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Case No: 2012 folio 1398

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/04/2014

Before:

MR JUSTICE BLAIR

- -

Between :

Starbev GP Limited	**Claimant**
- and -	
Interbrew Central European Holdings BV	**Defendant**

- -
- -

Lord Grabiner QC, Simon Colton, Nehali Shah
(instructed by **Allen & Overy LLP**) for the **Claimant**
Ali Malek QC and Richard Brent
(instructed by **Skadden, Arps, Slate, Meagher & Flom (UK) LLP**) for the **Defendant**

Hearing dates: Tuesday 25 February to Thursday 27 February, Monday 3 March to Thursday 6 March and Tuesday 11 March

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE BLAIR

Mr Justice Blair :

1. This case arises out of a dispute between the seller and buyer of a business as to what, if any, further payments are due to the seller pursuant to the element of deferred consideration agreed between them. The seller, Interbrew Central European Holdings BV ("ICEH"), is a Dutch subsidiary of the global brewer, Anheuser Busch InBev NV/SA ("ABI"), which is a Belgian company listed in Brussels and on the New York Stock Exchange. ICEH is the defendant in these proceedings.

2. The buyer is part of a structure created for the transaction by private equity investment funds advised and managed by CVC Capital Partners ("CVC"), a private equity firm. The structure includes the claimant, Starbev LP ("Starbev"), a limited partnership registered in Jersey, which in these proceedings is acting through its general partner, Starbev GP, a limited company incorporated in Jersey. The limited partners include funds managed by CVC. The entity that was the buyer under the sale and purchase agreement was Starbev Sàrl, a Luxembourg company, which is indirectly owned by another Luxembourg company, Starbev Holdings Sàrl ("Caspian"), which in turn is owned by the claimant.

3. In substance, the dispute is between ABI and CVC. Where it is necessary to distinguish between particular entities, I refer to the entity concerned. Otherwise, in reading this judgment it may be helpful to keep in mind that on the claimant buyers' side are the CVC Funds and their Starbev vehicles. On the defendant sellers' side are ABI and its subsidiary ICEH which held the business (reference to ABI and ICEH is usually interchangeable).

4. The business which was the subject of the transaction consisted of ICEH's brewing business in Central and Eastern Europe. The deal was completed in 2009, and included an element of deferred consideration to which the seller was entitled under a "Contingent Value Right" on the on-sale of the business by CVC. An on-sale happened in 2012 when the business was sold by Starbev to the American brewer, Molson Coors. Starbev and ICEH are in dispute as to the amount due in respect of the deferred consideration, and each seeks declarations from the court in support of its respective interpretation of the contractual documentation.

5. Though the issues arising are primarily issues of construction, both sides gave factual evidence in the form of documentary evidence and witness evidence in three main respects; first, as to the factual matrix, second as to Starbev's estoppel argument, and third as to whether the transaction by which Starbev sold the business on was structured with the purpose of reducing payments due to ICEH thereby engaging certain "anti-avoidance" provisions in the Contingent Value Right.

6. The witnesses at trial were all witnesses of fact. The four witnesses called by Starbev were as follows. Mr Tom Meredith is employed by CVC Partners Ltd, and he was a member of the CVC team working on the deal. Mr Istvan Szőke is a partner and head of the Central Eastern Europe business for CVC Partners Ltd, and he headed the deal

team at CVC. The other two witnesses were not involved in the deal making, but in the administrative and investment approval functions. Mr Carl Hansen is the Senior Managing Director of CVC Capital Partners Jersey Ltd and is a director of Starbev GP. Mr Fred Watt is a Managing Partner and Chief Operating Officer of CVC Partners Group.

7. The four witnesses called by ICEH were as follows. Mr Pedro Earp is now employed by ABI as Vice-President, Marketing, Latin America. At the time of the deal with CVC he was Vice President for M&A. Mr Rafael Goncalves is ABI's Global Vice-President of Budgeting and Business Planning. At the time, he led the ABI team on the CVC deal reporting to Mr Earp. Mr Robert Golden is Vice-President, M&A of ABI, and took over from Mr Earp in late 2009. Mr Nicholas Caton is presently Director, Asia-Pacific Corporate Strategy, of ABI, but worked in M&A at the time of the on-sale of the business by CVC in 2012.

8. Certain criticisms were made of the witnesses by the parties, particularly by Starbev of ICEH's witnesses. But so far as such criticism is put in general terms, I do not accept it, and in my view, each witness on both sides gave their evidence in a professional manner. However, whilst I have accepted much of their evidence, in certain respects, and for reasons set out below, I have not accepted all of it. So far as necessary, any other comments about the witnesses are set out in the course of this judgment.

9. There are two further points to note here. First, both sides complained of the absence of witnesses. ABI had its own small M&A function, consisting of two or three people. Between January 2011 and January 2012, one of them was a Mr David West, who did not give evidence. Whilst I accept that his evidence may have added something as regards the estoppel case, he was not with the M&A function either at the time of the 2009 deal with CVC or the 2012 on-sale to Molson Coors. I draw no adverse inference from the failure to call him. There is in my view no basis for Starbev's criticism of the fact that the signatory of the statement of truth in ICEH's original defence was not called (this point was made by Starbev in connection with ICEH's pleading as to what ABI was able to determine from various documents, which having regard to the evidence I do not think is significant).

10. Judging by certain emails he sent, I agree with ICEH that a more significant omission is that Starbev did not call Mr Przemek Obloj, who was involved for CVC reporting to Mr Szőke in both the 2009 deal with ICEH and the 2012 on-sale. On the whole, however, I think that this is more a matter of comment as to why the witness was not called rather than the drawing of an adverse inference on issues of fact (c.f. *Prest v Prest* [2013] 2 AC 415, at 492F, Lord Sumption). Similar considerations apply to Mr Alex Fotakidis who was involved for CVC in the 2009 deal at a more senior level (he seems to have been involved in some capacity in the 2012 deal also), though I was told that he was not a key member of the deal team.

11. The second point is that both Mr Meredith and Mr Szőke accepted in cross-examination that they have a financial stake in the outcome of the litigation, because it may affect their share (whatever that might be) of the 20% performance fee charged by the fund. I agree with ICEH that this fact should have been disclosed in their witness statements and consider this to be a regrettable omission. But I do not think that in itself it has much impact on the appraisal of their evidence. As Starbev says, in

private equity deals the deal team is likely to have a stake in the financial outcome, so to that extent, it was not unanticipated.

The background to the deal

12. The facts as I find them are as follows. ABI came into existence as the result of the merger of various substantial brewery businesses globally. The details do not matter for present purposes, but broadly in 2004 there was a merger between Brazilian and European businesses to form InBev, followed in November 2008 by a merger with the American company, Anheuser-Busch. This substantial deal, which closed in the middle of the financial crisis, was financed largely with debt. I was told by Mr Golden that in 2009 a top priority for the company was raising cash to pay down the debt. That gave rise to an extensive disposals programme under which ABI sold assets for over US$7bn in 2009.

13. In early 2009, CVC began to investigate the possibility of the CVC Funds acquiring ABI's central and eastern European brewing businesses. The day-to-day head of the CVC deal team was Mr Szőke. Another member of the team was Mr Meredith. The early stages of the project involved them putting together teams of external advisers (including corporate finance, legal, accounting and industry specialists), starting due diligence, and beginning to engage with ABI.

14. Mr Earp led for ABI, and Mr Goncalves worked with him. Having heard the evidence, I consider that the CVC team was the more focused in its approach. Once they had decided on a deal, they were in my view completely single-minded in getting it done. ABI's team, on the other hand, had other disposals proceeding at the same time, and they seem to have placed more reliance on their investment bankers for advice. Notwithstanding, both sides were professionals, and knew what they were about. In terms of external advisers, ABI's advisers were similar in makeup to those of CVC.

15. On 27 July 2009, CVC submitted a non-binding offer to ABI for the business, which was rejected. On 7 August 2009, CVC submitted a further offer totalling approximately €1.545bn, which was about US$2.220bn at current exchange rates. However, this fell short of ABI's target valuation of US$2.400bn. It is not in dispute that the gap between the parties was about US$200m.

16. By now, the only potential buyer was CVC, and, as Mr Goncalves put it, the central and eastern European M&A market was poor in 2009 because of the financial crisis, which inhibited bank financing for prospective purchasers. To bridge the gap between what CVC was prepared to offer and what ABI considered to be a fair value, the parties began to discuss an "earnout" or "contingent value right" mechanism which would be based on the ultimate CVC Fund's returns.

17. Such mechanisms are common in M&A transactions, and amount in effect to an element of deferred contingent consideration on the price. In this case, it was understood that, if the deal went through, CVC as a private equity firm would be selling the business on at some stage so as to realise profits for its investors. The mechanism the parties were discussing would give ABI a share of CVC's return on the on-sale above threshold levels which the parties would agree. This idea enabled the impasse to be overcome, and negotiations and due diligence to proceed.

18. The course of the negotiations, and what the parties may, or may not, have proposed, or understood to be proposed, is not, of course, admissible in construing the agreement they reached. However, it is necessary to say something about the interchange between them to give context to the questions the court has to decide.

19. It is not in dispute that the "contingent value right" proposal would hinge on the amount CVC invested in the acquisition (presently speaking in general terms) as against what it received on the on-sale. The part of the acquisition costs that was to be financed by bank debt was not directly relevant in that respect. However, it is a fact that, in the run-up to the conclusion of the sale and purchase agreement, ABI did not enquire as to, nor did CVC volunteer, the amount that it was proposing to invest.

20. Further, CVC did not disclose to ABI at that time that it intended to "overfund" the transaction. The overfund was to guard against adverse currency movements in the various countries in which the brewing businesses were located jeopardising the ability to repay the bank debt. The amount of the overfund CVC had in mind was substantial. At one point €95m was under consideration, though in the event it was €50m. The significance of this is that both parties understood that when it came to any payout under the proposed contingent value right, the higher the amount invested by CVC, the lower the return would be to ABI, in other words, as the parties put it during the trial, as between them it was a "zero sum game".

21. The overfund was subsequently disclosed prior to the sale and purchase agreement being entered into, and is not the subject of any claim by ICEH in these proceedings. However, I agree with its submission that the overfund issue shows that the figures making up the investment amount could be and were the subject of adjustment by CVC according to its interests, a point made by ICEH in the context of the case against it based on estoppel (the way ICEH put it was that the figures could be "easily manipulated" by CVC).

22. The detailed terms of the contingent value right were negotiated in the second week of October 2009. These were to be English law agreements, and the lawyers acting for CVC and ICEH were Freshfields and Clifford Chance respectively. By now, the thresholds beyond which ABI would be entitled to share in CVC's return had been agreed. The thresholds were to apply in step changes, with two increases over four years after the sale. The effect of the steps was that the earlier CVC sold, the lower the threshold that would apply to its return so as to entitle ABI to a share in the return. That share was agreed at 40%. How this should operate is essentially the heart of the dispute between them.

23. It is apparent from their internal documentation that at the time the parties had very different views as to the value of the contingent value right. This depended on a number of imponderables, among other things on the success of ABI's business plan, which expected much better performance than CVC anticipated in its base case. CVC appears to have considered the right to be a "low-value give for CVC".

24. The presentations to ABI's board prepared by its investment bankers, on the other hand, valued the right (discounted to produce a net present value) as between US$200m and US$400m. This was based on an estimated investment by CVC of US$920m, which at then current exchange rates was about €624m. Mr Goncalves explained in his evidence how the figure of €624m was calculated. It started with the

headline price for the transaction of US$1.385bn, deducted senior debt, the amount of a vendor loan note, and then added back in what CVC had to pay for minority interests and transaction costs. However, to repeat, this was ABI's estimate (or to be more precise that of its investment bankers) not that of CVC itself. As Starbev has submitted, without a number from CVC, the starting point for ABI's calculation if not a guess was at least a guesstimate, albeit (in my view) one which applied reasonable assumptions. The figure of €624m is to be compared with what CVC subsequently informed ABI was the investment amount, namely €720m, and what ICEH maintains in these proceedings was the investment amount, namely €681m. These make big differences to the amount if any to which ICEH is entitled to recover.

The SPA and the Equity Commitment Letter

25. On 14 October 2009 the agreement for the sale and purchase of the shares in the companies that were being sold (the "SPA") was entered into between ICEH as seller and ABI as guarantor, and Starbev Sàrl as buyer. The purchase price was €1.475bn of which €1.385bn was for ICEH's ownership stake, and €110m related to minority shareholders' interests. By now, the "Contingent Value Right" (the "CVR") was in agreed form but was not executed at that time.

26. The provisions of the SPA do not give rise to any dispute. So far as relevant to this case, it defines "Earnout Consideration" as the amount payable under the CVR, and provides that the Earnout Consideration (if any) is to be paid by the buyer to the seller after completion on the basis set out in the CVR. The SPA records that the final purchase price of the shares is €1,385,000,000 with various additions (including the Earnout Consideration, if any) and various deductions. (By a provision in the CVR, the obligation on Starbev Sàrl to pay Earnout Consideration was transferred to Starbev upon completion.)

27. On the same day, that is 14 October 2009, CVC sent an "Equity Commitment Letter" to ICEH. This is a significant document but the parties differ as to how significant. The letter refers to the proposed acquisition, and submits "our commitment to procure the requisite shareholder financing". The letter confirms that CVC has approved the transaction at an enterprise value of €1,475,000,000 and that it will procure that identified CVC funds will provide the shareholder financing in specific amounts which are set out on or before completion.

28. The amounts of the shareholder financing are set out against the names of eight CVC funds. The total is not set out in the letter, but it is not in dispute that as a matter of arithmetic it in fact comes to €720m. As to the use of the proceeds, the letter is to the effect that Starbev Sàrl will use the proceeds of the shareholder financing, together with the required third party debt financing (a reference to the bank debt) "to consummate the Transaction and, to the extent necessary, fund the cash consideration and related expenses pursuant to the Transaction".

29. Mr Earp said that he did not remember this letter, which is surprising, even allowing for his heavy workload with other transactions that were happening at the same time. ICEH's case is that the letter only states that the funds would be used "to the extent necessary, [to] fund the cash consideration and related expenses pursuant to the Transaction". It relies on the evidence given by Mr Goncalves in cross-examination to the effect that, "[t]hat's a commitment letter … it is not an investment letter".

30. It is correct that the letter shows what CVC was committing to invest, not what it actually did invest, and this is not as I understand it challenged. However, the obvious substance of the letter was that CVC was telling ABI what it would be providing by way of shareholder financing, namely €720m to be invested by eight CVC Funds. I consider that ICEH's witnesses were defensive about the letter because in its internal appraisals, including those placed before the board, ABI or its investment bankers continued to value the CVR on the basis of a €624m not a €720m investment number.

31. Also, a press release was issued in the name of both parties dated 15 October 2009. According to the text, the future payments under the CVR were "estimated to be as much as USD 800 million contingent on CVC's return on its initial investment". Mr Earp had negotiated carriage of the communication, and explained in cross-examination that he did not want a low value shown which could be used against ABI in the other transactions it was negotiating. Mr Szőke made it clear at the time that he did not agree this "very high cvr value number", but CVC did not actually veto the press release (and says that it was not in a position to do so). Particularly given that it was based on the €624m number, it is hard in retrospect to see how such a high figure was really plausible. However it was within (albeit at the upper end of) the investment bankers' figures, and I am satisfied that there was no intention on the part of Mr Earp or Mr Goncalves to mislead anybody. It was made clear in oral closings that Starbev is not suggesting that there was any impropriety in giving out the figure.

The Contingent Value Right ("CVR")

32. Matters moved towards completion. Between about 25 November and 1 December 2009, payments were made by the CVC Funds totalling €720m (the movement of the funds is not in dispute). On 2 December 2009, completion took place under the SPA, and the CVR was signed in the form agreed at the time of the SPA. On 9 December 2009, ABI was notified that €720m was the Investment Amount.

33. In outline, the CVR provided as follows. It states that it is the intention of the parties (clause 4.4.1) that ABI is to be entitled to participate in the return received by CVC if a "Determination Event" occurs, including the sale of the business, which happened in June 2012. The return is dependent on the CVC Funds receiving sums in excess of defined thresholds. There is a dispute as to how the operation of the thresholds works.

34. The first threshold is the "Investment Threshold". This operates on a stepped basis in multiples of the Investment Amount. For the first two years after completion (up to 2 December 2011), the multiple was 1.65 x Investment Amount. For the period up to 2 December 2012, the multiple was 2.05 x Investment Amount. From 2 December 2012 onwards, the multiple is 2.50 x Investment Amount. The proportion ABI is to get of the "Excess Equity Return" is fixed at 40%, but because of the stepped thresholds, the earlier a sale takes place, the greater potential there is for ABI participating in CVC's return. Whether this situation arose in respect of the sale of the business in June 2012 is in dispute.

35. The other threshold is the "IRR Threshold", IRR being the "Internal Rate of Return". This is an accounting term, but issues as to its calculation do not arise in this case. It is common ground that it is a rate that takes into account, on an annualised basis, all

forms of return, whether capital or income, from interests and dividends through to payments of principal. It is described in the evidence as a "theoretical compounded annual interest rate". The IRR Threshold is agreed at 25% with respect to the Investment Amount, and it is not in dispute that this threshold was exceeded at the times that are material for the decision in these proceedings.

36. The other point to note at this stage is that the CVR contains "anti-avoidance" provisions which (if applicable) have the effect of deeming proceeds received by CVC Funds to be returns for the purpose of the agreement. The anti-avoidance provisions are set out in the part of this judgment that deals with that issue.

