Neutral Citation Number: [2021] EWHC 68 (Ch)

Case No: FL-2019-000015

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
FINANCIAL LIST (ChD)

7 Rolls Building
Fetter Lane
London EC4A 1L

Date: 19 January 2021

Before:

THE HONOUABLE MR JUSTICE ZACAROLI

Between:

GALAPAGOS BIDCO S.À.R.L.	**Claimant**
- and -	
(1) DR. FRANK KEBEKUS	**Defendants**
(2) GLAS TRUST CORPORATION LIMITED (in its capacity as Security Agent)	
(3) GLOBAL LOAN AGENCY SERVICES LIMITED (in its capacity as Revolving Agent)	
(4) GLOBAL LOAN AGENCY SERVICES LIMITED (in its capacity as Guarantee Agent)	
(5) GLAS TRUSTEES LIMITED (in its capacity as Senior Secured Note Trustee)	
(6) DEUTSCHE TRUSTEE COMPANY LIMITED (in its capacity as High Yield Note Trustee)	
(7) SIGNAL CREDIT OPPORTUNITIES (LUX) INVESCO II S.À.R.L.	
(8) GALAPAGOS S.A.	

David Allison QC and Ryan Perkins (instructed by **Kirkland & Ellis International LLP**) for the **Claimant**
Andreas Gledhill QC and Shane Sibbel (instructed by **Stewarts Law LLP**) for the **First Defendant**
Tom Smith QC and Henry Phillips (instructed by **Sidley Austin LLP**) for the **Second, Third, Fourth and Fifth Defendants**
Alain Choo-Choy QC and Ben Woolgar (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Seventh Defendant**
The Sixth and Eighth Defendants were not present or represented

Hearing dates: 17 and 18 December 2020; Further written submissions filed on 5, 8 and 13 January 2021

APPROVED JUDGMENT

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 11.30 am on 19 January 2021.

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MR JUSTICE ZACAROLI

Mr Justice Zacaroli:

Introduction

1. In October 2019 the claimant, Galapagos Bidco S.A.R.L. ("Bidco") entered into a financial restructuring with certain of its creditors (the "Restructuring"). This was effected under the terms of an intercreditor agreement dated 30 May 2014 to which I refer in more detail below (the "ICA").

2. Certain junior ranking creditors, who Bidco alleges would receive nothing under the Restructuring, objected to it.

3. In September 2019 (before the Restructuring was completed), Bidco issued these proceedings seeking declarations, in summary, that the Restructuring complied with the terms of the ICA. There were originally 14 defendants to the proceedings but, following an amendment made in February 2020 prior to service of the claim form, seven of them were removed, while the first defendant was added to the claim.

4. The first defendant (domiciled in Germany) and the seventh defendant (which is, for the purpose of this application, accepted to be domiciled in Luxembourg) challenge the jurisdiction of this Court to determine the claim as against them.

5. The claimant relies, as against both the first and seventh defendants, on Article 8(1) of Regulation (EU) No 1215/2012, the Recast Brussels Regulation (the "RBR"), on the basis that each of the second to sixth defendants is domiciled in the UK and the claims against them and against the first and seventh defendants are so closely connected that it is expedient to hear them together to avoid the risk of irreconcilable judgments.

6. As against the seventh defendant, the claimant relies in addition on Article 25(1) of the RBR, on the basis of a jurisdiction clause in the ICA in favour of the courts of England.

7. In the event that Signal is unsuccessful in challenging the jurisdiction of this court, it applies for a stay of these proceedings on case management grounds.

The parties

8. Bidco is incorporated in Luxembourg. It is the holding company of a group with two operating divisions: "Kelvion", a supplier of heat exchangers; and "Enexio", a supplier of cooling systems.

9. Prior to the Restructuring, Bidco was the wholly owned subsidiary of Galapagos SA, the eighth defendant ("GSA"). In turn, GSA was wholly owned by Galapagos Holding SA ("Holding"). GSA and Holding are incorporated in Luxembourg. Holding was ultimately owned by a consortium of private equity funds managed by Triton Investment Management Limited ("Triton")

10. The Galapagos Group (the "Group", by which I mean Holding and its direct and indirect subsidiaries) was financed by, among other things (collectively referred to as the "Original Debt"):

    i) A €99.8 million multi-currency revolving credit facility ("RCF"). The borrowers included GSA and Bidco. The third defendant, Global Loan Agency Services Limited (the "Agent") was (from 12 July 2019) the Revolving Agent under the RCF, representing the lenders under the RCF.

    ii) A €375 million guarantee facility ("GCF"). The borrowers included GSA and Bidco. The Agent (i.e. the same entity as the third defendant) is joined also as fourth defendant, but in its capacity as Guarantee Agent, representing the lenders under the GCF. The Agent was appointed to this role on 12 July 2019.

    iii) Two series of senior secured notes ("SSN") with an aggregate face value of €525 million issued by GSA, due in 2021. Since 12 July 2019 the Senior Secured Notes Trustee has been the fifth defendant, GLAS Trustees Limited (the "SSN Trustee"), authorised to act on the instructions of the holders of SSN.

    iv) A series of high-yield notes ("HYN") issued by Holding and guaranteed by (among others) GSA and Bidco with a face value of €250 million. The High Yield Notes Trustee has at all times been the sixth defendant, Deutsche Trustee Company Limited (the "HYN Trustee"). The HYN are the subject of a New York law governed Indenture dated 30 May 2014 (the "Indenture").

11. The ranking of the various tranches of the Original Debt and the rights of the creditors in respect of the enforcement of security over the Group's assets are governed by the ICA. The ICA provides that the RCF, GCF and SSN (the "senior debt") rank (firstly, the RCF and GCF pari passu among themselves, then the SSN) in priority to the HYN (the "junior debt").

12. The security agent under the ICA, since 12 July 2019, has been the second defendant, GLAS Trust Corporation Limited ("the Security Agent"). The Security Agent held security (on behalf of holders of the Original Debt) over a number of assets of the Group and over the shares in Bidco held by GSA.

13. The Security Agent, the Agent and the SSN Trustee are affiliated companies. Collectively, I shall refer to them as the "GLAS defendants". They are domiciled in England and Wales. The HYN Trustee is also domiciled in England and Wales.

14. The first defendant ("Dr Kebekus") is the German insolvency administrator of GSA. He is domiciled in Germany. On 31 October 2019 the Düsseldorf Court, upon being satisfied that GSA's centre of main interests ("COMI") had been successfully moved to Germany, as from 25 August 2019, opened main insolvency proceedings within the meaning of the European Insolvency Regulation (EU 2015/848) in respect of GSA. Dr Kebekus was appointed on

the same date. This follows an earlier attempt to place GSA into an insolvency proceeding in Germany which was dismissed on 9 September 2019.

15. The seventh defendant, Signal Credit Opportunities (Lux) Investco II S.A.R.L. ("Signal") is a company incorporated in Luxembourg. It holds an interest in the HYN, in the following circumstances:

(1) Prior to 14 May 2020 the HYN were constituted by a single "Global Note" registered in the name of Deutsche Bank AG, London Branch as the "Common Depositary". Under the terms of the Indenture, a "Holder" of a note is a person in whose name a Note is registered. Prior to 14 May 2020, therefore, the Common Depositary was the only Holder of any of the HYN.

(2) Beneficial interests in the HYN were traded through two European clearing systems, Euroclear and Clearstream. Signal had a beneficial interest in 31% by value of the HYN, which was held for it (either directly or via intermediaries) by a "Participant", defined in the indenture as a person who has an account with Euroclear or Clearstream.

(3) On 14 May 2020, Signal acquired a Definitive Note with a face value of €1,000,000. As such it has from that date been a Holder of HYN in that amount. This represents, however, only a small fraction of its overall beneficial interest in the HYN.

Summary of the Restructuring

16. According to Bidco, the Group was in financial difficulties by 2019. On 6 June 2019 an initial lock-up agreement was entered into between entities in the Group and certain of the financial creditors. This set out commercial terms for a restructuring of the Group and its debt. The proposed restructuring involved the sale of GSA's shares in Bidco and the release of the Original Debt and of the security granted by those companies (including security granted in respect of the HYN).

17. A sale process was initiated after the lock-up agreement was signed in order to market the shares in Bidco for sale.

18. On 8 September 2019 a supplemental lock-up agreement was entered into and the Restructuring was effected on 9 October 2019. The terms of the Restructuring are complex and involve numerous detailed transaction documents. For the purposes of the jurisdiction challenge, it is sufficient to record only the following elements:

i) The entire share capital of Bidco was sold by the Security Agent as a "Distressed Disposal" under the ICA to Mangrove IV Luxco SARL ("Mangrove"), a company owned and controlled by Triton;

ii) The lenders under the RCF and the GCF provided Mangrove with new facilities and Mangrove issued new senior secured notes, a substantial portion of which was issued to the holders of the SSN, in effect for exchange of the SSN;

iii) The Security Agent released the Original Debt and the security granted in respect of it (including all liabilities, including guarantee liabilities, in respect of the HYN and security in respect of the HYN);

iv) So far as the holders of the HYN were concerned, therefore, their rights against GSA, Bidco and the Group were released but they received nothing in return. Bidco maintains that this reflects the fact that the holders of the HYN were 'out of the money' and would have received nothing on a security enforcement, given the value of the Group.

19. The key provision of the ICA under which these steps were carried out is clause 17, which confers wide-ranging powers on the Security Agent in the event of a "Distressed Disposal". Clause 17.1 provides as follows:

> "Subject to Clause 17.4 (Restriction on enforcement), if a Distressed Disposal is being effected, the Security Agent is irrevocably authorised (at the cost of the Parent and without any consent, sanction, authority or further confirmation from any Creditor, other Secured Party or Debtor):
>
> (a) ... to release the Transaction Security or any other claim over the asset subject to the Distressed Disposal and execute and deliver or enter into any release of that Transaction Security or claim and issue any letters of non-crystallisation of any floating charge or any consent to dealing that may, in the discretion of the Security Agent, be considered necessary or desirable in each case on behalf of the relevant Creditors and Debtors;
>
> (b) ... if the asset subject to the Distressed Disposal consists of shares in the capital of a Debtor, to release:
>
> (i) that Debtor and any Subsidiary of that Debtor from all or any part of:
>
> (A) its Borrowing Liabilities;
>
> (B) its Guarantee Liabilities; and
>
> (C) its Other Liabilities;
>
> (ii) any Transaction Security granted by that Debtor or any Subsidiary of that Debtor over any of its assets ...
>
> on behalf of the relevant Creditors and Debtors ..."

