

JUNIOR CREDITORS...ALL WASHED UP?

Richard Fisher 3-4 South Square, for the Scheme Companies

Adam Al-Attar, 3-4 South Square, for the Senior Lenders

Stephen Horan, Erskine Chambers, for the Mezzanine Lenders

Case Summary

In re Bluebrook Ltd [2009] EWHC 2114 (Ch)

Three companies in the IMO carwash group of companies applied to sanction three linked schemes of arrangement to effect a restructuring. The companies were balance sheet and cash flow insolvent, being unable to pay interest to senior and mezzanine lenders and relying on their forbearance to trade.

The schemes of arrangement were as between the senior lenders and did not by their operative terms affect the rights of other creditors, in particular, the mezzanine lenders. The mezzanine lenders nonetheless objected to the sanctioning of the schemes of arrangement because following any sale of the companies' businesses and assets in administration (upon which the schemes of arrangement were contingent) the mezzanine debt would be enforceable against companies without any substantial assets.

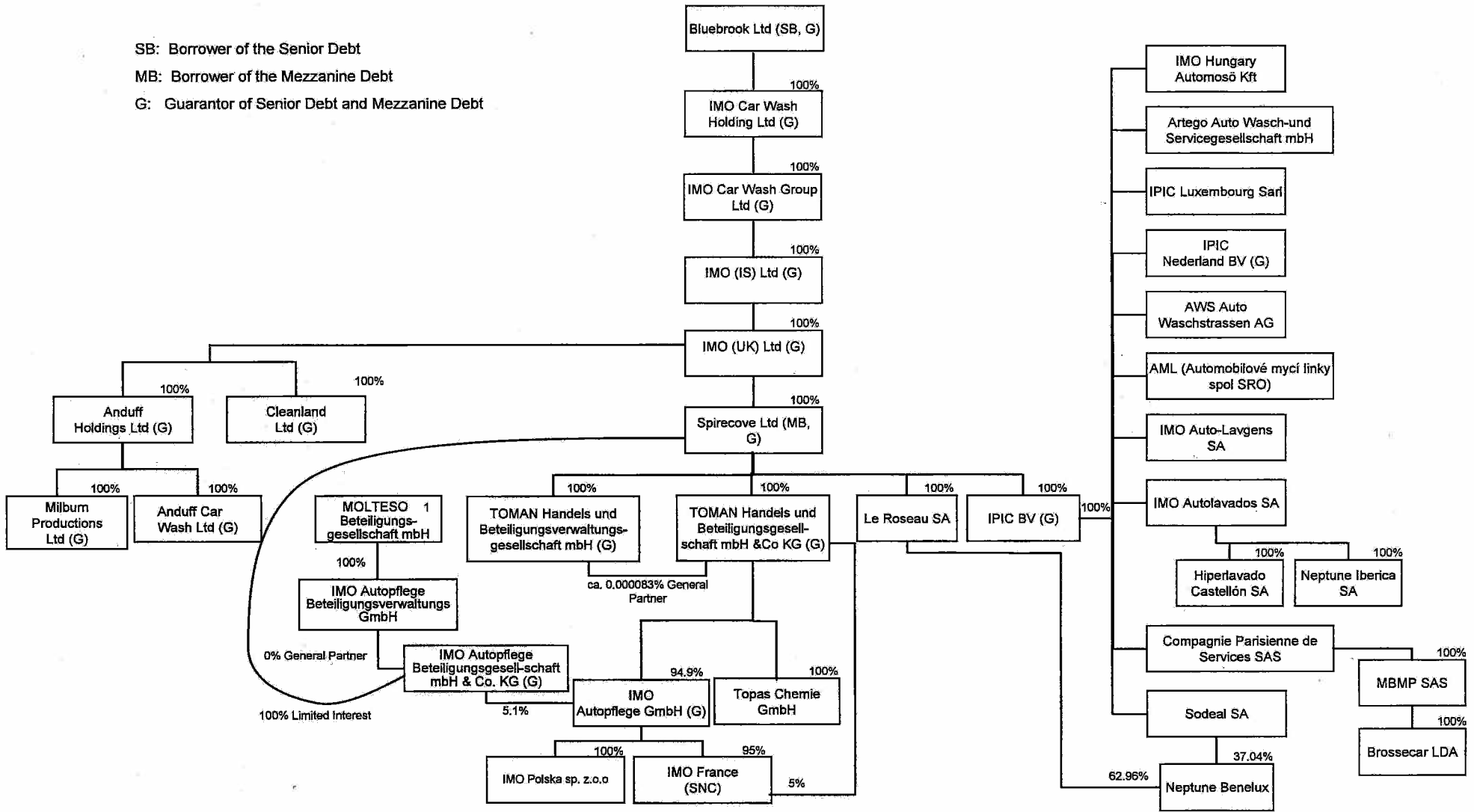
The mezzanine lenders contended that the schemes of arrangement were unfair because the value of the companies' businesses and assets were such that they had a real (and not merely theoretical) economic interest in the restructuring, and because the schemes of arrangement in fact involved a breach of duty by the companies' directors who had not done enough in negotiations with the seniors lenders to secure concessions for the companies and hence their creditors as a whole.