37. The terms of the CVR presently relevant are as follows: Clause 4.1 provides:

> "**4. Terms and conditions of the Contingent Value Right**
>
> **4.1 Payments**
>
> 4.1.1 If a Determination Event occurs and the euro Equivalent of the Cash proceeds received by the Investor in connection with such Determination Event (together with the euro Equivalent of all previous Cash proceeds received by the Investor in connection with prior Determination Events) exceeds both (i) the Investment Threshold and (ii) the IRR Threshold (a '**Trigger Event**'), then Starbev shall pay to ABI an amount in euro equal to the product of (a) 40% and (b) the Excess Equity Return at that date (such amount, an '**Excess Return Payment**'). Thereafter, if the Investor receives any further Excess Equity Return, Starbev shall pay to ABI an Excess Return Payment equal to the product of 40% and such Excess Equity Return."

38. By the definitions clause in clause 1.1 of the CVR:

> "'**Determination Event**' means any payment by Starbev to the Investor out of proceeds received from or in connection with (i) Distribution, (ii) Sale, (iii) Refinancing, (iv) Listing of any member of Caspian's Group and/or (v) a Winding-Up;"
>
> "'**Equity Return**' means the euro Equivalent of any Cash proceeds directly received by the Investor from a Determination Event (including, for the avoidance of doubt, any amounts withheld from the Investor to be paid to ABI as an Excess Return Payment) and any amount deemed to be so under clause 4.4.2 or 4.4.3;"
>
> "'**Excess Equity Return**' means any Equity Return (other than an Equity Return with respect to which an Excess Return Payment has already been made) (i) accruing, as of the relevant date of determination, on or after the date on which the Trigger Event has occurred and (ii) that is in excess of the Equity Return required for the Equity Return of the Investor to exceed both the IRR Threshold and the Investment Threshold. By way of illustration, if, on the date that both the IRR Threshold and

the Investment Threshold are exceeded for the first time, the Internal Rate of Return upon a Determination Event is 30% and the Investment Threshold has been exceeded by €500 million, the Excess Equity Return would represent the lower of (a) the Equity Return corresponding to the 5% excess of the Internal Rate of Return over the IRR Threshold and (b) €500 million, and any Equity Return accruing after such date would also constitute an Excess Equity Return to the extent that the Equity Return continues to exceed the IRR Threshold;"

39. The Investment Threshold and the IRR Threshold were defined as follows:

> "'**Investment Threshold**' means:
>
> (a) at any time after SPA Completion up to and including the date falling two years after SPA Completion, an amount equal to 1.65 times the Investment Amount;
>
> (b) at any time after the date falling two years after SPA Completion up to and including the date falling three years after SPA Completion, an amount equal to 2.05 times the Investment Amount; and
>
> (c) at any time after the date falling three years after SPA Completion, an amount equal to 2.5 times the Investment Amount;"
>
> "'**IRR Threshold**' means the amount required (as described in the definition of Internal Rate of Return), at any point in time, to give the Investor an IRR greater than or equal to 25% with respect to the Investment Amount;"

40. As regards the IRR Threshold, clause 1.1 further defined '**Internal Rate of Return**' or '**IRR**'. This was the:

> "internal rate of return per annum received by the Investor in the aggregate with respect to the Investment Amount, taking into account:
>
> (a) as outflow at the time of the SPA Completion, the Investment Amount; and
> (b) as inflows... *[essentially, all relevant payments made to the CVC Funds]*.
>
> Subject to clause 14, the parties shall calculate IRR in good faith by applying Microsoft Excel's XIRR function, or a substantially similar application or function, to the cashflows described above, with returns calculated on a daily basis but compounded annually".

<u>Events following closing, and the €2.5m syndication</u>

41. There were various post-completion disputes between the parties, the most significant of which appears to have related to the vendor loan notes. It is clear that ABI took exception to what it regarded as blocking tactics by Starbev preventing it from selling the notes, but these disputes are not relevant for present purposes. So far as the events are relevant to CVC's estoppel case, I will consider them further under that issue.

42. In May 2010, Starbev internally adjusted the Investment Amount to reflect the fact that certain of the investors in the CVC Funds did not wish to participate in the investment on ethical grounds (presumably because the business consists of the production and sale of alcohol). Through a process of syndication, these investors were bought out, the value in question being €2,510,611.97. This was deducted from the €720m, leaving a figure of €717,489,388.03 for the Investment Amount. ABI was notified of the reduced figure on 7 December 2010.

43. It is not in dispute that the deduction was properly made. Starbev says that it was a "voluntary, non-contractual, goodwill adjustment", whilst ICEH says that the €2.5m had to be deducted from the Investment Amount, because if it had not been, the return to the CVC Funds on a subsequent sale of the business would be understated. I accept the submissions of ICEH in this respect, and do not think that the suggestion that it was a "goodwill adjustment" by CVC is credible. The issue does not affect in any substantial way the points that arise for decision, and I am not asked to give a declaration about it. It does, however explain why Starbev's case is that from 2010 the Investment Amount was (in round terms) €717.5m rather than €720m.

The sale of the business to Molson Coors

44. According to Mr Meredith, generally CVC seeks a projected return on investments over a three year period, the suggestion being that it normally holds the businesses which it acquires for that period. Its base case in July 2009 envisaged returns in year 4. Under an "anti-embarrassment" clause in the SPA designed to protect ABI, Starbev agreed not to sell the business for at least 12 months. In fact, Mr Szőke says the complexities of a deal meant that soon after completion he began to start investigating potential exit opportunities for CVC.

45. On 22 November 2011 these efforts bore fruit when Molson Coors (a major North American brewer) approached CVC with an indicative bid for the business of 11 times 2011 EBITDA. The multiple in respect of the 2009 deal with ABI had been 6.7 times EBITDA, so that CVC was looking at what by any standards was a very successful investment. It hoped for a still higher multiple of EBITDA from one of two major Japanese brewers, namely Asahi and Suntory, which had also shown an interest in the business.

46. As negotiations got closer to a deal, Mr Szőke told Mr Golden of ABI about the possible sale informally in January and formally in February of 2012. This was because of a "right of first offer" (ROFO) clause in the SPA in favour of ABI (Starbev describes it as a very limited right). ABI investigated the possibility of making an offer, but I consider that it was never seriously contemplating buying back the business that it had so recently sold.

47. The ROFO aside, by March 2012 Molson Coors and Asahi remained in the field as serious bidders. The deal had become, as Mr Meredith put it, "exciting". As I explain

below, it is clear that CVC was focused not only on bringing a deal off, but on structuring the deal in a way that would maximise the return for its investors. However, on 5 March 2012, Molson Coors made a headline offer which was (according to Mr Szőke) far lower than expected.

48. On or about 20 March 2012, Mr Przemek Obloj (who as explained was also a member of the CVC deal team) came up with the idea of a convertible note (the "Note"). I consider this note in further detail in the context of the anti-avoidance issue. For the present it is enough to say that the amount of the Note would be €500m, that it would contain an option enabling CVC to take advantage of a rise above 15% in Molson Coors' share price prior to the maturity of the note, and that it would have an approximate 1.5 year tenor with a final maturity date of 31 December 2013. Molson Coors agreed to this proposal. A similar proposal was put to Asahi, which it did not agree, and it effectively walked away from the deal a few days later.

49. On 2 April 2012, ABI confirmed that it did not intend to make an offer, and CVC's Investment Committee recommended a sale to Molson Coors on the terms negotiated by the deal team. The way was now clear for the SPA, which was entered into between Starbev Sàrl and Molson Coors on 3 April 2012. According to the Molson Coors press release that day, the price was €2.65bn. The sale completed on 15 June 2012, and the convertible Note was issued on the same day.

The bringing of these proceedings

50. On 18 June 2012, Starbev notified ABI that a further Distribution to the CVC Funds of €1,385,520,399 had taken place (none of this sum was referable to the convertible Note). In particular, ABI was notified that the Investment Threshold had not been surpassed, and so no Excess Return Payment was triggered.

51. This led to a swift response on the part of ABI, which had initially thought it would be in for a "windfall". On 21 June 2012, it exercised its right to appoint independent accountants (KPMG) to verify and report on CVC's calculations under clause 3.3 of the CVR (I have set this out below). On 21 August 2012, it asserted that the Investment Amount as stated by Starbev was not correct. Starbev disputed this assertion, and began these proceedings for a declaration on 24 October 2012.

52. On 13 August 2013, Starbev exercised its option under the convertible Note, and received the amount due less €44m withheld by Molson Coors for alleged breach of warranty, being €466m. Applying the 2.50 threshold, it paid ABI €31,609,783 which it considered was due by way of an Excess Return Payment.

53. ABI did not agree that this was all that was due. In November 2013, ICEH amended its pleading to include a counterclaim against Starbev on the basis (among others) that the convertible Note fell within the anti-avoidance provisions in the CVR.

54. In January 2014, following a (partial) settlement reached with Molson Coors in respect of the breach of warranty claim, Starbev paid to ABI an additional €12,579,980 which it considered was due by way of an Excess Return Payment, bringing the total paid to €44,189,763. Although ABI has not provided its own figures, on Starbev's calculations, depending on the precise outcome, if ICEH is

correct on the points it argues it could be entitled to a total of about €200m. The parties are therefore presently far apart.

The issues in outline

55. There are four main issues between the parties. Each raises points of construction as to the CVR, but also certain factual issues. Each side seeks declaratory relief, and in closing, each party provided the text of the declarations which they submitted that the court should make. The first two issues raised by Starbev concern the "Investment Amount" attributable to CVC under the CVR. The second two issues raised by ABI on the counter claim concern the anti-avoidance provisions and the effect of the provisions as to thresholds.

56. The detailed arguments are set out below, but broadly, the issues (which are considered in this order below) are as follows:

(1) Whether the Investment Amount asserted by Starbev is correct as a matter of construction of the CVR. This is the starting point for determining CVC's return. Starbev submits that the correct figure is €720m, which less the deduction made in 2010 of about €2.5m produces a figure of €717,489,388.03. ICEH's case is that when the term "Investment Amount" in the CVR is properly construed, deductions of €20,436,150 and €15.35m have to be made from Starbev's figure so that the Investment Amount is €681,603,239.03. The deductions ICEH submits should be made relate (broadly) to transaction costs.

(2) In the alternative, Starbev submits that ICEH is estopped by convention from denying Starbev's figure. It says that this follows from the fact that ICEH did not object to the Investment Amount notified to it by Starbev for a number of years until after Starbev had relied to its detriment on the conventional understanding that the Investment Amount was as stated in its notifications. At trial, this was advanced as an estoppel by acquiescence argument. ICEH denies that there was any acquiescence on its part, and contends that it was entitled to challenge the Investment Amount under the terms of the CVR.

(3) ABI contends that the transaction by which Starbev sold the business to Molson Coors in 2012 including the convertible Note was structured with the purpose of reducing the payments due to ABI under the CVR, and engaged the anti-avoidance provisions of the CVR. Starbev denies that the anti-avoidance provisions have any application.

(4) The last issue is whether proceeds received by CVC at a time when there has been a "step-up" in the Investment Threshold remain subject to the lower threshold if the "Investment Amount" has been exceeded in a period covered by the lower threshold. ICEH says that the lower threshold applies, whilst Starbev says that the higher threshold applies. This issue arises if the threshold was exceeded in the earlier period.

57. It is perhaps not surprising that each of these issues raises difficult questions of construction. The parties had clinched their deal, and the question as to how the deferred consideration would work in practice was pushed off into the indefinite future.

Principles of construction

58. There is no substantial dispute between the parties as to the principles. Both parties rely on *Rainy Sky S.A. and others v Kookmin Bank* [2011] UKSC 50 as the modern leading authority. It is sufficient to take this summary from ICEH's submissions, and deal with other legal issues concerning construction where they arise:

(1) The "ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant": *Rainy Sky S.A. and others v Kookmin Bank* [2011] UKSC 50, [14] (Lord Clarke).

(2) The "relevant reasonable person is one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract" (ibid).

(3) Where "the parties have used unambiguous language, the court must apply it" (ibid, [23]).

(4) However, "the language used by the parties will often have more than one potential meaning … If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and reject the other" (ibid, [21]).

(5) Resolving an issue of interpretation is "an iterative process, involving checking each of the rival meanings against other provisions of the document and investigating its commercial consequences" (ibid, [28]).

(1) "Investment Amount": the construction issue

The facts

59. It is not in dispute (and in any case I find) that between 25 November and 1 December 2009, the CVC Funds paid €720m to Starbev. Of these payments, €1m was in the nature of a limited partner interest in Starbev, while €719m was in the nature of limited partner loans to Starbev.

60. Starbev applied these sums in the following manner:

(1) Subscribing for shares in Caspian €1,000,000

(2) Subscribing for A PECs in Caspian €493,211,447

(3) Subscribing for B PECs in Caspian €49,000,000

(4) Subscribing for C PECs in Caspian €76,244,537

(5) Subscribing for C PECs in Caspian €49,757,866

(6) Subscribing for D PECs in Caspian €30,350,000

(7) Acquisition costs paid by Starbev €20,436,150

As explained at the beginning of the judgment, "Caspian" is a reference to Starbev Holdings Sàrl, the Luxembourg holding company that indirectly owns the buyer under the SPA, Starbev Sàrl. Starbev (the claimant) at the top of the ownership chain is a limited partnership registered in Jersey.

61. The term "PECs" means Preferred Equity Certificates, and as can be seen there was a series of them. I am told that they had different maturity dates and bore different rates of interest. Starbev says (and I accept) that PECs are financial instruments which are broadly similar to loan notes. I am told that they are generally regarded as debt for Luxembourg tax purposes (permitting the deduction of interest paid on them), and that PECs are commonly used by private equity investors as part of the structuring of their equity investments in order to optimise returns.

62. The above numbers add up to €720m. The dispute relates factually to the last two entries. Of the total sum, €20,436,150 was applied by Starbev in discharging certain fees expended in acquiring the business. It is not in dispute that this was done to mitigate VAT exposure, since whereas Caspian was liable to pay VAT, Starbev was not. (The Tax Structure Report prepared by Deloitte is in evidence, and it is clear that this was just one of many tax issues arising out of the transaction, none of the others being relevant.) This is the first sum in dispute, and for convenience I will refer to it as €20.4m.

63. The second sum consists of amounts owed by Caspian for financial, corporate and debt advisory services, which were discharged by Starbev and recharged to Caspian pursuant to the terms of an agreement between them dated 10 December 2009. In return, Starbev received D PECs in Caspian. The second sum in dispute is €15,350,000, and for convenience I will refer to it as €15.3m. In short, the issue is whether these sums (or either of them) are properly treated as part of the Investment Amount.

The terms of the CVR

64. Reference is made to the terms of the CVR as set out above. On this point, the relevant terms are as follows. The key term is the definition of "Investment Amount" in clause 1.1:

> "'**Investment Amount**' means the aggregate Cash investment in Starbev Interests made by the Investor and applied by Starbev in acquiring Relevant Interests at the SPA Completion, but excluding any Cash investment by the Investor in respect of Starbev Interests allocated to or actually sold to management of Caspian;"

On ICEH's contention as to construction, the words which are particularly important in the definition are "… *and applied by Starbev in acquiring Relevant Interests* …".

65. The terms within that definition are defined as follows:

> "'**Cash**' means coin or currency of any jurisdiction, immediately available funds, treasuries, certificates of deposit, eurodollar time deposits, short-term repurchase obligations, highly rated commercial paper, money market funds or other cash equivalents;"
>
> "'**Starbev**' means Starbev LP;"
>
> "'**Starbev Interests**' means limited partnership interests in or limited partner loans to Starbev;"
>
> "'**Investor**' means the CVC Funds;"
>
> "'**Relevant Interests**' means the interests (including Equity Interests) in Caspian held by Starbev or, directly or indirectly, by the Investor, together with any other interests in Caspian deemed to be part of the Relevant Interests pursuant to clause (b)(i) of the definition of Internal Rate of Return, including any Equity Interests of any other person established subsequently to hold interests of the Investor or Starbev in Caspian (but notwithstanding anything to the contrary contained herein Equity Interests issued to the Investor in respect of a Follow-On Investment shall in no event be considered Relevant Interests);"
>
> "'**SPA Completion**' means the completion of the sale and purchase of the Shares (as defined in the Share Purchase Agreement) in accordance with the terms of the Share Purchase Agreement);"

The contentions of the parties as to the €20.4m

66. It is convenient to begin with the contentions of ICEH, since it is challenging Starbev's figure. Its starting point is the sum of €699,563,850 reported in Caspian's accounts and stated by Starbev in its Financial Statements as "Investments", that is, investments in Caspian. It is not in dispute that this is what the financial statements show. Nor is it in dispute that the €20.4m makes up the total of €720m.

67. ICEH's case is straightforward. The definition of Investment Amount requires that the Cash investment is not only made in Starbev, but is "applied by Starbev in acquiring Relevant Interests", defined as interests in Caspian. Meaning has to be given to these words. ICEH gives meaning to them by saying that the Investment Amount means that portion of the Cash investment in Starbev that was invested in Caspian. In other words, the Investment Amount figure is intended to provide the answer to the question: "what was invested in Caspian?" It is not intended to provide the answer to the different question: "What did the CVC Funds invest in Starbev?" Accordingly, the figure of €20.4 million representing Cash held in Starbev, but not invested in Caspian, ought to be excluded from the definition of Investment Amount.

68. Starbev's case in summary is that:

(1) €720m was invested by the Investor (the CVC Funds) in Starbev Interests (ie, in shares issued by, or loans made to, Starbev). This sum was entirely "applied by Starbev in acquiring Relevant Interests at the SPA Completion". Accordingly the Investment Amount was €720m, (subsequently reduced to €717.5m to take account of the syndications dealt with above).

(2) There is no good commercial reason to exclude from the Investment Amount sums paid by Starbev to third party advisers etc, whether or not such sums were subsequently recharged to Caspian. On the contrary, the fact that Starbev would be spending part of the €720m invested in it on "related expenses" was known to both parties, both as a matter of common knowledge, and by the terms of the Equity Commitment Letter of 14 October 2009.