20. As the Restructuring involved the release of guarantees and security in respect of the HYN, the Security Agent was required to comply with the terms of clause 17.4(c) of the ICA, which provides as follows:

> "At any time when any High Yield Liabilities are outstanding, if a Distressed Disposal is being effected such that the High Yield Guarantees and High Yield Debt Shared Security will be released under Clause 17.1 (Facilitation of Distressed Disposals) it is a further condition to any such release or disposal that either the Majority High Yield Creditors have approved the release and/or the disposal or, where such shares or assets are sold or disposed of:
>
> (A) the proceeds of such sale or disposal are in cash (or substantially in cash);
>
> (B) all claims of the Primary Creditors against any member of the Group and any Subsidiary of that member of the Group whose shares that are owned by a Debtor are pledged in favour of the Primary Creditors are sold or disposed of pursuant to such Distressed Disposal, are unconditionally released and discharged concurrently with such sale (and are not assumed by the purchaser or one of its Affiliates), and all Security under the Security Documents in respect of the assets that are sold or disposed of is simultaneously and unconditionally released and discharged concurrently with such sale ... and
>
> (C) either:
>
> (I) such sale or disposal is made pursuant to a Public Auction; or
>
> (II) a Financial Advisers' Opinion is obtained."

21. The "Guarantee Liabilities" which may be released under clause 17.1(b)(i)(B) of the ICA include any liability including by way of contribution. Since both Bidco and GSA were guarantors of the HYN, the liabilities of Bidco which the Security Agent caused to be released included not only its own liability as guarantor of the HYN but also any potential contribution liability to GSA to the extent that GSA was itself liable pursuant to its guarantee of the HYN.

<u>The jurisdiction agreement</u>

22. The ICA is governed by English law (clause 31). By clause 32.1 the parties to it agreed to confer jurisdiction on the courts of England:

> "(a) The courts of England have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement (including a dispute relating to the existence, validity or

> termination of this Agreement or any non-contractual obligation arising out of or in connection with this Agreement) (a "Dispute").
>
> (b) The Parties agree that the courts of England are the most appropriate and convenient courts to settle Disputes and accordingly no Party will argue to the contrary.
>
> (c) ... this Clause 32.1 is for the benefit of the Secured Parties only. As a result, no Secured Party shall be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by law, the Secured Parties may take concurrent proceedings in any number of jurisdictions."

23. Bidco, the GLAS defendants, the HYN Trustee and GSA were all parties to the ICA at the date these proceedings commenced. Neither Bidco nor GSA is a Secured Party. Accordingly, they are bound by the *exclusive* jurisdiction provision in clause 32.1(a).

24. Pursuant to section 4.25(e) of the Indenture:

> "Each Holder, by accepting a Note, will be deemed to have agreed to and accepted the terms and conditions of the [ICA]…"

25. Although Signal did not formally accept that upon its acquisition of a Definitive Note it became bound by the terms of the ICA, it presented no argument against that proposition. It is content to assume that it is to be treated as a party to the jurisdiction agreement in the ICA as from 14 May 2020.

Initial objection to the Restructuring

26. Before the Restructuring took place, an ad hoc group of those holding an interest in the HYN, which included Signal, objected to it. On 16 August 2019 solicitors to the ad hoc group, Milbank (stating that they acted for persons holding approximately 64% of the HYN, but writing on behalf of Signal), wrote a letter before action to the solicitors acting on behalf of the Security Agent, copied to the solicitors for the Group. The threatened action was a Part 8 claim, raising issues of interpretation of the ICA, in particular:

    i) that the Restructuring would not effect the unconditional release and discharge of all Primary Creditors, in breach of clause 17.4(c)(B);

    ii) that the proceeds received by the Security Agent would not be "in cash (or substantially in cash)" in breach of clause 17.4(c)(A); and

    iii) the Security Agent was not conducting a valid "Public Auction" within Clause 17.4(c)(C)(I).

27. Before any proceedings were issued by Signal, Bidco issued the claim form in these proceedings on 13 September 2019. The Details of Claim which accompanied the claim form sought declarations that the proposed Restructuring would be compliant with the three aspects of clause 17.4 identified in the letter before action.

28. Although no proceedings were in fact issued in England by Signal or any other person representing the interests of holders of the HYN, various proceedings were subsequently commenced in other jurisdictions, as I detail in the next section.

Brief chronology of legal proceedings in England, New York, Luxembourg and Germany

English Proceedings (commenced 13 September 2019)

29. As I have noted above, at the time these proceedings were commenced they sought declarations in relation to the *proposed* restructuring.

30. On 13 February 2020, prior to the claim form being served on any party, it was amended to remove a number of the defendants and to add Dr Kebekus. On the same date, the particulars of claim were filed. Both the claim form and the particulars of claim were amended further on 18 February 2020 to correct the name of one of the defendants.

31. The re-amended particulars of claim seek declarations that, among other things, the Security Agent had effectively released the liabilities of the Group (including the Guarantee Liabilities of the Group in respect of the HYN) and the various steps undertaken in the Restructuring were in accordance with the ICA.

32. These were served on Dr Kebekus on 31 March 2020. Dr Kebekus issued his application challenging the jurisdiction of this court on 2 June 2020.

33. GSA, which was a party to these proceedings at the outset, has been under Dr Kebekus' control as insolvency administrator since 31 October 2019. It filed an acknowledgment of service on 8 April 2020 indicating an intention to defend the proceedings. The reason Dr Kebekus has been joined to these proceedings is because Bidco's German lawyers advised that it is necessary as a matter of German Law so as to ensure that whatever order is made by this court is effective as against GSA.

New York Proceedings (commenced 25 September 2019)

34. Shortly following the issue of the claim form by Bidco in the English proceedings, Signal filed a complaint in the State Court of New York on 25 September 2019, alleging that entities associated with Triton had engaged in a conspiracy to defraud the beneficial owners of the HYN. This was amended and consolidated with a separate summons on 11 December 2019.

35. The amended complaint asserted that the Restructuring did not comply with the ICA for reasons which mirror those asserted in the Milbank letter before action and in the English proceedings. It then asserted ten causes of action under New York law against (among others) Holding, GSA, Bidco, Triton and Mangrove. Those included breach of contract (relying on various provisions in the Indenture, including breach of the requirement that consideration for the sale of the shares in Bidco be at least equal to their "Fair Market Value"), tortious interference with contract, fraudulent conveyance, and a declaration that the guarantees under the Indenture had not been released.

36. In a short judgment dated 22 July 2020, the Hon. Barry R Ostrager of the Supreme Court of the State of New York ordered a stay of the New York proceedings, saying:

> "If the Senior Notes Trustee and/or Signal are successful in defeating the declaratory judgment action in England on the grounds that the distressed debt transaction failed to comply with Section 17 of the Intercreditor Agreement, then the New York action will likely be ripe for summary adjudication on two of the claims in the Complaint in this action. On the other hand, if the English Court grants a declaratory judgment that the restructuring transaction was made in accordance with the Intercreditor Agreement, then eight of the ten causes of action in the New York action would essentially be mooted and the remaining two breach of contract claims (counts 1 and 2 of the Complaint) would be futile claims against assetless shells."

37. In a further short judgment dated 19 October 2020, the Judge refused a motion to amend the first sentence of his July judgment, in which he had stated that "If Signal has standing to bring this lawsuit – a point of contention among the parties – it is bound by the Intercreditor Agreement." As I have noted above, although Signal has argued that its acquisition of a Definitive Note did not bind it as a matter of contract to the terms of the ICA, it did not pursue that argument before me.

Luxembourg Proceedings (commenced 24 December 2019)

38. By a writ of summons dated 24 December 2019, GSA and Dr Kebekus commenced proceedings in Luxembourg against Bidco, Mangrove, the Security Agent and Unicredit Bank AG (the predecessor Security Agent to the second defendant). In those proceedings it is alleged that the Restructuring constituted a fraud, the object of which was for Triton to retain control of the Group. Specifically it is alleged that the enforcement by the Security Agent of the security over GSA's shares in Bidco was null and void for fraud or as an abuse of process contrary to Article 6(1) of the Luxembourg Civil Code. The relief sought is rescission of the transfer of shares in Bidco from GSA to Mangrove and damages.

39. Prior to the issue of the writ in Luxembourg, GSA and Dr Kebekus obtained an ex parte order from the Luxembourg court appointing a receiver over the shares in Bidco. That interim relief was subsequently set aside on 5 June 2020, on the basis that Luxembourg law precludes the unwinding of the enforcement of the pledge at least until there has been a decision on the merits at a trial. An appeal is pending by Dr Kebekus to the Luxembourg Supreme Court.

German Proceedings (commenced 11 September 2020)

40. I have referred above to the opening of main insolvency proceedings in relation to GSA by the order of the Düsseldorf court of 31 October 2019. To date, Bidco's attempts to appeal that order (on the basis that GSA's COMI had not been shifted to Germany) have failed, but an appeal is pending to the Federal Court of Justice in Germany. An application to stay the German insolvency proceedings pending the outcome of that appeal was dismissed by the Federal Court of Justice on 28 January 2020. On 17 December 2020 the Federal Court of Justice suspended its proceedings pending determination by the Court of Justice of the European Union of two questions posed to it. Depending on the answers to those questions, it is possible that all proceedings commenced by Dr Kebekus might at some point in the future fall away.

41. On 11 September 2020 Dr Kebekus commenced proceedings in Germany against Mangrove and the Security Agent, seeking an order that Mangrove transfer the shares in Bidco to GSA, pursuant to sections 133 and 134 of the German Insolvency Code (the "Claw-back Action"). Under section 133, a transaction undertaken by a debtor within the period of ten years prior to commencement of insolvency proceedings, which was intended to prejudice its creditors, may be avoided if the counterparty to the transaction was aware of the debtor's intention.

