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ARTICLE

Re NN2 Newco Limited [2019] EWHC 1917 (Ch) and [2019] EWHC 2532 (Ch)

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Synopsis

In the summer of 2019, the Nyrstar group ('Nyrstar') completed a financial restructuring, delivered in part via a UK scheme of arrangement under Part 26 of the Companies Act 2006. The terms of the wider restructuring are reported in detail in 'Zinc or Swim? The Restructuring of the Nyrstar Group' by Bethan Cunniffe and Samantha Rigney elsewhere in this issue of *International Corporate Rescue*.

This article is focused on the scheme which dealt with: (i) two series of New York law high yield notes, issued by a Dutch issuer and listed on the Luxembourg Stock Exchange and (ii) a series of English law convertible bonds issued by the then Belgian group parent and listed on the *Freiverkehr* of the Frankfurt Stock Exchange ((i) and (ii) together the 'Bonds'). The scheme was proposed by a special-purpose UK company, incorporated specifically to accede to the Bonds for the purpose of delivering the restructuring.

Norris J, sitting in the High Court, handed down judgments at both convening and sanction stage, which offer welcome clarifications in relation to schemes, in particular in respect of jurisdiction and 'forum shopping', asymmetric jurisdiction clauses and fees paid to creditors.

Despite little nexus to the UK at the outset, the scheme structure, combined with Chapter 15 recognition in the US, provided an effective mechanism to release both the primary obligations of the issuers and also the secondary obligations of the multiple guarantors across Nyrstar's global group, through a wholly UK-based process able to withstand the throes of Brexit.

1. Background to the Nyrstar group

Nyrstar is a global multi-metals and mining business with operations in Europe, North America and Australia, and which was commercially and financially headquartered in Switzerland. The then group parent, Nyrstar NV ('NNV'), is a publicly listed Belgian company, the largest shareholder of which is a member of the Trafigura group, the global commodities trader.

At the time, Nyrstar's commercial and financial hub comprised two Swiss entities: (i) Nyrstar Sales & Marketing AG ('NSM'), Nyrstar's outward-facing contracting party and the borrower of its various loan facilities, and (ii) Nyrstar Finance International AG, the intragroup treasury and banking entity. Prior to the restructuring process, Nyrstar had no substantive nexus to the UK.

The NN2 and Politus schemes – an overview

The NN2 Scheme

The Bonds subject to the scheme of arrangement were as follows:

a) €350m and €500m New York law high yield notes issued by a direct subsidiary of NNV, Nyrstar Netherlands (Holdings) BV ('NNH') maturing respectively in September 2019 and March 2024 (together the 'High Yield Notes'); and

b) €115m convertible bonds maturing 2022, originally issued by NNV (the Belgian listed parent) and governed by English law (with the exception of certain provisions, for instance those dealing with meetings and voting of bondholders, and conversion rights, which were governed by Belgian law) (the 'Convertible Bonds').

NN2 Newco Limited ('NN2', a UK company, newly incorporated for the purposes of the restructuring) proposed a two-class scheme in respect of the High Yield Notes and the Convertible Bonds (the 'NN2 Scheme'). As explained further below, shortly after its incorporation and having obtained the necessary approvals through consent solicitations (in respect of the High Yield Notes) and Belgian statutory bondholder meetings (in respect of the Convertible Bonds), NN2 acceded as a co-obligor, assuming primary liability on a joint and several basis, for the High Yield Notes and the Convertible Bonds.

In short, the NN2 Scheme proposed the release, in full, by holders of the Bonds of their claims under those instruments against the Nyrstar group, in return for a *pro rata* share of new instruments to be issued by

various Trafigura entities. As is explained further below, existing Nyrstar bondholders would either receive the new Trafigura instruments directly, or they would become beneficiaries of trust interests in respect of such new instruments.

The Politus Scheme

In addition to the NN2 Scheme, a second scheme was initiated in the context of the restructuring and was considered at a joint convening hearing with the NN2 scheme. This scheme concerned a €150m syndicate-backed prepayment agreement lent to NSM by Politus BV ('Politus'), a Dutch special purpose vehicle. Importantly, Politus was not a Nyrstar entity. Under back-to-back prepayment and facility agreements, Politus advanced funds to NSM by way of prepayment for the future delivery of metal, with the funds themselves lent to Politus by a syndicate of lenders. Because one dissenting lender had refused to sign the lock-up agreement and continued to oppose the restructuring deal, Politus initially needed to proposed a scheme to the syndicate (the 'Politus Scheme'), under which Politus would be released from its obligations under the facility agreement (thereby allowing it to release NSM from its own obligations under the prepayment agreement) and NNV's guarantee of the prepayment debt would be released. In return, Politus' lenders would: (i) have their debt participations reinstated (at a haircut) under a new unsecured multi-tranche facility (amalgamating several other reinstated unsecured facilities) borrowed directly by NSM and guaranteed by Trafigura; and (ii) be entitled to participate in a new money facility in favour of NSM, through participation in which they would be eligible for an increased reinstatement value for their existing unsecured debt.