(3) Moreover, the wording of the Investment Amount definition does not require the exclusion of such sums. The wording "applied by Starbev in acquiring Relevant Interests at the SPA Completion" excludes:

a) sums invested by the CVC Funds in Starbev after Completion – for example, if any 'overfund' at Completion proved insufficient to cover currency fluctuations or other cash flow problems;

b) sums applied by Starbev following Completion in acquiring other assets – this would be a "Follow-On Investment" and investments after SPA Completion are excluded both from calculation of the CVC Funds' investment (by exclusion from the 'Relevant Interests' element of the Investment Amount), and from the calculation of the CVC Funds' return on that investment, by clause 4.2.1 of the CVR;

c) sums applied by Starbev for another purpose – for example, if at SPA Completion Starbev had also acquired a chain of public houses through which to sell the beer being produced by the brewery Business being acquired by ABI; and

d) sums not applied by Starbev at all – a wholly unlikely scenario, Starbev says, since this would simply depress the CVC Funds' returns for no commercial gain.

(4) In fact, Starbev did apply all the Cash invested in it in acquiring the Business at Completion, and so the entire amount invested by the CVC Funds in Starbev falls within the Investment Amount (subject only to the later reduction to reflect the syndication of interests).

The €20.4m issue: discussion and conclusion

(a) General points

69. If the €20.4m is to fall within the Investment Amount then, subject to Starbev's case in estoppel, it must have been "… applied by Starbev in acquiring Relevant Interests at the SPA Completion …" which means interests in Caspian. The dispute is essentially a narrow one. ICEH says that the money was applied by Starbev in meeting transactional costs and not in acquiring interests in Caspian, whereas Starbev

says the whole €720m was applied in this way, and that there is no good commercial reason to exclude from the Investment Amount sums paid by Starbev to third party advisers etc, whether or not such sums were subsequently recharged to Caspian.

70. Though narrow, a great deal may turn on the dispute if ICEH is right on its arguments as to the operation of the Investment Threshold. On the basis that the proceeds of the Molson Coors sale received in June 2012 were €1.430bn, ICEH says that, mathematically, if it succeeds in its contention that the €20.4m ought to be excluded from the Investment Amount, then the threshold will have been exceeded (€697.2m (i.e. €717.5m – €20.4m) x 2.05 = €1.429bn). I do not have to decide in these proceedings whether this calculation is correct. However I do have to decide whether as ICEH contends, once exceeded, the Investment Amount threshold applies to further proceeds without a step-up (the fourth issue). The inference is that a threshold of 2.05 would continue to apply to the proceeds of the convertible Note when received in September 2013. I infer that the practical outcome of this contention may depend on the answer to the €20.4m issue, and that a deduction of €15.3m would not be enough in itself to get ICEH over the threshold.

71. Turning to the parties' contentions, there are a number of general points to note. First, I have described above the treatment of the €20.4m in the accounts of Caspian and Starbev. Starbev's Financial Statements under "Statement of Cash Flows" have a heading "Cashflows (used in) provided by investing activities" the figure given being €699,563,850. Whilst such treatment is relevant as showing how ICEH calculates the figure it argues for, I do not consider that it advances the argument on construction because, as Starbev says, these statements are dated 13 December 2011, and are a post-contractual document. (For the same reason, I do not consider that the email sent by Mr Fotakidis of CVC to Mr Meredith on 9 December 2009 can be of assistance on the construction of the CVR, even if it is admissible.)

72. Second, the accounts reflect what ICEH was told at closing by Freshfields' email of 10 December 2009 to Clifford Chance. Freshfields explained that €20m had been held back in Starbev as it was more efficient for certain fees to be paid directly out of Starbev and not recharged than that the relevant amount was invested in Caspian and the cost incurred there. I accept Starbev's submission that the distinction drawn in the accounts between "operating" and "investing" expenditure is not relevant as to the issue on the construction of the CVR.

73. Third, I do not think that it is in dispute, and in any case I am satisfied, that the sole reason for Starbev (a Jersey entity) rather than Caspian (a Luxembourg entity) paying these fees was to save VAT. (As Starbev pointed out, had the fees been paid by Caspian, because of the additional VAT the returns on the Investment Amount would have decreased.) The question is as to the application of the CVR on this factual premise. (I do not consider that the treatment of an underwriting fee which was debated between the parties advances the argument, since this fee was dealt with as a discrete item in the agreement and does not give rise to any wider conclusions.)

74. Fourth, there was a suggestion in ICEH's closing submissions that "the costs of acquiring Relevant Interests i.e. interests in Caspian are a sub-set of the costs of acquiring the Business". It is suggested that Starbev did not put forward any evidence to demonstrate that the relevant sums were "applied in acquiring Relevant Interests" as opposed to simply being incurred more generally in the course of the acquisition of

the Business. Starbev took exception to this suggestion, saying that this is not a point that ICEH has pursued in this litigation, although it has had ample opportunity to do so. I agree, and do not think that this can be an "independent" point (as suggested in ICEH's closing). It is not said that ICEH's pleaded defence asserts a case as to the costs of acquiring interests in Caspian being a "sub-set" of the costs of acquiring the Business, or indeed advances a positive case as to the numbers.

75. Fifth, I do not think that it makes a difference on the construction question that (as ICEH puts it) the parties cannot have intended that a "granular audit" of transaction costs might be required. As Starbev says, ABI had specific audit rights so that the figures could be verified, and was not obliged to accept the numbers put forward by Starbev. (As noted elsewhere, in these proceedings both parties seek declarations that the Investment Amount is a specific sum: the court is not being asked to decide as to whether the sums are correct as a matter of calculation.)

76. Sixth, Starbev submits that it was obvious to both sides, as it would be to any business person, that the returns under the CVR would be based on the money used by the CVC Funds to acquire the Business, which would have to include acquisition costs. It relies in part on the oral evidence of Mr Earp and Mr Goncalves. They accepted that transaction costs would be included in the calculation of the Investment Amount. Mr Earp accepted in cross examination that equity would be needed to fund those costs, and so far as his earlier evidence suggested a contrary position, I do not accept it.

77. The position is touched on in the contemporary documents. For ABI to give a value to the CVR, it had to adopt a figure representing CVC's equity investment. Barclays Capital (one of ABI's investment bankers) estimated the equity required from CVC on the assumption that fees would be paid, and gave an estimate in respect of fees of US$63m. This figure was used in ABI's own calculations, which assumed that part of the Investment Amount would be comprised of acquisition costs. The number given by Mr Goncalves in his oral evidence as CVC's transaction costs was €40m, and again this went into ABI's estimate of the Investment Amount, which as I have explained above, was about €624m.

78. ICEH submitted that this was inadmissible evidence. It is correct, of course, that the court cannot allow evidence of pre-contractual negotiations to be used in aid of construction (see e.g. *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 at [30]). However, Starbev relied on what Lord Hoffmann said of the exclusionary rule in that case at [42]:

> "The rule excludes evidence of what was said or done during the course of negotiating the agreement for the purpose of drawing inferences about what the contract meant. It does not exclude the use of such evidence for other purposes: for example, to establish that a fact which may be relevant as background was known to the parties, or to support a claim for rectification or estoppel. These are not exceptions to the rule. They operate outside it."

79. Applying this statement, I agree with Starbev that the evidence of ABI's understanding as to the status of the transaction costs in relation to the Investment Amount is admissible as part of the factual matrix. As it was put by Starbev,

everybody knew that there would be transaction fees and that they would be borne out of the investment amount. The evidence that ABI itself counted the transaction costs within its estimates of the Investment Amount (the opposite position to that which it adopts on the construction issue) is quite striking.

80. On the other hand, it cannot be more than background. It cannot obscure the court's task, which is to construe the terms that the parties in the event agreed. I agree with the following statement of principle:

> "… there is often a temptation to turn the process of construction on its head and a party seeking to circumvent clear wording will inevitably encourage the court to look for (and "find") the commercial purpose not in those clear words, but in the background to the transaction or in broader notions of (supposed) commercial common sense. Having reviewed (if necessary in meticulous detail) the background factual evidence and 'found' the commercial purpose outside the words of the bargain, counsel will then make his construction argument relying on his account of what the parties were supposedly intending to achieve. As a result, the court may find itself being invited to undertake the exercise from the wrong starting position and become embroiled in (possibly) voluminous and complicated factual matrix material. The court may then be driven to resolve disputed issues of fact which lead to it being distracted away from the more important question, namely, the meaning of the contract as recorded in the words used.
>
> If the court is distracted in this way, the process of construction will have become a species of "top-down" reasoning …
>
> Viewed in this way, the commercial purpose is an abstract concept. It is not rooted in the terms of the contract, but in the evidence of the background to it or in broad notions of commercial reasonableness. The flaw in this approach is obvious: wrongly, the words of the contract will have been relegated in favour of the much-debated factual matrix material for the purpose of deducing the commercial purpose of the bargain. This approach is wrong for reasons of both principle and practice." (Lord Grabiner QC, *The iterative process of contractual interpretation* (2012) 128 LQR 41 at 49.)

81. Seventh, I agree with ICEH that Mr Szőke's suggestion in his witness statement that the inclusion of transaction costs is in accordance with "market practice" is inadmissible since he is not proffered as an expert witness nor is market practice relied on by Starbev in its statements of case. This suggestion was not pursued by Starbev at trial. The parties were clearly free to agree whatever they wanted about such costs.

(b) The redundancy point

82. The key issue is what is meant by the words "applied by Starbev in acquiring Relevant Interests" in the definition of Investment Amount of clause 1.1 of the CVR. ICEH said that if the draftsman had intended that all cash put into the transaction was to be included within the definition of Investment Amount, since cash invested in Starbev by definition could only ever be put into the acquisition of the Business in this wider sense, the words "applied … in acquiring" would be redundant.

83. ICEH said that the contract does not define the Investment Amount as consisting of the entirety of the funds received from CVC. It was open to the draftsman to do so, but he did not. There is an obvious commercial rationale for ignoring part of the sums Starbev received from the CVC Funds, it was suggested, because those sums might include funds which might be held, unused, by Starbev in its accounts.

84. There was considerable debate about what the critical words might operate to exclude. I have set out above what Starbev says they exclude. I agree with Starbev that the words would operate to exclude sums applied after completion, or for another purpose, or not applied at all, although the latter scenario is unlikely. They are not redundant on Starbev's case.

85. ICEH took issue with Starbev in relation to "Follow-On Investments". It pointed out that the definition of Investment Amount refers to Cash investment "at the SPA Completion" (underlining added). So, it is said, Follow-On Investments after completion necessarily fall outside the Investment Amount.

86. However, I do not think that this necessarily undermines Starbev's point. This is that the CVR treats Follow-On Investments (defined in the CVR to mean any investment in Caspian "following the date of the SPA Completion") differently from the original investment not only because of the definition of Investment Amount, but because of the specific treatment of Follow-On Investments in clause 4.2. The definition of "Investment Amount" thus reflects the parties' common intention that the CVC Funds' return on investment should extend to the entirety of the investment made by the CVC Funds in Starbev, but not include later investments by the Investor which would be treated as Follow-On Investments.

(c) The "iterative test" point

87. The principal submission made by ICEH in support of its construction case was that the "fatal flaw" in Starbev's construction is that it fails the "iterative test". This is a reference to a passage in *Rainy Sky S.A. v Kookmin Bank* [2011] UKSC 50 at [28], where Lord Clarke says that resolving an issue of interpretation is "an iterative process, involving checking each of the rival meanings against other provisions of the document and investigating its commercial consequences".

88. ICEH places particular reliance on section 3 of the CVR, which deals with notifications to ABI. Clause 3.1 provides that, "Immediately following the SPA Completion, Starbev shall procure that Caspian promptly provides ABI with details of the Investment Amount". It follows, ICEH submits, that the CVR proceeds on the basis that the right person to inform ICEH about what was invested was not the investor (Starbev) but the subject of the investment (Caspian). By definition, Caspian would not know what expenditure Starbev has incurred in making that investment. It submits that it is noteworthy that, of all the notifications in section 3 of the CVR, the

only one that is to be done by Caspian alone is under clause 3.1 concerning the Investment Amount.

89. ICEH also relies on the fact that the only accounts that the CVR expressly specifies ICEH is to receive are Caspian's annual report and accounts (clause 3.5.1). Self-evidently, it says, whereas those accounts will show the ownership of interests in Caspian, and its expenditure in the transaction, they will not show transaction costs incurred by Starbev on its own account; these costs will only appear in Starbev's report and accounts.

90. Accordingly, ICEH submits that if the definition of the Investment Amount was intended by the parties to include all transaction expenditure, irrespective of which entity incurred it, one would have expected the CVR to require Starbev to provide ICEH with its accounts as well as those of Caspian. The CVR does not do so. The obvious inference is that the parties intended to exclude such costs from the definition of the Investment Amount.

91. Starbev takes a different view of the effect of clause 3 of the CVR. It submits that the requirement in clause 3.1 that "Starbev shall procure that Caspian promptly provides" details of the Investment Amount, rather than Starbev providing it itself, does not support ICEH's construction. Starbev would be at least as well placed as Caspian to know how much money it had subscribed, and therefore the Investment Amount.

92. Starbev submits that the requirement in clause 3.5.1 for Starbev to provide Caspian's annual report and accounts (rather than its own) is nothing to do with the Investment Amount. These reports were to be provided annually, not only after Completion. The provision of these accounts would enable ABI to see how the Business was developing, and thus to forecast likely future returns, and thus likely future payments under the CVR.

93. Starbev further refers to clause 3.3 of the CVR which requires Starbev itself to make available on reasonable notice "any books and records (including accounting records), and its internal and external accountants and provide any other information reasonably requested...".

94. On this issue I accept that, as ICEH points out, in accordance with authority the definition of "Investment Amount" has to be read with the other provisions of the CVR. Nevertheless, I do not consider that its argument based on the "iterative process" is strong. The distinctions it seeks to draw between Caspian and Starbev in this respect are, in my view, of little practical substance. The fact that it was Caspian that was to provide ABI with details of the Investment Amount is of no consequence, since under clause 3.1 Starbev was to procure that this was done. It was in a position to do so because it owned the company. As at SPA Completion, which is when the obligation to provide ABI with details of the Investment Amount arises under clause 3.1, distinctions between what Caspian knew as opposed to what Starbev knew are in my view likewise inconsequential.

95. The fact that the only accounts that ICEH was to receive were those of Caspian does not in my view advance its contention either. As Starbev says, the requirement was to provide the accounts annually, and it is reasonable to infer that the objective was to enable ABI to see how the Business was developing, in circumstances in which it had

the right to potential future payments under the provisions of the CVR. This does not bear on the meaning of "Investment Amount".

(d) Conclusion

96. As I have indicated, ICEH's contention is that the Investment Amount figure is intended to provide the answer to the question: "what was invested in Caspian?" It is not intended to provide the answer to the different question: "What did the CVC Funds invest in Starbev?"

97. Starbev's response is that there is no good commercial reason to exclude from the Investment Amount sums paid by Starbev to third party advisers etc, whether or not such sums were subsequently recharged to Caspian. In submission, it was put more graphically, to the effect that "no sane businessman would exclude acquisition costs in the calculation of his return on investment".

98. ICEH said that an obvious commercial purpose underlying the exclusion of Cash held in Starbev for expenses from the definition of the Investment Amount is that it was always possible for the CVC Funds to overfund the transaction structure at the outset, in order to reduce any subsequent pay-outs to ICEH. Its protection against this was the phrase "applied in acquiring" in order to exclude from any calculation funds that had been put into the transaction structure, but had not been applied in acquiring interests in Caspian.

99. I have explained the facts as to the overfund above. It was intended to deal with currency exchange risks, was disclosed to ABI prior to the SPA, albeit ABI complains (possibly with justification) as to the way CVC held the information back until the last moment. I do not think that the possibility of an overfund helps in explaining the phrase "applied in acquiring". I also agree with Starbev's submissions that this was not a real concern since a private equity investor would be unlikely to pump in surplus cash.

100. It was said by ICEH that the "sane businessman" might want to exclude acquisition costs if he was measuring relative performance—but this point does not arise on the facts. The substantial point, in my view, is that Starbev did apply all the Cash invested in it in acquiring the Business at Completion and that included the transaction costs. The transaction costs were just as much part of acquiring the Business as the price. ICEH could not (and did not seek) to argue that there was anything unreasonable about such a construction because (as I have explained) ABI included transaction costs in its own estimates of the Investment Amount. I agree with Starbev that there is no commercial logic to a construction that seeks to exclude such sums from the Investment Amount.

101. Since the Equity Commitment Letter of 14 October 2009, ABI knew what CVC had committed to invest, namely €720m. These funds were transferred at the beginning of December 2009, and applied in acquiring the business. On 10 December 2009, ABI was notified as to the €720m Investment Amount and it was explained that €20m (it is not in dispute that this is a reference to the €20.4m) was held back in Starbev because it was more efficient that certain fees were paid directly out of Starbev and not recharged. This was a reference to tax savings.

102. Against that background, the question resolves into a relatively simple point. I agree with Starbev that as a matter of construction, fees necessarily incurred in acquiring the interests were just as much "applied ... in acquiring" those interests as the purchase consideration, taxes, etc. The fees in this deal were very substantial (as ABI anticipated they would be). I reject ICEH's case that as a matter of construction of the term "Investment Amount", they have to be excluded when calculating the Investment Amount. Such money was "applied by Starbev in acquiring Relevant Interests", and so falls within the definition. This gives effect to the language used, and there is no commercial reason for a contrary interpretation.