42. Prior to the issue of those proceedings, on 27 May 2020, Dr Kebekus had applied to the Düsseldorf Regional Court ex parte for an order against Mangrove that Bidco's shares be placed into escrow to secure the future Claw-back Action. That order was granted on 2 June 2020. Mangrove's challenge to the ex parte order was dismissed on 9 November 2020 and Mangrove has filed a notice of appeal against that decision.

43. The Claw-back Action has yet to be served (by the German court) on Mangrove and the Security Agent.

<u>Article 8(1)</u>

44. The basic rule of jurisdiction under the RBR is that persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State: RBR, Article 4(1).

45. Article 8(1) provides that a person domiciled in a Member State may also be sued:

> "where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings ..."

46. There was agreement between the parties that for Article 8(1) to apply it is necessary for a claimant to demonstrate a sustainable claim against an anchor defendant: see the (obiter) conclusion of the majority of the Court of Appeal in *Sabbagh v Khoury* [2017] EWCA Civ 1120; and see *Senior Taxi Aero Executivo v Agusta Westland SpA* [2020] 3 WLR 977, per Waksman J at [64] to [78].

47. There was a difference of emphasis between the parties, however, as to the test to be applied in determining whether there is a sustainable claim. Mr Allison QC, who appeared with Mr Perkins for Bidco, submitted that there is a low threshold, which is satisfied so long as the claim against the anchor defendant is not "hopeless" (referring, for example, to the use of that word at [68] and [69] of *Sabbagh*). Mr Smith QC, who appeared with Mr Phillips for the GLAS defendants, agreed, suggesting that the test was whether the claim against the anchor defendants was more than "wholly unarguable" (referring to the use of that phrase at [43] of *Sabbagh*).

48. Mr Choo-Choy QC, who appeared with Mr Woolgar for Signal, and Mr Gledhill QC, who appeared with Mr Sibbel for Dr Kebekus, contended that the test is equivalent to that applied in a summary judgment or strike out context, namely whether there is a serious issue to be tried or whether the claim has a real prospect of success. I agree. I do not read the majority (Patten and Beatson LJJ) in *Sabbagh* as having intended, when referring to claims that are "hopeless" or "wholly unarguable", to set a hurdle any different from the summary judgment or strike out test. The phrases "hopeless" and "presents no serious issue to be tried" are used interchangeably at [68] of *Sabbagh* and, at [43], the phrase "wholly unarguable" is used in contrast to a claim that is "seriously arguable". The test actually applied to the facts of that case, at [74], was whether the claim had "a real prospect of success".

49. The parties were also agreed that, for the purpose of determining whether the requirements of Article 8(1) are satisfied, it is necessary to have regard to the time at which the proceedings were commenced: see, for example, *Canada Trust Co v Stolzenberg (No.2)* [2002] 1 AC 1, in which the House of Lords held that the time by reference to which the domicile of an anchor defendant was to be determined, for the purposes of Article 6 of the Lugano Convention, was the initiation of the proceedings; and see the *Cartel Damages Claims* case (above) in which the CJEU held that in order to exclude the application of Article 6(1) of the Brussels Regulation an allegation that a claimant and anchor defendant purposefully delayed the formal conclusion of a settlement until proceedings had been instituted must be supported by firm evidence that "at the time that proceedings were instituted", the parties concerned had

colluded to artificially fulfil, or prolong the fulfilments of, that provision's applicability. It implicitly follows that a settlement agreement reached *after* the date that the proceedings were instituted would not exclude the application of Article 8(1) of the RBR.

50. Article 8(1) is subject to the general principle of abuse of law such that "at least in certain circumstances, abuse of the right to commence proceedings against an anchor defendant will not confer jurisdiction against a foreign defendant": see *JSC Commercial Bank Privatbank v Kolomoisky* [2018] EWCA Civ 1708, at [77], applying the CJEU's decision in *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV* [2015] QB 906. So far, the circumstances in which this is likely to apply have been narrowly defined. In the *Cartel Damage* case, the potential abuse of law consisted of a collusive arrangement between the claimant and anchor defendant to conceal a settlement of the claim until the proceedings had been issued and served on foreign defendants. The Court of Appeal in *Privatbank* noted that other examples might be naming a fictitious person as the anchor defendant and commencing proceedings against an anchor defendant knowing that it was an inadmissible claim.

51. In its skeleton argument, Signal contended that Bidco's reliance on Article 8(1) was abusive. In oral argument, however, Mr Choo-Choy abandoned reliance on this principle as a free-standing argument, making it clear that Signal's case on abuse was co-extensive with its case that there was no sustainable claim against the anchor defendants. In other words, it only advanced a case on abuse if and to the extent that it succeeded in establishing that the claims against the anchor defendants were unsustainable. In those circumstances it is unnecessary to consider the question of abuse further.

52. For completeness, I note that in light of the decision in *Privatbank* it was not suggested by either Dr Kebekus or Signal that a claimant with a sustainable claim against an anchor defendant is precluded from relying upon Article 8(1) simply by reason of the fact that its sole object in issuing proceedings against the anchor defendant is to sue the foreign defendant in the same proceedings.

Application of Article 8(1)

53. It is common ground that most of the requirements of Article 8(1) are satisfied in this case. First, the HYN Trustee and the GLAS defendants (being the anchor defendants) have at all material times been domiciled in England. Second, the claim for declarations as against Signal and as against Dr Kebekus is not merely closely connected with the claim for declarations as against the anchor defendants, it is the very same claim. Third, Signal and Dr Kebekus accept that Bidco's claim for declarations gives rise to a serious issue to be tried, in the sense that the contention that the Restructuring complied with the ICA has at least real prospects of success. They also accept that, as between Bidco and them, there is a real and genuine dispute over that question.

54. It is Signal's and Dr Kebekus' contention, however, that while there is a substantial dispute between them and Bidco, there is no real or genuine dispute between Bidco and any of the anchor defendants. In those circumstances, they contend that, on the assumption that the only parties before the court were Bidco and the anchor defendants, there would be no real prospect that the court would make the declarations sought. For that reason, they contend, there is no sustainable claim against any anchor defendant for the purposes of Article 8(1).

55. Before turning to address the detailed arguments advanced by the parties, I make the following preliminary observation as to the application of the "sustainable claim" test in the circumstances of this case. Where, as here, there is a claim for a declaration against multiple defendants, some domiciled in the UK and some domiciled abroad, the application of the requirement that there is a sustainable claim *against* the anchor defendants is not straightforward. The parties to an action for a declaration will in general be those affected by it and who need to be bound by it. Where the issue concerns the meaning or effect of a contract, then the parties to the contract would properly be parties to the proceedings. The relief is sought "against" them, collectively, as opposed to individual relief being sought against each of them.

56. This is important in light of the rationale for the sustainable claim test, as explained by the majority of the Court of Appeal in *Sabbagh*. At [43] of the judgment in that case, it was pointed out that the purpose of Article 8(1) is to avoid the risk of irreconcilable judgments and that:

> "where there is no serious issue to be tried, because a claim is wholly unarguable on the merits, that risk is unlikely to arise. This is because "even if the proceedings could be and were brought elsewhere, the outcome would be the same, if there is no seriously arguable claim": see Hamblen J in *Brown v Innovatorone Plc* [2010] EWHC 2281 (Comm)."

57. That rationale does not obviously apply here, in view of the acceptance that there is a serious issue to be tried as to the underlying merits of the declarations sought, and the same declarations are sought against all parties. In a case involving separate but closely connected claims against an anchor defendant and a foreign defendant, the assumption is fairly made that if there is no reasonably arguable claim, that conclusion would be reached irrespective of the forum in which the claimant sought to bring its claim. In contrast, where, as here, there is a serious issue to be tried as to the underlying merits of the declarations sought, it cannot be assumed that the answer given upon that issue would be the same, wherever proceedings were brought.

58. Further, in light of the fact that the same declarations are sought against all parties, the contention advanced by Dr Kebekus and Signal that there is no sustainable claim *as against the anchor defendants* turns (assuming their substantive arguments, which I address below, are successful) on whether or not the foreign defendants are parties to the proceedings. That is because the essence of their case is that in the absence of Signal and/or Dr Kebekus there is no sustainable claim because there is no-one before the court who actively

opposes the declarations sought and who is in a position to present opposing arguments. That objection falls away if Dr Kebekus and/or Signal are joined and, in that event, the claim against the anchor defendants themselves would need to continue: there could be no question of the court granting the declaration *as against the anchor defendants only* on the basis that they did not oppose it, if the dispute between Bidco and the other parties remained unresolved.

59. That is very different from the case involving separate but connected claims against the anchor defendant and the foreign defendant: in such a case, the sustainability of the claim against the anchor defendant is a free-standing point, unaffected by whether or not the foreign defendant is also a party.

60. In addressing the arguments advanced by the parties, I will deal first with the application of Article 8(1) on the basis that the HYN Trustee alone is the anchor defendant, before dealing with its application on the basis that the GLAS defendants are anchor defendants.

Sustainable claim as between Bidco and the HYN Trustee

61. Mr Choo-Choy and Mr Gledhill pointed to the classic statement of the principles to be applied when declaratory relief is sought, in the judgment of Aikens LJ in *Rolls-Royce plc v Unite the Union* [2009] EWCA Civ 387, at [120]:

> "(1) The power of the court to grant declaratory relief is discretionary.
>
> (2) There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However, the claimant does not need to have a present cause of action against the defendant.
>
> (3) Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question.
>
> (4) The fact that the claimant is not a party to the relevant contract in respect of which a declaration is sought is not fatal to an application for a declaration, provided that it is directly affected by the issue; (in this respect the cases have undoubtedly "moved on" from *Meadows*).
>
> (5) The court will be prepared to give declaratory relief in respect of a "friendly action" or where there is an "academic question" if all parties so wish, even on "private law" issues. This may particularly be so if it is a "test case", or it may affect a significant number of other cases, and it is in the public interest to decide the issue concerned.

