Regional Court in Ostrava
Havlíčkovo nábř. No. 34
728 81 Ostrava 1

In London 05 August 2016

File No.: KSOS 25 INS 10525/2016

Creditor — **Citibank N.A., London Branch**, with its registered seat at Citigroup Centre, Canada Square, Canary Wharf, London, E14 5LB, United Kingdom of Great Britain and Northern Ireland, Registration No.: BR001018

Debtor — **OKD, a.s.,** with its registered seat at Stonavská 2179, Doly, 735 06 Karviná, registered in the Commercial Register administered by the Regional Court in Ostrava, Section B, Insert 2900

Statement of the Creditor regarding the preliminary statement of the Debtor and the insolvency trustee of the Debtor regarding the claims of the Creditor

Filed via e-mail and in person at the court's filing office

Attachments specified in the text

1. INTRODUCTION

[1] The Creditor submitted to the aforementioned insolvency proceedings claims in the total amount of CZK 10,151,307,023.50. The Creditor is the absolutely largest registered creditor of the Debtor.

[2] On July 25, 2016 a list of submitted claims prepared by Ing. Lee Louda, the insolvency trustee of the Debtor (hereinafter referred to as the "**Insolvency Trustee**"), was published in the insolvency register of the Debtor, from which the Creditor found out, to its great surprise, that the Insolvency Trustee as well as the Debtor apparently intend to contest the claims submitted by the Creditor at the review hearing called for August 10, 2016.

[3] The Creditor considers the grounds for the contest of the claims announced by the Insolvency Trustee and the Debtor to be incorrect both in fact as well as legally, regarding which the Debtor submits this statement, so that the Insolvency Trustee and the Debtor can change their existing opinion.

2. REFUTATION OF THE GROUNDS FOR CONTESTING THE CREDITOR'S CLAIMS

[4] The Creditor submitted to the aforementioned insolvency proceedings the below-specified claims:

(a) a claim in the amount of CZK 9,530,033,808.71 which has arisen from the issuance of bonds of the company New World Resources N.V. (hereinafter referred to as „**NWR NV**"), ISIN: XS1107303148 and ISIN: XS1107303650 (hereinafter referred to as the "**Bonds**"), and from the guarantee of the Debtor for the repayment of these Bonds, all this in accordance with the "*Indenture €300,000,000 Senior Secured PIK Toggle Notes due 2020"* contractual documentation (hereinafter referred to as "**SSN**") concluded on October 7, 2014 (hereinafter referred to as "**Claim 1**"), claim submission No. P-33; and

(b) a claim in the amount of CZK 621,273,214.79 which has arisen from the draw-down by NWR Holdings B.V. (hereinafter referred to as "**NWR BV**") of a loan for the purpose of financing the operation of the Debtor and from the guarantee of the Debtor for the repayment of the loan, all this in accordance with the contractual documentation consisting of the "*Super Senior Term Facility Agreement €35,000,000"* concluded on September 9, 2014 (hereinafter referred to as "**SSCF**") and the "*Intercreditor Agreement"* concluded on October 7, 2014 (hereinafter referred to as "**ICA**") (hereinafter referred to as "**Claim 2**"), claim submission No. P-100

(Claim 1 and Claim 2 hereinafter referred to collectively also as the "**Claims**"; SSN, SSCF and ICA hereinafter referred to collectively also as the "**Contractual Documentation**").

[5] The Creditor submitted the Claims as an entity which is in accordance with the Contractual Documentation (by virtue of its capacity as the *Security Agent* thereunder) explicitly entitled also obliged to independently enforce the Claims against the Debtor, and thus in its own name as the creditor of the Claims.

[6] **Regarding the intention of the Insolvency Trustee and the Debtor to contest the Claims, the Creditor in particular considers that, for the reasons explained below, its Claims would be wrongfully excluded with the consequence that it has been denied its lawful right to participate in this insolvency proceeding in a way corresponding to the significance of the Claims submitted by the Creditor.**

[7] **That this exclusion is wrongful is entirely evident from the fact that the Debtor itself specifies the Creditor as its creditor in relation to the Claims in the Debtor's own insolvency petition dated May 3, 2016,[1] the Claims are kept in the Debtor's accounting books,[2] the Debtor lists the Claims and advocates their existence in its annual reports,[3] and it even accepts remuneration for their establishment (see in particular paragraph [50] bellow).**

[8] **In the Debtor's own insolvency petition, it even justifies its bankruptcy with reference to the Claims of the Creditor, whereas the Debtor claims that it is in the state of over-indebtedness by the amount exceeding ten billion CZK, which is at the same time the approximate total amount of the Claims of the Creditor. The Debtor proposes to resolve this state of over-indebtedness by the means of reorganization. The fundamental contradictions of the Debtor's actions, when the Debtor first uses the Claims to justify its bankruptcy and then later contests their existence, are self-evident and any Debtor's motion to reorganize on the basis of such contradictions must be flawed and in contradiction with the conditions set out by the Insolvency Act. [.]**

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1 Cp. in particular paragraphs 13, 15 and 17 of the Debtor's insolvency petition and annex No. 2N to the Debtor's insolvency petition.

2 See annex to the financial statement of the Debtor of 2014 (in particular p. 69 of the annual report of the Debtor for 2014) and annex to the financial statement of the Debtor of 2015 (in particular p. 52 of the annual report of the Debtor for 2015).

3 See p. 69 and 84 of the annual report of the Debtor for 2014 and p. 52 of the annual report of the Debtor for 2015.

[9] The Creditor responds bellow to the individual "grounds" for the contest of the Claims as announced by the Debtor and the Insolvency Trustee in the structure corresponding to the review sheets of the individual Claims.

2.1 Refutation of the Grounds for Contesting Claim 1

2.1.1 Refutation of the Grounds for Contesting Claim 1 Alleged by the Debtor

[10] The Debtor contests the authenticity of Claim 1 on the basis of the following statements:

(a) the absence of an economic reason and a conflict with the public order (*ordre public*);

(b) the controlling entity of the Debtor forced the Debtor to enter into the guarantee obligation; and

(c) the guarantee was not duly agreed upon and signed by the Debtor.