On the eve of the convening hearing, Politus' dissenting lender sold its participation to an assenting lender, removing the need for a scheme. Though the Court was made aware of this development, it nevertheless heard submissions on the Politus Scheme, since it raised important legal issues and the scheme had not yet been formally discontinued.

3. The Schemes as part of the wider deal

The NN2 Scheme and Politus Scheme together dealt with all Nyrstar's bond debt and the Politus facility agreement only. The scale of Nyrstar's total debts (including instruments not dealt with by the schemes) was such that the value of NNV's equity had been extinguished, theoretically leaving NNV's shareholders with 'no economic interest in the Group' (*Convening,* [26]). Via an intragroup reorganisation, NN2 became a holding company for all Nyrstar's operating entities and Trafigura acquired 98% ownership of NN2, leaving NNV's shareholders the remaining 2% stake in the restructured operating group, benefitting from a €20 million put-option.

4. Jurisdiction

The NN2 Scheme and its UK NewCo structure

NN2, incorporated into the Nyrstar group specifically for the purposes of the NN2 Scheme, voluntarily assumed primary debt obligations under the High Yield Notes and Convertible Bonds (as 'co-issuer' and 'co-obligor' respectively, sharing joint and several liability with the original issuers). The Court found that this was not 'in any sense "abusive" of the jurisdiction', recognising both that a similar structure had been used successfully and acceptably in previous schemes (most notably *Re Codere Finance (UK) Ltd* [2015] EWHC 3778 and *Re AI Scheme Ltd* [2015] EWHC 1233), and also that significant majorities of scheme creditors were supportive of the structure used and had enabled such structure by approving the necessary amendments pre scheme to allow accession of NN2 of the bonds and the changes in governing law/jurisdiction.

In any event, the incorporation of NN2 was 'convenient but not necessary' to achieve jurisdiction (*Convening* [29(b)]). The Convertible Bonds were already governed by English law (with certain specific provisions governed by Belgian law because of the Belgian-listed issuer), and the High Yield Notes had been changed from New York governing law to English law, via a consent solicitation with high levels of bondholder approval (an approach also confirmed by the Court as appropriate, citing *Re Apcoa Parking* [2014] Bus. LR 1358, [236]–[256]). The English governing law alone would therefore have given both original issuers 'sufficient connection' to the UK to propose the Scheme (*Convening,* [29(c)]).

Similarly, Politus (a Dutch BV) had 'sufficient connection' to the UK through the English governing law of the relevant debt documents.

Article 25 of the Recast Judgments Regulation and asymmetric jurisdiction clauses

A key question on jurisdiction at the convening hearing related to Article 25 of the Recast Judgments Regulation, in respect of the parties' choice of jurisdiction. The Court considered two (substantively similar) *asymmetric* jurisdiction clauses (in the case of the High Yield Bonds, such clause was inserted through the pre-scheme amendments facilitated by consent solicitations), by which the (co)issuer/borrower is bound to use the English jurisdiction, but conversely the lenders/notes trustee/noteholders agree to use the English courts (which are 'most convenient') though without

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being legally bound to do so. Therefore, such clauses are exclusive vis-à-vis the debtor and non-exclusive vis-à-vis the creditor. Previous High Court authority on this point was divergent on whether such clauses (which are common) are sufficient to found jurisdiction under Article 25. Here the Court held that '[b]y its own terms Article 25 covers both exclusive and non-exclusive agreements' (*Convening* [40]). In this case, the Court followed *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd [2013] EWHC 1328* and *Commerzbank Aktiengesellchaft v Pauline Shipping Limited* [2017] EWHC 161, rather than the *obiter* comments in *Re Global Garden Products Italy SpA [2016] EWHC 1884* (in which *Mauritius Commercial Bank* was not cited) (*Convening* [39]–[41]).

Adding further clarity, the Court held that for the purpose of interpreting the relevant contractual provisions regarding jurisdiction, 'an application to the Court for approval of a scheme … constitutes a "dispute"', since 'if the Regulations are to be read as extending to schemes, then contractual provisions obviously intended to engage with the Regulations must be read in accordance with the same interpretative approach' (*Convening* [41]).

In this case, the Court was not drawn into substantive discussion on the 'controversy' of whether a single creditor based in England is sufficient for the purposes of founding jurisdiction under Article 8, or conversely whether a 'sufficiently large' number of creditors based in England is required before the test of 'expediency' is met (*Convening* [34]–[35]).