> (6) However, the court must be satisfied that all sides of the argument will be fully and properly put. It must therefore ensure that all those affected are either before it or will have their arguments put before the court.
>
> (7) In all cases, assuming that the other tests are satisfied, the court must ask: is this the most effective way of resolving the issues raised? In answering that question it must consider the other options of resolving this issue."

62. A declaration will not be made merely because the person asking for it feared that at some time or other he might be liable to an action: see Zamir & Woolf, The Declaratory Judgment, 4th ed (2011), at paragraph 4-60 (citing Bailhache J in *Guaranty Trust Co of New York v Hannay & Co* [1915] W.N. 38, at 38). The court will in general reject a claim for a declaration that the claimant is under no duty to the defendant if the defendant does not assert that the claimant owes him such a duty: Zamir & Woolf, at paragraph 4-65.

63. The HYN Trustee has at no time challenged the Restructuring. It has received no instructions to take any action in relation to it from any holder of HYN. It has not engaged at all in these proceedings. In a letter dated 20 March 2020, the HYN Trustee invited Bidco to discontinue the claim against it, noting that the matter is essentially a dispute between Bidco and the parties to related proceedings in New York and Luxembourg. It confirmed that if the proceedings were not discontinued against it, the HYN Trustee nevertheless did not intend to take an active role in the proceedings and was content to be bound by the final decision of the court.

64. On the basis of these undisputed facts, Signal and Dr Kebekus contend that there is clearly no sustainable claim for declarations against the HYN Trustee. They contend that the only opposition to the Restructuring has been advanced by Signal and that the amended particulars of claim do not suggest otherwise (making no allegation as to any conduct by the HYN Trustee). Without opposition from the HYN Trustee, it is contended on behalf of Signal and Dr Kebekus that there is no real and genuine dispute between Bidco and the HYN Trustee and that the court would be bound to refuse to make the declarations sought by Bidco.

65. As against this, Bidco points to the fact that the HYN Trustee is trustee for, indirectly at least, all those who hold beneficial interests in the HYN, between some of whom (at least) and Bidco there is a real and genuine dispute as to the validity of the Restructuring, and that joinder of the HYN Trustee is essential in order to bind all such holders.

66. It is important in considering these rival contentions to distinguish between: (1) whether a *lis*, or dispute, exists at all as between Bidco and the HYN Trustee which would justify declarations being granted; and (2) even if there is, whether the HYN Trustee's lack of participation in the proceedings means that there is no real prospect that the court would grant the declarations sought.

67. As to the first point, I am satisfied that there was, at the inception of these proceedings, and still is, a *lis* between Bidco and the HYN Trustee, for the following reasons, which largely reflect the submissions made on behalf of Bidco.

68. At the commencement of these proceedings, the HYN were held in global form, so that the only Holder was the Common Depository. Beneficial interests in the HYN were held through a series of sub-participations: the Holder held its interest for the benefit of the clearing systems, who held for the benefit of account holders, who in turn held for the benefit of the ultimate beneficial holders, either directly or through one or more intermediaries: *Secure Capital SA v Credit Suisse AG* [2017] 1 BCLC 325 at [8]-[11]. Under English law, this is analysed as a series of sub-trusts: see, for example, Bridge, Gullifer, Low and McMeel, The Law of Personal Property, Sweet & Maxwell, 2nd ed, at 6-051.

69. The HYN Trustee is appointed under the Indenture as trustee for the benefit of the Holders of the HYN: see, for example, clause 6.08 ("the Trustee is authorized to recover judgment in its own name and as trustee of an express trust against the Issuer for the whole amount of principal of, premium on, if any, interest and Additional Amounts, if any, remaining unpaid, on the Notes…"); clause 10.04 ("the Trustee is authorized to receive any funds for the benefit of the Holders distributed under the Security Documents or Intercreditor Agreement"); and clause 12.02 (all money deposited with the Trustee under clause 12.01 "shall be held on trust and applied by it, in accordance with the provisions of the Notes and this Indenture" to the persons entitled to it). By clause 6.03 of the Indenture, the HYN Trustee is authorised to "pursue any available remedy to collect the payment of principal … or interest on the Notes or to enforce the performance of any provision of the Notes or this Indenture."

70. Since, at the commencement of these proceedings, the only direct beneficiary of the trust constituted by the Indenture was the Common Depository (as the only "Holder" of HYN as at that date), all those who held beneficial interests in the HYN were indirect beneficiaries as a result of the sub-participation arrangement described above.

71. Mr Choo-Choy accepted, in light of this holding structure, that a judgment obtained by Bidco against the HYN Trustee would be binding on all holders of beneficial interests in the HYN at least as against those who had been notified of the proceedings. He also accepted that the same would have been true if any of the HYN had been held in Definitive form: the only difference being that the Holder of a Definitive Note has a direct, as opposed to indirect, beneficial interest in the rights held by the HYN Trustee under the Indenture.

72. When these proceedings commenced, there was undoubtedly a genuine dispute between Bidco and Signal (the holder of a beneficial interest in 31% of the HYN) as to the validity of the Restructuring. Further, although Signal was the only holder of an interest in the HYN that had expressed, through Milbank, an intention to take proceedings challenging the Restructuring, it was clear that the Restructuring was opposed by a number of other holders of beneficial

interests in the HYN. First, in the letter before action Milbank indicated that it represented 64% of the beneficial holders of HYN, all of whose rights were said to be reserved. Second, a week after the letter before action, a majority of the beneficial holders of the HYN issued an instruction to replace the board of GSA, with a view to insolvency proceedings being commenced in Germany so as to protect the interests of the holders of the HYN. The clear inference was that a majority of those holding an interest in the HYN were opposed to the Restructuring.

73. Apart from Signal, the identity of the remaining holders of interests in the HYN was unknown. Moreover, those interests continued to be traded, so the identity of the ultimate beneficial holders was liable to change over time. Not only, therefore, was it appropriate to join the HYN Trustee in order to obtain declaratory relief, it was necessary to do so in order to obtain a judgment that would be binding on the unknown holders of interests in the HYN.

74. In those circumstances, I consider that there was sufficient *lis*, at the time these proceedings were commenced, between Bidco and the HYN Trustee, in its capacity as trustee for those ultimately interested in the HYN, to give rise to a real prospect that the court would grant declaratory relief as to the validity of the Restructuring. The absence of any opposition being advanced by the HYN Trustee itself (whether because of its personal inclination or because it was not in receipt of instructions and a sufficient indemnity) is, in my judgment, irrelevant: it is enough that there was opposition from those with underlying beneficial interests in HYN, for whom the HYN Trustee holds its rights under the Indenture.

75. Mr Choo-Choy pointed to the fact that although the HYN Trustee is authorised to take action on behalf of the Holders of HYN, it is not *obliged* to take any action under the Indenture unless instructed to do so and indemnified by the Holders (see clause 6.06). He also pointed to the fact that under clause 6.07 of the Indenture the Holders themselves are permitted to take action to recover amounts payable to them, once they have fallen due, under the HYN.

76. So far as clause 6.07 is concerned, that had no relevance as at the date proceedings were commenced, since neither Signal nor any other person with a beneficial interest in the HYN was a Holder, entitled to take action under that provision. The fact that the HYN Trustee is under no obligation to take action unless in receipt of an instruction and satisfactory indemnity does not detract from the conclusion that since the HYN Trustee is the holder of rights under the Indenture for the benefit of all those beneficially entitled in the HYN, it is the appropriate person to be joined as defendant representing the interests of all such beneficial holders, particularly where their identity is unknown, in order to obtain declaratory relief binding on all of them.

77. For completeness, while it is necessary to consider the position as at the date that the proceedings were commenced, in my judgment there remains a *lis* between Bidco and the HYN Trustee notwithstanding Signal's acquisition in May 2020 of a Definitive Note. Its ability to take its own action to recover the sum due to it under that Definitive Note does not change the analysis set out

above as to the existence of a *lis* between Bidco and the HYN Trustee as trustee for all those beneficially interested in the HYN.

78. It is the second of the two points referred to in [66] above that is the principal focus of opposition from Signal and Dr Kebekus. Mr Choo-Choy submitted that Bidco's arguments confuse the question whether the HYN Trustee is a proper party with the question whether there is a real and genuine dispute between Bidco and the HYN Trustee.

79. He submitted that even if the HYN Trustee is a proper party because it represents those with a beneficial interest in the HYN, that does not get around the problem that since it has *not* been instructed by any Holder it does not constitute effective opposition. Given its stated neutrality (in its letter of 20 March 2020) the fact that it has formally filed an acknowledgment of service indicating an intention to defend the proceedings is irrelevant.

80. Further, he submitted that the court cannot force the HYN Trustee to participate in the proceedings. As to the suggestion of Bidco and the GLAS defendants that there are many cases in the English courts where proceedings for declaratory relief have been brought against a note trustee by a debtor (see, for example, *McLaren Holdings Ltd v US Bank Trustees Ltd* [2020] EWHC 1892 (Ch)), Mr Choo-Choy pointed out that those were cases where the trustee was willingly before the court and taking an active role.

81. Signal and Dr Kebekus rely in particular on the sixth of the principles set out by Aikens LJ in *Rolls Royce v Unite the Union* (above), namely that the court must be satisfied that all sides of the arguments will be fully and properly put.

82. They referred, in this respect, to the decision of Marcus Smith J in *The Bank of New York Mellon v Essar Steel India Limited* [2018] EWHC 3177 ("*Essar Steel*"). In that case, the trustee of notes issued by the defendant issuer sought a declaration as to the amounts due and payable under the notes. The defendant, which was in an insolvency process in India, was served in this jurisdiction pursuant to a contractual provision in the trust deed governing the notes, but it played no part in the proceedings. When considering the exercise of the discretion to grant declaratory relief, Marcus Smith J said (at [21]) that the court should take into account "justice to the claimant, justice to the defendant, whether the declaration sought would serve a useful purpose and whether there are other special reasons why or why not the court should grant the declaration." He referred to, and expanded upon, the factors identified by Aikens LJ in *Rolls Royce v Unite the Union* and concluded against making the declarations sought for three principal reasons: (1) both sides of the argument would not be put; (2) because of the potential effect on a third party (the Indian insolvency office-holder) not before the court; and (3) the difficulty in identifying a real and present dispute and the potential for interference in a foreign process.