Regarding point (a) - the absence of an economic reason and conflict with the public order (*ordre public*)

[11] The Debtor claims that Claim 1 has no economic reason. Firstly, it is necessary to emphasize that the **existence and the legal regime of Claim 1, as well as the existence and validity of the Bonds and the SSN, is governed by the law of the State of New York, in accordance with article 14.05 of the SSN. Under the law of the State of New York, Claim 1 was duly established and it exists, whereas this fact is not even contested by the Debtor.**

[12] The Debtor however states that the alleged absence of the economic reason of Claim 1 causes its unrecognizability and unenforceability in the Czech insolvency proceedings in the sense of Section 4 of the Czech Act No. 91/2012 Coll., the International Private Law Act, as amended (hereinafter referred to as the "**IPLA**").[4] The reason for this shall be an alleged incompatibility with the public order if a creditor fails to prove the economic reason for the obligation in accordance with Section 1791 (1), after the semicolon, of the Czech Act No. 89/2012 Coll., the Civil Code, as amended (hereinafter referred to as the "**CC**").

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[4] For the sake of completeness the Creditor adds that the provision of Article 21 of the regulation of the European Parliament and Council (EC) No. 593/2008 of June 17, 2008 on the law applicable to contractual obligations (Rome I), as amended should be applied in the given case, rather than IPLA. Since the content of both of the legal rules regulating the public order (*ordre public*) is in principle identical, there is no need to analyze this question in further detail.

[13] Regarding the abovementioned, it is in particular necessary to state that **Claim 1 clearly does have an economic reason.** The Debtor accepted an obligation corresponding to Claim 1 for a specific economic purpose, that is to stand as a guarantor for the primary debtor (NWR NV), for which it is and has been receiving a consideration (see paragraph [50] and [51] bellow), while other benefits have arisen for the Debtor from the issuance of the Bonds (see paragraph [23] to [28] bellow). These reasons constitute absolutely legitimate economic reasons for the establishment of Claim 1.

[14] The economic reason of the debts of the primary debtor under the SSN (i.e. NWR NV) is the temporary provision of monetary funds by the means of issuance of debt securities, the Bonds, which gave rise to the obligation of the primary debtor to reimburse these debts in accordance with the SSN.

[15] The economic and practical reason for the establishment of the function of a security agent as such is, similarly to other secured issuances of bonds or syndicated financing, in particular the need to ensure the continuity of security (e.g. in case of a change of persons entitled to an interest from the performance received on the account of those instruments), the reduction of price, simplification and streamlining of the process of enforcement of claims arising from the Bonds, including the guarantee obligation for the repayment of the Bonds, and making the process more transparent. Instead of a great number of creditors, the identity of which could also rapidly change due to the free marketability of the Bonds, the rights of the creditors arising from the Bonds are enforced by only one contractually agreed entity – the security agent (in the present case the Creditor). The security agent is jointly and severally entitled from all the claims arising from the Bonds as well as from the related guarantee. It is in particular the obliged entity (in the present case the Debtor) which benefits from this concept, because it significantly reduces the transaction costs connected with the complexity of the transaction as well as the costs of enforcement of their obligations which would be eventually borne by them in connection with the costs of the relevant financing. In cases of secured syndicated financing or issuances of bonds, the security agents are absolutely routinely used worldwide (that is also in the Czech Republic) for their clear-cut practical and economic advantages in said transactions.

[16] The legal ground for the establishment of Claim 1 is the agreement on the guarantee obligation of the Debtor for the reimbursement of the debts arising from the Bonds contained in article XII of the SSN and the agreement that the Creditor, who - by virtue of its capacity as the Security Agent – is the joint and several creditor of all of the claims, is entitled and obliged to enforce the claims arising from the Bonds, including the claims arising from the guarantee obligation of the Debtor in accordance with article 13.06 of the SSN. Such agreement therefore undoubtedly constitutes - in accordance with the *pacta sunt servanda* principal - an eligible legal ground for the

establishment of Claim 1, both under the law of the State of New York, as well as under the Czech law.

[17] In addition, the position of the Creditor as a joint and several creditor (which is the subject of the so-called *Parallel Debt* provision), whereas the Debtor is as such entitled to independently enforce all of the claims arising under the SSN and the Bonds against the obliged entities, is a concept well known in Czech law as well.[5] For instance, every syndicated loan financing in the Czech Republic governed by the Czech law is based on a similar principle. Accordingly there was a clear economic reason for entering into this agreement and its absence (which is denied) would not have invalidated it.

[18] **Even in the hypothetical event that there was no economic reason for Claim 1, the establishment and existence of Claim 1 could still hardly be incompatible with the public order of the Czech Republic.** Such incompatibility can only be established in case of such an application of a foreign legal rule, which would be incompatible with the utterly fundamental principles of the legal order of the Czech Republic, in particular with the legislation constituting the constitutional order. The refusal to apply a provision of a foreign legal act should be exceptional.[6]

[19] The enforcement of a claim without the need of proving its economic reason can hardly be considered incompatible with the public order of the Czech Republic, if there is an agreement in writing of all parties involved (in the given case it is expressed in the SSN). This applies even more so with regard to the fact that even the Czech law itself is familiar with abstract obligations and accepts, where e.g. in case of obligations arising from securities it generally does not require the creditor to claim and much less to prove the economic reason of the obligation (see Section 1791 (2) of the CC).[7]

[20] The process of enforcement of claims by a security agent is even expressly approved of in the Czech law. The provision of Section 2010 (2) of the CC states that "*if a*

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5 See the provision of Section 1877 and following of the CC.