The facts as to the €15.3m

103. This is the second aspect of the first issue which I have to decide. As stated above, the €15.3m consists of amounts owed by Caspian for financial, corporate and debt advisory services, which were discharged by Starbev and recharged to Caspian pursuant to the terms of an agreement between them dated 10 December 2009. In return, Starbev received D PECs in Caspian.

104. The recharge arrangement was contained in a letter of 10 December 2009 from Starbev to Caspian. It is a brief letter and reads as follows:

> "We hereby recharge to you, in the amount set out below, full financial, corporate and debt advisory services … procured by [Starbev] for the benefit of [Caspian] in connection with the acquisition by Starbev Sàrl (the wholly-owned indirect subsidiary of [Starbev]) of the Central European businesses of the Anheuser-Busch InBev group in Bosnia-Herzegovina, Bulgaria, Croatia, Czech Republic, Hungary, Montenegro, Romania, Serbia and Slovakia, as detailed in the copies of the engagement letters appended to this letter. We note that the Services were charged to [Starbev] exempt of VAT."

105. The total stated is €15,350,000. In opening submissions, ICEH raised the question of how the total of the €20.4m and €15.3m fitted with the amounts seemingly attributable to transaction costs in the Starbev/Caspian financial statements. The explanation given by Starbev (but not supported by evidence) is that account has to be taken of the element that was spent in the 2010 period. I make no findings in this regard, and the issue does not affect the questions I have to decide.

The parties' contentions as to the €15.3m

106. Since the parties were not always in accord as to what the other was contending, I set out the passages from the pleadings which deal with this issue starting with paragraph 27 of ICEH's defence, which is to the effect that to the best of its knowledge and belief:

> "(1) As at the date of the SPA Completion (being the date at which the Investment Amount has to be assessed) a further deduction of €15,350,000 has to be made from the purported Investment Amount of €720m.

(2) This is because €15,350,000 in respect of cash supplied by the CVC Funds to Starbev was not applied by Starbev at the SPA Completion to acquire interests in Caspian, but was used to pay for financial, corporate and debt advisory services procured [*the word "provided" is wrongly used where this is set out in Starbev's opening submissions*] by Starbev for the benefit of Caspian.

(3) On 10 December 2009 i.e. following the SPA Completion, this sum was then recharged to Caspian as an 'incidental cost' linked to its investment in Starbev Investments Sàrl (as reported in Caspian's notes to its accounts for the year ending 31 December 2010) and treated as 'advisory fee income' in the hands of Starbev pursuant to a recharge agreement of that date (as reported in Starbev's unaudited financial statements for the year ended 31 December 2010).

(4) The debt was discharged by Caspian after the SPA Completion by means of the issue to Starbev of D preferred equity certificates in Caspian.

(5) Accordingly, Starbev did not acquire that interest in Caspian either (a) as a result of a Cash investment in Caspian or (b) [*this is not pursued by ICEH*]."

107. Paragraph 23(4) of Starbev's Reply states that:

> "The €720 million included €15,350,000 applied by Starbev in paying transaction expenses on behalf of Caspian with the resulting receivable applied in acquiring Relevant Interests (D preferred equity certificates in Caspian) on 9 December 2009."

108. By oral closings, the parties' respective contentions were as follows. ICEH says that Starbev's case is that it acquired Relevant Interests in Caspian in the form of a debt owed by Caspian to Starbev as recognised in the recharge agreement. This was an Equity Interest which falls within the definition of Relevant Interests, and as it happens this loan was repaid by the issue of further PECs, which were further Relevant Interests.

109. ICEH contends that the debt (i.e. €15,350,000) owed by Caspian to Starbev pursuant to the bespoke recharge agreement and which debt Caspian settled by the issue of D preferred equity certificates (as recorded in Note 3 to Starbev's Financial Statements for the year ending 31 December 2010), is not to be treated as "Cash" as defined. (The definition in the CVR is set out above.) It submits that the recharge agreement contains no agreement to lend a sum of money in exchange for a promise to repay. At best it creates only a debt. It says that the fallacy in Starbev's case is that it assumes that because a loan is a kind of debt, this debt was a loan. However, it was not a loan and, as a result, it is not an Equity Interest.

110. Starbev says that this is not its case. Its case is not that the recharge agreement was Cash. The Cash consisted of the fees met by Starbev. The Relevant Interests were, first of all, the loan from Starbev to Caspian by way of the recharge agreement, which is an Equity Interest, and second the PECs which were issued to Starbev in

satisfaction of that loan. They are themselves Relevant Interests. The recharge agreement evidences the loan from Starbev to Caspian.

111. The way it was primarily put on behalf of Starbev in oral closing was that the question whether there was a loan is marginal, because in return for this element of Starbev's Cash investment, in other words in return for the payment of the fees, Starbev acquired the PECs which are indisputably Relevant Interests. It says that there can be no question of past consideration, if that is what ICEH submits.

Discussion and conclusion as to the €15.3m

112. My view on this issue is as follows. I have set out above the relevant passage from ICEH's pleading. The factual premise to its contentions ("to the best of its knowledge and belief") is that €15,350,000 in respect of cash supplied by the CVC Funds to Starbev was used to pay for financial, corporate and debt advisory services procured by Starbev for the benefit of Caspian. This sum was then recharged to Caspian pursuant to the recharge agreement, and Starbev was issued with PECs in Caspian. There is no reason not to accept this as an accurate factual premise. (There were "advisory fee letters" dated 13 or 14 October 2009 from investment banks addressed to Starbev Sàrl attached to the recharge agreement, the fees making up the total.)

113. ICEH's case on that factual premise is essentially that Starbev did not acquire its interest in Caspian as a result of a Cash investment in Caspian. It says that the recharge agreement was a settlement "in kind" and at best created a debt owed by Caspian to Starbev but not a loan of money by Starbev to Caspian which was repaid by the issue of the PECS.

114. This is a very technical contention. In any case, the question for decision is whether the €15.3m sum should be included within the definition of "Investment Amount". This is defined in clause 1.1 of the CVR to mean "… the aggregate Cash investment in Starbev Interests made by the Investor and applied by Starbev in acquiring Relevant Interests at the SPA Completion …". Under the CVR, the PECs (i.e. preferred equity certificates) that were issued to Starbev were "Relevant Interests" because they are expressly included within the definition of "Equity Interests" which is itself included within the definition of "Relevant Interests".

115. The point is a short one and has been treated by the parties as such. The factual situation is similar to that in respect of the €20.4m since the €15.3m is also in respect of transactions costs, except that in this instance PECs were issued. I do not agree with ICEH's contention that on the correct construction of the term Investment Amount, the €15.3m does not count as Cash in this regard. I prefer the primary analysis put in oral closing submissions on behalf of Starbev. The €15.3m was part of the aggregate Cash investment in Caspian made by CVC, and it was applied by Starbev in acquiring the PECs. It follows that it formed part of the Investment Amount.

116. The question whether the recharge agreement created a loan or debt is not central in my view. It was an internal agreement between Starbev entities to provide for the recharge of the fees paid to the banks. Nor do I accept ICEH's suggestion in closing submissions that the consideration provided by Starbev was past consideration, so far as this was pursued. The recharge agreement was made at or about the time of SPA

Completion, and there is no reason to treat the consideration as past. (It is relevant to note that ICEH did not pursue a pleaded contention based on the requirement that the cash investment has to be applied at SPA Completion, saying that in the particular circumstances of this case it did not materially add to the requirement that the interests in Caspian are acquired through "Cash".)

117. I would in the alternative accept Starbev's submission in its written closing submissions that it was the payment of money to third parties (in other words the recipients of the fees) which was the application by Starbev of the Cash investment which it had received from the Investor, and that this payment was in the form of Cash, and that Starbev acquired Relevant Interests in Caspian in the form of a debt owed by Caspian to Starbev, as recognised in the recharge agreement, repaid by the issue of PECS, which are further Relevant Interests.

"Investment Amount": conclusion on the construction issue

118. For the above reasons, I conclude that Starbev is entitled to a declaration that the Investment Amount is €717,489,388.03, being €720,000,000 less €2,510,611.97.

(2) <u>"Investment Amount": the estoppel issue</u>

The parties' contentions

119. Starbev's alternative case is that ICEH is estopped from denying that the Investment Amount is €717.5m. Since I have held in Starbev's favour that as a matter of construction of the CVR the Investment Amount is €717.5m, the question of estoppel does not arise. However it was the subject of extensive evidence and submissions, and I will deal with it.

120. Starbev's case is straightforward, and based on the fact that ICEH (which abbreviation can be used interchangeably with ABI in this context) did not challenge what it says were "repeated notifications" it received that the Investment Amount was €720m (or €717.5m) until after the sale to Molson Coors had gone through on the basis of that number.

121. Starbev does not contend there was any contractual duty on the part of ICEH to respond to the notifications. Nor does it contend that ICEH acted dishonestly. Its case is that a reasonable person, in Starbev's position, would have expected ICEH acting responsibly, if it wished to challenge the Investment Amount, to have taken steps to make that challenge known much earlier than in fact occurred. It submits that ICEH acquiesced in Starbev's notifications that the Investment Amount was €720m (or €717.5m) for a number of years until after Starbev relied to its detriment on the fact that the Investment Amount was as stated in its notifications in particular by entering into the sale with Molson Coors. The facts, it submits, demonstrate that ICEH acted irresponsibly, and on the basis of such irresponsibility it is contended that an estoppel by convention arises.

122. ICEH denies that it behaved irresponsibly, because it says that there was no reason to challenge the Investment Amount until it looked as though there might be a payment due to it. This only happened on the sale to Molson Coors. It denies that Starbev relied on any assumption that ICEH accepted the €720m (or €717.5m) number, and

submits that no estoppel is made out even on Starbev's case. Where (as here) a case of estoppel by convention is not based on an assumption shared by both parties, but on an assumption made by one and acquiesced in by the other, the test is whether a reasonable person would have expected the other party "acting honestly and responsibly" to have raised the challenge earlier (in other words dishonesty which ICEH describes as equitable dishonesty is required).

The legal principles

123. Both parties agree that the authoritative modern statement of the principles applicable to estoppel by convention is to be found in the speech of Lord Steyn in *Republic of India v India Steamship Co* [1998] AC 878, 913-4, (*The "Indian Endurance")*. This identifies two types of situation in which an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law. These are (1) where the assumption is shared by them both, or (2) where it is made by one and acquiesced in by the other. The relevant passages are brief and can be set out in full:

> "It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption: *Lokumal & Sons (London) Ltd. v. Lotte Shipping Co. Pte. Ltd.* [1985] 2 Lloyd's Rep. 28; *Norwegian American Cruises A/S v. Paul Mundy Ltd*. [1988] 2 Lloyd's Rep. 343; *Treitel, Law of Contracts*, 9th ed. (1995), at 112-113. It is not enough that each of the two parties acts on an assumption not communicated to the other. But it was rightly accepted by counsel for both parties that a concluded agreement is not a requirement for an estoppel by convention.
>
> . . .
>
> That brings me to estoppel by acquiescence. The parties were agreed that the test for the existence of this kind of estoppel is to be found in the dissenting speech of Lord Wilberforce in *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890. Lord Wilberforce said, at p.903, that the question is:
>
> > 'whether, having regard to the situation in which the relevant transaction occurred, as known to both parties, a reasonable man, in the position of the 'acquirer' of the property, would expect the 'owner' acting honestly and responsibly, if he claimed any title to the property, to take steps to make that claim known . . .'
>
> Making due allowance for the proprietary context in which Lord Wilberforce spoke, the observation is helpful as indicating the general principle underlying estoppel by acquiescence."

124. Starbev's case was originally pleaded as based on a shared assumption that the Investment Amount was €720m. However, that case has not been pursued, and Starbev's case at trial has been one of estoppel by acquiescence. No point is taken on the pleadings, but ICEH does maintain that had the acquiescence case been pleaded earlier, it is likely that it would have called additional evidence. I agree that there has been a change in the way the case is put, but I doubt that this greatly hampered ICEH in the evidence it produced at trial. In any case, given the view I take of this issue, it makes no difference.

125. On that basis, the parties are agreed that the main questions for the court to decide are as formulated in *ING Bank NV v Ros Roca SA* [2012] 1 WLR 472 at [66] by Carnwath LJ:

(1) Was there a relevant assumption of fact or law made by Starbev and acquiesced in by ICEH?
(2) If so, would it be unconscionable to allow ICEH to go back on the assumption?

126. It is not in dispute that ICEH did not challenge the Investment Amount as notified by Starbev until after the sale of the business to Molson Coors. This gives rise to the question whether ICEH had any duty to do so. The parties are broadly in agreement as to the principles that apply to that question. It is common ground that this is not a case in which the parties were engaged in a "joint project" as "business partners" in which each was entitled to assume that the other would not knowingly conceal information of significance to the project where the question—in this kind of situation, the question whether there is a "duty to speak" may be of less significance (see *Ros Roca SA*, ibid, at [71], Carnwath LJ, and [87], Rix LJ).

127. In the present case, where there is no such relationship between the parties, for the purposes of estoppel by acquiescence it is common ground that silence on the part of a party to a contract can only amount to acquiescence where there is a duty to speak: "Mere silence, inactivity or failure to take a point cannot be enough to found an estoppel by convention" (*HIH Casualty & General Insurance Ltd v Axa Corporate Solutions* [2002] EWCA Civ 1253 at [32], Tuckey LJ).

128. A duty to speak may arise where the relationship between the parties is one of good faith, as in the insurance context, or by way of a contractual term, express or implied. Neither of these is relied on by Starbev. It relies on authority which shows that a duty to speak may also arise where, having regard to the situation in which the transaction occurred as known to both parties, a reasonable person would expect the other party, acting honestly and responsibly, if he had a claim, to take steps to make that claim known. The reasonable person for these purposes is a person in the position of the party who seeks to rely on the estoppel. This is the test in the dissenting speech of Lord Wilberforce in *Moorgate Mercantile*, as cited in *The Indian Endurance*, and effectively approved in *Ros Roca* (ibid, at [60], and [92]-[94]).

129. In such a case, the duty to speak arises because "a reasonable man would expect the person against whom the estoppel is raised, acting honestly and responsibly, to bring the true facts to the attention of the other party known by him to be under a mistake as to their respective rights and obligations" (*The Lutetian* [1982] 2 Lloyd's Rep 140, 157, Bingham J; *Ros Roca*, ibid, at [93]-[94], Rix LJ).

130. Starbev's case is that the duty to speak arises here because, acting honestly and responsibly, ICEH should have spoken up when it received notification of the Investment Amount. Starbev further submits that a party may be found to have acquiesced if he acts honestly but irresponsibly. Its case is that irresponsible behaviour is enough without the need to show dishonesty. It relies in particular on *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133, where Oliver J said at p151-152:

> "…the more recent cases indicate, in my judgment, that the application of the *Ramsden v. Dyson*, L.R. 1 H.L. 129 principle - whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial - requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour… So regarded, knowledge of the true position by the party alleged to be estopped, becomes merely one of the relevant factors - it may even be a determining factor in certain cases - in the overall inquiry."

131. ICEH submits that, having regard to the formulation in the *Moorgate Mercantile* case, and the passages in the *Ros Roca* case that I have identified, it is necessary to show both dishonesty and irresponsibility. An essential element of estoppel by acquiescence, it submits, is some form of "dishonesty" in an equitable sense. Since Starbev does not assert dishonesty against it, it follows that its estoppel case must fail.

132. On this dispute of principle, my view is as follows. It is correct, as Starbev submits, that the court has to ask whether it would be "unjust" or "unconscionable" for the party against whom the estoppel is raised to resile from the convention (that is the assumed state of facts or law) that has been established (*Revenue and Customs Commissioners v Benchdollar Ltd* [2009] EWHC 1310 (Ch) at [44]–[52], Briggs J). But though unconscionability is a fundamental requisite (*The 'Stolt Loyalty'* [1993] 2 Lloyd's Law Rep 281, 290, Clarke J), I do not agree with Starbev that the phrase "acting honestly and responsibly", which has now been adopted in a number of cases most notably *Ros Roca*, can be read as meaning that irresponsible behaviour alone is sufficient. Plainly the term "acting honestly" is intended to add something. In any case, it is not open to me to depart from this authority, even if I thought it right to do so. The effect of the estoppel contended for is to prevent the other party to the contract from relying on its contractual right to audit and challenge the figures. These were both commercial parties, and there is no reason to apply a lower bar.

133. The question is what is meant by "acting honestly" for these purposes. It does not in my view necessarily imply that the party against whom the estoppel is raised must be guilty of actual dishonesty, in the sense of acting fraudulently. ICEH seemed to acknowledge this in its closing submissions, saying that what is required is "'dishonesty' "in an equitable sense". It submitted that absent a relationship of good

faith or partnership or something akin to a joint enterprise, the courts will not impose a duty to speak in the absence of impropriety of some description by the person who is alleged to be estopped. I would accept that way of putting it, subject to adding that the impropriety may come from the act of staying silent itself, as where a reasonable person would expect the person who is alleged to be estopped, acting honestly and responsibly, to bring the true facts to the attention of the other party known by him to be under a mistake as to their respective rights and obligations—this was how Bingham J put it in *The Lutetian*, ibid, (see also *Avocet Industrial Estates LLP v Merol Ltd* [2011] EWHC 3422 (Ch) at [124], Morgan J). The "reasonable person", it is to be noted, is a reasonable person in the position of the party raising the estoppel, in this case Starbev.

134. This leads to the other main point of disagreement between the parties, which is what Starbev calls ICEH's "known mistake proposition". This arises from the fact that Starbev is not saying that its assumption that the Investment Amount was €720m is mistaken. Its case is that €720m is the correct figure. ICEH submits that a case like the present is based on the premise that the assumption in question is mistaken, and that the person alleged to have been estopped knew about the other party's mistake and was under a duty to bring it to his attention.