83. In relation to the first of these reasons, the defendant's arguments would not be heard by the court because it had chosen not to engage in the proceedings. Marcus Smith J said:

> "That, I fully accept, is not the Claimant's fault. I also accept that it would be invidious and wrong to allow a defendant's non-participation to prevent the making of declarations. That is particularly so where, as here, the claim is a Part 8 claim, not turning on substantial disputes of fact. Nevertheless, where the defendant is absent, even if that absence is not the fault of the claimant and might be said to be the fault of the defendant, it is incumbent on the court to approach the factors set out in paragraph 21 above with great care and with something of a conservative mindset against the granting of a declaration, bearing in mind the propositions summarised in paragraph 21(5) above ["the court must be satisfied that all sides of the argument will be fully and properly put"]."

84. As to the second point, the effect on the Indian insolvency proceedings of any declaration the Judge might grant was unclear. If it would have an effect, then that would be a factor against making a declaration in circumstances where the Indian insolvency office-holder was not a party. If the declaration would not have an effect, there would be little utility in granting it.

85. As to the third point, he said: "The need for a real and present dispute between the parties, that is resolved by the making of the declaration, is central to the question of whether a declaration should be made." There did not appear to be any dispute at all as to the amount owed by the defendant. Instead it was a case of a defendant who simply could not pay. Although there did appear to be some points of dispute between the claimant and defendant within the Indian insolvency proceedings, the judge was concerned that any declaration he made would amount to an improper interference in a foreign process being conducted by a party not before him and who had been unable to make submissions.

86. There are a number of points of distinction between *Essar Steel* and this case.

87. First, *Essar Steel* was a decision at the final hearing of the claim for the declaration, involving the exercise of a discretion taking into account all of the circumstances then existing. In contrast, the question in this case is whether it can be shown that there is no real prospect of the court exercising its discretion – in the future, at the trial of Bidco's claim – in favour of granting the declarations sought.

88. Second, Marcus Smith J relied on the lack of any substantive dispute at all as to the declaration sought (because there was in fact no issue as to the amount payable). That is not so in this case. As I have set out above, there is a real dispute as between Bidco and at least some of those whose interests are represented by the HYN Trustee as to the validity of the Restructuring. There is also a real dispute between Bidco and GSA (demonstrated among other things by GSA having taken action, at the direction of Dr Kebekus, in Luxembourg).

89. Third, Marcus Smith J was concerned either that the declarations would interfere improperly with the Indian insolvency proceeding, to the extent that they had any effect in those proceedings, or, if they did not have such effect, that they would lack any utility. There is no equivalent concern here. At the date when these proceedings commenced there were no foreign proceedings. The declaration sought in *Essar Steel* was as to the amount payable in respect of a debt which was provable in the Indian insolvency process. Here, the question is whether Bidco has been released from liabilities which it owes in respect of the HYN Notes, including to GSA. That is a question which arises under the ICA, governed by English law and subject to a jurisdiction agreement in favour of England. It is accepted that so far as the claim against GSA is concerned, GSA is bound by the choice of England as the exclusive jurisdiction in clause 32.1 of the ICA. There is no evidence that this would amount to any improper interference with any of the German insolvency proceedings, the Luxembourg proceedings or the New York proceedings. The New York court has itself recognised the utility of the English court making declarations as to the extent to which a Restructuring which took place in England complied with an English law governed agreement.

90. Fourth, Marcus Smith J was concerned that such interference would occur without the potentially affected third party (the office-holder in the Indian insolvency proceedings) being before the court. There is no similar concern here, at least not due to any conduct on Bidco's part, as it is seeking to join Dr Kebekus (so that any judgment against GSA is effective) and Signal.

91. Bidco, for its part, relies on Marcus Smith J's comment that it would be "invidious and wrong" to allow a defendant's non-participation to prevent the making of declarations, particularly where there are no substantive disputes of fact.

92. I consider this to be a pertinent factor here, for two reasons. First, this is not a case where there is nobody willing to advance contrary arguments. Signal, at least, is doing so. It is just that it wishes to do so in New York and not England. Second, Signal's desire to advance contrary arguments in New York and not England (whether directly or by instructing and indemnifying the HYN Trustee to do so) must be seen in the context that both of the entities through which it held its interest in the HYN at the time the proceedings commenced, namely the HYN Trustee and the Common Depository (as Holder), are bound by the terms of the ICA, including the jurisdiction agreement in clause 32.1: the HYN Trustee is a party to the ICA and each Holder of a HYN is deemed (by clause 4.25(e) of the Indenture) to have agreed to the terms of the ICA.

93. In any event, as Marcus Smith J pointed out, the lack of participation of the defendant does not lead inexorably to the court refusing to grant declarations. Instead, it leads the court to approach the exercise of discretion with "great care" and a "conservative mindset".

94. Mr Smith contended that there would be alternative means by which the court could ensure that opposing arguments were put. I agree with Mr Choo-Choy that forcing the HYN Trustee to participate is not one of them. On the other

hand, while the Security Agent has expressed its support for the declarations and is incentivised to do so in order to avoid a finding that it acted in breach of the terms of the ICA, it holds (or held) the security under the terms of the ICA on trust for all the holders of senior and junior debt. It would be open to the court, if it considered it necessary to ensure that all arguments were advanced, to require the Security Agent to appoint independent solicitors and counsel for the sole purpose of advancing arguments on behalf of the holders of junior debt.

95. Even if no-one appeared at trial to present arguments that Signal, Dr Kebekus, the HYN Trustee or GSA would wish to advance, the court will have available to it material already filed in the various foreign proceedings which sets out those arguments in some detail. It is likely that by the time of the trial there will be further such material available.

96. This would be a more challenging prospect if the court was required to determine substantial disputes of fact (c.f. Marcus Smith J's comment that it is all the more invidious for a defendant's participation to prevent the court from making declarations where there are no substantive disputes of fact).

97. The claims made by Dr Kebekus and GSA in Luxembourg and Germany undoubtedly involve substantial disputes of fact, since they are based on allegations of intention to defraud creditors and the contention that the shares in Bidco were transferred to Mangrove at a substantial undervalue. At least one of the claims advanced by Signal in the New York proceedings, namely that the transfer of the Bidco shares did not involve a consideration at least equal to their fair market value, also raises a question of fact.

98. Mr Smith and Mr Allison submitted, however, that the issues raised in the English proceedings are legal ones, pointing to the essentially "tick-box" nature of the requirements of the ICA and the conclusiveness of a financial advisor's certificate as to meeting the "Enforcement Objective" in Schedule 5 to the ICA.

99. I am not in a position to determine the extent to which, if at all, questions of fact will need to be determined at trial. To do so would involve entering further into the substantive merits of the claims for declaratory relief than the parties did at the hearing (and further than would be appropriate given the nature of the test to be applied on this application). At this stage, it is sufficient to say that there is a real prospect that Bidco's claim can be determined without the need to decide substantial issues of fact.

100. Finally, it does not seem to me to be a foregone conclusion, in the counterfactual that the claim continues against the anchor defendants, that there would be no opposition to the declarations at trial. Given the risk that a judgment against the HYN Trustee might be considered binding on those whose interests the HYN Trustee represents (see above), it is at least possible that the HYN Trustee would be instructed to take action by those interested in the HYN. Mr Choo-Choy submitted that it would be inconceivable that any holder of a beneficial interest in the HYN would give instructions to turn the HYN Trustee into a viable defendant, given the existence of the jurisdiction

dispute. While it is true that there is a clear tactical incentive against providing instructions to the HYN Trustee, I do not think it can be assumed that it would remain the case once that issue is out of the way, even if it was resolved against Bidco.

101. Mr Gledhill advanced two additional arguments against the application of Article 8(1) in relation to Dr Kebekus.

102. First, he contended that Bidco's purpose in joining GSA (and indirectly therefore Dr Kebekus – it being common ground that the direct purpose of joining Dr Kebekus was to ensure that a judgment against GSA was effective as a matter of German law) was so that findings of fact in the English proceedings could be used (in a so far unspecified way) in the German and Luxembourg proceedings. There was no real prospect, he submitted, of the court granting declarations for that purpose, citing *Howden North America In v Ace European Group Ltd* [2012] EWCA Civ 1624 ("*Ace European*").

103. In *Ace European*, Howden asserted claims under an insurance policy against its insurer in Pennsylvania. The Pennsylvanian court rejected the insurer's application to stay the proceedings before it on forum grounds, indicating a provisional view that it was unlikely English law applied to the claims. The insurer brought proceedings in England seeking declarations that the relevant policies were governed by English law and as to their meaning and effect in English law. Field J held, first, that England was the appropriate forum for the dispute and, second, that there was utility in granting the declarations. On appeal (on the second point alone) the Court of Appeal reversed the judge, holding that there was no utility in granting the declarations.

104. At [22] to [23] of his judgment Aikens LJ (with whom the other judges agreed) quoted Phillips LJ in *New Hampshire Insurance Co v Phillips Electronics North America Corp* [1998] CLC 1062, 1066, referring to the fact that the existence of imminent or current foreign proceedings was always a highly relevant consideration both to the utility of granting a negative declaration and to the question whether England is the appropriate forum:

> "The two questions will, however, cover common ground where the possibility exists that the [claimant] in the English proceedings will be sued by the defendant in an alternative jurisdiction. It is in that situation that the court must be particularly careful to ensure that the negative declaration is sought for a valid and valuable purpose and not an illegitimate attempt to pre-empt the jurisdiction in which the dispute between the parties is to be resolved"

105. At [24], Aikens LJ said that the same considerations applied whether the declaration sought was positive or negative.

106. At [32] he distinguished *Ace European* from the earlier decision in the related case of *Faraday Reinsurance Co Ltd v Howden North America Inc* [2011] EWHC 2837, in which the court had granted Howden permission to serve out of the jurisdiction proceedings for similar declarations against different

insurers, accepting that the proceedings had sufficient utility. The case could be distinguished, first, because the English proceedings had been commenced before the Insurers became parties to US proceedings and, second, because the Insurers in *Faraday* had argued that the declarations would have preclusive effect in the foreign jurisdiction.