6 See Bříza, P., Břicháček, T., Fišerová, Z., Horák, P., Ptáček, L., Svoboda, J.: The International Private Law Act. The Commentary. 1st edition. Prague: C. H. Beck, 2014, p. 25: "*The legal acts, the content of which may lead to the application of public order exception, are represented in particular by the legal acts that form a part of the constitutional order. The public order exception is an exceptional device, which can only be used as an ultimate measure. Only the principles of social and governmental establishment and legal order are protected, the significance of which reaches such a level that it is necessary to unconditionally insist on their application.*"

7 See the explanatory memorandum to Sections 1789 to 1791 of the CC: "*the obligations arising from securities are constructed as principally abstract obligations, which do not require a prove of the economic reason of their establishment.*"

security is administered by another party for the benefit of the creditor, that party may assert the same rights as the creditor (...) with respect to the debtor or the provider of the security." The enforcement of the claims by the security agent cannot therefore constitute incompatibility with public order. The security agent is entitled to enforce the claims on the mere ground that it holds the security for the creditor in accordance with the agreement (regardless of the fact whether it himself directly provided any financial means to the debtor).

[21] After all**, the enforcement of claims by a security agent has been a perfectly standard and generally accepted practice in the Czech Republic even from the point of view of insolvency trustees and insolvency courts, even before the date of effectiveness of the CC**.[8] The Insolvency Trustee is obviously aware of this fact as he has performed the office of an insolvency trustee in other insolvency proceedings in which he did not contest the enforcement of the claims by a security agent,[9] and also currently he does not contest it in connection with Claim 1.

[22] **It is apparent from the above mentioned that Claim 1 does not lack economic reason and even in the hypothetical event that it did, its enforcement in this insolvency proceeding could not be incompatible with the public order of the Czech Republic. On the contrary, the enforcement of Claim 1 by the Creditor is expressly approved of by the Czech law as well as the practice of Czech courts in previous analogous insolvency matters.**

Regarding point (b) – the controlling entity of the Debtor forced the Debtor to enter into the guarantee obligation

[23] The acceptance of the guarantee obligation by the Debtor for Claim 1 which has arisen on the basis of the SSN occurred in connection with the restructuring of the (former) debts of the entire NWR group, of which the Debtor has been a member, executed in 2014 and caused by the unfavorable financial situation of the entire NWR group, including the Debtor (hereinafter referred to as the "**Restructuring 2014**"). The Restructuring 2014 formed part of a scheme of arrangement which was also approved by a decision of an English court (High Court of Justice in England and Wales) which examined and confirmed its conditions and their compliance with the law of England.

[24] It is in particular necessary to state that **the acceptance of the guarantee obligation in connection with the Restructuring 2014 did not lead to a deterioration of the**

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[8] Cp. e.g. the insolvency proceedings with SALEZA, a.s., file No. MSPH 60 INS 628 / 2011, with MSV Metal Studénka, a.s., file No. KSOS 36 INS 8817 / 2011, or with PALCOR CZECH s.r.o., file No. MSPH 94 INS 3902 / 2010.

financial position of the Debtor, but on the contrary to its improvement, because these guarantee obligations replaced original guarantee obligations of the Debtor for the debts of the NWR NV arising from the bonds with the aggregate principal amount of EUR 500 million issued in 2010 which were replaced within the Restructuring 2014 by the issuance of the Bonds under the SSN. Specifically it meant a **decrease of the extent of the guarantee obligation of the Debtor from EUR 500 million to EUR 335 million (i.e. the guarantee according to the SSN and the SSCF), that is a decrease by EUR 165 million (i.e. c. CZK 4.4 billion) and also an extension of the maturity of the new emission compared to the original one (from 2018 to 2020).**

[25] As far as the Restructuring 2014 as such is concerned, the total debt of the NWR group was decreased from EUR 825 million to EUR 535 million as a result of it and at the same time the NWR group was provided with additional funding in the amount of EUR 185 million. **A large proportion of these new financial means was used for the purpose of financing the Debtor and its operation**, by means of shareholder loans. This can be seen e.g. from the purpose of the loan according to the SSCF[10] and also from the annual report of the Debtor for 2015.

[26] A significant decrease of indebtedness of the NWR group was achieved thanks to the Restructuring 2014. In addition, the Debtor accepted the guarantee obligation in exchange for a remuneration set by an expert evaluation (see paragraph [50] below). **The acceptance of the guarantee obligation by the Debtor thus brought a verifiable benefit to the Debtor and it made significant economic sense to the Debtor.**

[27] This proves that the Debtor accepted the guarantee obligation entirely freely and in its own interest, which can be demonstrated by the decision of the board of directors of the Debtor dated September 2, 2014 (see in particular point VI., where an explicit consent to the provision of guarantee is expressed) and also by the decision of the supervisory board of the Debtor dated September 3, 2014 (see in particular point II., the last point). The annual report of the Debtor for 2014 in fact comments on this as follows: "*The board of directors of the OKD is convinced that the above mentioned actions performed in the context of the capital restructuring of the New World Resources Plc group were in the interest of the OKD.*" For the sake of completeness, the Creditor states that the aforementioned annual report was produced by the board of directors of the Debtor, while two out of its present three members were performing the office of members of the board of directors at that time.

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[10] The purpose of the loan was in accordance with art. 3.1 of the SSCD to provide the Debtor with additional means from the NWR BV for the capital purposes of the Debtor.

[28] The significant benefit and economic reason for the Debtor of the Restructuring 2014 should also be assessed when reflecting the entire benefit of the Debtor in the amount of tens of billions CZK, which the Debtor acquired not only due to the Restructuring 2014 as itself, but also as a result of the restructuring of financing of the NWR group concluded in 2010. **Since 2010, the Debtor received an extraordinary total of EUR 612 million (i.e. cca. CZK 16.5 billion) on the basis of shareholder loans, whereas a substantial part of these loans and relevant interest accrued to them in the amount EUR 586 million (i.e. cca. CZK 15.8 billion) was subsequently capitalized into the equity of Debtor. The Debtor thus does not ever have to repay the capitalized financial means back to its shareholders**. Nevertheless, the obligation of the shareholders to repay the corresponding financial means to their creditors (in particular banks and bondholders) remains. The shareholder loans and their capitalizations are in more details set out in annex No. 1 hereto. The aforementioned information is apparent from the Annual Reports of the Debtor.