135. In response, Starbev submits that the contention that there can only be estoppel by acquiescence in a case where the party to be estopped knows the party raising the estoppel to be mistaken—as opposed to knowing that the two parties simply disagree, without necessarily knowing which party is correct—is unsupported by the authorities. The existence of a dispute or the existence of uncertainty is as much a matter which a party, acting honestly and responsibly, must bring to the attention of another, as the existence of a known fact.

136. Starbev relies on *ING v Ros Roca*, but that was a "shared assumption" case (see ibid at [67]), and as I have said, it was decided on the basis that the parties were concerned in a joint project as business partners, which is not the case here. It also relies on *The Lutetian*, a case in which owners exercised the right to withdraw a vessel where charterers had tendered payment of hire which the owners knew they believed was the right amount whilst keeping silent about their own calculations. At p.158 Bingham J said:

> "The relationship of owner and charterer is not one of the utmost good faith. One must be careful not to impute unrealistically onerous obligations to those who may choose to conduct their relations in a tough and uncompromising way. There is nonetheless a duty not to conduct oneself in such a way as to mislead. I have no doubt that the owners knew that the charterers believed they had paid the right amount. It was their duty, acting honestly and responsibly, to disclose their own view to the charterers. They did not do so and indeed thwarted the charterers' attempts to discover their views. Their omission to disclose their own calculation led the charterers to think, until a very late stage, that no objection was taken to their calculation. It would in my view be unjust in the circumstances if the owners could rely on the incorrectness of a deduction which they had every opportunity to point out at an

> earlier stage and which their failure to point out caused the charterers to overlook. I answer this question in favour of the charterers."

The context was that "the owners were bent not on securing performance of the charter-party but on stage-managing a very profitable withdrawal" (p. 158). The conclusion was it was the owners' duty to disclose their own view to the charterers, and having kept silent they were estopped from exercising their right to withdraw.

137. At p.157, in a passage I have already quoted, Bingham J expresses the principle in terms of "mistake", and in *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84, where estoppel by convention was first articulated in the English case law (citing *Grundt v The Great Boulder Proprietary Goldmines Ltd* (1937) 59 CLR 641), it was in terms of "common mistake" (p. 121).

138. On those authorities, I do not think that knowing of the existence of a dispute or the existence of uncertainty can in itself give rise to a duty to speak. However, I do not agree with ICEH that the estoppel case must fail because Starbev's position is that the figure of €720m is not mistaken but correct. The fact of agreement may also be the subject of a relevant assumption. Applying the test in *The Indian Endurance* and subsequent authorities, where one party is proceeding on the assumption that something is agreed, whereas as the other party knows it is disputed, on the particular facts the other party "acting honestly and responsibly" may be under a duty to make its disagreement known. The relevant mistake is not as to the amount, but as to whether there is a dispute as to the amount. In this case, it is Starbev's case that it did believe that ICEH had agreed the €720m figure, and an important issue on the facts is whether that is established.

Starbev's case on the facts

139. Against those legal principles, I come to consider Starbev's case on the facts. As I have indicated, it says that the facts show that a reasonable person, in Starbev's position, would have expected ICEH acting responsibly, if it wished to challenge the Investment Amount, to have taken steps to make that challenge known much earlier than in fact occurred. The facts, it submits, demonstrate that ICEH acted irresponsibly.

140. Starbev's case is that ABI was "repeatedly informed" of the Investment Amount. In fact, there are four such occasions relied on.

(1) On 14 October 2009, CVC sent an Equity Commitment Letter to ICEH, by which the CVC Funds committed a total of €720m to the transaction. This letter is dealt with above.

(2) As noted already, by clause 3.1 of the CVR, immediately following the SPA Completion (which was 2 December 2009), Starbev had to procure that Caspian promptly provided ABI with details of the Investment Amount. On 8 December 2009, Freshfields emailed that, "Regarding the details of the Investment Amount under the CVR, please note that the relevant amount is €720m …". Formal notification dated 9 December 2009 signed on behalf of

Caspian was sent attached to an email of 10 December 2009. This was the email that informed ICEH that approximately €20m had been held back in Starbev (the text of the email is set out above). It stated the figure of €720m (no supporting documentation was attached or required at this stage). (Receipt of the email was acknowledged by Clifford Chance, but nothing turns on the acknowledgment.)

(3) On 7 December 2010, that is about a year later, a further notification under the CVR was sent by Caspian to ICEH. This was occasioned by a Distribution of €49.4m to CVC on 29 November 2010. Such a small Distribution could not give rise to any payment due to ABI. Starbev relies on it because the Annex states the Investment Amount on 2 December 2009 as €720m. This was also the document that informed ABI about the €2.5m syndication, which I have described above. The effect was that the Investment Amount was stated "as adjusted" as €717.5m.

(4) On 1 August 2011, Caspian sent ICEH its accounts for year ended 31 December 2010, in accordance with the obligation contained in clause 3.5.1 of the CVR. This shows PECs being issued to Starbev totalling about €699.6m, in other words not including the €20.4m.

141. I agree with ICEH that this does not amount to "repeated notifications" of the Investment Amount. In fact there were two notifications, that of 10 December 2009 and that of 7 December 2010, and the figures notified differed. I agree with ICEH that this shows that the calculation of the Investment Amount was done by Starbev without any participation by ICEH, and that the amount was capable of (and did) change after closing. Furthermore, as ICEH also points out, the notification of 7 December 2010 was occasioned by the Distribution of €49.4m to CVC. It did not comply with clause 3.4.1 of the CVR which requires that a notification of this kind has to include "detailed calculations (with supporting documents and records)…". Without such supporting documentation, the numbers could not be verified (and this is not in dispute). The sending of the accounts on 1 August 2001 was not a notification of an Investment Amount at all. Further, the investments stated a total of €699.6m (not €720m or €717.5m) and Starbev's contention that the accounts should have been read with the email of 10 December 2009 to the effect that the €20.4m had been held back in Starbev has little weight in my view.

142. Starbev's detailed arguments are as follows. It says that the evidence shows that ICEH doubted the accuracy of the Investment Amount at all times from October 2009 onwards. This contention is based on the evidence of Mr Earp and Mr Goncalves. This is based on the Equity Commitment Letter of 14 October 2009 which I have dealt with above. The notification of the Investment Amount was on 10 December 2009, when Caspian sent a formal notification of the €720m figure.

143. Mr Earp had moved positions by that time, and was not involved. In his witness statement, Mr Goncalves says that his reaction on receiving it was that the "purported Investment Amount was considerably higher than I had expected and that the figure seemed unusually rounded". In cross-examination, he denied that he was suspicious of the figure, and maintained that he thought it may well have been the right figure.

144. Although Starbev says that this evidence was a contortion, I accept that Mr Goncalves did not conclude that the figure €720m was wrong. As he said, it might have been right. He had no reason to reach a conclusion at that point in time and no information on which to reach it. His evidence (which I accept) was that the value of the Investment Amount would not be relevant until a sale of the business, and that ICEH then had the right to audit the information.

145. The audit provisions are in clause 3 of the CVR. Clause 3.2 provides that Starbev is to inform ABI promptly about various matters, including any Distribution or any Sale. Clause 3.3 provides that Starbev is to make available to an independent firm of accountants appointed by ABI at ABI's expense books and records and any other information reasonably requested by such accountants so that they:

> "… can verify and report to ABI on the amount and timing of any such payments and transactions and any other transactions relevant to the calculation of the IRR, whether the Investment Threshold has been exceeded and each Excess Return Payment".

146. I am satisfied that (as he says in his witness statement) while Mr Goncalves did not know what the Investment Amount actually was, he thought that the figures put forward by Caspian in their notifications in 2009 and 2010 were at least €100m greater than the figure that he believed was likely. He did not form a concluded view as to what the Investment Amount was, because he believed that this could only be determined on an audit, which it did not make sense to do until the sale of the business—it was only then when there might potentially be a return due to ICEH. The evidence is that an audit by independent accountants would be an expensive exercise (Mr Earp's estimate was US$500,000), and I accept that ICEH reasonably saw no reason to require an audit before it was needed. Generally, I do not accept the criticisms made of Mr Goncalves as a witness, and consider that his evidence is consistent with the facts and the commercial sense of the situation.

147. Whilst therefore I consider that Starbev is correct to say on the evidence that ICEH doubted the accuracy of the Investment Amount as set out in the December 2009 notification, since it might have been right or wrong, I agree with ICEH that the fact that the parties had different views of what might be paid under the CVR depending on future events was not surprising, and is not legally relevant. It was not, in my view, unreasonable for ABI not to consider an audit until the amount became an issue on sale, and I accept Mr Caton's evidence that since an audit would be necessary on actual sale of the business anyway, there would be no point in doing the exercise twice.

148. Starbev points out that the definition of IRR in clause 1.1 of the CVR provides that "… the parties shall calculate IRR in good faith". Mr Goncalves accepted that he very likely calculated the IRR after receiving the notification of 7 December 2010. Starbev says that he "chose not to speak up", but there was no reason to do so at this time, in my view, since the amount of the Distribution was only €49.4m, and such a small Distribution could not possibly give rise to any payment due to ABI.

149. Starbev submits that the fact that ICEH had a contractual right to verify the Investment Amount gave rise to "a contractual duty to use its rights". It submits that

it would be inconsistent with the requirement in clause 3.1 of the CVR that immediately following completion Starbev would procure that Caspian "promptly" provided details of the Investment Amount for ABI then to ignore such Investment Amount and not challenge it promptly. This in my view is an attempt to write something into the contract which is not there. The contract placed an obligation on Starbev to provide details of the Investment Amount promptly, but it did not place a commensurate obligation on ICEH to challenge it promptly. The notice did not require ICEH to do anything. There is therefore no inconsistency—as ICEH says, such an obligation could have been included in the CVR had Starbev proposed it and ICEH been prepared to agree it.

150. Starbev submits that ABI always intended to challenge the Investment Amount. This may have followed, it says, from the "deep-seated suspicion which ABI apparently had of Starbev". This was accepted by Mr Goncalves in cross examination to the extent that while he thought that Starbev's figure may have been correct, he knew that ABI would want to verify and challenge the Investment Amount in due course. This was in the context of calculating the Excess Return Payment after verification, since he said that he knew that the figure was going to be contentious upon a sale.

151. This evidence has to be seen against Starbev's own understanding of the position. I am satisfied that Starbev's understanding was also that at some point in time ABI would want to verify the Investment Amount. Mr Meredith accepted that in cross-examination, and there is contemporaneous evidence to this effect. Mr Fotakidis expressly contemplated such verification in an email of 9 December 2009 to Mr Meredith. He said that ABI would probably use the Caspian accounts to do so (these were the accounts which were provided in 2011). As he put it, "I think where we need to be careful is this notification because if the [Caspian] accounts show a different number then that will raise concerns".

152. Starbev submits that ICEH knew that the Investment Amount was a fundamental element in calculating the thresholds in the CVR, and this is not in dispute. It submits that ICEH knew that Starbev would rely on the Investment Amount when deciding whether, and on what terms, to exit the business, and subsequently making distributions to the CVC Funds. However, it does not follow that ICEH knew that Starbev would be relying on ICEH accepting the figure that it had given without verifying it, and I do not make such a finding. It was put to Mr Golden that by June 2012, he had taken a deliberate decision not to query the Investment Amount at that time. As he explained however, ICEH were by now acting on the advice of Clifford Chance, which is not surprising, the SPA with Molson Coors having been entered into in April.

The conclusion that Starbev seeks to draw on the facts

153. The conclusion that Starbev seeks to draw is that ICEH "knew, or ought to have known, that its silence gave the impression that the Investment Amount was not being disputed". It is convenient to consider this question by reference first to Starbev's contention that it assumed that the Investment Amount was €720m (or €717.5m), and this number was not going to be challenged. In his oral evidence, Mr Meredith said that so far as he was concerned, the Investment Amount was agreed by ICEH.

154. There is, in my view, no evidence to support this suggestion (the evidence of Mr Hansen which Starbev cites does not support it). It is inconsistent with Mr Meredith's own evidence that ICEH would need to verify the Investment Amount. When ICEH requested an audit on 21 June 2012, there was no suggestion from Starbev that the amount had been agreed, or that ICEH was not entitled to investigate it. I do not accept Mr Meredith's evidence in this respect. Nor do I accept his second statement to the effect that it was "not obvious" to him that the audit would extend to the Investment Amount. I am satisfied that it was understood that this would be examined. When ICEH wrote to Starbev on 21 August 2012 asserting that "on the basis of information provided to KPMG by Starbev, it appears that the Investment Amount is incorrectly stated…", it was not asserted in response that the figure could not be challenged or that it had been agreed.

155. Further, there is contemporaneous evidence which contradicts Starbev's case. By email of 26 August 2011 from Mr Obloj (copied to Mr Szőke), he discusses the calculation, saying "ABI may want to contest it but the docs are bullet-proof in this respect". Understandably, Starbev has emphasised the point about the documents being bullet-proof, but the significance of the email is that it shows that Mr Obloj (and CVC) understood that ICEH might want to contest CVC's calculation. I agree with ICEH that this email goes to explain why he was not called to give evidence, because it is completely inconsistent with Starbev's estoppel case.

156. A calculation done by Mr Caton of ABI on 3 April 2012 estimating what would be due to ABI under the CVR took €720m as one of the "Assumptions". This followed what he had been told by Clifford Chance that day (which was the day when the SPA with Molson Coors was entered into). I agree with ICEH that this shows that it did not think that the Investment Amount of €720m was necessarily wrong. Mr Caton's evidence, which I accept, was that he did not have sufficient information to determine whether the figure was correct, but was prepared to use Starbev's figure for his calculation. (Taking into account the element of deferred consideration by way of the convertible Note, Mr Caton's calculation was that ABI would be entitled to €56m under the CVR.)

157. Viewed in context, I do not consider that the evidence of either Mr Earp or Mr Golden supports Starbev's contention that ABI knew or ought to have known that its silence gave the impression that the Investment Amount was not being disputed. I am satisfied that at no time was that the case, either in 2009 when the notification was first given, or in 2012 when CVC approached ABI about the ROFO and the parties were in communication on that subject. Although Mr Earp spoke of the necessity of "deep discussion", it was in the context that, "If Istvan [Szőke] would have called me and asked me to validate the 720 figure and if I had realised it was very different from my figure, there would have been a discussion, yes".

158. It is not in dispute that Mr Golden did not know about Freshfields' email of 10 December 2009 until April 2012, when it was drawn to his attention by Clifford Chance following Starbev's notification of the SPA with Molson Coors on 2 April 2012. (The explanation given is that it was only in late 2009 that he took on his M&A responsibilities, including ABI's post-closing rights relating to the sale of the business to Starbev and the CVR). In the light of it, he was asked whether he would have passed back to Mr Szőke the discrepancies between Mr Goncalves' figure and that provided to ABI by Starbev had he been aware of them. He said:

> "A. Yes, based on what I knew then, if I had known that they were -- CVC was near agreeing on a full sale of the business, which I didn't know, and that they were working on a structure that involved a convertible bond that was finely tuned around a definition of the investment amount, through a structure that we viewed as contrary to the anti-avoidance language, and that there was a difference in the investment amount. Yes, I think given all that, if I would have known all that, we would have approached this situation differently. I'm not sure how I personally would have approached it if that would have been the driver. We would have been working very carefully with counsel at that point to determine how to move ahead."

159. The point that Mr Golden was making was that he did not know that CVC was working on a structure that involved a convertible note that was "finely tuned around the definition of the Investment Amount". His point was that it was the way that CVC structured the Molson Coors transaction that meant that the Investment Amount number was so important. He did not know that the deal would be structured so that the proceeds received by CVC at closing on 15 June 2012 fell just below the 2.05 Investment Threshold applicable at that time. I do not think that his evidence assists Starbev in relation to estoppel.

160. In the light of the above findings, I can deal briefly with Starbev's case as to detrimental reliance. Its case is that Starbev and its limited partners relied to their detriment on their assumption that the Investment Amount was €717.5m in November 2011 when the Investment Committee authorised costs to be incurred in connection with a sale, and in April and June 2012, when Starbev concluded the Molson Coors SPA, and subsequently made a distribution to the CVC Funds, onward distributions being made by the Funds to their own investors. Starbev's evidence was that on the basis of an Investment Amount of €682m, the expected returns would have been too low to have made the deal with Molson Coors attractive. The case is premised on the contention that the sale would not have gone ahead if it had been known that ABI would later dispute Starbev's figure for the Investment Amount.

161. So far as the evidence of Mr Hansen and Mr Watt was that they themselves did not know that ABI might dispute Starbev's figure, I accept it. However, this deal was very much driven by the deal team and, as I have found, they knew that ABI would likely want to verify the Investment Amount. I find that they were prepared to take the risk that their numbers on the Investment Amount would stand up. On these factual premises, I am satisfied that there was no detrimental reliance by Starbev on any assumption that the Investment Amount was €720m or €717.5m on the basis of acquiescence by ABI/ICEH in such figure.

Discussion and conclusion

162. The notification given to ICEH by Starbev on 10 December 2009 that €720m was the Investment Amount was clear, albeit unsupported by documents at that stage. It was also made clear that €20m had been withheld in Starbev in respect of fees.

163. There was some question as to whether the email reached ICEH as opposed to its solicitors, but I was told that it was in ICEH's disclosure, and in any event it is

unlikely that it was not passed on. It is a matter of legitimate comment (in my view) that more attention was not paid within ABI to the figure, since it differed by about €100m from ABI's own figure. I consider that this is because the deal once done was no longer of pressing interest to ABI, which had other deals it was doing at the same time, since any payout under the CVR lay some years in the future.

