report (at 61 et seqq.), the sanction order of the English High Court would be subject to automatic recognition in Germany. Automatic recognition extends to all aspects of the relevant foreign proceedings that are equipped with a *res iudicata* effect. To what extent a part of the sanction order is subject to *res iudicata* effect and therefore has to be automatically recognised in Germany is determined from an English law perspective.

96. A German court confronted with the Restructuring Plan will therefore have to determine the *res iudicata* effect of the sanctioning of the Restructuring Plan by considering English law. The Parent Company is also at the least partially a party to the Restructuring Plan (contrary to Pfeiffer Report at 66). The scope of the effect of the Restructuring Plan on the Parent Company is also to be determined in accordance with English law.

97. Therefore, the suggestion by the Pfeiffer Report that the Issuer Substitution is somehow ineffective until the Frankfurt Regional Court has made a final decision on its effectiveness are misleading and wrong.

98. I should add for the sake of completeness, that the distinction drawn by Professor Pfeiffer between the different relationships strikes me as odd and overly formalistic. In essence, Professor Pfeiffer tries to deny that the noteholders/Plan Creditors are bound by the effects of the English Court's order by stating that the *Parent Company* is not strictly a party to the proceeding. I am instructed that this formalistic assumption disregards the very purpose under English law of these proceedings and the English Court's order. I am further instructed that the Parent Company also provides certain undertakings in the course of the Restructuring Plan and shall become a party to the relevant Amendment Agreements. Correspondingly, the Pfeiffer Report itself states at para. 49 (fn. 59) that the Restructuring Plan would have "effects on the Adler Group

Bonds". Thus, the Pfeiffer Report accepts that the main focus of the Restructuring Plan is on these notes, the SUN Notes, not a particular party.

3. Part 3 of the Pfeiffer Report

99. In Part 3 the Pfeiffer Report offers specific comments on Thole 1. In view of the conclusions that appear earlier in this report, and in particular regarding each of the applicable provisions of §§ 305-310, I do not believe it is necessary to reply to each of subsection of Part 3 in detail. I do not accept the Professor's arguments regarding those sections for the reasons I have already given. There are, however, several final points I wish to make in reply:

100. In respect of the general remarks made by Professor Pfeiffer in his paras. 75-77 regarding the difference between substitution agreements, majority vote, and unilateral substitution, my findings in Thole 1 were in full recognition and accordance with these differences. With regard to para. 77 of the Pfeiffer Report, I must reiterate that the fairness requirement of § 307 must be seen in the context of bonds/notes, rather than ordinary contracts (on which, by looking at the citations and references, the Pfeiffer Report seems to focus). As I have mentioned throughout, corporate notes are governed by their terms and conditions.[55] In essence, the substitution clause is indeed an agreement whereby the noteholders give their *ex ante* consent to the issuer substitution.

101. The possibility of providing *ex ante* consent was similarly also reflected in the landlord case mentioned above (at para. 36). The BGH held that the necessary consent to the substitution of the landlord (as required by § 415 BGB[56]) was given in advance by concluding the tenancy.[57]

102. The Noteholders therefore agreed to the Issuer Substitution in advance pursuant to §§ 414, 415 BGB by consenting to the SUN Notes Terms and Conditions (cf. Thole at

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[55] See, e.g., Thole 1, para. 5.28.

[56] **[CT3/44]**.

[57] BGH NJW 2010, 3708, para. 15.

5.3, 5.10 et seq., 5.25, 5.28, 5.39).[58] Such prior consent is valid.[59] Professor Pfeiffer does not dispute this (Pfeiffer Report at para. 76).

103. Insofar as the newly enacted Act on Electronic Securities (or "**eWPG**") is concerned – to which I referred in Thole 1 (para. 5.25) the official explanation of the draft act on the introduction of the eWPG is relevant and contradicts the point made at the Pfeiffer Report at 93. That explanation confirms the view that market standard issuer substitution clauses – like those included in the SUN Notes Terms and Conditions – are valid. This view on the relevance of the eWPG is shared, for example, by *Schmies*, who the Pfeiffer Report notably cites as well (in a different context). The final Act was introduced in 2021 and concerns the possibilities and limitations of amendments to the terms and conditions of electronic securities by the registry.[60] In this context, the official explanation explicitly states that "amendments whose permissibility is already provided for in the terms and conditions of the notes may be carried out as amendments on the basis of a legal transaction (e.g. issuer substitution clauses)". This shows that the German legislator naturally assumes that (market standard) issuer substitution clauses are permissible and valid. The statement of the German legislator is not qualified. In particular, it does in not refer to any of the requirements for an issuer substitution set forth in the Pfeiffer Report.