[29] **It is apparent from all of the above mentioned facts that it is not true that the controlling entity forced the Debtor to accept the guarantee obligations.** After all, the Debtor only speculates about it and presents no evidence that the controlling entity allegedly forced the Debtor to accept the guarantee obligation against its will or despite its resistance. The Debtor's resistance would not even make sense with regard to the above-mentioned favorableness of the Restructuring 2014 for the Debtor.

[30] **Moreover, even in the hypothetical event that the controlling entity forced the Debtor to accept the guarantee obligation and even if the Restructuring 2014 actually was disadvantageous to the Debtor (which is untrue), the Debtor offers no legal qualification as to why Claim 1 should not be considered to be existing for the above mentioned reasons or why the acceptance of the guarantee obligation by the Debtor for the debts arising under the SSN should be considered to be invalid. The Creditor is unaware of any provision of the law of the State of New York, which is applicable to the SSN, on the basis of which such invalidity could be established.**

[31] **After all, such invalidity could not even be established under the Czech law, even though it is irrelevant in this matter. The potential disadvantageousness of the guarantee obligation might, at the very most, lead to the establishment of the right of the Debtor vis-à-vis the respective entities in its group (see Sections 71 and following of the Czech Act No. 90/2012 Coll., on commercial corporations), but these could not cause the invalidity of such guarantee obligation.**

Evidence: annual report of the Debtor for 2014, accessible from <http://www.okd.cz/cs/o-nas/vyrocni-zpravy>, in particular p. 84

annual report of the Debtor for 2015, accessible from z <http://www.okd.cz/cs/o-nas/vyrocni-zpravy>, in particular p. 65

annual report of New World Resources Plc. of 2014 accessible from <http://www.newworldresources.eu/en/investors/reports/annual-reports-and-accounts>, in particular the parts regarding the Capital Restructuring

press release of New World Resources Plc. and NWR NV entitled „Completion of the Balance Sheet Restructuring" from October 7, 2014 accessible from <http://www.newworldresources.eu/en/investors/nwr-capital-restructuring>

record of the adoption of the decision of the board of directors of the Debtor adopted out of session from September 2, 2014 (annex No. 2 hereto)

record of the adoption of the decision of the supervisory board of the Debtor adopted out of session from September 3, 2014 (annex No. 3 hereto)

Regarding point (c) - the guarantee was not duly agreed upon and signed by the Debtor

[32] The Debtor claims that there was a conflict of interests of the Debtor and Mr. Boudewijn Wentink, who has signed the SSN on behalf of the Debtor on the basis of a power of attorney. The Debtor argues that Mr. Boudewijn Wentink was at the same time an employee of the NWR NV, which allegedly benefited from the Restructuring 2014 at the expense of the Debtor.

[33] As described in particular in paragraphs [24] to [27] above, the **Restructuring 2014 was significantly beneficial to the Debtor. The interests of the Debtor, NWR NV or Mr. Boudewijn Wentink therefore could not be and in fact were not conflicting in this context.**

[34] **Mr. Boudewijn Wentink signed the SSN on the basis of a power of attorney which was duly granted to him by the Debtor which expressly approved Mr. Boudewijn Wentink as its representative (see point V. of the decision of the board of directors of the Debtor dated September 2, 2014).** It is irrelevant in this regard whether it is specified next to the signature box of Mr. Boudewijn Wentink that he has executed the document on the basis of a power of attorney or any other basis. The only relevant matter is whether he was authorized to sign the SSN on behalf of the Debtor,[11] which he, on the basis of the aforementioned power of attorney, in fact was.

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[11] Cp. e.g. the decision of the Supreme Court of the Czech Republic from August 29, 2007, file No. 29 Odo 1635/2005: "*If a physical person executes an agreement as a person acting on behalf of a contractual party, it is not important for the validity of such agreement whether it was explicitly stated that it acts on the basis of a power of attorney*."

[35] Despite this being legally irrelevant, the Creditor - for the sake of completeness - has been advised by restructuring legal counsels engaged within the Restructuring 2014 that the draft SSN which was being executed on October 7, 2014, the signature box of the Debtor specified incorrectly that agent acted as a *"Chief Legal Officer"*. It was an obvious inaccuracy with respect to OKD although it of course remained correct as a description of his job title. After this inaccuracy was notified to transaction counsel, it was corrected in the printed and completed documents that the agent of the Debtor acted *"under proxy"*. A correct document was distributed together with other transaction documents to all parties to the agreements and this is the agreement that the parties entered into. On this basis, no change of the document was made without the knowledge of any party. All of the parties (and the Debtor probably the best) knew that the representative of the Debtor acted always on the basis of a power of attorney not as a *"Chief Legal Officer"*.

[36] **Even in the hypothetical event that there was a conflict of interests of the Debtor and of Mr. Boudewijn Wentink (which there was not), it is not possible to deduce the invalidity of the SSN and of the acceptance of the guarantee obligation for the repayment of the Bonds from it, and in particular not on the basis of Section 4 of the IPLA cited by the Debtor, i.e. for the conflict with the public order.** The effects of the legal acts of an agent on the principal are regulated by Section 44 (2) and (3) of the IPLA. In accordance with this provision, it is necessary to consider the acceptance of the guarantee obligation by the Debtor on the basis of the power of attorney granted to Mr. Boudewijn Wentink to be valid, if the granting of authority is valid in accordance with at least one of the following legal orders (alternatively):

(a) Czech legal order in accordance with Section 44 (2) letter b) of the IPLA;

(b) Dutch / English legal order in accordance with Section 44 (2) letter c) of the IPLA; or

(c) legal order of the State of New York in accordance with Section 44 (3) of the IPLA.

[37] The Debtor however does not offer any provision of any of the above mentioned legal orders (let alone all, which would be necessary to prove the invalidity of the guarantee obligation), on the basis of which the invalidity of the acceptance of the guarantee obligation should be established for the reasons stated by the Debtor. Neither is the Creditor aware of any such provision of the above mentioned legal orders.