107. At [35], he concluded that there was no utility in granting the declarations sought, taking into account: (1) the Pennsylvanian judge had reached the preliminary conclusion that English law was not the applicable law; (2) the Pennsylvanian court was well equipped (as it had stated) to receive evidence of English law even if it was the governing law; and (3) it had expressed no request or need to be instructed by the English court on what, in the view of the English court and according to English conflict of law rules, was the applicable law.

108. Mr Gledhill drew four propositions from *Ace European*. First, a declaration, whether positive or negative, will not be granted unless it meets the test of utility laid down in *New Hampshire*. Second, the existence of imminent or current foreign proceedings is always a highly relevant consideration for the purposes of testing utility. Third, where there is no evidence as to the preclusive effect of an English judgment in the foreign proceedings, the court will tread warily. Fourth, it is no answer that the English court has jurisdiction because the presence of jurisdiction is a necessary, but not sufficient, consideration for granting declaratory relief.

109. As to Bidco's purpose in joining GSA and Dr Kebekus, Mr Gledhill pointed to a reference in the witness statement of Mr Aaron Marks dated 29 June 2020, filed on behalf of Bidco, to the fact that the action before the English court would resolve three of the causes of action in the New York proceedings because if Bidco succeeds in obtaining a declaration that the Restructuring was carried out in accordance with clause 17 of the ICA, then "*ipso facto*, it could not have been motivated by an intent to defraud the Galapagos Group's creditors." He also referred to a witness statement of Mr Richard Boynton dated 12 January 2020 in support of Bidco's application to extend time for service of the claim form. In that statement, Mr Boynton explained that one of the reasons for the extension sought was so that Bidco's legal advisors could review the recently served Luxembourg proceedings and consider whether it was appropriate to continue the English proceedings in the light of all the litigation commenced in respect of the Restructuring. Mr Gledhill submitted, in light of this evidence, that there could be little doubt that Bidco would seek to rely in Germany on findings made in the English proceedings.

110. Mr Allison denied that Bidco's purpose in bringing the English proceedings was to obtain findings of fact to be used in foreign proceedings. Indeed, at the time the proceedings were issued against GSA there were no such foreign proceedings in contemplation. Even at the point in time that Dr Kebekus was joined, the German proceedings were not in contemplation. I have already referred to Mr Allison's and Mr Smith's contention that the English proceedings raise points of law, not fact. In Mr Boynton's witness statement of 12 January 2020 (upon which Mr Gledhill relied) it was noted that Bidco sought, in particular, a declaration that the contractual power under clause 17

to release the financial liabilities of Bidco and its subsidiaries had been validly exercised, and that this was of importance to Bidco because "it would determine whether Bidco and its subsidiaries remain liable to the relevant financial creditors for the pre-Restructuring debt."

111. Mr Allison added that one of the purposes in GSA being made a party was to ensure that Bidco was released from potential "ricochet" claims by GSA arising from the fact that GSA was a co-guarantor of Bidco's own guarantee liabilities.

112. Mr Gledhill submitted that this purpose had never before been stated and requested the opportunity to file submissions after the conclusion of the hearing addressing this point. In those written submissions, Mr Gledhill and Mr Sibbel submitted that any contribution claim by GSA would be governed by New York law, which was understood in this respect to be the same as English law. Accordingly, GSA would be entitled to assert a claim for contribution against Bidco only if it had paid more than its share of the common liability. As there was no prospect of that occurring, because GSA had no assets to distribute to its creditors, a claim for declaratory relief failed to meet the "serious issue to be tried" test.

113. In their written submissions in response, Mr Allison and Mr Perkins pointed out that there had been no need for this specific point to have been made before the hearing, given that Dr Kebekus' arguments had until the filing of his skeleton argument been essentially the same as those of Signal. I note, in this respect, that in Mr Boynton's witness statement of 12 January 2020 referred to above, the fact that the declarations sought would release Bidco from its liabilities (generally) in relation to the financial creditors was specifically relied upon. Further, they submitted that the absence of any assets in GSA's insolvency estate at present does not preclude the possibility that assets might be recovered in the future, after which ricochet claims might be pursued.

114. Dr Kebekus, in a further written note from Mr Gledhill and Mr Sibbel, then sought a further period of 21 days in which to submit evidence on behalf of Dr Kebekus on this issue. For the reasons I set out below, however, I have concluded that this issue is not material to my decision and it is therefore unnecessary to delay handing down judgment by waiting for further evidence and submissions.

115. I do not accept Mr Gledhill's contention that there is no real prospect of the court making the declarations sought in this case by reason of the principles he derives from *Ace European*. The position in this case is fundamentally different from that in *Ace European*.

116. In the first place, in *Ace European*, the very argument being advanced to justify the utility of the English proceedings was that they would be of "considerable assistance" to the Pennsylvanian judge. In this case, not only is no such argument made to justify the proceedings here, but at the time the English proceedings were commenced neither the Luxembourg nor German proceedings were imminent or current. The factor said to be "highly relevant"

in *Ace European* was not a consideration at all, therefore, when these proceedings were commenced.

117. I do not accept that the passages in Mr Marks' statement and Mr Boynton's statement referred to by Mr Gledhill to support his contention that Bidco's intention was (or is) to obtain findings of fact for use in German or Luxembourg proceedings. The evidence of Mr Marks does not directly assist Dr Kebekus, as it related to the New York proceedings (as to which, as I set below, no similar argument as to lack of utility is made). The reasons given by Mr Boynton for delaying service of the claim form in these proceedings do not in my judgment demonstrate that the purpose of these proceedings is to obtain findings of fact in England for use in any of the foreign proceedings.

118. Second, leaving aside the timing point, Bidco is not even a party to the German proceedings. Germany is therefore patently not the jurisdiction in which the dispute between the parties is to be resolved. It follows from this and the first point just made that it cannot be said (to adopt the language of Phillips LJ in *New Hampshire*, quoted above) that the English proceedings constitute an "illegitimate attempt to pre-empt the jurisdiction in which the dispute between the parties is to be resolved".

119. Third, whereas in *Ace European* declarations were sought as between the parties to a bilateral contract (insured and insurer), the declarations sought in these proceedings relate to a multi-lateral agreement, the ICA, and are intended to be binding on all parties to it and those who claim an interest through them. The utility of the declarations therefore has to be seen in the context of all parties to the ICA. Dr Kebekus' argument focuses only on the position of GSA and, by extension, his own position. No similar argument is, or could be, made by Signal in relation to the New York proceedings, in light of the fact that the New York court has stayed the proceedings there having taken the view that the determination by the English court is likely to be dispositive of the case in New York.

120. Fourth, so far as the utility of the declarations sought in general is concerned, and in stark contrast to the position in *Ace European*, they relate to a Restructuring carried out in England pursuant to an English law governed agreement. They were commenced in England pursuant to an agreement conferring jurisdiction on the English courts (exclusive jurisdiction in the case of proceedings brought by Bidco). They will have the objective effect of determining whether Bidco has, by that Restructuring, been effectively released from all of its liabilities in respect of the HYN, by reference to that English law governed agreement. They will also determine whether the steps taken to transfer the shares in Bidco to Mangrove were in accordance with the ICA. I consider that there is a clear utility in such circumstances in the English court granting declaratory relief, irrespective of whether (1) insofar as the declarations would preclude GSA bringing any "ricochet" claims there is any practical risk of such claims arising and (2) whether a judgment of the English court would have any effect in proceedings in Germany or Luxembourg.

121. Fifth, insofar as Mr Gledhill's objection is based on the lack of need to join GSA/Dr Kebekus to these proceedings (as it was put in his post-hearing written submissions), I consider that this fails to recognise that there is, and can be, no objection to the joinder of GSA itself. It is a party to the ICA and clearly affected by the declarations sought (given that a key step in the Restructuring was the sale of shares in Bidco held by GSA). It is bound by the agreement in the ICA as to choice of English law and as to the choice of England as an *exclusive* jurisdiction. Dr Kebekus' only interest in the ICA is as representative of GSA and his joinder (as I have already noted) is solely for the purpose of ensuring that any judgment against GSA is effective under German law.

122. For these reasons, I do not accept that there is anything in the *Ace European* decision, or the principles Mr Gledhill derives from it, that indicates there is no real prospect of the court granting the declarations sought in these proceedings, such that there is a sustainable claim for the purposes of Article 8(1).

123. Second, Mr Gledhill relied on the recent decision of Henshaw J in *The Public Institution for Social Security v Al Rajaan* [2020] EWHC 2979 (Comm) ("*Al Rajaan*"). In that case, the claimant was a state institution providing Kuwaiti nationals with retirement and other forms of insurance. It claimed that numerous financial institutions and individual representatives of those institutions acted in concert to make corrupt payments to Mr Al Rajaan, the claimant's former director general. Mr Al Rajaan was domiciled in the UK and was the main "anchor defendant" for all other defendants for the purposes of the claimant's case under Article 6(1) of the Lugano Convention or Article 8(1) of the RBR. (In citing passages in the judgment of Henshaw J, I shall refer only to the provisions in the RBR.)

124. The Judge found that, as against three of the defendants, Banque Pictet, Pictet Europe and Mirabaud, and as against three other defendants who were partners in Mirabaud, the claimant was bound by exclusive jurisdiction agreements to bring certain of their claims (the "bribery claims") in Geneva or Luxembourg.

125. Other claims against those defendants (the "laundering claims"), however, did not fall within the exclusive jurisdiction clause.

126. At [427], Henshaw J, having concluded that the bribery claims must be brought in Geneva or Luxembourg as a result of the exclusive jurisdiction clause, identified the question as being whether Article 8(1) could be relied on to pursue in the UK: (1) connected claims against the same entities and/or (2) connected claims against third parties.