104. In this context, the Pfeiffer Report notably also appears to accept that issuer substitution clauses, which – like those included in the SUN Notes Terms and Conditions – include the requirement that all obligations under the relevant notes must be guaranteed by the original issuer, reflect the market standard. At para. 42 (when citing *Schmies*), the Pfeiffer Report refers to "typical substitution clauses" and the guarantee requirement in substitution clauses to be "usually the case".

105. Similarly, the draft bill regarding the introduction of § 795a BGB is particularly relevant to this case (and is contrary to what Professor Pfeiffer says at para 84). The Pfeiffer Report appears to try to state the obvious in that only laws which are eventually enacted

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[58] Begründung RegE (Official Explanation on the Draft Act on the Introduction of Electronic Securities), BT-Drucksache 19/26925, p. 46 **[CT3/20]**; *Leber*, Der Schutz und die Organisation der Obligationäre nach dem Schuldverschreibungsgesetz, 2012, p. 274 **[CT3/21]**; *Bliesener/Schneider*, in: Langenbucher/Bliesener/Spindler, Bankrechts-Kommentar, 3. Ed. 2020, § 5 para. 28 **[CT3/22]**.

[59] Cf. BGH, NJW-RR 1996, 193, 194, juris, para. 24 **[CT3/34]**; NJW-RR 2019, 977, 979 para. 26; *Röh*, in: BeckOGK, German Bond Act, § 5 para. 75 **[CT3/36]**.

[60] Cf. *Schmies*, (Keine) Auswirkungen des BGH-Urteils zu AGB-Änderungen auf Finanzinstrumente?, Recht der Finanzinstrumente (a law journal)("RdF") 2022, p. 1 [**TP2/19-20**].

do have direct legal force. Thole 1 did not question that. The point which was made (and which was not disputed by the Pfeiffer Report) is that even if the conditions in Draft 795a BGB were applicable, they would be satisfied in the present case (Thole 1 at para. 5.14).

106. This and the historical context of Draft 795a BGB can and must be considered when interpreting the laws which are currently applicable. Also according to *Hartwig-Jacob* (repeatedly cited by Professor Pfeiffer), the reason why Draft 795a BGB was never enacted is that the German legislator came to the conclusion, that "it is not necessary to interfere with the smoothly running practice of issuer substitutions" in Germany.[61] Again, this shows that the German legislator naturally assumes that (market standard) issuer substitution clauses are permissible and valid.

107. The allegations made in the Pfeiffer Report regarding the correct interpretation of the OLG Frankfurt judgment in Thole 1 have been rebutted in general elsewhere (above, at section 1(f)). The further statement made in the Pfeiffer Report that BGH judgment, which was cited in Thole 1 and which overturned the OLG Frankfurt, "did not deviate from the OLG Frankfurt as regards the invalidity of substitution clauses" (Pfeiffer Report at para. 99) is misleading at best.

108. The Pfeiffer Report rightly accepts (at para. 98) that the OLG Frankfurt was merely *obiter dictum*. As I indicated in my first report (Thole 1 at para. 5.22) the BGH did not get the chance to overturn the OLG Frankfurt in that particular case as the company had to file for insolvency immediately afterwards. However, the BGH judgment, which was cited in Thole 1, overturned the OLG Frankfurt in its main reasoning, i.e. going beyond merely correcting an *obiter dictum*. As stated before (and not disputed by the Pfeiffer Report), the decision of the OLG Frankfurt has not been confirmed by any other court in Germany in the course of the last ten years (Thole 1 at para. 5.22).

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61 *Hartwig-Jacob*, in: Frankfurter Kommentar SchVG, 2013, § 3 Rn. 99 **[CT3/23]**; cf. also Langenbucher/Bliesener/Spindler/Bliesener/Schneider, Bankrechts-Kommentar, 3. Ed. 2020, § 5 para. 30 **[CT3/17]**.

VII. Expert Declaration

109. 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 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.