164. In order to make good a case in estoppel, Starbev (as it accepts) has to show that ABI/ICEH was under a duty to raise the issue with CVC/Starbev. There was no contractual duty. In fact, the contract was structured so that following (among other things) a sale, ABI could have the Investment Amount independently audited (clause 3 of the CVR). On its own case, Starbev has to show that it was irresponsible of ABI not to make its doubts about the figure clear in December 2009, or when there was another notification in December 2010, or at any rate before the sale to Molson Coors. Starbev points to the fact that such doubts clearly existed, and that the Investment Amount would be relevant to the way in which such a sale would be structured. I do not think that this is in dispute.

165. I say "irresponsible" because Starbev submits that "irresponsible behaviour" by the party to be estopped is sufficient for the purposes of estoppel by acquiescence. For reasons given earlier, I disagree with its analysis, but am content to proceed on that basis.

166. It is useful, in my view, to recall that each side had good reasons for doing this deal in 2009. ABI had a pressing need to repay debt and, at a low multiple of EBITDA, CVC saw the deal as a good investment, which it turned out to be. But the parties were still some US$200m apart, and an element of deferred consideration by way of the CVR was the means to bridge the gap. However, deferring the consideration in this way inevitably introduced an element of uncertainty for the future.

167. For reasons I have explained, I am satisfied on the facts that the CVC deal team knew that ABI had not agreed the €720m (or €717.5m) number. They knew that ABI would likely want to verify the Investment Amount. On ABI's part, there was no question of verifying the number until it became an issue, which did not happen until after the sale to Molson Coors. I consider that this was an entirely reasonable position to take, particularly since it would have to bear the considerable costs.

168. It is also material in my view that ICEH exercised its right to appoint an independent accountant on 21 June 2012, and Starbev complied with the requests for information. Following the KPMG audit, ICEH asserted the lower figure by letter of 21 August 2012. In its response of 6 September 2012 Starbev did not suggest that the Investment Amount had been agreed, or that ICEH could not argue to the contrary. The estoppel allegation was not made until 28 September 2012, when Starbev sent a letter before claim.

169. Starbev complains that ABI did not reveal its doubts about the figure much earlier. However, it can equally be said that, had it wanted certainty going into the on-sale of the business, Starbev could have got ABI to confirm the figure. I am satisfied that it did not do so because the deal team was prepared to take the risk. On the basis of the construction of the Investment Amount that I consider to be the correct one, the risk was worth running, since as a matter of construction of the contract I agree with Starbev that the Investment Amount is €717.5m. If, however, that is incorrect,

Starbev cannot (in my judgment) use estoppel by convention to rewrite the parties' bargain.

170. This case is completely unlike either *Ros Roca* (where the duty to speak arose because the parties were in a joint project) or *The Lutetian* (where shipowners deliberately kept silent about their hire calculations so as to stage-manage a withdrawal). In my view, no estoppel lies for the various reasons set out above, principally because Starbev knew that there was always a risk that the Investment Amount might be challenged by ICEH at least until the figure had been verified and reported on by independent accountants, and because ICEH cannot be accused of irresponsible behaviour (which Starbev submits is the test), or unconscionable behaviour, in not communicating its doubts about the figure to Starbev, and waiting until after the sale before verifying the Investment Amount in accordance with the provisions of the contract.

(3) <u>The anti-avoidance issue</u>

171. ICEH's claim for a declaration relating to the anti-avoidance issue was not pleaded as part of its original counterclaim, though the issue was expressly left open. The explanation given in correspondence is that it was not until after Starbev's disclosure that ICEH could determine whether Starbev had the purpose of reducing the amount payable to ABI when it structured the consideration payable by Molson Coors for the purchase of the Business. It is right to say that the issues between the parties on this part of the case were raised but not explored on the pleadings (Starbev's reply on the point consisting of a traverse), though becoming clear at trial. The issues turn on the €500m convertible Note which Molson Coors issued to Starbev as part payment of the price for the purchase of the business.

The anti-avoidance provisions of the CVR

172. The determinative provisions of the CVR for this issue are those in clause 4.4. This provides so far as relevant as follows:

> "**4.4 Anti-Avoidance**
>
> 4.4.1 It is the intention of the parties hereto that ABI shall be entitled to participate in the return, whether directly or indirectly, of Cash proceeds received by the Investor and derived from the Relevant Interests on the basis set forth in this Agreement.
>
> 4.4.2 In accordance with clause 4.4.1, any transaction between the Investor and/or its Affiliates and any member of Caspian's Group other than a Follow-On Investment that results in payments to or receipt of value by the Investor or any of its Affiliates ... shall be deemed to be an Equity Return for the purposes of determining the Internal Rate of Return, whether the Investment Threshold has been exceeded and whether an Excess Return Payment is required.
>
> 4.4.3 Without prejudice to clauses 4.4.1 and 4.4.2, any other transaction that is structured or undertaken that results in

> payments to or receipt of value by the Investor and/or its Affiliates, with the purpose of reducing payments due to ABI hereunder, including
>
> (a) a Reorganisation;
> (b) an issue of shares, other securities (including convertible securities) or instruments or any other Equity Interest other than on arm's length terms or at less than at Fair Market Value;
> (c) the sale or transfer of assets by Caspian's Group to the Investor or one of its Affiliates other than on arm's length terms, and/or
> (d) any other transactions that are made between a member of the Caspian Group and the Investor or one of its Affiliates other than on arm's length terms
>
> shall each be deemed to be an Equity Return for the purposes of determining the Internal Rate of Return, whether the Investment Threshold has been exceeded and whether an Excess Return Payment is required, in each case, solely to the extent that such transaction has reduced the amount of the payments due hereunder."

173. The constituent elements of this clause which are of primary relevance (set out above but repeated here for convenience) are as follows:

> "'**Cash**' means coin or currency of any jurisdiction, immediately available funds, treasuries, certificates of deposit, eurodollar time deposits, short-term repurchase obligations, highly rated commercial paper, money market funds or other cash equivalents;"
>
> "'**Investor**' means the CVC Funds;"
>
> "'**Relevant Interests**' means the interests (including Equity Interests) in Caspian held by Starbev or, directly or indirectly, by the Investor …;"
>
> "'**Equity Return**' means the euro Equivalent of any Cash proceeds directly received by the Investor from a Determination Event (including, for the avoidance of doubt, any amount withheld from the Investor to be paid to ABI as an Excess Return Payment) and any amount deemed to be so under clause 4.4.2 or 4.4.3;"
>
> "'**Determination Event**' means any payment by Starbev to the Investor out of proceeds received from or in connection with (i) Distribution, (ii) Sale, (iii) Refinancing, (iv) Listing of any member of Caspian's Group and/or (v) a Winding-Up."

174. It is also relevant to note that "Trigger Event" is defined in clause 4.1.1 as occurring when the Cash proceeds received by the CVC Funds on a Determination Event

exceed both the Investment Threshold and the IRR Threshold. Also, there is a lengthy definition of the "Affiliates" of the CVC Funds (i.e. the Investor), and it is not in dispute that this includes Starbev.

Starbev's contentions

175. Starbev's case in summary is that ABI is not entitled to a declaration primarily for four reasons. First, the convertible Note was not a "transaction... that results in payments to or receipt of value by the Investor":

(1) The Note it submits was not a 'transaction' at all. It was only part of the consideration for the sale to Molson Coors. Furthermore, it did not result in payments to or receipt of value by the Investor, since the proceeds of the Note were payable to – and paid to – Starbev.

(2) Clause 4.4.3 of the CVR is designed to capture side deals with the Investor (or an Affiliate of the Investor) which are not at fair market value or other than on arm's length terms. The Note was not a side deal with the Investor – it was not a stand-alone transaction at all, and did not result in payments to the Investor.

176. Secondly, the purpose of the Note was not to reduce payments to ABI due under the CVR. It is Starbev's case that under clause 4.4.3 it cannot be the "purpose" of a transaction to reduce payments to ABI unless, objectively judged, that is the sole purpose of the transaction. It says that:

(1) The Note was negotiated and agreed at arm's length, and had a commercial rationale. It was not artificial or a sham transaction.

(2) Starbev had legitimate commercial reasons for seeking the Note as part of the consideration for the sale of the Business to Molson Coors, and Molson Coors had legitimate commercial reasons for agreeing to issue it.

(3) There were no legal, commercial or personal connections between Starbev and Molson Coors which made the Note some part of a scheme for avoiding payments to ABI.

(4) Even though the sale to Molson Coors did not cause a Trigger Event in 2012, so no sum was due to ABI, this was not the purpose of the Note. The Note enabled Starbev to take the benefit of a price rise in Molson Coors' share price, without being exposed to downside risk on the share price; it satisfied the Molson Coors management's desire for CVC to demonstrate its faith in the business by having 'skin in the game'; and it avoided money in escrow which would be 'dead money'.

177. Thirdly, even if the Note was structured "with the purpose of reducing the payments due to ABI" under the CVR within the meaning of clause 4.4.3, and even if the Note could be treated, in isolation, as a "transaction", the Note did not in fact reduce the amount of payments "due to ABI" under the CVR. But for the Note, the sale of the Business to Molson Coors would not have gone ahead in 2012 at all. If, instead of the Note, Starbev had been faced with a decision whether to sell entirely for cash in April 2012, Starbev could and would – entirely legitimately – have delayed making the sale

to Molson Coors because the economics of the transaction would have been unacceptable.

178. Fourthly, even if the Note did reduce the amount of payments "due to ABI" under the CVR, it was not by the full €500m face value of the Note:

(1) There was never any question of Molson Coors agreeing to pay an additional €500m to Starbev in cash in June 2012. Rather, if there had been no Note, then Molson Coors would have wanted an escrow of €200m to cover any possible claims for breach of warranty, which would not have been released until 2013 at the earliest.

(2) Even if Molson Coors had not insisted on an escrow, and had been willing to pay an extra €500m in cash to Starbev in June 2012 without condition, this sum could not all have been distributed to CVC Funds. Starbev would have been obliged to retain in excess of €150m, against the need to resolve any warranty claims, together with any other fees etc. Furthermore, the CVC Funds are only entitled to approximately 93.9% of any distributions by Starbev, since the CVC Funds only own 996,513 of 1,061,288 Ordinary Units in Starbev L.P, and so not all of any sums which could have been distributed by Starbev would have been paid to the CVC Funds.

179. Starbev seeks a declaration that, "The Note is not (by virtue of clause 4.4.3 of the CVR or otherwise) deemed to fall within the definition of an Equity Return".

ICEH's contentions

180. ICEH's case in summary is as follows. First, it focuses on what it submits are weaknesses in Starbev's case. Starbev contends that only transactions which have as their "sole purpose" the reduction of payments to ICEH fall within clause 4.4.3. It was suggested in oral opening that the test was alternatively whether the transaction was "without any commercial or economic justification" and that, for ICEH to succeed, it "would have to show that there was no legitimate commercial rationale for the deal with Molson Coors" (the "deal" being understood to be a reference to the Note). Starbev further tries to limit the scope of clause 4.4.3, by relying on some (but not all) of the examples of transactions provided in clause 4.4.3 as potentially being in breach of that provision. As a consequence, Starbev contends that clause 4.4.3 is only intended to apply to "artificial transactions with no commercial purpose … or, which may be the same thing, a side deal at an undervalue".

181. ICEH contends that there is no justification for the limitation of the application of clause 4.4.3 in this way. Provided that the Note (and/or the structure of the consideration for the sale of the Business to Molson Coors) had as its purpose "reducing payments due to ABI hereunder" (clause 4.4.3), the Note is to be deemed to be an Equity Return even if it has other purposes.

182. Further, and in any event, ICEH contends that on the facts the primary or dominant purpose of the Note was to reduce payments to ICEH because it was intended to ensure that the Cash proceeds received by the CVC Funds in the year of the sale of the Business, i.e. 2012, fell just beneath the Investment Threshold of 2.05x the Investment Amount, with the result that no payment to ICEH was triggered until

2013, when the Investment Threshold had risen to 2.5x the Investment Amount. The alternative commercial justifications put forward for the Note were both subordinate and speculative and not substantiated on the evidence.

183. Moreover ICEH submits that:

(1) There is no substance to Starbev's argument that the Note is not a transaction based on examples of transactions provided in clause 4.4.3 as potentially being in breach of that provision or otherwise.

(2) Whether or not the sale of the Business would have proceeded without the Note is an irrelevant consideration: clause 4.4.3 is concerned not with counterfactuals, but with what in fact took place.

184. ICEH seeks declarations as follows:

(1) Both the re-sale by the Claimant to Molson Coors Holdco-2 Inc ("Molson Coors") of the Central and Eastern European business of the Defendant ("the Re-Sale Transaction") and the €500 million Zero-Coupon Convertible Bond ("the Note"), issued by Molson Coors on 15 June 2012 to the Claimant as part consideration for the Re-Sale Transaction, were structured with the purpose of reducing payments due to the Defendant within the meaning of clause 4.4.3 of the CVR.

(2) All proceeds of the Note (to the extent that they are not lawfully distributed to investors in the Claimant other than the Investor as that term is defined in the CVR) are deemed to be an Equity Return occurring on 18 June 2012 for the purpose of determining the Internal Rate of Return, whether the Investment Threshold has been exceeded and whether an Excess Return Payment is required (all as defined in the CVR) in relation to the Re-Sale Transaction.

The facts

185. I have set out above the facts as to the sale of the business to Molson Coors, and here consider the facts in more detail so far as relevant to the anti-avoidance issue. This was the subject of documentary and witness evidence at trial. However, it should be stated at the outset that both parties are in agreement that the test of "purpose" as that word is used in clause 4.4.3 of the CVR is an objective test.

186. The point on the contract to note is that from 2 December 2012 onwards, and so far as relevant, the multiple on which the return under the CVR is calculated is 2.50 x Investment Amount. Had the sale of the business happened after that date, the structure of the transaction would not have been affected by the threshold which was thereafter constant. However, between 2 December 2011 and 2 December 2012, the multiple was 2.05 x Investment Amount, and applying the lower threshold to a sale within that period would potentially produce a bigger payment to ABI.

187. I am satisfied, and indeed I do not think it is seriously in dispute, that once it became clear in about October 2011 that an advantageous sale could be made before 2 December 2012, the deal team was concerned to structure the transaction so as to

minimise the payment that would be due to ABI under the CVR. For example, an email from Mr Obloj to Mr Szőke and others of 14 October 2011 says:

> "3. ABI EARN OUT: ABI are entitled to 40% of 'super-return' over the higher of 25% IRR and 2.05xMoM (until 2 Dec 2012) / 2.5x MoM afterwards. It is calculated based on cash actually received i.e., a partial exit before Dec 2012 with the rest in 2013 would allow to manage it. All calculations above assume that we manage that for 1 year i.e., only pay above 2.5x. In this case ABI would receive EUR 250 million in 2012; otherwise they would get EUR 400 million.
>
> 4. STRUCTURE: Our exit could be structured either as a firm '2nd tranche' in early 2013/Dec2012 or a put option for us to sell at the higher of the minimum value and some multiple of EBITDA in 2012, 2013 or later."

188. Some of the emails refer to this as "optimisation" of the structure. In an email of 16 October 2011, Mr Obloj set out an "ABI/CVR table". He said:

> "First table shows ABI CVR assuming 2.05 cut off, second with 2.5x cut off. Change obviously only in 2012 – 2013 is above 2.5x anyway. Change in the cut off would be worth EUR 130m to ABI. And since it's a zero-sum game it would also mean a loss of EUR 130m to CVC funds.
>
> NB, under the optimisation only part of the proceeds (over 2x) need to get delayed.
>
> Another topic to discuss at some stage (probably not know) is whether we could bundle some option for upside sharing (one-way) with the delayed payment."

189. I am satisfied that ICEH is right to submit that the evidence shows that the question for the deal team was how to structure a possible sale so that ICEH/ABI got less and the CVC Funds got more. I also accept the evidence of the CVC witnesses to the effect that they would only do this so far as was possible under the terms of the contract. This appears from the cross-examination of Mr Szőke, who was asked:

> "Q. And because of the zero sum game, and because as you say you regard it as your duty to maximise the returns to the CVC funds, in essence what you were trying to do was to pay as little as possible to ABI and to structure the deal accordingly.
>
> A. My duty is to maximise value to our investors so indeed what we were always thinking about is how to maximise value for our investors within the legal boundaries that any agreement allowed.

> Q. And that involved, did it not, structuring the deal accordingly, albeit within the legal bounds of the contract as you understood it?
>
> A. As long as we were doing a structure that legally allowed, yes."

190. A number ways were considered at various times of optimising the structure. In particular, I find that the CVC deal team considered the possibility of receiving a second tranche of the price in late 2012/early 2013, having a put option to sell in that period or later, using an escrow account (so as to defer the receipt of cash until the release of the escrow), and charging a 3% structuring and underwriting fee which might be moved outside the terms of the CVR.

191. As stated above, an indicative offer by Molson Coors was received by Starbev on 22 November 2011. By now, if not before, the deal team was reporting to CVC's Investment Committee (of which Mr Hansen is a member and chaired from time to time) and which is part of the funds' decision-making process. On 30 November 2011, the Investment Committee considered the deal team's Preliminary Investment Recommendation and recommended continuing the investigation of exit possibilities, appointment of advisors, and solicitation of further offers. The CVC Funds accepted the recommendation of the Investment Committee.

192. On 5 March 2012, Starbev received a bid from Molson Coors which Mr Szőke said he regarded as very disappointing. He said, "Not only was their headline offer far lower than expected, they had proposed that CVC Capital Partners Limited act as a guarantor for the seller's warranties and that EUR 200 million of the purchase price be placed into escrow to cover any warranties".

193. At this point, however, Asahi was still very much a serious bidder, and negotiations with both Molson Coors and Asahi were proceeding at about the same time. Asahi's offers had been made on 2 February 2012 and in early March 2012.