[38] For the sake of completeness, the Creditor adds that even if there actually was a conflict of interest of Mr. Boudewijn Wentink and of the Debtor (which is untrue), then the agency could still occur in accordance with the Czech law, in particular under provisions of Section 437 (1) of the CC: if the Restructuring 2014 really were

disadvantageous to the Debtor (which again it was not), the Debtor must had been aware of this at the moment of the granting of the power of attorney, because it was aware of the details of the Restructuring 2014 which had been agreed and were formally approved by the board of directors on 2 September 2014 and by the supervisory board on 3 September 2014. In other words, the Debtor must had been aware of the conflict of its interests with the interests of Mr. Boudewijn Wentink at the time of the granting of the power of attorney (if such a conflict in fact had existed, which it had not). Moreover, the Debtor expressly declared in letter (e) of the power of attorney that the attorney is entitled to act on behalf of the Debtor on the basis of the power of attorney also in situations where he represents a Debtor's counterparty as well (while with relation to the foregoing the other companies from NWR group may not be even considered as counterparties, they were on the same side as the Debtor). This confirms that the Debtor was aware of all aspects in which he now sees alleged conflict of his interests with the interests of Mr. Boudewijn Wentink already in time when he empowered Mr. Boudewijn Wentink to represent him.

[39] **Thus even in the hypothetical event that there was a conflict of the Debtor's interests with the interests of Mr. Boudewijn Wentink (which there was not), it is necessary to consider the actions of Mr. Boudewijn Wentink carried out on behalf of the Debtor in connection with the acceptance of the guarantee obligation to be valid in accordance with Section 44 (2) and (3) of the IPLA. It is not possible to consider a practice to be incompatible with public order of the Czech Republic in the sense of Section 4 of the IPLA, if it is approved of by the Czech legal order itself in Section 44 of the IPLA.**

Evidence: power of attorney dated September 2, 2014, granted to Mr. Boudewijn Wentink by the Debtor (annex No. 4 hereto)

2.1.2 Refutation of the Grounds for Contesting Claim 1 Alleged by the Insolvency Trustee

[40] The Insolvency Trustee contests the legitimacy of Claim 1 on the basis of the following statements:

(a) the non-existence of the primary debt, the non-existence of the guarantee; and

(b) the ineffectiveness of the legal acts.

<u>Regarding point (a) - the non-existence of the primary debt, the non-existence of the guarantee</u>

[41] The Insolvency Trustee claims that the Creditor did not prove the establishment of the primary debt, the repayment of which the Debtor guarantees in accordance with the

SSN, i.e. the issuance of the Bonds. In essence, the Insolvency Trustee bases his intention to contest Claim 1 on the allegation that the Bonds have not been issued and that they do not exist.

[42] In this regard, the Creditor draws attention to the obligation of the Insolvency Trustee under Section 188 of the Czech Act No. 182/2006 Coll., the Insolvency Act, as amended (hereinafter referred to as the "**IA**"), to base the review of the submitted claims among others on the accounting books of the Debtor or, if needed, to carry out his own inspections of the claims as necessary.

[43] The issuance and the existence of the Bonds is very easily traceable and verifiable to without difficulties. It is very easy to find out from publicly accessible sources that the Bonds are being traded e.g. on the Luxembourg Stock Exchange,[12] for which a prospectus authorized by the Luxembourg Commission for Surveillance of the Financial Sector (*Commission de Surveillance du Secteur Financier*) was issued. It is hard to imagine that an allegedly non-existent commodity (the Bonds) could be traded on such a highly regulated platform as a world-class financial exchange surely is. The Bonds are also for instance traded on the Stuttgart Stock Exchange.[13]

[44] The existence of the Bonds and the guarantee for their repayment is also regularly mentioned by the Debtor in its annual reports. [14]

[45] The guarantee obligation for the repayment of the Bonds is kept in the accounting books of the Debtor, therefore the existence of Claim 1 is indisputably apparent also from the accounting books of the Debtor, on which the Insolvency Trustee is obliged to base his review of the claims in accordance with Section 188 of the IA.[15] The guarantee obligation for the repayment of the Bonds is also expressly mentioned in the insolvency petition of the Debtor dated May 3, 2016 and it is in particular this claim that the Debtor uses to justify its bankruptcy in the form of over-indebtedness, which was declared by the insolvency court in the same decision, in which the Insolvency Trustee was appointed.

[46] It is apparent from the above mentioned, that it is impossible to base the contest of the legitimacy of Claim 1 with reference to the alleged non-existence of the primary debts,

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12 See https://www.bourse.lu/instrument/bond/summary?cdVal=215056&cdTypeVal=OBL and https://www.bourse.lu/instrument/bond/summary?cdTypeVal=OBL&cdVal=215058.

13 See https://www.boerse-stuttgart.de/en/New-World-Resources-PLC-bond-XS1107303148.

14 See p. 33, 69 and 84 of the annual report of the Debtor for 2014 and p. 37 and 52 of the annual report of the Debtor for 2015.

15 See the annex to the financial statement of the Debtor of 2014 (in particular p. 69 of the annual report of the Debtor for 2014) and the annex to the financial statement of the Debtor of 2015 (in particular p. 52 of the annual report of the Debtor for 2015).

i.e. the Bonds and the Creditor assumes that Claim 1 will no longer be disputed on such basis..

[47] The Insolvency Trustee further claims that the valid acceptance of the guarantee obligation for the repayment of the Bonds is not supported by the relevant power of attorney granted by the Debtor to Mr. Boudewijn Wentik. The Creditor hereby attaches the aforementioned power of attorney to this statement, by which he deems the objection of the Insolvency Trustee to be resolved.

[48] The Insolvency Trustee further repeats the argumentation of the Debtor that the interests of Mr. Boudewijn Wentink were allegedly in conflict with the interests of the Debtor, who therefore could not validly accept the guarantee obligation by his signing of the SSN on behalf of the Debtor, and further that it is not specified next to the signature box of Mr. Boudewijn Wentink, that he acts as an agent of the Debtor. The Creditor thoroughly dealt with these arguments in particular in paragraphs [31] to [39] above, to which it hereby referrers in full extent.