110. 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 of Thole 1 and Appendix 1 of Thole 2, have been provided with the following documents by White & Case:

a) The Offering Memoranda in respect of:
   - €400,000,000 1.500 per cent. notes due 2024 (ISIN: XS1652965085); attached and the quotes per the below
   - €400,000,000 3.250 per cent. notes due 2025 (ISIN: XS2010029663); attached and the quotes per the below.
   - €700,000,000 1.875 per cent. notes due 2026 (ISIN: XS2283224231); attached under 2026/2029 and the quotes per the below.
   - €400,000,000 2.750 per cent. notes due 2026 (ISIN: XS2248826294); attached and the quotes per the below.
   - €500,000,000 2.250 per cent. notes due 2027 (ISIN: XS2336188029) issued under the attached 5B programme – attached the programme and the specific terms; and
   - €800,000,000 2.250 per cent. notes due 2029 (ISIN: XS2283225477).

Appendix 2 Case Summaries

I. Summary of Judgments relied on by Professor Pfeiffer on the Requirement of Definiteness				
Judgment / Para of Pfeiffer	**Type of Dispute / Claim**	**Nature of the Claimant**	**Type of Underlying Agreement**	**Summary of the Judgment Regarding Insufficient Clarity / Specification**
BGH, 25 November 2015, BGHZ 208, 52-75, at para 39 **(Pfeiffer, para 32)**	Dispute on a price adjustment clause included in the general terms and conditions for electricity supply agreements	Both parties are competitors and are providing electricity supply to end customers	Electricity supply agreement	No breach of the transparency principle. The clause set out the criteria under which the prices can be adjusted by the electricity supplier. In particular, the clause uses an example to explain the price adjustment clause. Therefore, it is irrelevant that the clause does not set out all details and factors of the price adjustment as it would be too complicated and not understandable to regulate every single case.
BGH, 9 June 2011, NJW-RR 2011, pp. 1618-1624, at paras 27-29 **(Pfeiffer, paras 32 and 87)**	Dispute on the validity of misuse clauses included in the general terms and conditions for mobile agreements	Claimant was a registered association whose statutory duties included the protection of the interests of consumers	Mobile service agreements (General Terms and Conditions for mobile agreements with a specific term and prepaid cards)	No breach of the transparency principle. The requirements and legal consequences of the respective general terms and conditions must not allow an unjustified scope of discretion. Telecommunication services are required to present the rights and obligations of their customers as clearly and transparently as possible. However, they are not required to assume such a degree of definiteness that all contingencies are covered. It is not possible and reasonable to provide a complete list of potential misuse scenarios. It is sufficient to enumerate examples that provide the customer with an adequate indication of the nature and weight of the facts which may result in a misuse.

I. Summary of Judgments relied on by Professor Pfeiffer on the Requirement of Definiteness				
Judgment / Para of Pfeiffer	**Type of Dispute / Claim**	**Nature of the Claimant**	**Type of Underlying Agreement**	**Summary of the Judgment Regarding Insufficient Clarity / Specification**
BGH, 26 October 2005, BGHZ 165, pp. 12-28, para 23 (**Pfeiffer, paras 32 and 87)**	Dispute on the validity of a guarantee concluded as part of the general terms and conditions of a franchise agreement	Claimant was a franchisor (business person)	Franchise agreement including a provision pursuant to which the shareholders of the franchisee shall be liable for the obligations of the franchisee under the franchise agreement	Breach of the transparency principle. The underlying franchise agreement included a provision pursuant to which all shareholders of the franchisee are liable for the complete and timely fulfilment of all payment obligations of the franchisee resulting from the franchise agreement and its termination. This provision violates the transparency requirement and is therefore invalid because the nature and scope of the liability assumed by the shareholders for the franchisee's payment obligations is not sufficiently clear and precise. When determining the nature and scope of a guarantee, the guarantor is particularly dependant on the contractual provisions that provide it with a complete and true picture of the content of its obligation and thus enable it to properly exercise its negotiating and decision-making options.
BGH, 3 March 2004, case VIII ZR 151/03, juris para 18 (**Pfeiffer, paras 32 and 87)**	Dispute on the validity of a clause allowing the increase of the rent by the landlord	Claimant was a tenant (private person)	Rental agreement	No breach of the transparency principle and the requirement of definiteness. The actual conditions and legal consequences shall be described in such detail that there is no unjustified scope of discretion. A clause satisfies the transparency principle and the requirement of definiteness if it describes the rights and obligations of the tenant as clearly and precisely

I. Summary of Judgments relied on by Professor Pfeiffer on the Requirement of Definiteness				
Judgment / Para of Pfeiffer	**Type of Dispute / Claim**	**Nature of the Claimant**	**Type of Underlying Agreement**	**Summary of the Judgment Regarding Insufficient Clarity / Specification**
				as possible within the scope of what is legally and effectively reasonable.
BGH, 5 November 2003, NJW 2004, pp. 1598-1600, at 1600 **(Pfeiffer, paras 32 and 87)**	Dispute on the validity of a clause allowing the increase of the rent by the landlord	Claimant was a tenant (private person)	Rental agreement	No breach of the transparency principle and the requirement of definiteness. The clause needs to describe the granted rights as clearly as possible in order for the tenant to know its rights. The requirements and legal consequences of the rental agreement must not allow for an unjustified scope of discretion.