5. Classes & Voting

The NN2 Scheme

The NN2 Scheme was proposed to all of Nyrstar's existing bondholders, who had also become NN2's creditors by virtue of NN2's accession as co-primary-obligor to the Bonds. The Court confirmed, citing *Re Magyar Telecom BV* [2013] EWHC 3800 (Ch), that bondholders are properly classified as *contingent* creditors where the bond is issued in global form, held by a fiduciary on behalf of the relevant clearing system and the beneficial entitlement of a bondholder appears as a book entry on the system, on the basis that, under the terms of the relevant instrument, the bondholder can require the delivery of definitive notes or bonds in certain circumstances.

The NN2 Scheme proposed that scheme creditors would vote in two classes: holders of Convertible Bonds in one, and holders of either (or both) High Yield Notes in another. This separation was deemed 'pragmatic' (though, by implication, not absolutely necessary) given the difference in rights against the respective original issuers, for example the equity conversion rights in respect of NNV attaching to the Convertible Bonds but not to NNH's High Yield Notes (*Convening* [45(d)]). The two series of High Yield Notes formed one class together, with identical guarantor groups and ranking *pari passu* in an insolvency (with the difference in interest rates not materially impacting the amounts admissible for proof), and also proposed to be treated in the same way under the NN2 scheme, with noteholders under both series receiving rateable shares of the same consideration.

Certain other factors were considered by the Court, but ultimately did not fracture the classes. Certain of the new instruments to be issued as scheme consideration had a relatively high minimum denomination and were to be issued indivisible form. Therefore, trust structures were put in place so that holders whose scheme entitlements fell below the minimum denomination of the new instruments would be able to hold their interests through the trust. The fact that a portion of the scheme consideration would be held on trust for creditors was not seen as problematic because the terms of the trust enabled trust beneficiaries to have maximum flexibility to deal with their beneficial interests. For example, trust beneficiaries were entitled to transfer their beneficial interests to any other person, to withdraw their interests once they acquired (whether within or outside of the trust) an aggregate holding of notes above the minimum denominations of the new instruments, combine together with other holders to require the trustee to sell their aggregated interests (by way of an instrument exceeding the minimum denomination) and also receive interest and principal payments and sale proceeds of trust assets rateably. The Court found that the trust arrangements placed them 'as nearly as may be in the position' of those holders whose scheme consideration was not subject to the trust, and they could therefore confer together 'upon the fundamental question whether to prefer scheme over insolvency, and whether to accept the new instruments' (*Convening* [45(c)]).

Various fees were made available to bondholders as part of the restructuring. Early in the restructuring process, an initial 'ad-hoc group' of bondholders negotiated a temporary 'lock-up agreement' with Nyrstar and Trafigura, in order to facilitate further negotiations with broader creditor groups towards a wider, more formal lock-up agreement (which was ultimately signed by substantial numbers of Nyrstar's various creditor constituencies). In return, it was agreed between the initial ad-hoc group and Trafigura that the latter (rather than a Nyrstar entity) would pay to each initial ad-hoc-group member a 'work fee' of 1.5% of principal outstanding on their relevant Bonds, conditional on the successful implementation of the restructuring. This 'work fee' did not fracture the classes. The work fee was calculated as a percentage of a recipient's holding as opposed to being based solely on the time/cost actually incurred by each recipient. This was held to have an independent commercial justification and was held

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to be a 'not disproportionate' reward for those holders who not only spent time and effort negotiating the restructuring deal, but importantly also took the financial risk of receiving 'inside information' about Nyrstar in the context of negotiations, therefore becoming restricted from trading their holdings, and so exposing themselves to the 'precarious position of the Nyrstar group' (*Convening* [46]). The very high level of votes in favour of the scheme, including from those were *not* entitled to the work fee, ultimately showed that it had had no impact on the voting outcome.

In addition to the work fee, a 'timely consent fee' of 1.5% of outstanding principal was offered by Nyrstar to all bondholders provided they acceded to the lock-up agreement by a certain date. At the convening hearing, the question of materiality was left open (on the basis that that it is better to 'preserve class unity and to address the question of the materiality of the reward at the sanction stage once the votes have been cast') (*Convening* [47]), though there was nothing to suggest that it would raise class issues. By the time of the sanction hearing, it was clear from voting results that fee was immaterial to the way in which holders voted (*Sanction* [17]–[18]).