Evidence: prospectus of the Bonds authorized for the admission to trading on the Luxembourg Stoch Exchange *(Listing Particulars dated 8 October 2014)*

annual report of the Debtor for 2014 accessible from <http://www.okd.cz/cs/o-nas/vyrocni-zpravy>, in particular p. 33, 69 and 84

annual report of the Debtor for 2015 accessible from <http://www.okd.cz/cs/o-nas/vyrocni-zpravy>, in particular p. 37 and 52

power of attorney from September 9, 2014 granted by the Debtor to Mr. Boudewijn Wentink (annex No. 4 hereto)

Regarding point (b) - ineffectiveness of legal acts

[49] The Insolvency Trustee claims that undertaking of the guarantee for payment of the Bonds by the Debtor is an ineffective legal act because it is supposedly a legal act without adequate consideration pursuant to Section 240 of the IA, or a favouring legal act pursuant to Section 241 of the IA.

[50] **The Debtor has been however receiving and still receives a consideration for the undertaking of the guarantee. Primarily it is worth to state that the Debtor created the guarantees within the Restructuring 2014 in which the financing of the NWR group concluded in 2010 was replaced together with a significant decrease of the debt of the NWR group (including the Debtor) by a write-off of a part of the debt and provision of a new financing necessary in particular for the conduction of Debtor's business. As already stated in paragraph [28] above, such financing allowed the provision of shareholder loans in amount EUR 612 million**

in respect of which the Debtor does not have to repay EUR 586 million as a consequence of capitalization of the part of the principal amount and the relevant interest accrued thereon. These financial means have to be without any doubt considered as a factual consideration which the Debtor received for his guarantee undertakings while it is obvious that such consideration is more than adequate. Also from the Restructuring 2014 itself the Debtor gained also other, particularly financial, benefits (see paragraphs [25] and [26] above). Any other consideration for the guarantee undertakings made by the Debtor was not necessary to conclude and pay.

[51] **Nevertheless, in addition, the Debtor receives on the basis of agreements on payment of consideration for guarantees regular annual payments invoiced by the Debtor as a strict consideration for guarantees. For instance, in 2015 the Debtor thus received a payment in the amount of EUR 2,537,000 as consideration for the undertaking of the guarantee. Regardless to a significant consideration referred to in paragraph [50] above, just these payments have to be considered as an adequate consideration because they are based on the findings of expert valuation of guarantees from September 8, 2014 carried out by a renowned consulting company Ernst & Young, s.r.o.** Said information on consideration for guarantees result, among others, from the Annual Reports and from the accounting books of the Debtor, on which the Insolvency Trustee is obliged to base his review of the claims in accordance with Section 188 of the IA. On the basis that adequate consideration is clearly evidenced within the meaning of the IA, the Creditor cannot understand why the Insolvency Trustee intends to deny the largest claim registered within the insolvency proceedings with a reasoning that the Debtor does not receive any consideration for the guarantees undertaken nor why the Debtor has not disclosed receipt of that consideration.

[52] Moreover, it is evident that the Debtor did not undertake the guarantee at a time when it was bankrupt; even the Insolvency Trustee does not claim this. However, the Insolvency Trustee claims that during that time the Debtor was on the threshold of bankruptcy. This is evidently incorrect, though. As it is stated in paragraph [24] above, undertaking of the guarantee for payment of the Bonds in 2014 substituted previous guarantee of the Debtor from 2010, which led to reduction of the Debtor´s guarantee obligations. It is obvious that an act by which the Debtor reduced its guarantee obligations could not result in its insolvency. Therefore even if it was theoretically a legal act without adequate consideration (which is not true), the condition of its ineffectiveness pursuant to Section 240 (2) IA would not be satisfied.

[53] Due to the same reason, the given act also cannot be considered a legal act by which the Debtor favoured its creditor according to Section 241 of the IA. It is obvious that it

cannot be considered as an act of favouring as the total amount of guarantee obligations of the Debtor was significantly reduced.

[54] At the same time, the time condition for the possibility to oppose the guarantee pursuant to Section 240 (3) of the IA or Section 241 (4) of the IA is not fulfilled. The guarantee declaration is actually made in favour of the Creditor. Obviously the Creditor is neither a close person to the Debtor, nor does it form a group with the Debtor. The guarantee obligation which is more favourable for the Debtor and replaced the previous guarantee obligation in 2014 was moreover undertaken more than 1 year prior to the commencement of these insolvency proceedings.

[55] **From the above mentioned it is evident that undertaking of the guarantee for payment of the Bonds by the Debtor is not an ineffective legal act. This is why the Insolvency Trustee cannot contest Claim 1 on these grounds.**

[56] Moreover, the Insolvency Trustee cannot contest Claim 1 due to reasons which are solely procedural, even if the conditions for ineffectiveness of the undertaking of the guarantee were satisfied (which they are not). **If the Insolvency Trustee claims that Claim 1 was created pursuant to an ineffective legal act of the Debtor, he can bring an action to set the transaction aside pursuant to Section 239 et seq. of the IA, but he cannot contest its authenticity pursuant to Section 193 of the IA for the same reason**. It is because the ineffectiveness of a legal act pursuant to Section 235 (2) of the IA can only be established by a decision of the insolvency court. Before such decision is made, it is not possible to argue the ineffectiveness of a legal act for the purpose of contesting the legitimacy of a claim. This can be confirmed also by the settled judicial practice of insolvency courts.[16]

[57] In the present case, the procedure approved by the Supreme court of the Czech Republic in the judgment from March 31, 2014, File No. 29 ICdo 13/2002, which the Insolvency Trustee referred to, should not be applied either, because it is based on different circumstances. Actually, the subject of the court´s assessment was not the process of contesting the claim in respect of its authenticity, but rather in respect of its order. In terms of procedural process there is a significant difference between the aforementioned acts related to contesting of a claim: whereas the order of a claim can be contested "*if the right to satisfy a claim of collateral is denied*" (while term "denied" can be interpreted as a denial of the right by an action to set a transaction aside), the authenticity of a claim pursuant to Section 193 of the IA can be contested only due to one of the explicitly stated reasons which are as follows: "*the debt **has not been established** or it **ceased to exist completely** or it **has become time-barred***

[16] See e.g. resolution of the High Court in Olomouc from February 17, 2010, File No. 2 VSOL 351/2009 (KSBR 38 INS 190/2008), and resolution of the High Court in Prague from January 13, 2011, File No. 10 Cmo 183/2010 (MSPH 88 INS 3125/2008).

completely". Ineffectiveness or an action to set a transaction aside, evidently, are quite clearly not listed in the above-stated.