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II. Summary of Judgments relied on by Professor Pfeiffer on the Presumption of Unfairness				
Judgment / Para of Pfeiffer	**Type of Dispute / Claim**	**Nature of the Claimant**	**Type of Underlying Agreement**	**Summary of the Judgement**
BGH, 22 February 2022, case X ZR 102/19, juris, para 82 (**Pfeiffer, para 47)**	Dispute on the exclusiveness of a license resulting from a patent license agreement	Claimant was a patent licensee (business person)	Patent sublicense agreement	The decision sets out the general criteria for interpretation of contractually agreed clauses. The content of contractual clauses is interpreted on the basis of the wording, the underlying intention of the parties, the purpose pursued, the interests of the parties and other circumstances surrounding the clause which led to the assumption of exclusiveness.
BGH, 27 April 2021, BGHZ 229, pp. 344-358, at para 38 (**Pfeiffer, para 37)**	Dispute on the validity of the clause on amendments to the general terms and conditions by means of fictitious consent	Claimant was the Federal Association of Consumer Centers and Consumer Associations (*Bundesverband der Verbraucherzentralen und Verbraucherverbände*) (association) (business person)	Bank service agreement	The presumption of unfairness applies. The underlying bank service agreement includes a provision pursuant to which the price for the bank services will be adjusted automatically if the customer does not reject the bank's offer to amend the price for the bank service within a certain period of time (so-called fictitious consent). Such a clause puts the customer at an unreasonable disadvantage, as the customer's main performance obligation can be substantially changed without the customer's intervention. Such substantial changes to the basis of the contract can only be made by concluding an amendment agreement and not by means of a fictitious consent.

BGH, 20 July 2017, NJW 2017, pp. 2762-2765, para 23 (**Pfeiffer, para 48)**	Dispute on the validity of an unrestricted fixed price clause in a construction agreement	Claimant was a building contractor (business person)	Construction agreement	The presumption of unfairness applies and the claimant is unreasonably disadvantaged. The underlying construction agreement included a clause according to which, in general, the agreed prices are fixed for the entire contract period. The BGH deemed this clause invalid because it unreasonably disadvantages the defendant customer. The defendant customer is unreasonably disadvantaged because it is not clear from the clause whether a price adjustment shall be excluded even in the event of major changes in circumstance (such as the occurrence of a war or an act of nature). If a general term and condition is unclear, any doubts as to the general term and condition's content are to be borne by the issuer of the general term and condition (*i.e.*, the party that drafted the term and intends to use it in multiple cases). This means that the most customer-unfriendly interpretation is used as a basis of interpretation of such a general term and condition. In this case, the most customer-unfriendly interpretation is that no price adjustment should be possible even in the event of extreme changes. This excludes the statutory right of adjustment/cancellation (§ 313 BGB) and the customer is forced to abide by the originally agreed price.
BGH, 12 May 2016, BGHZ 210, 206-224, para 42 (**Pfeiffer, para 48)**	Dispute on the validity of a clause regarding the acceptance of joint property	Claimant was a condominium ownership (legal entity under German law, however no status as business person)	Property development agreement	The presumption of unfairness applies. The decision refers to a purchaser of a condominium unit suing the seller and constructor (the defendant) of the condominium unit for elimination of defects in the common areas, which are co-owned by all condominium

				unit owners. The seller and the constructor refused to eliminate the defects and referred to a clause of the purchase agreement according to which the common areas were already accepted by the purchaser of other condominium units who acquired and accepted the areas prior to the acquisition of the suing purchaser. As a result, the limitation period for any warranty claims had already been triggered and had expired by the time of the removal complaint by the subsequent purchaser. According to the Federal Court of Justice, this clause is invalid because it unreasonably disadvantages the subsequent purchaser. The disadvantage results from the fact that the subsequent purchasers are deprived of the right to decide on the acceptance of the common property by themselves. General terms and conditions shall be interpreted as understood by reasonable and honest contracting parties, taking into account the interests of the involved parties, based on the understanding of the average contracting party. The interpretation most hostile to the customer shall be applied if this leads to the invalidity of the clause and thereby favours the customer. The most customer-unfriendly interpretation is that the subsequent purchaser was deprived of the opportunity to carry out his own acceptance and appraisal and should therefore be excluded from the statutory rights to rectification. This deviates too much from the statutory guiding principle and therefore unreasonably disadvantages the customer.