194. By March 2012, I find that negotiations were coming to a head. It was seemingly at this time that the idea was first proposed within the CVC deal team to structure the sale to include a convertible bond (convertible, that is, into Molson Coors shares on an actual or synthetic basis) which would be payable after the step-up in the Investment Threshold on 2 December 2012. This idea appears to have come late in the day—Mr Meredith's evidence was that it was introduced "not much before" 20 March 2012. In internal emails, the convertible bond is referred to as a "PIG", meaning "Przemek's Idea of Genius" (Przemek being Mr Obloj, a member of the CVC deal team).

195. On 20 March 2012 following a lengthy face-to-face meeting Starbev received a revised offer from Molson Coors. By an email sent that evening, Mr Szőke said to his team that they would go back to Molson Coors the next day to "introduce the concept of a convertible bond that is issued to us as part of the payment". They would tell Molson Coors that they were very disappointed that it had not moved on value, and would make the following points as to the "commercial logic" of the bond (which was to be in the sum of €500m):

> "The commercial logic would be as follows:
>
> - we believe in significant upside in the business and this will be reflected in the MC share price through, which we can benefit from such upside
>
> - they complained about mgmt skin in the game – this will give it as part of mgmt equity will be retained as long as the convert is outstanding
>
> - they complained about CVC skin in the game behind warranties, this somewhat achieves it and should serve as another argument to reduce escrow further
>
> - we complained about 'dead money' for our money sitting on a lengthy escrow earning nothing, this way our money at least has upside potential.
>
> - the instrument could have a term until say YE13 logic being that if they don't mismanage the business a lot of the benefits will be visible in the market by then and reflected in the share price also. this date is also before they anticipate to make their next acquisition that could 'dilute' our upside
>
> - it would have a put say after their annual earnings announcement in Feb 13, logic if we don't like the way they manage the business then we won't believe in them delivering the upside we will just cash in our chips
>
> - if they are really worried about dilution it can be a 'phantom' cash settling convertible
>
> - finally we would take out an FX hedge and buy a CDS to eliminate any credit risk
>
> The instruments have other benefits we can chat about. [*The following passage is redacted*]"

196. Additional key points were "tell them to up their price" and "SPA – comeback dependent on tomorrow morning's session". The email does not mention the role of the bond so far as the effect on the potential payments under the CVR to ABI was concerned. This was not something that Molson Coors needed to know about at this stage, and the deal team itself was well aware of that aspect of the bond. (When Molson Coors later learned about it, they required an indemnity from Starbev in respect of its obligations under the CVR.)

197. Nomura was asked to advise whether there could be an "upside" for CVC in the Molson Coors and Asahi share prices, which it did on 21 March 2012, with further analyses following over the next few days. Nomura had been CVC's investment bank in relation to the sale for some months, though it seems from emails of 16 December 2011 that Nomura was not told until later about the threshold issue concerning the

ABI and the CVR (Mr Szőke's evidence was to the effect that he did not trust investment banks because they tend to leak).

198. For the purposes of the trial, ABI has obtained through proceedings in the United States Molson Coors internal documents which include an email of 21 March 2012 between Julio Ramirez (Corporate Treasurer) and a number of other Molson Coors employees. The email says (the redactions being by Molson Coors):

> "Need your help urgently on a new development on the negotiations. The Seller objected to putting up an escrow of €175 million for up to two years.
>
> In order to address the escrow or what they call 'Dead Money' issue AND the low value of our deal, (we have refused to give in on our €[redacted] million of negative adjustments to the [redacted] multiple Purchase Price, they want us to issue them a convertible debt instrument for €500m (either straight convertible debt or synthetic convertible debt). They are willing to take 'market rates' for the convertible debt instrument and we would have the right to 'offset' any of our reps from the convertible debt versus an escrow fund.
>
> We pushed hard to get them to drop the convertible. To our surprise, they don't want the money! They have a strategic and unknown agenda for delaying the receipt of the cash on the deal...
>
> ... We believe agreeing to their demand could lead to immediate exclusivity and the ability to get a better financial deal. They have stated that we have a deal if we agree to the €500 million convertible debt and a €100 million reduction to the €[redacted] million in price adjustments. Kandy believes we could agree to all of his terms for a €[redacted] million reduction in the purchase price adjustments v. their ask for €100 million. We believe the synthetic instrument would costs us less than the €[redacted] million purchase price adjustment. We also believe that depending on how the instrument is constructed, we could get favourable Rating Agency treatment (50% to 100% equity treatment), and partial interest deductibility."

199. It is plain from this that the introduction of the convertible bond came as a complete surprise to Molson Coors, which "pushed hard" to get CVC to drop it. On the other hand, the email also shows that the deal remained attractive to Molson Coors which thought that agreeing to the bond "could lead to immediate exclusivity and the ability to get a better financial deal". I do not think it is in dispute but in any case I am satisfied that CVC's "strategic and unknown agenda" for delaying the receipt of €500m mentioned in this email is a reference to the CVR and the lesser sum that would be payable under it to ABI as a result.

200. The position is shown by calculations which Mr Meredith emailed to Mr Szőke late in the evening of 21 March 2012. The attached calculations show that as at that date

Molson Coors had made an offer with a shareholder value of €1,879m, as against an offer from Asahi of €2,105m. On that basis, Asahi's offer was significantly ahead. However, when the €500m convertible bond was factored into the Molson Coors offer, the effect on the CVR payment to ABI meant that the net proceeds for the CVC Funds would be €1,786m as against net proceeds under the Asahi offer without the convertible bond of €1,784m. In other words, the offers came out as almost the same.

201. CVC had a short meeting with Asahi on 22 March 2012 which said that (subject to a minor adjustment) they had made their final offer, and that CVC should come back on it by the end of the week. According to an internal email from Mr Szőke which states this, he did not think that CVC should sell at the price being offered, but he preferred the deal with Molson Coors:

> "Please find attached the current economics of the deal. As you can see they are virtually identical but Molson has upside attached to it. It is trading at 7.6x; if the US market continues to trade up and particularly if ABI makes a move on SAB there is material upside in the stock, which we would benefit from through the convert.
>
> Our assessment:
>
> MC
>
> - Momentum to do a deal
>
> - Moved a lot on the SPA, still large escrow and some warranty issues but should get there quickly
>
> - Importantly 'we speak the same language' and we think they are painful but straight
>
> Asahi
>
> - Difficult to read
>
> - Have not negotiated the SPA at all [*redacted passage*]
>
> - Don't have the same confidence in them staying the course although this may strengthen after their AGM on Tuesday [*27 March 2012*]"

202. The precise chronology is unclear, because many meetings were happening at this time, and the evidence focused (understandably) on Molson Coors rather than Asahi. At some point about this time, CVC put the convertible bond proposal to Asahi. The amount was €900m, but otherwise it is to be inferred that it was much the same proposal for much the same reasons as that in the case of Molson Coors. According to Mr Szőke, the proposal did not elicit a response from the Asahi team, which he says he attributed to their negotiating style.

203. However a response was solicited on his behalf by Mr Obloj, who contacted the member of the Asahi negotiating team who spoke fluent English. He reported to Mr

Szőke in an email of 23 March 2012: "She sounded a bit surprised that we want this instrument - they may have really thought we are trying to trick them."

204. Had Asahi gone for the note, it would have given it a €100m advantage over Molson Coors. In an update to the Investment Committee dated 22 March 2012, the deal team said that, "We have also told Asahi through Rothschild that if they offered us a convertible as part of the payment they can have the deal. We are awaiting their response".

205. The response came on 23 March 2012 and it was negative. Asahi was not prepared to "settle a portion of the offer consideration with a convertible bond or a synthetic convertible bond". In forwarding the email to his team, Mr Szőke said that he assumed that "we should concede to the Japanese and still go ahead with the SPA discussion over the weekend". However, on 24 March 2012, which was a Saturday, Asahi (in Mr Szőke's words) dropped a bomb to the effect that it wanted confirmation by 6 pm the following day that it had a deal. This was effectively the end of the prospect of a deal with Asahi.

206. The last major steps in the negotiations with Molson Coors were concluded speedily, with Molson Coors increasing the value of its offer, and agreeing to the main elements of the convertible bond, including that, "Any escrow amounts would be 'rolled in' the convertible, i.e. no dead money". Nomura continued to provide the deal team with equity research notes on Molson Coors shares. By 27 March 2012, the terms of a convertible Note were largely agreed. The deal team's Final Investment Recommendation of 27 March 2012 recommended the sale to Molson Coors to the CVC Investment Committee, which approved it on 2 April 2012. The SPA was entered into with Molson Coors on 3 April 2012, and the sale completed on 15 June 2012.

207. The convertible Note was issued at completion. It is quite a complex instrument, and the terms are conveniently summarised in Starbev's submissions:

(1) The Notional Initial Number of Shares was 12,894,044 (section 21(u)), being the number of Molson Coors shares which (after application of a conversion premium of 15%: section 21(g)) had a notional value of €500m.

(2) The 'First Redemption Date' was 14 March 2013: section 21(o). The 'Conversion Period' ran from First Redemption Date to 19 December 2013: section 21(h). During this period, Starbev ('Holder') could at its option either:

a) put the Note in full for the Principal sum of €500m, or

b) put the Note in full for cash in an amount equal to the Principal plus the Upside Amount (being the increase in the value of the Notional Initial Number of Shares): section 2, section 21(ff).

If not put earlier, the Note would mature on 31 December 2013: (section 1).

(3) Molson Coors retained the option to redeem the Note early, if during the Conversion Period its share price had increased such that the parity value of

the Notional Initial Number of Shares was consistently above 140% of the Principal amount: section 3.

(4) On redemption or maturity, Molson Coors was obliged to settle the Principal amount in cash, but could settle any Upside Amount in shares, at its option: section 4(a).

(5) The Note could not be transferred, absent the consent of Molson Coors and its parent: section 9.

(6) The Note was governed by New York law: section 20.

208. The number of Molson Coors shares was "notional" because this was a synthetic instrument—actual shares would not change hands. In short, the Note was zero-coupon (i.e. interest free), but after 15 March 2013 Starbev had a put option by which it would receive the principal plus any increase in the value of the notional shares above a 15% threshold. If the option was not put, the Note would mature on 31 December 2013 for its face value, i.e. €500m. This is why the Note is described as having an upside potential, since Starbev would not receive less than €500m but could receive more if the Molson Coors share price rose by more than 15%. There was of course a credit risk involved in this arrangement, which the evidence is that CVC considered hedging by taking out a credit default swap at an estimated cost of €3m, though it appears that this did not happen in the end.

Discussion and conclusions

General points

209. Mr Goncalves says that at the time of negotiating the CVR, he was concerned that CVC would attempt to avoid its payment obligations, which "caused me to fight for the inclusion of the anti-avoidance provisions in the CVR". That may be so but is of no relevance to what I have to decide. It is however a fair inference that clause 4.4 of the CVR received close attention from both parties when the contracts were being concluded. This cannot have been an easy subject to provide for, and it is not surprising that the agreed terms are far from straightforward to construe.

210. There are a number of general points to make. The first goes to the parties' intention. In construing the contract in this case, it is not necessary to infer what the parties' intention was. This is because clause 4.4.1 of the CVR (which I have set out above) specifically states that it is the intention of the parties that ABI shall be entitled to participate in the return of "Cash proceeds" received by CVC derived from its interests in the business.

211. The term "Cash" is a defined term (see above). ICEH says that the term, in its natural and ordinary meaning, is intended to encompass cash and highly liquid investments that are readily convertible to known amounts of cash. I agree with that submission, but in any case there was no dispute about this. It is not ICEH's case that receipt of the Note was receipt of Cash. Its case is that the Note is deemed to be an Equity Return pursuant to clause 4.4.3 of the CVR.

212. ICEH's pleaded case is that the "Cash proceeds of the Convertible Note when they were in fact received fell within the definition of Equity Return in the CVR". This is on the basis that within the definition of "Equity Return", as well as Cash proceeds received by the Investor, is any amount deemed to be so under clause 4.4.3. ICEH's case (as it confirmed in closing) is that the proceeds when received by CVC in August 2013 were subject to the 2.05 threshold, rather than the 2.50 threshold.

213. It may be noted that ICEH's case is that it reaches the same result by a different route. This is the subject of the fourth issue which I have to decide, and it is based on the premise that ICEH is correct as to the Investment Amount with the consequence that the threshold was exceeded on the completion of the sale to Molson Coors. On its construction of the CVR, once exceeded, the Investment Threshold does not change, and so the 2.05 threshold would apply to the proceeds of the Note when received in August 2013. However, for reasons explained earlier, I have held as a matter of construction of the CVR that the Investment Amount was as Starbev and not as ICEH has contended, so that this route is closed.

214. Second, Starbev submits that the CVC Funds are fully entitled to act in their own commercial interests. They are not required to have regard to ABI's interests on a par with their own, still less to put ABI's interests first, and have no obligation to consult ABI or have regard to its views. They can decide to hold or exit the Business, and to hold profits within the Starbev structure or to distribute them as they see fit. They can sell all the assets of the Business at once, or piecemeal. They can structure the consideration which they received as they think fit, including by way of an earn-out mechanism or a vendor loan note (each of which was used in the original sale from ABI). There is no obligation on Starbev to exit the Business or to make a distribution to the CVC Funds at any particular time. On the contrary, the CVR and the SPA make clear that it is entirely up to Starbev for how long it wishes to delay exiting the Business or making a Distribution. Equally, Starbev says, there was no restriction on Starbev including an element of deferred consideration in any sale of the Business. It is common in private equity transactions for there to be some element of deferred consideration, in the form of vendor loan notes, earn-outs or the like, just as there was when Starbev acquired the Business from ABI.

215. In support of these submissions, Starbev sent me a copy following the end of the trial of the recent decision in *Barclays Bank PLC v Unicredit Bank AG* [2014] EWCA (Civ) 302. (*Porton v 3M* [2011] EWHC 3895 2895 (Comm) was cited in its opening written submissions.) In the *Barclays* case, the court was considering the question of what is "commercially reasonable" in the context of determinations made by parties to financial instruments. Longmore LJ (with whom Patten LJ and Christopher Clarke LJ agreed) held that in deciding whether a party had acted in a "commercially reasonable manner", the party under the obligation is entitled to take account of its own interest in preference to the interest of the other party. He said at [17]:

> "Mr Robin Knowles QC for Unicredit submitted that the purpose of requiring the determination to be made by Barclays in a commercially reasonable manner was to require Barclays to have regard to the interests of Unicredit as its counterparty in order that a mutual (or a mutually satisfactory) outcome could be achieved. Attractively as the submission was put, it is impossible to see how it could work in practice. Bankers, as

> commercial men, have a keen instinct for where their own interests lie. But if they are asked to have regard to the interests of the other party to the contract, how do they begin to assess what those interests are, let alone weigh those interests in comparison to their own interests? If the clause is to work in the way Mr Knowles suggests, there would have to be some method of discovering and assessing the counterparty's interests. The obvious way to do so would be to ask the counterparty what their interests were. But is Barclays to be expected to take the answer at face value? That might be beneficial to the counterparty but not be a balanced or accurate assessment of the counterparty's interest. Could Barclays ask that the counterparty's account of its own interests be backed up with documentary evidence? If so, it might be a long process; if not, it might lead to an unfair result. If this sort of exercise were envisaged, one would expect a neutral third party to be allotted the task of determining whether consent should be given but that is not what the clause says."

216. ICEH's response is that Starbev's approach fails to take account of the terms of the CVR. It cites clause 2.3 which provides that "Starbev agrees to cooperate in good faith at all times from and after the date hereof to give effect to the Contingent Value Right and the payment of each Excess Return Payment ….", clause 6.1 which provides that "Starbev agrees that it shall not, without the prior written consent of ABI, consent to, or take any action that adversely affects the rights of ABI under this Agreement", and clause 10.4 which provides that "This Agreement sets out the objectives and the commercial arrangements agreed between the parties. Accordingly, each party shall take all actions (including in relation to Starbev voting its Equity Interests) and exercise its rights under this Agreement to achieve these objectives and to implement these arrangements".

217. ICEH's fundamental point is that Starbev's insistence that it can act without regard to its interests is only valid until the thresholds in the CVR are exceeded. It is correct, ICEH says, that the CVC Funds could do whatever they wanted to maximise their return until the thresholds were exceeded, but once that had happened, what was contemplated by the contract was that there would be a sharing of the "super return" on a 40/60 basis. The CVC Funds were not entitled to maximise their return at ABI's expense.

218. In my view, both parties' submissions are correct, but with qualifications. As a subsidiary point, there was little similarity between the deferred consideration agreed in respect of the sale by ABI and that agreed on the sale to Molson Coors. In the first case, the deferred consideration in the CVR was agreed by both parties as a means to bridge the gap between them. In the second, the idea of the Note came from CVC, and (at least initially) to quote from its internal email Molson Coors "pushed hard to get them to drop [it]".

219. More important, whilst I of course entirely accept that CVC had freedom of action to act in its own interests, this was subject to the terms of the contract. This was not a contract like that in *Barclays v Unicredit*, where the obligation in question was to act in a "commercially reasonable manner". The CVR gives rights to ABI to share in an

"Excess Equity Return" (clause 4.1.1), and imposes concomitant obligations on Starbev, and deems certain transactions to be Equity Returns for this purpose to the extent that the transaction has reduced the amount of the payments due under the CVR. This is completely different from *Barclays v Unicredit*.

220. Likewise, whilst ICEH is right to submit that these constraints to CVC's freedom of action apply once the contractual thresholds are exceeded, this does not provide an answer to the question when the thresholds are exceeded. The issue raises the following questions which I have taken from Starbev's submissions.

(i) Was the Note a "transaction … that results in payments to or receipt of value by the Investor"?