Mann J rejected these contentions. The mezzanine debt was contractually subordinated to the senior debt, and, in the circumstances, the senior lenders were entitled to enforce their security against the companies and to restrain any enforcement by the mezzanine lenders. As enforcement was highly likely, the relevant hypothesis for assessing the value of the companies' businesses and assets was a sale in the current market and not a theoretical discounted cashflow valuation which regarded the companies as income generating assets to be held. The discounted cashflow valuation relied on by the mezzanine lenders to show that value broke in the mezzanine debt could not therefore 'displace' the evidence of market value – a combination of a marketing exercise, a discounted cashflow valuation, and a multiples analysis – relied on by the companies' to show that value in fact broke in the senior debt.

The allegations of breach of duty, which were not foreshadowed in evidence, was without substance because, firstly, having regard to the value of the companies, a duty to have regard to creditors' interests (other than the interests of the senior lenders) was a duty to have regard to the interests of the mezzanine lenders who were capable of and did participate in negotiations to protect their own position; and, secondly, the companies' directors were without any or any substantial bargaining power as against senior lenders with accrued rights of enforcement. It was unreal to allege a breach of duty on the part of the companies' directors in proposing the schemes of arrangement in these circumstances.

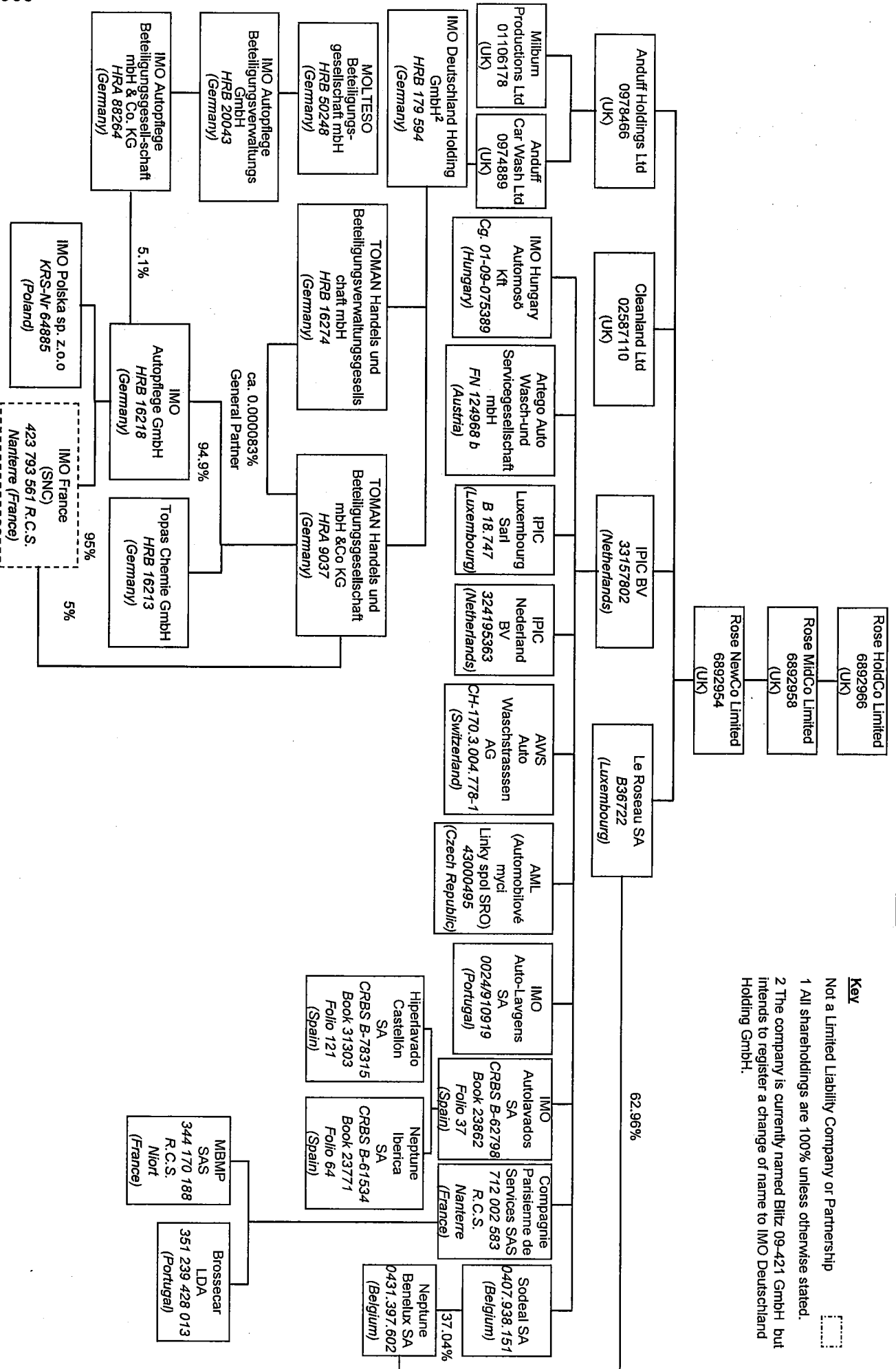
Existing Group structure chart

SB: Borrower of the Senior Debt
 MB: Borrower of the Mezzanine Debt
 G: Guarantor of Senior Debt and Mezzanine Debt



1 Note: MOLTESO Beteiligungsgesellschaft mbH is not part of the IMO Group but affiliated with the CommerzbankLeasing Group

RESTRUCTURED GROUP STRUCTURE CHART¹



Key
 Not a Limited Liability Company or Partnership
 1 All shareholdings are 100% unless otherwise stated.
 2 The company is currently named Blitz 09-421 GmbH but intends to register a change of name to IMCO Deutschland Holding GmbH.