OLG Frankfurt, 27 March 2012, case 5 AktG 3/11, juris paras 31 and 34 (**Pfeiffer, paras 40 and 96-99)**	Dispute on the validity of the clause allowing amendments by majority vote to the terms and conditions of a bond	Claimant/Applicant was the Bond issuer	Bond agreement	The facts of the case are as follows. A Dutch entity (subsidiary of the German parent company) is the issuer of a bond governed by German law as set out in the bond terms. The Dutch issuer held a meeting of creditors, where they, among other things, changed the bond terms including a clause allowing amendment of the terms and conditions of the bond by a majority vote (implementation of the majority principle, sec. 24 German Bond Act (*Schuldverschreibungsgesetz*, "**SchVG**") of the old version, sec. 5 SchVG of the current version). The old § 12 of the terms of the bond set forth that the Dutch entity could be substituted by a German entity based on the SchVG (issuer substitution by resolution, sec. 5 para. 3 no. 9 SchVG current version). However, in the case at hand, the SchVG was not applicable as the issuer was a Dutch entity and not a German entity (§ 1 SchVG, territorial principle). Following this argument, the Court added a statement in *obiter dictum* (*i.e.*, without relevance to the decision and without having any legal impact on the decision) that : A possible issuer substitution could be an unlawful essential change of the bond terms and in the case in hand not be mitigated by granting the respective guarantee. (*Only this obiter dictum without relevance to our case is used by Prof. Pfeiffer*).

BGH, 8 December 2010, NJW 2011, pp. 1215-1217, para 14 (**Pfeiffer, para 37)**	Dispute on the validity of the clause on the reservation of financing rights in a share purchase agreement	Claimant was the seller of the shares	Share purchase agreement	According to Section 308 (3) of the German Civil Code, a clause granting a right to a user to withdraw from his obligation to perform without an objectively justified reason is invalid. The term "right to dissolve" in Section 308 (3) of the German Civil Code is to be understood comprehensively in accordance with the purpose of this section, which is to secure the contractual obligation of the user. However, Section 308 (3) of the German Civil Code only covers clauses according to which the user is granted the possibility of withdrawing from an existing obligation to perform without a reason that is stated in the contract and is objectively justified. Such a situation does not exist in the case of the conclusion of a contract subject to a condition precedent prior to the occurrence of the condition. Thus, the conclusion of a contract under a condition precedent cannot be regarded as a right to withdraw from an (existing) obligation to perform.
BGH, 9 June 2010, NJW 2010, pp. 3708-3710, para 22 (**Pfeiffer, paras 37 and 38)**	Dispute on the validity of a contract transfer clause in a commercial lease	Claimant was a business person registered in the commercial register and entered into the tenant position	Commercial lease	Contract transfer clauses which are intended to replace the approval requirement of Section 415 (1) of the German Civil Code in a pre-formulated manner are objectionable if the customer cannot typically be indifferent to their contractual partner according to the type of contract concluded, but must rather be interested in obtaining certainty about the reliability and solvency of the third party to whom the contract is to be transferred. The Supreme Federal Court has affirmed this prerequisite in the case of a vending machine installation contract concluded for a period of several

				years, which, in addition to rental contract elements, also has personal characteristics.
BGH, 30 June 2009, NJW-RR 2009, pp. 1641-1644, para 20 and para 24 (**Pfeiffer, paras 27 and 37)**	Effectiveness of a performance adjustment clause included in general terms and conditions of a derivate agreement (option on gold price) / claim for payment	Customer	Derivate agreement (knock-out call option on gold price)	A clause reserving a right of modification included in the general terms and conditions of a derivative agreement that entitles the issuer of the option agreement, at his discretion and without the consent of the holders, to amend material terms provided that such change is "*intended to correct an obvious error*" is ineffective as it unreasonably disadvantages option traders. The requirement that a change "*is intended to correct an obvious error*" is not specific enough and does not meet the minimum degree of calculability of the possible change of performance in its conditions and consequences for the contracting party. Clauses in general terms and conditions in securities agreements need to be interpreted from the point of view of the public typically involved in transactions of this kind. In the interest of the marketability of capital market securities and the functioning of securities trading, the interpretation of debt securities must be uniform for all securities and without regard to particularities in the person of the individual holder. A clause reserving a right of modification which relates to the main performance terms appears to be particularly disadvantageous. It is necessary that such clause guarantees at least a certain degree of calculability of the possible change of performance in its conditions and consequences.