The Politus Scheme

Politus argued successfully that all six of its lenders should vote in one class. In light of the previously dissenting lender's intention to object, the question for the Court was whether the choice of some Politus lenders to enhance their returns from the restructuring by participating in a new money facility would fracture the class for scheme voting purposes. Each Politus lender stood to receive a minimum return under the scheme, but this return could be increased if and to the extent that each lender participated in a new money facility (a right open to all Politus lenders and which, importantly, was outside the scope of the scheme and to be entered into between a broad group of Nyrstar's creditors, which also included various non-Politus lenders). The *choice* to lend new money did not arise as a right under the scheme; it was a 'simple question' of whether or not to accept the commercial terms of the new money. The fact that the dissenting lender had made the commercial decision not to lend new money, and would thus receive a lower return overall, did not result from a difference in rights conferred by, or as a result of, the scheme. This did not fracture the class; the crucial difference being between a difference in interests (which will not fracture a class) and a difference in rights (which can do).

NSM, the borrower under the Politus prepayment agreement, had agreed to pay a monthly fee to the 'Co-ordinating Committee' of certain of Nyrstar's bank and loan facility lenders (of which one of Politus' lenders was a member). The fee did not fracture the single Politus Scheme class, as it was 'comparatively low … and it is very small when compared with the level of indebtedness of those represented' (*Convening* [51]) and was available irrespective of how the eligible Politus lender would vote on the Politus Scheme.

6. US Chapter 15 recognition

With a number of bondholders based in the US, and because the High Yield Notes were, at the outset, governed by New York law, NN2 sought recognition of the scheme under Chapter 15 of the US Bankruptcy Code. The restructuring envisaged that obtaining Chapter 15 recognition for the NN2 Scheme would be a waivable pre-condition of the effectiveness of the restructuring as a whole (though not a direct condition precedent to the NN2 Scheme). As had been the case in *Re Magyar Telecom BV* [2013] EWHC 3800, such an approach was unproblematic. The fact that the condition could be waived was not material and, due to the overwhelming support for the scheme, it would 'very largely achieve its purpose' even if recognition was not granted because the risk of challenge was very minimal. At the sanction hearing, NN2 provided expert evidence as to the likelihood of receiving Chapter 15 recognition, which was later successfully obtained prior to the restructuring effective date.

7. Support and opposition

The NN2 Scheme enjoyed overwhelming levels of support across all bondholder constituencies. Prior to the launch of the NN2 Scheme, a 'lock-up agreement' provided early indications of bondholder (and other) support for the restructuring. Ultimately, holders representing a total of 79% by value of the High Yield Notes and 87% by value of the Convertible Bonds signed the lock-up agreement, and thereby agreed to promote and implement the restructuring on the terms envisaged therein (including by voting in favour of the NN2 Scheme). In the result, of those who voted at the Scheme meeting, 98.93% by number and 99.96% by value of the High Yield Notes (representing 95.57% by valur of all holders), and 100% by number and value of the Convertible Bonds (representing 98.87% by value of all holders) voted in favour.

Nevertheless, the NN2 Scheme was subject to 'persistent' opposition from a single shareholder also holding a single High Yield Note (Sanction [24]). At the Convening stage, this holder wrote to the Court requesting an adjournment of the NN2 Scheme meeting. The Court took the view that the holder's concerns would be 'most justly addressed by allowing it to ventilate them at the scheme meeting rather by giving it an individual veto over a proposal favoured by the vast majority of the holders …' (*Convening* [26]).

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Prior to the sanction hearing, the Court received further correspondence from the opponent, in respect of voting procedure and levels of disclosure. Upon examination during the hearing, the complaints were seen as based on a misunderstanding of voting mechanics, with disclosure to bondholders again deemed to be appropriate and sufficient – it was not a roadblock to the sanction of the NN2 Scheme, since the views of the 'properly informed and properly constituted majority' were to be preferred to 'the individual concerns of a particularly anxious creditor' (*Sanction* [31]–[32]).

8. Conclusion and analysis

The NN2 Scheme judgments provide us with helpful confirmation of the acceptability of certain features of schemes which have raised jurisdictional questions in the past. The use of a newly-incorporated UK company to accede to debt obligations purely for the purpose of promoting a UK scheme of those obligations, is confirmed as commercially justifiable, 'good forum shopping', in the right circumstances. The convening judgment also provides helpful clarification of the treatment of asymmetric jurisdiction clauses (which are particularly commonplace) for the purposes of Article 25 of the Judgments Regulation, in the face of previously conflicting case law.

These factors, combined with various other jurisdiction-strengthening tools (such as changing the governing law and jurisdiction clauses of the relevant debt documents to the laws and courts of England and Wales) show that the UK scheme of arrangement remains a powerful tool for restructuring global corporations. This is the case even where there is limited nexus to the UK, and is expected to continue to be an attractive global restructuring option in a potentially post-Brexit world.

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International Corporate Rescue

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