Evidence: invoice dated September 9, 2015 for EUR 2,537,000 issued by the Debtor to the company NWR NV (annex No. 5 hereto)

The annual report of the Debtor for 2014, accessible on <http://www.okd.cz/cs/o-nas/vyrocni-zpravy>, especially pages 70, 74 and 100-101

The annual report of the Debtor for 2014, accessible on <http://www.okd.cz/cs/o-nas/vyrocni-zpravy>, especially pages 52, 54 and 78

2.2 Refutation of the Grounds for Contesting Claim 2

2.2.1 Refutation of the Grounds for Contesting Claim 2 Alleged by the Debtor

[58] The Debtor contests the authenticity of Claim 2 on the basis of the following statements:

a) the controlling entity of the Debtor forced the Debtor to enter into the guarantee obligation ; and

b) the guarantee was not duly agreed upon and signed by the Debtor.

Regarding point a) – the controlling entity of the Debtor forced the Debtor to enter into the guarantee obligation

[59] The Debtor alleges that of the acceptance of the guarantee for repayment of the loan provided under the SSCF was unfavourable for the Debtor and the Debtor was forced to accept it against its will. For this reason, the Debtor intends to contest Claim 2 in terms of its authenticity.

[60] **The [conclusion of the SSCF and the ICA actually occured within the Restructuring 2014, it was favourable for the Debtor and the Debtor was not forced to undertake the guarantee by anyone.** The Creditor has already provided detailed reasoning connected to these statements, including the relevant evidence, in paragraphs [23] to [29] above, to which it hereby refers in full extent.

[61] **Moreover, the Debtor was a financial beneficiary of the resources which have been drawn on the basis of the SSCF (see art. 3.1 SSCF).**

[62] **Even if the controlling entity theoretically forced the Debtor to accept the guarantee and if the Restructuring 2014 was unfavourable for the Debtor (which is not true), the Debtor does not offer any legal background for supporting its**

statement that Claim 2 should not exist, or undertaking of the guarantee for payment of the debts arising under the SSCF by the Debtor should be invalid for the above-specified reasons. The Creditor is not aware of any provision of the English law, by which the SSCF is governed under art. 40 of the SSCF, which may provide a basis for deducing such invalidity. After all, such invalidity cannot be constituted even according to the Czech law, although in this case the Czech law is not the governing law.

Regarding point (b) - the guarantee was not properly agreed upon and signed by the Debtor

[63] The Debtor alleges that there was a conflict of interests of the Debtor and Mr. Boudewijn Wentink, who signed the SSCF and the ICA on behalf of the Debtor on the basis of a power of attorney. The Debtor argues that Mr. Boudewijn Wentink was at the same time an employee of NWR NV, which allegedly benefited from the Restructuring 2014 at the expense of the Debtor. Therefore the Debtor assumes that Claim 2 has not been established validly pursuant to Section 4 of the IPLA.

[64] The same argumentation is used by the Debtor in relation to Claim 1. The Creditor has already dealt with this reasoning in paragraphs [33] to [39] above, to which it hereby refers in full extent. Thus it is evident that **the authenticity of Claim 2 cannot be contested by arguments raised by the Debtor**.

2.2.2 Refutation of the Grounds for Contesting Claim 2 Alleged by the Insolvency Trustee

[65] The Insolvency Trustee contests the authenticity of Claim 2 on the basis of the following statements:

(a) the non-existence of the primary debt, the non-existence of the guarantee; and

(b) the ineffectiveness of the legal acts.

Regarding point (a) – the non-existence of the primary debt, the non-existence of the guarantee

[66] The Insolvency Trustee claims that the Creditor failed to prove the establishment of the primary debt, the repayment of which is guaranteed by the Debtor in accordance with the SSCF and the ICA, i.e. the corresponding credit having been drawn by the company NWR BV. Thus, the Insolvency Trustee basically supports his intention to contest Claim 2 with the statement that the credit has not been drawn.

[67] The Debtor actually registers the guarantee obligation for repayment of the credit in its accounting books and therefore the existence of Claim 2 can be without any doubt seen from the Debtor´s accounting on which the Insolvency Trustee is obliged to based his review of the claims pursuant to Section 188 of the IA.[17] The existence of the credit and the guarantee obligation for its payment are also regularly mentioned in the annual reports of the Debtor.[18]

[68] Based on the above-mentioned facts, it is evident that the authenticity of Claim 2 cannot be contested on the grounds of alleged non-existence of the primary debt, i.e. the obligation of NWR BV to repay the loan provided pursuant to the SSCF and the Creditor assumes that the Insolvency Trustee will not continue to dispute Claim 2 on such a basis.

[69] The Insolvency Trustee further claims that the valid acceptance of the guarantee obligation for the repayment of the credit provided pursuant to the SSCF is not supported by a respective power of attorney granted by the Debtor to Mr. Boudewijn Wentink. The Creditor hereby attaches the aforementioned power of attorney to this statement, by which it deems this objection of the Insolvency Trustee to be resolved.

[70] The Insolvency Trustee also repeats the arguments of the Debtor that the interests of Mr. Boudewijn Wentink were supposedly in conflict with the interests of the Debtor who therefore could not validly accept the guarantee by his signing of the SSCF and the ICA on behalf of the Debtor and, further that it is not specified next to the signature box of Mr. Boudewijn Wentink that he acts as an agent of the Debtor. The Creditor has already dealt with these arguments in particular in articles [32] to [39] above, to which it hereby refers in full extent.