BGH, 29 April 2008, BGHZ 176, 244-255, para 19 **(Pfeiffer, para 48)**	Effectiveness of a unilateral price increase clause in general terms and conditions of gas supply agreement	Business Company	Gas supply agreement	A clause in a gas supply agreement which entitles the gas supplier to change the gas prices if a price change is made by its own supplier unreasonably disadvantages the customer and is invalid. General terms and conditions are to be interpreted uniformly according to their objective content as understood by reasonable and fair contracting parties, taking into account the interests of the involved parties. Ambiguous clauses are to be interpreted in the "most anti-customer" sense if this interpretation leads to the invalidity of the clause and this is more favourable to the customer.
BGH, 15 November 2007, NJW 2008, pp. 360-364, para 21 **(Pfeiffer, paras 37 and 39)**	Effectiveness of a performance adjustment clause included in the general terms and conditions of a pay-TV-agreement	Consumer Association	Pay-TV-agreement	A clause reserving a right of modification included in general terms and conditions of a Pay-TV-agreement that entitles the Pay-TV provider at his discretion and without the consent of the customer to amend material terms (such as the price) if *inter alia* the costs for provision of the television services increases, is ineffective as it unreasonably disadvantages customers. Section 308 no. 4 of the German Civil Code provides for a presumption of invalidity of clauses reserving a right of modification, as these deviate from the legal principle that both contracting parties are bound by the agreement originally made. In this context, a reservation of the right of modification appears to be particularly disadvantageous for the other party if it concerns the main performance obligations. The possible justification of a right of modification depends on whether it is reasonable for the other party to the contract. The reasonableness of a reservation of performance requires wording that cannot serve to justify unreasonable changes. It is generally also necessary that the clause, in

				its conditions and consequences, includes at least a certain degree of calculability of the possible changes in performance.
BGH, 13 December 2006, NJW 2007, 1054-1057, at para 28 (**Pfeiffer, para 44)**	Effectiveness of unilateral price increase clause in general terms and conditions of a liquid gas supply agreement	Association for protection of customer rights	Liquid gas supply agreement	A unilateral price adjustment clause used by a liquid gas provider towards its costumers is ineffective if the customer is granted a right of early termination in the event of a price increase which only becomes effective after the price increase or which is associated with unreasonable costs for the customer or which is hard to recognize. The unreasonableness of price adjustment clauses is not compensated by other provisions. The user of a price adjustment clause has to provide appropriate compensation for the customer by granting a right to dissolve the contract, which can be by granting a right of withdrawal or a special right of termination. However, a right of the customer to terminate the contract does not always lead to an appropriate balance of interests. This depends on its concrete form. In any case, it must not become effective only after the price increase and must not be limited by unreasonable consequential costs for the customer or similar obstacles. Furthermore, the customer must be able to clearly recognise that he has a right to dissolve the agreement.
BGH, 11 October 2007, NJW-RR 2008, 134-137, at para 31 et seq. (**Pfeiffer, para 37)**	Effectiveness of a performance adjustment clause included in general terms and conditions of an	Association for protection of customer rights	Internet provision agreement	The following clause in the general terms and conditions of an internet provision contract was found to unreasonably disadvantages customer and is therefore invalid: "*The company is entitled to amend the respective service and product description with a notice period of six weeks and shall notify the customer by e-mail or in writing. The amendment shall become part of the*

	internet provision agreement			*contract if no objection is raised within a period of six weeks from notification. If the customer objects, either party can terminate the agreement*" The clause disadvantages customers unreasonably, even taking into account the fact that the company has no unilateral right to make adjustments andthat contractual changes are only to be made by way of a - possibly fictitious – consensus (following lack of contradiction). According to the decisive interpretation of the clause that is most hostile to customers, adjustments are not only permissible to individual details of the agreement by means of the deemed consent, but also "*the respective service and product description*" can be adjusted. Therefore, changes to the main terms of the contract are possible without any restriction. The company thus obtains a means to amend the contract structure as a whole, in particular to shift the equivalence ratio of services and counter-services considerably in its favour. For such far-reaching changes an amendment agreement is necessary. A fictitious consent is not sufficient for this, taking into account the legitimate interests of the customers.

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