127. At [430], he said that there was no indication that the legislator of Article 8 had in mind a situation where a court assumes jurisdiction under Article 8 over a defendant against whom related claims must be pursued in another Convention State by reason of Article 25. At [431], he said that it does not follow that the legislator must be assumed to have taken the view that were such a situation to arise, such related claims would be irrelevant. On the contrary, the fundamental policy of the conventions is that defendants should

be sued in their domicile except for a few limited exceptions that must be properly confined so as not to undermine that policy. The justification for assuming jurisdiction under Article 8 is (as a derogation from that basic rule) the desirability of avoiding concurrent proceedings and irreconcilable judgments.

128. At [432], Henshaw J said that EU legislation should be interpreted in light of the purposes it aims to serve. Depending on the facts it may not be expedient to hear and determine claims against an anchor defendant and a foreign defendant in the same proceedings, if by doing so would create a risk of irreconcilable judgments. At [443], he concluded that it was not an answer to the risk of irreconcilable judgments that the foreign court (the subject of the exclusive jurisdiction clause) could stay their proceedings under Article 30. That would derogate from the principle of freedom of choice underlying Article 25.

129. Mr Gledhill submitted that there were important parallels between *Al Rajaan* and this case, because Dr Kebekus is obliged to bring the Claw-back Action in Germany, by reason of the provisions as to jurisdiction in the EC Insolvency Regulation. He submitted that, as in *Al Rajaan*, the policy behind Article 8(1), namely the avoidance of irreconcilable judgments, was promoted by refusing to apply it in the circumstances of this case.

130. The circumstances in *Al Rajaan* are, however, far removed from those in this case. It involved a claim for fraud extending over many years, with the highly complex facts of the bribery claims being closely entwined with those of the laundering claims, and it was the claimant itself which was bound to bring the scheme claims in the foreign court. As Henshaw J pointed out, at [433]:

> "If the laundering allegation against the bank is intimately connected with the allegation relating to the bank's own bribery, then to assume jurisdiction under Article 6 in relation to the former claim would create a risk of inconsistent judgments against the very same defendant in respect of intimately connected claims." (emphasis added).

131. The same is not true here. First, it is Dr Kebekus who is seeking to bring the claims in Germany and Luxembourg, claims which were not in contemplation at the time these proceedings were commenced (and, in the case of the former, were not in contemplation when Dr Kebekus was joined). Second, although there is no doubt a connection between the issues raised in the English and German/Luxembourg proceedings, the degree of connection is far less than that in *Al Rajaan* and the matters raised for determination in England are relatively self-contained. Third, the risk of inconsistent judgments, if Article 8(1) is applied, against the very same defendant that existed in *Al Rajaan* has no parallel here. On the contrary, if Article 8(1) is not applied in this case, the risk is of inconsistent judgments in respect of the same declaration as it affects different parties to the ICA. Moreover, although Dr Kebekus and GSA are technically different parties, Dr Kebekus' only relationship with the ICA is through GSA, so the risk is of inconsistent judgments as between one party to the ICA (GSA) and the person who is authorised under German law to

represent that party (Dr Kebekus). I do not accept, therefore, that the approach taken by Henshaw J in *Al Rajaan* should be adopted in this case.

132. Returning to the factors identified by Aikens LJ at [120] of *Rolls Royce v Unite the Union*, Mr Choo-Choy submitted that, insofar as they are relevant in this case, they point towards the declarations being refused in this case. It will be apparent, from my reasoning above, that I disagree:

(1) For all the above reasons, I consider that there is a real and present dispute between the parties before the court and I am satisfied that there is a real prospect that the relevant arguments would be put for and against the declarations sought.

(2) Each party will be affected by the decision. I do not accept, as Mr Choo-Choy submitted, that the HYN Trustee would not be affected because it has no economic interest. It is affected in its capacity as trustee because those whom it represents have an economic interest.

(3) I agree with Mr Choo-Choy that this is not a case where the court would be willing to grant relief in the context of a "friendly" or "academic" dispute, but that is because the dispute in this case is real, not merely academic.

(4) As to the final factor, whether the court is satisfied that this is the most effective way of resolving the issue, Mr Choo-Choy's argument was that it is not because, given Signal's refusal to participate in these proceedings, the most effective way to resolve matters would be for Bidco to sue Signal in Luxembourg or engage in the New York proceedings. I disagree. As Marcus Smith J said in *Essar Steel*, it would be wrong for a defendant to defeat a claim for declarations simply by refusing to take part. Further, Mr Choo-Choy's argument confuses the question whether declaratory relief is the most effective way of resolving the issue as to whether the Restructuring complied with the ICA, with a question as to the appropriate forum in which the issue should be resolved. As I explain below, however, it is not open to Signal to apply to stay these proceedings on forum conveniens grounds.

133. For the above reasons, I conclude that, whether judged as at the time of the commencement of these proceedings or in the case of Dr Kebekus his subsequent joinder, there was (and remains) a sustainable claim against at least the HYN Trustee as an anchor defendant. Moreover, in circumstances where there is a claim for the same declarations as against all parties, the claims against all defendants are so closely connected that it is expedient that they be brought in the same proceedings.

Sustainable claim against the GLAS defendants

134. My conclusion that there is a sustainable claim against the HYN Trustee makes it strictly unnecessary to deal with the alternative case that there is a sustainable case against the GLAS defendants. Moreover, it is highly unlikely, if my conclusion as regards the HYN Trustee as anchor defendant is

wrong, that Bidco could rely upon the GLAS defendants as anchor defendants for the purposes of Article 8(1). Accordingly, I will deal only briefly with this alternative case.

135. Unlike the HYN Trustee, the GLAS defendants are actively participating in the proceedings but have confirmed that they do not intend to oppose the relief sought. Their position is that the Restructuring was validly effected. As such, and in contrast to the position of the HYN Trustee, there does not appear to be any real or present dispute between the GLAS defendants and Bidco.

136. Nevertheless, I consider that in all the circumstances of this case there is a sustainable claim for declaratory relief against the GLAS defendants. It is not disputed that, but for their acquiescence in the result, they are proper parties to a claim for declaratory relief as to the terms and effect of the ICA. The mere fact that the GLAS defendants agree with the declarations being sought does not preclude the court making those declarations, given that they potentially affect all parties to the ICA and there is known opposition to the declarations being sought, albeit by other parties to the ICA (or by others whose interests are represented by a party to the ICA). Given that opposition, the claim for declarations is not academic (in the sense which would preclude the court from granting relief as explained in Zamir & Woolf: see [62] above).

137. In considering whether there is a real prospect that the court would exercise its discretion to grant the declarations, for the purposes of considering the position of the GLAS defendants as anchor defendants, it is nevertheless necessary to take account of the fact that GSA and the HYN Trustee would still be parties, because (1) this is a case of a single claim affecting all defendants as opposed to a separate but related claim against the different defendants and (2) there is no need to rely on Article 8(1) to join GSA or the HYN Trustee to the proceedings. Accordingly, the matters I have relied on above to justify the conclusion that there is a real prospect that the court would make the declarations sought in the context of the HYN Trustee as anchor defendant, apply equally where the GLAS defendants are relied upon as anchor defendants.

Article 25(1)

138. My conclusion on Article 8(1) also makes it unnecessary to consider whether this court has jurisdiction over Signal on the alternative basis pursuant to Article 25. Nevertheless, since the point has been fully argued and in case my conclusion in respect of Article 8(1) is wrong, I will go on to do so.

139. Bidco contends that Signal, as a Holder of a Definitive Note, is bound by the agreement to confer jurisdiction on the English court in clause 32.1 of the ICA, principally by reason of clause 4.25(e) of the Indenture (see above at [24]). As I have already noted, Signal does not dispute that, once it acquired a Definitive Note, it became bound to the terms of the ICA, including the jurisdiction agreement. I consider it right not to contest this: any Holder of the HYN is to be treated as having agreed to the terms of the ICA, including the choice of jurisdiction in clause 32.1, and that constitutes an agreement that

the courts of England shall have jurisdiction to determine any dispute arising in connection with the ICA for the purposes of Article 25(1) of the RBR.

140. Signal denies, however, that this court has jurisdiction over it by virtue of Article 25(1) for two reasons. First, the time for determining whether the conditions of Article 25(1) are complied with is the date on which the proceedings were commenced and, at that time, Signal was not a Holder of any HYN and was therefore not bound by the terms of the ICA. Second, in answer to Bidco's riposte to its first reason, that it would be possible to re-join Signal to the proceedings now when it *is* bound by the jurisdiction agreement in the ICA, Signal contends that on its true construction clause 32.1 does not confer jurisdiction on the English court in respect of a claim commenced by Bidco *after* Signal has commenced proceedings in New York.

Time for determining compliance with Article 25(1)

141. The House of Lords in *Canada Trust Co v Stolzenberg (No.2)* (above) identified the date of issue of proceedings as the relevant time to establish domicile for the purposes of Article 8(1). The only authority cited to me as to the time at which jurisdiction pursuant to Article 25(1) is to be established was *Sebastian Holdings Inc v Deutsche Bank AG* [2010] EWCA Civ 990. At [62], Thomas LJ said "…the question as to whether a claim falls within the jurisdiction clause is an issue that has to be determined at the time the proceedings are issued." Mr Allison submitted that this passage was not addressing the point in time at which jurisdiction was to be established pursuant to Article 25, but was concerned with a different question as to a series of contracts with competing jurisdiction clauses. I do not detect anything, however, in the surrounding paragraphs of the judgment of Thomas LJ which casts doubt on his proposition as to timing in [62].

142. Bidco nevertheless contends that Article 25(1) applied to Signal at the date the proceedings commenced, notwithstanding that it became a Holder of HYN only after the commencement of proceedings, for four reasons.

143. First, it is said that Signal has, upon becoming a Holder of HYN, contractually submitted to the jurisdiction of the English court and submission to the jurisdiction can occur at any time after proceedings have been issued, relying on Dicey, Morris & Collins on the Conflict of Laws (15th edition) at Rule 32.

144. As Mr Choo-Choy pointed out, however, that passage in Dicey relates to the common law regime for asserting jurisdiction, i.e. where the RBR does not apply (see the heading above Rule 31 in Dicey). Where, as here, the RBR applies, then jurisdiction needs to be established solely in accordance with the RBR. While the RBR does countenance jurisdiction being acquired by submission, it requires – in Article 26(1) – that a defendant "enters an appearance". That has not been satisfied in this case.