Evidence:

The annual report of the Debtor for 2014, accessible on <http://www.okd.cz/cs/o-nas/vyrocni-zpravy>, especially pages 69 and 84

The annual report of the Debtor for 2014, accessible on <http://www.okd.cz/cs/o-nas/vyrocni-zpravy>, especially pages 37, 52 a 65

Power of attorney from September 2, 2014 granted by the Debtor to Mr. Boudewijn Wentink (annex No. 4 hereto)

Regarding point (b) – ineffectiveness of legal acts

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17 See attachment to the annual report of the Debtor for 2014 (in particular p. 69 of the annual report of the Debtor for 2014) and attachment to the annual report of the Debtor for 2015 (in particular p. 52 of the annual report of the Debtor for 2014).

18 See p. 69 and 84 of the annual report of the Debtor for 2014 and p. 37, 52 and 65 of the annual report of the Debtor for 2015.

[71] The Insolvency Trustee claims that undertaking of the guarantee for payment of the credit by the Debtor provided pursuant to the SSCF is an ineffective legal act because it is supposedly a legal act without adequate consideration pursuant to Section 240 of the IA, or a favouring legal act pursuant to Section 241 of the IA.

[72] **The Debtor has, however, received and receives consideration for the guarantee undertaking, along with consideration for undertaking a guarantee for repayment of the Bonds.** In order to refute the arguments of the Insolvency Trustee, the Creditor hereby refers in full extent to the paragraphs [52] to [57] above. Thus, **the Insolvency Trustee cannot contest Claim 2 on the grounds of the alleged ineffectiveness of the SSCF and the ICA**.

Evidence: invoice dated September 9, 2015 for EUR 2,537,000 issued by the Debtor to the company NWR NV (annex No. 5 hereto)

The annual report of the Debtor for 2014, accessible on <http://www.okd.cz/cs/o-nas/vyrocni-zpravy>, especially pages 70, 74 and 100 - 101

The annual report of the Debtor for 2014, accessible on <http://www.okd.cz/cs/o-nas/vyrocni-zpravy>, especially pages 52, 54 and 78

3. REGARDING THE SPECULATIONS REGARDING THE CONTROL OF THE DEBTOR

[73] Despite the fact that the Creditor considers it to be irrelevant with regard to its procedural position and satisfaction of the Claims within the insolvency proceedings, the Creditor deems it appropriate to make at least a brief statement on the previous speculations of the Debtor and the Insolvency Trustee[19] regarding the Creditor´s alleged role in these insolvency proceedings as a security agent who secures parallel claims of, among others, creditors (or companies which control or administer these creditors, as the case may be) which are considered by the Debtor and the Insolvency Trustee to be the controlling entities of the Debtor. Specifically, the Debtor and the Insolvency Trustee point out to the following companies: Ashmore Investment Management Limited (hereinafter referred to as „**Ashmore**“), M&G Investment Management Limited (hereinafter referred to as „**M&G**“) and Gramercy Funds Management LLC (hereinafter referred to as „**Gramercy**“) (Ashmore, M&G a Gramercy hereinafter referred to collectively as the „**Funds**“).

[74] Primarily, the Creditor states that the aforementioned speculations do not have any importance for these insolvency proceedings, due to the fact that the Creditor is

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[19] See e.g. statements published in the insolvency register of the Debtor, items No. B-41, B-82, B-122 and B-127.

undoubtedly a rightful and properly registered independent creditor of the Claims who acts in these insolvency proceedings on its own behalf. If the procedural position of a creditor in this respect is connected with any consequences according to the IA, it should be noted that it relates only to creditors close to the debtor, its senior employees, partners or persons forming a group with the debtor. It is evident that in relation to the Debtor, the Creditor is not in any of the aforementioned positions.

[75] Regarding the speculations about the control of the Debtor, the Creditor states that even in the theoretical event that the Funds controlled the Debtor and enforced any of their claims in these insolvency proceedings, it would be prohibited to charge them with it in these insolvency proceedings. Apart from the explicit exceptions stated in the IA, also the shareholders of the debtor have a right to proportional satisfaction of their claims, like any other creditors, and they also have the same rights to influence the insolvency proceedings, in particular to vote at the meeting of creditors. Therefore the Creditor does not see the purpose of the extended focus on the controlling entities of the Debtor.

[76] Regarding the Debtor´s claims about an alleged control over it being performed by the Funds, it can be stated that the controlled entity (i.e. in this case the Debtor), from the logic of it, usually does not act in a hostile or unfriendly manner towards its controlling entity or entities (like the Debtor does), as the controlling entities can exercise a decisive influence over the controlled entity. The fact that the Debtor acts in such a way, indicates that it is actually not controlled by the Funds.

4. CONCLUSION

[77] **From the above mentioned it is clearly evident that all Claims submitted in the insolvency proceedings by the Creditor are authentic and there are no relevant grounds under which the Claims could be contested by the Insolvency Trustee or the Debtor.**

[78] If the Debtor or the Insolvency Trustee contest the Claims regardless of all the arguments and information stated above, the Creditor will be unjustly prevented from exercising its lawful rights as a creditor in these insolvency proceedings. This may cause a severe procedural defect of these insolvency proceedings which would consequently make these proceedings more complicated and longer, because the respective resolutions of the meeting of creditors would be unlawful and contestable (including the resolutions which are substantial for the entire insolvency proceedings, e.g. the resolution on the method of resolving bankruptcy).

[79] However, the Creditor believes that such situation will not occur and that the Insolvency Trustee and the Debtor will reconsider their original intention to contest the Claims of the Creditor with regard to the aforementioned facts.

[80] In this respect, the Creditor is ready to provide the Insolvency Trustee with any and all necessary cooperation. The Creditor is convinced that with respect to the amount and importance of its Claims, the Insolvency Trustee should pay his closest attention to the Claims of the Creditor and their proper review.

Citibank N.A., London Branch