

Hamburg Local Court authorizes bondholders to convene a bondholders' meeting

In a ruling of October 27, 2023, the Hamburg Local Court decided the following:

1. The applicants are authorized to convene a creditors' meeting of Rickmers Holding AG with its registered office in Hamburg (AG Hamburg, HRB 136889).
2. Rainer Manthey, [REDACTED], Hamburg, is appointed chairman of this meeting.
3. Rickmers Holding AG shall pay the costs of the proceedings.

Grounds:

The applicants' admissible application is substantiated.

1. The ruling is based on Section 9 (2) of the German Bond Act (SchVG). According to this, creditors whose justified request to convene a creditors' meeting pursuant to Section 9 (1) SchVG has not been complied with are to be authorized by the court to convene the creditors' meeting. These requirements are met in the present case:

a) The applicants Jutta Manthey and Rainer Manthey are creditors of Rickmers Holding AG with registered office in Hamburg (AG Hamburg, HRB 136889) (hereinafter also referred to as the "debtor"). They are holders of bonds of the debtor with the description "8.875 % Rickmers Holding AG 2013-2018" and "ISIN DE000A1TNA39" with a nominal value of EUR 58,072,000 as shown in the confirmation of holdings submitted by Bank J. Safra Sarasin AG dated January 25, 2023 (Annex Ast 8).

b) The applicants have requested that the debtor convene a creditors' meeting. They made this request to the debtor's insolvency administrator, attorney Dr Schröder. The latter is also the addressee of such a request within the meaning of Section 9 (1) and (2) SchVG, since the debtor's insolvency administrator is entitled to convene the creditors' meeting (Veranneman/Rattunde, 2nd ed. 2016, SchVG, Section 19, para. 68).

c) The applicants' request to convene a creditors' meeting was justified within the meaning of Section 9 (2) SchVG. This is because the creditors' meeting must be convened in accordance with Section 9 (1) sentence 2 SchVG if creditors whose bonds together amount to 5% of the outstanding bonds request this in writing on the grounds that they wish to appoint a joint representative. This is the case here. The applicants fulfill the 5%-quorum. In total, the bonds issued by the debtor and still outstanding have a nominal value of EUR 275,000,000. With their bonds with a total nominal value of EUR 58,072,000, the applicants hold 21.12% of the outstanding bonds. The aim of the applicants' request to convene the meeting is also the appointment of a joint representative as expressly mentioned as a possibility by law.

d) The applicants' justified request to convene a creditors' meeting was not complied with. Attorney Dr Schröder refused to convene the requested meeting, as can be seen from his letter dated June 12, 2023 (Annex Ast 11).

e) The request pursued by the applicants is also not precluded by the fact that a joint representative of the creditors already exists. There is currently no joint representative.

The creditors' meeting on June 1, 2017 elected a joint representative of the creditors, namely One Square Advisory Services GmbH with its (then) registered office in Munich (AG Munich, HRB 207387).

On July 3, 2020, this creditors' representative changed its legal form to a limited partnership, One Square Advisory Services GmbH & Co. KG with (then) registered office in Munich (AG Munich, HRA 112559). This change of legal form had no effect on the company's position as

joint representative of the creditors. This is because a change of legal form merely changes the legal form of the legal entity, whereby the legal and economic identity of the legal entity is retained (Semler/Stengel/Leonard/Schwanna, 5th ed. 2021, UmwG, Section 190, para. 3 et seq.).

However, the role as the creditors' representative ended with the withdrawal agreement of the shareholders of One Square Advisory Services GmbH & Co. KG dated October 1, 2020, as this meant that the sole personally liable partner, One Square Advisors GmbH, left the KG, so that it was immediately terminated in full and the entire company assets of the KG were transferred to its sole limited partner, One Square Advisory Services S.a.r.l. based in Geneva/Switzerland (commercial register of the Canton of Geneva CHE-147.389.697). This is because the withdrawal of the only personally liable partner of a two-party KG leads to the complete termination of the KG and to the transfer of the entire assets of the KG to the remaining limited partner by way of universal succession (Hopt/Roth, HGB, Section 131 para. 35 et seq.; Section 140 para. 25; Sauter, in: Beck Hdb. PersG, Section 10 para. 204).

The role as the creditor representative is however not included in the universal succession. The universal succession extinguishes strictly personal rights (Hopt/Roth, HGB, Section 140, para. 25). The role as the creditors' representative is just such a right. In analogy to Section 673 sentence 1 of the German Civil Code (BGB), the office of the creditors' representative expires with the full termination of the KG. Insofar as an assignment has not yet been terminated at the time the company ceases to exist, Section 673 BGB applies by analogy (MüKoBGB/F. Schäfer, 9th ed. 2023, BGB, Section 673, para. 4 et seq.). In contrast to a merger under the German Reorganization Act (UmwG), there is no special statutory provision such as that of Section 20 para. 1 no. 1 UmwG, which expressly orders the transfer of all assets and the complete legal position of the transferring legal entity to the receiving legal entity (see only MüKoBGB/F. Schäfer, 9th ed. 2023, BGB, Section 673, para. 5). This is also the decisive difference to the case decided by the German Federal Court of Justice regarding the transfer of the legal status of a legal entity appointed as the administrator of a residential property complex (see German Federal Court of Justice of February 21, 2014, V ZR 164/13, BGHZ 200, 221). There, the limited liability company appointed as administrator was merged in accordance with the provisions of the UmwG. This is not the case here. Therefore, Section 673 BGB (as in the case of a merger pursuant to the UmwG, see: Semler/Stengel/Leonard/Leonard/Simon, 5th ed. 2021, UmwG, Section 20, para. 20) is not superseded by Section 20 (1) no. 1 UmwG.

f) The authorization by the court pursuant to Section 9 (2) SchVG is also not precluded by Section 19 SchVG. According to this, the insolvency court must convene a creditors' meeting in accordance with the provisions of the SchVG if a joint representative for all creditors has not yet been appointed, Section 19 (2) SchVG. This is not the case here, since at the time of the opening of insolvency proceedings on September 5, 2017, a creditors' representative had already been appointed in the form of One Square Advisory Services GmbH, meaning that the provision does not apply. Section 19 (2) SchVG only regulates the convening of the (first) creditors' meeting to appoint a joint representative. Section 9 SchVG applies to further creditors' meetings held thereafter (Higher Regional Court Zweibrücken of March 20, 2013, 3 W 9/13, juris para. 7; Veranneman/Rattunde, 2nd ed. 2016, SchVG, Section 19 para. 66 et seq.; Section 9 para. 3). Accordingly, now that the creditors' representative has ceased to exist during the ongoing insolvency proceedings, it is no longer the insolvency court but the court with jurisdiction pursuant to section 9 (2) SchVG that is competent.

2. The appointment of the applicant Rainer Manthey as chairman of the meeting is based on Section 9 (2) sentence 2 SchVG. The court exercised its discretion in this respect to the effect that it complied with the applicants' suggestion. As the applicants together hold more than 20%

of the outstanding bonds, it appears appropriate for the creditors' meeting to be chaired by one of the applicants.

3. The decision on costs is based on Section 9 (4) SchVG.