145. Second, it is contended that clause 32.1 applies, as a matter of construction, to disputes that arose at any time, whether before or after Signal became bound by the ICA. I agree that there is no temporal limitation within clause 32.1 but

that does not bridge the gap so as to make someone a party to the ICA as at a particular date when, as a matter of fact, they were not.

146. Third, Bidco relied on authorities to the effect that it is irrelevant that the contents of procedural form N510 failed to refer to Article 25(1), citing Mann J in *Heraeus Medical GmbH Biomet UK Healthcare Ltd* [2016] EWHC 1369 (Ch) at [61] ("in my view it matters not that [the claimant's form N510] was right for the wrong reasons. It would be odd to set it aside in those circumstances"). Again, however, as Mr Choo-Choy submitted, the problem in this case was not that form N510 failed to refer to Article 25(1) but that (as Bidco accepted in its skeleton argument) at the stage when these proceedings began, "Article 25(1) was not yet applicable … since Signal had not yet acquired a Definitive Note").

147. Fourth, and in answer to a question from me, Mr Allison did contend that in reality Signal had always been bound by the jurisdiction agreement in the ICA, because prior to acquiring a Definitive Note its rights in respect of the HYN were held through the Common Depositary and the HYN Trustee, both of whom were themselves bound. Mr Choo-Choy objected that Article 25(1) is concerned with "parties" who have agreed upon a particular court having jurisdiction and the fact that Signal's beneficial interest is held through an entity that has itself agreed to the terms of the ICA does not render Signal itself a party to the exclusive jurisdiction agreement. I did not receive extensive argument on the point, it being raised only during the hearing. On the basis of such argument as I did hear, however, I consider that Mr Choo-Choy's submissions are to be preferred: the fact that a party to a contract holds the rights under that contract for the ultimate benefit of others (through a series of sub-participations as described above) does not make those others "parties" to the agreement.

Re-joinder of Signal to the proceedings

148. The fact that Article 25(1) did not apply as at the date of the commencement of the proceedings would not, however, prevent Bidco seeking to join Signal to these proceedings now, at which point Article 25(1) would be satisfied (subject to Signal's point on construction of clause 32.1 of the ICA) by the fact that Signal is a Holder of HYN.

149. Signal accepts that clause 32.1 would, if Bidco commenced a claim in England *before* Signal had commenced proceedings in New York, provide the English court with jurisdiction, indeed, exclusive jurisdiction, over that claim.

150. Mr Choo-Choy submitted, however, that once a dispute has been maintained in a foreign court by a Secured Party under clause 32.1(c), then reading clause 32.1 as a whole it cannot have been intended that Bidco could subsequently commence proceedings in England in relation to the same dispute. He advanced three reasons in support:

(1) If Bidco were able to do so, it would negate the choice given to Secured Parties to commence proceedings in a court of their choosing under clause 32.1(c);

(2) The express allowance of pursuing proceedings in concurrent jurisdictions is reserved to the Secured Parties and there is no equivalent for the benefit of Bidco;

(3) Rational businessmen cannot have intended that the same dispute could be litigated in multiple jurisdictions unless specific provisions were made for it.

151. I do not accept this submission. Since Bidco is bound to take proceedings in England alone, the effect of Signal's construction of clause 32.1 would be that Bidco would be prevented from commencing proceedings, at all, where a Secured Party had already commenced proceedings in relation to the same subject matter in a foreign court. There is nothing in the wording of clause 32.1 that indicates that there is any such restriction on Bidco. As a matter of English law, it would not negate Signal's contractual choice pursuant to clause 32.1(c) to commence or continue concurrent proceedings in a foreign court.

152. As to Mr Choo-Choy's second point, the need for a provision allowing the Secured Parties *concurrent* proceedings abroad is a consequence of the fact that all parties have agreed to confer jurisdiction on the English court. There is no need for an equivalent provision permitting Bidco to take proceedings in England, notwithstanding the existence of concurrent proceedings abroad.

153. As for the rational businessman, I do not see a distinction, in terms of rationality, between allowing multiplicity of proceedings where Bidco's claim is brought first in time, which Signal accepts is permitted under clause 32.1, and where the Secured Party's claim is brought first.

154. Even if Mr Choo-Choy's construction were correct, so as to preclude Bidco commencing proceedings in relation to the same subject matter *after* proceedings have been commenced by a Secured Party in a foreign jurisdiction, I do not think it could operate to prevent Bidco's joinder of Signal in this case. Bidco has already commenced proceedings against all parties to the ICA (including the HYN Trustee). Those proceedings relate to the same dispute under the ICA to which Signal's claim in New York relates. A judgment in those existing proceedings would have been binding on Signal as the holder of a beneficial interest in the HYN (for the reasons set out above). In those circumstances, I do not consider an action commenced by Bidco now for the sole purpose of binding Signal to the same outcome as the existing proceedings should be considered "subsequent proceedings" for the purposes of clause 32.1, as interpreted by Mr Choo-Choy.

Impact of Brexit

155. At the hearing, the parties were in agreement that the UK's departure from the EU (in particular the ending of the transition period on 31 December 2020) had no impact on the issues to be determined on this application.

156. In a letter received from Bidco's solicitors after the hearing, however, it was pointed out that if I determined that Bidco needed to rely upon the re-joinder of Signal so as to establish jurisdiction under Article 25(1), then a potential

issue arose. That was because of the possibility that, if proceedings were instituted against Signal only after 31 December 2020, the RBR would no longer apply, as Article 67(1)(a) of the Withdrawal Agreement retains the application of the RBR only in the case of proceedings instituted before the end of the transition period. Signal's solicitors provided a response which re-iterated the arguments advanced as to the construction of clause 32.1 which I have dealt with above.

157. Given my conclusion on the applicability of Article 8(1), Bidco does not need to rely upon Article 25(1) to establish jurisdiction against Signal. I accordingly need do no more than note the following. Bidco's solicitors indicated that it would if necessary have contended that proceedings against Signal were instituted before the end of the transition period so that the RBR continues to apply. In case that argument failed, however, it issued a protective claim form against Signal on 31 December 2020 to which (on the basis of my conclusion above) Article 25(1) applies.

Stay of the English proceedings

158. Signal (but not Dr Kebekus) applies in the alternative to stay the English proceedings. Although Signal originally contended that a stay should be granted under Article 34 of the RBR, that is no longer pursued. As Bidco contended: (1) to the extent that jurisdiction is founded upon Article 25(1), then Article 34 has no application: see, for example, *UCP plc v Nectrus* [2018] EWHC 380 (Comm) at [40] to [44] per Cockerill J; and (2) to the extent that jurisdiction is founded upon Article 8(1), then a stay could only be granted if a related action was pending before the New York court at the time when the English court was first seised.

159. The only basis upon which a stay is now sought is therefore upon case management grounds. It is common ground that a stay on case management grounds will be ordered only in "rare and compelling circumstances": *Reichhold Norway ASA v Goldman Sachs International* [1999] 2 Lloyd's rep 567, at p.571 per Moore-Bick J. Moreover, "exceptionally strong grounds" are required to justify such a stay where the parties have conferred exclusive jurisdiction on the English court: *Mazur Media Ltd v Mazur Media GmbH* [2004] 1 WLR 2966, per Lawrence Collins J at [69] to [70]. The risk of inconsistent judgments does not justify a stay: *MAD Atelier International BV v Manès* [2020] EWHC 1014 (Comm), per Bryan J at [82(2)].

160. It is also common ground that a case management stay cannot be used to circumvent the fact that in a case where the RBR applies, a stay under Article 34 is not available: see *Gulf International Bank BSC v Aldwood* [2019] EWHC 1666 (QB), particularly at [92], [102] to [106] [138]. The court should therefore not accede to an application that is presented as one for a case management stay where it is made essentially on forum conveniens grounds: see, for example, the *MAD Atelier* case (above) at 82(3).

161. The grounds advanced for a stay in Signal's skeleton argument were as follows: the claims in these proceedings overlap with the New York proceedings; the claims in New York were broader; and clause 32.1(c) of the

ICA permits Signal to sue Bidco in any other courts with jurisdiction (and this carries more weight than the fact that the New York court may be less familiar with English law than an English court). The fact that the New York court had temporarily stayed its own proceedings was said to be a neutral factor, and Bidco's contention that the proceedings would continue in this jurisdiction against the HYN Trustee in any event was unrealistic.

162. I agree with Mr Allison's description of these grounds as essentially based on forum conveniens. This was reinforced by the fact that the stay sought was, in substance, a permanent stay.

163. Mr Choo-Choy nevertheless submitted that there was an exceptional circumstance in this case, being the subsequently accrued right of Signal (following its acquisition of a Definitive Note) to take advantage of the jurisdiction agreement in the ICA under which the Secured Parties are permitted to sue elsewhere. If the English proceedings are not stayed that will in effect preclude Signal from pursuing its claim in New York.

164. I do not accept that this constitutes exceptional circumstances so as to permit a case management stay to be ordered. The refusal of a stay of the English proceedings itself has no effect on Signal's contractual right to pursue proceedings elsewhere (it is not the equivalent, for example, of an anti-suit injunction). Whether Signal would be able to do so in New York is a matter for the New York court. When balanced against the facts that (1) the English claim relates to the effectiveness of a Restructuring carried out in England with an English law governed contract, in the context of an asymmetric jurisdiction clause under which Bidco is required to sue in England, and (2) there is no evidence that Signal is domiciled in or connected with New York, I have no hesitation in refusing the application for a stay of these proceedings.

Conclusion

165. For the above reasons, I conclude that there is jurisdiction over both Signal and Dr Kebekus under Article 8(1) of the RBR and, in the case of Signal, there is jurisdiction under Article 25(1) of the RBR in respect of proceedings commenced against it since it acquired a Definitive Note. Accordingly, I dismiss the challenges to the jurisdiction of this court brought by Signal and Dr Kebekus.

166. In addition, for the reasons set out at [158] to [164] above, I dismiss Signal's application for a stay of these proceedings on case management grounds.

167. I am indebted to all counsel and their instructing solicitors for the clarity and high standard of their written and oral submissions.