221. Starbev's contention is as follows. Any construction of clause 4.4 must start with clause 4.4.1, which sets out the intention of the parties. The intention is that ABI shall be entitled "to participate in the return... of Cash proceeds received by the Investor and derived from the Relevant Interests". This mirrors the definition of Investment Amount, which is the "aggregate Cash investment... made by the Investor... and applied... in acquiring Relevant Interests". The focus is on the position of the CVC Funds: if Cash proceeds are not "received by the Investor", then there is no intention that ABI shall be entitled to any participation.

222. Clause 4.4.2 then seeks to make further provision "in accordance with clause 4.4.1". Again, the focus is on any transaction "between the Investor and/or its Affiliates and any member of Caspian's Group ... that results in payments to or receipt of value by the Investor or any of its Affiliates ...". Unless there is a "payment to or receipt of value" by the Investor (or an affiliate), the parties did not intend that ABI should have any rights.

223. This is, Starbev submits, the context in which clause 4.4.3 falls to be construed. It applies only where there is "any other transaction that is structured or undertaken that results in payment to or receipt of value by the Investor and/or its Affiliates, with the purpose of reducing the payments due to ABI hereunder...". There are two discrete elements to this definition: first the transaction in question must "result in payments to or receipt of value by the Investor and/or its Affiliates"; secondly it must be "with the purpose of reducing the payments due to ABI hereunder".

224. This clause, Starbev submits, is intended to catch a circumstance where the Investor does receive a payment or other value – but in a manner which is structured by Starbev or the Investor with the purpose of reducing the payments due to ABI (and for no other commercial reason). Clause 4.4.3 gives some particular examples of what is anticipated including (a) a Reorganisation, (b) an issue of shares etc other than on arm's length terms or at less than at Fair Market Value, (c) the sale or transfer of assets by Caspian's Group to the Investor or one of its Affiliates other than on arm's length terms, and/or (d) any other transactions that are made between a member of the Caspian Group and the Investor or one of its Affiliates other than on arm's length terms.

225. In summary, Starbev says that the Note was not a 'transaction' at all. It was only part of the consideration for the sale to Molson Coors. Furthermore, it did not result in payments to or receipt of value by the Investor, since the proceeds of the Note were

payable to – and paid to – Starbev. Clause 4.4.3 of the CVR is designed to capture side deals with the Investor (or an Affiliate of the Investor) which are not at fair market value or other than on arm's length terms. The Note was not a side deal with the Investor – it was not a stand-alone transaction at all, and did not result in payments to the Investor.

226. As is apparent, a number of points are made by Starbev under this head. It submitted that the Note did not result in payments to or receipt of value by the Investor since the proceeds of the Note were payable and paid to Starbev. But as ICEH pointed out, clause 4.4.3 extends to "Affiliates", and Starbev accepted in closing that it fell within that definition. In any case, it is not in dispute that proceeds were paid on by Starbev to the CVC Funds.

227. Otherwise, some of the above is uncontroversial, and in particular it is common ground that clause 4.4.3 has to be read with clause 4.4.1. Further, I accept Starbev's submissions that clause 4.4.3 has two discrete elements, one relating to the transaction, which is the one under discussion, and the other relating to the purpose of the transaction, which comes next.

228. ICEH does however take issue with the proposition that clause 4.4.3 is designed to capture side deals with the Investor (or an Affiliate) which are not at fair market value or other than on arm's length terms. This is because the list of transactions in clause 4.4.3 begins with the word "including", and clause 1.2 of the CVR expressly provides:

> "In this Agreement, general words shall not be given a restrictive meaning by reason of their being preceded or followed by words indicating a particular class of acts, matters or things by examples falling within the general words. Any phrase introduced by the terms … "including" … or any similar expression shall be construed as illustrative and shall not limit the sense of the words preceding those terms."

229. I agree with Starbev that the convertible Note differs from the transactions in the illustrative list in clause 4.4.3 since it was indisputably made on arm's length terms. However, I accept ICEH's submission that the four instances set out in clause 4.4.3 are not exclusive examples, and in its submissions Starbev did not argue to the contrary. It is therefore effectively common ground that in addition to those listed, clause 4.4.3 can apply to "… any other transaction that is structured or undertaken that results in payment to or receipt of value by the Investor and/or its Affiliates, with the purpose of reducing the payments due to ABI hereunder...". The question is whether the Note was such a transaction.

230. Starbev says that the Note was not a 'transaction' at all, being only part of the consideration for the sale to Molson Coors. ICEH submits that the Note was both a transaction in its own right, giving rise to contractual obligations between the parties as set out in the legally-binding terms of the Note, and part of a wider transaction that was structured so as to reduce payments to ICEH.

231. I prefer the submissions of ICEH in this respect. The Note was clearly part of the consideration for the sale of the business to Molson Coors. It is not (as Starbev put it)

a standalone transaction, but equally it appears to me that a note of this kind, and the issue of the note by the purchaser and its acceptance by the seller as part of the consideration, is a "transaction". I can see no reason to exclude the Note from the scope of clause 4.4.3 on this basis.

232. Finally, under this head is a point discussed in closings. The entitlement to participate in CVC's return arises in respect "of Cash proceeds received by the Investor". (Where clause 4.4.3 applies, it is common ground that that includes Affiliates.) ICEH's case is that the Note, as part of the sale transaction, is deemed to be an Equity Return for the purpose of determining whether an Excess Return Payment is required in relation to that transaction to the extent that the Note has reduced the payments due to ICEH under the CVR. Accordingly, it says that the proceeds of the Note available for distribution (which it says is €466,118,955 at the date of trial) are deemed to be an Equity Return occurring on 18 June 2012 – this is the date of Notification to ABI of the Distribution to the CVC Funds following completion of the Molson Coors sale. It submits that the proceeds received by CVC in August 2013 were subject to the 2.05 threshold applicable in June 2012, rather than the 2.50 threshold applicable at the time of receipt.

233. ICEH expresses this in the declaration it seeks: "All proceeds of the Note (to the extent that they are not lawfully distributed to investors in the Claimant other than the Investor as that term is defined in the CVR) are deemed to be an Equity Return occurring on 18 June 2012 for the purpose of determining the Internal Rate of Return, whether the Investment Threshold has been exceeded and whether an Excess Return Payment is required (all as defined in the CVR) in relation to the Re-Sale Transaction".

234. Starbev's response to this is that nothing was received by CVC under the Note until September 2013. (It is also the case that at completion on 15 June 2012 it was not known precisely what would be received under the Note, because this depended on the amount of Molson Coors' breach of warranty claims, which was a potential minus, and any rise in Molson Coors' share price, which was a potential plus.)

235. The position appears to me to be as follows. The definition of "Equity Return" in the CVR includes not only "Cash proceeds directly received by the Investor" but also "any amount deemed to be so under clause 4.4.2 or 4.4.3". That fits with the deeming language in clause 4.4.3 which has the effect that each transaction that falls within it is "… deemed to be an Equity Return for the purposes of determining … whether an Excess Return Payment is required … solely to the extent that such transaction has reduced the amount of the payments due hereunder". As ICEH says, the convertible Note did reduce the amount of the payments due under the CVR. On this basis, I consider that ICEH is correct in its construction of the deeming provisions in the CVR. Though nothing was in fact received in June 2012, what was received later is deemed to be received then if the provisions of clause 4.4.3 otherwise apply. As to that, the principal issue as argued at trial is whether the purpose of the Note was to reduce payments to ABI due under the CVR, and what is meant by "purpose" in this context.

(ii) Was the purpose of the Note to reduce payments to ABI due under the CVR?

236. This was the question upon which argument mainly focused at trial as regards this part of the case. It raises two points, the first being as to the construction of the term "the purpose" in clause 4.4.3 of the CVR, and the second being its application on the facts, the parties being in agreement that an objective test is to be applied.

The construction point

237. On the construction point, the parties' cases are straightforward. Starbev's case is that the purpose of a transaction must be assessed objectively, and it cannot be the purpose of a transaction to reduce payments to ABI unless, objectively judged, that is the *sole* purpose of the transaction. 'The' in clause 4.4.3 is a definite article, and it limits the number of purposes to one. If there is any commercial purpose to the transaction, other than reducing payments to ABI, then the purpose is not reducing payments to ABI. The examples given in sub-paragraphs (b) to (d) of this clause emphasise this requirement: each envisages a contrived or artificial transaction which is concluded other than on arm's length terms, or other than at a fair price – without any commercial basis. Where the parties to a transaction are dealing at arm's length – without legal, economic or personal links – then the transaction is extremely unlikely to be artificial, or to lack a commercial purpose. In such circumstances, the purpose of the transaction will not be to reduce payments under the CVR.

238. ICEH's case is that having regard to the object of clause 4.4.3 in the context of the agreement as a whole, it would be perverse, in the absence of any other compelling reason, if clause 4.4.3 were construed narrowly, as Starbev contends, so as to apply only to exceptional and extreme cases i.e. cases where a transaction was structured with the sole purpose of reducing the payments due to ABI and for no other commercial purpose.

239. Such a construction, ICEH submits, would provide Starbev with a licence to defeat the object of the clause and promote its interests at the direct expense of ICEH's right to share in the "super return", on the pretext that a structure had some other (if insignificant) commercial rationale. There are no compelling reasons for the Court to adopt such an approach which would be contrary to the ordinary principles of construction of such provisions. In particular:

    (1) There is no linguistic reason why the use of the definite article "the" in the words "with the purpose of reducing the payments due to ABI hereafter" should be read as meaning "the sole purpose" or "the only commercial purpose". The use of the definite article may imply singularity or uniqueness, but is equally capable of being used in a non-specific way, indicating only a requirement that the transaction has a specific particular purpose, whatever other purposes it also has.

    (2) Starbev's construction is contrary to *Hayes v Willoughby* [2013] 1 WLR 935.

    (3) The application of the "purpose" test is intended to be a straightforward exercise. This follows from the fact that, in the event of a dispute, clause 4.4.3 is intended to be applied by accountants pursuant to clause 14.1 of the CVR, and not by the courts.

240. In the light of its object, therefore, ICEH submits that clause 4.4.3 is to be interpreted as applying where one purpose of the transaction structure is to reduce the payments due to ICEH. This is because such a purpose (whatever the other purposes of the "structure") will of itself defeat the object of ensuring that, once the thresholds are exceeded, ICEH is entitled, in parity with Starbev, to participate in the "super return" to the extent of 40%. Such an interpretation additionally ensures that the test embedded in this provision is capable of being applied in a straightforward manner by accountants, who are not well-equipped to analyse the niceties of distinctions that might be made by lawyers between "dominant", "subordinate" and other purposes.

241. In the alternative, ICEH submits that clause 4.4.3 is to be interpreted as applying where the principal or dominant purpose of the transaction structure is to reduce the payments due to ABI. This is on the basis that (i) such an interpretation accords with ordinary principles in circumstances where (ii) there are no grounds to displace those principles.

Discussion and conclusion on the construction point

242. My conclusion on the point of construction is as follows. In my view, to construe the term "the purpose" as meaning "the sole purpose" gives the term read in context a construction that is too narrow. This is for the reason given by ICEH, namely that such a construction would deprive the term of most if not all effect. I do not think that this is required on the basis that the word "the" comes before the word "purpose".

243. Nor do I think that Starbev is correct to submit that any other construction would impermissibly require it to subordinate its interests to those of ABI. The *Barclays Bank v Unicredit* case (see above) relied upon does not support this point, since the obligation imposed on Starbev by the CVR is not analogous to an obligation to act in a "commercially reasonable manner". In the CVR, Starbev agreed to a term which imposed certain consequences in relation to a transaction "with the purpose of reducing the payments due to ABI hereunder". The term "purpose" is used in the context of clause 4.4.1, which records that it is the intention of the parties that ABI should be entitled to participate in the return of Cash proceeds received by CVC.

244. On the other hand, I consider that ICEH's primary construction, namely that clause 4.4.3 is to be interpreted as applying where one purpose of the transaction structure is to reduce the payments due to ICEH, is too wide. As Starbev says, the implication would be that it was not entitled to take into account the amount of payments due to ABI at all when structuring the on-sale, which would give the clause a very wide effect.

245. In *Hayes v Willoughby* [2013] 1 WLR 935, the Supreme Court considered the meaning of the term "the purpose" in the Protection from Harassment Act 1997. Lord Sumption (with whom Lord Neuberger and Lord Wilson agreed) said at [9] when considering whether the test for purpose was subjective or objective:

> "The starting point of any analysis of this question is that there is no general rule as to how purpose is to be established when it is relevant to a crime or civil wrong. When purpose is relevant to the operation of a statutory provision, the question will depend on the construction of the statute in the light of the

> mischief to which it is directed. When it is relevant to a rule of common law, the answer will normally be found in the object of the rule. In his concurring judgment in the High Court of Australia in *Williams v Spautz* (1992) 174 CLR 509, para 4, Brennan J attempted a partial definition of purpose in the context of the tort of abuse of process, which is committed when a person conducts litigation for a purpose other than that for which the court's process is designed:
>
> > "Purpose, when used in reference to a transaction, has two elements: the first, a result which the transaction is capable of producing; the second, the result which the person or persons who engage in or control the transaction intend it to produce. Or, to express the concept in different terms, the purpose of a transaction is the result which it is capable of producing and is intended to produce."
>
> This is probably as much as can usefully be said in general terms about this protean concept."

246. He went on to decide that the appellant in that case could not be regarded as having had the relevant purpose. He added at [17]:

> "In these circumstances, it is strictly speaking unnecessary to decide whether the purpose specified in section 1(3)(a) must be the sole purpose of the alleged harasser. But I should record that Mr Allen QC (who appeared for Mr Hayes) did not attempt to defend this particular ground of the Court of Appeal's decision and in my view it was indefensible. A person's purposes are almost always to some extent mixed, and the ordinary principle is that the relevant purpose is the dominant one."

247. This is authority for the proposition that "the ordinary principle is that the relevant purpose is the dominant one". Starbev sought to distinguish it on the basis that it was concerned only with the case of subjective intention. I do not read the judgment as restricted in that way. Although stated in the context of a statutory provision, the ordinary principle can in my view equally apply to a contractual provision where the test of purpose is objective or subjective. I consider that it applies to the term "the purpose" as used in clause 4.4.3 of the CVR. I further consider that reading the term "the purpose" as meaning "the dominant purpose" is correct both in context, and having regard to the commercial purpose of the CVR as a whole. Such a construction respects the CVC Funds' right to pursue their own interests, whilst giving effect to the expressed intention of the parties in entering into the CVR.

248. However, I do not accept ICEH's submission that there is no distinction between "purpose" and "effect" in this context. The concepts are different, even where the contract is concerned with objective rather than subjective purpose. I need say no more about this.

The purpose of the Note

249. The parties are agreed that the test of "purpose" as that word is used in clause 4.4.3 of the CVR is an objective test. The judgments in *Hayes v Willoughby* show that distinctions between subjective and objective purpose may not always be easy to draw, but that is not something that causes difficulties in this case. My findings would have been the same had the test been subjective.

250. I have dealt with many of the factual issues above, to which I make reference. I should deal first with the suggestion in Mr Szőke's evidence as to how the convertible Note emerged. He suggests in his witness statement that he decided to propose the concept of a bond convertible into Molson Coors shares to overcome issues as to the low valuation of the Molson Coors offer, its insistence on a large escrow, and its concern that there would be a lack of "skin in the game" from the CVC Funds and Starbev management after the sale. He says that he set out his reasoning in an email to the rest of the deal team on the evening of 20 March 2012.

251. I have set out the relevant parts of that email above. It does not, however, as Mr Szőke suggests in his witness statement, set out to the deal team his reasoning for introducing the bond. It sets out what he proposed the deal team should say to Molson Coors the next day by way of justification for the introduction of the bond. As I have said, internal emails obtained by ABI from Molson Coors through proceedings in the United States have shown that the idea of the convertible bond at a late stage in the negotiations came as a complete surprise to Molson Coors, and I am satisfied that Mr Szőke anticipated this.

252. Starbev identifies a number of matters which it says show the purpose of the Note. First, it submits that the Note exposed Starbev to the potential of significant upside in the Molson Coors share price. This potential it says was identified by both Nomura and the CVC deal team.

253. However, as ICEH points out, Nomura did not produce a document dealing with convertible bonds until the afternoon of 21 March 2012. That was the day the idea of the bond was introduced to Molson Coors and Asahi. Further material from Nomura followed over the next few days. So far as the deal team was concerned, I am satisfied that the proposal for the bond pre-dated input from the investment bankers.

254. It seems that an analysis of the Molson Coors share price was sought on 22 March 2012. ICEH says that the documents disclosed do not show that the prospects for a rise in Asahi's share price was investigated, which one would have expected since a Note was also proposed to Asahi, but I do not have the material to make findings in that regard. What is significant in my view is that the Molson Coors share price had to rise by more than 15% before there was any upside for Starbev. (As a matter of fact, the share price reached about 17% in August 2013 when Starbev exercised the put option. This produced a return of €10m, which was clearly modest given the fact that the Note amounted in substance to an interest-free loan of €500m which had been outstanding by then for over 12 months, but that is hindsight.)

255. Second, Starbev says that the Note "satisfied Molson Coors' requirement" for both CVC and management of the business to retain "skin in the game", since they stood to gain from any increase in the Molson Coors share price thereafter. However, this is contradicted by the fact that Molson Coors did not at least initially want the convertible Note, and in any case the point is in my view marginal.

256. Third, Starbev submits that the Note took the place of any escrow that would be required in relation to breach of warranty claims. Rather than money sitting in Starbev's bank accounts unused as "dead money", the escrow was rolled up in the Note. On the other hand, as Mr Szőke himself points out, by 27 March 2012 it had been agreed that the escrow amount for warranty claims would be limited to €50m which is a small sum compared to the amount of the payment being deferred.

257. Starbev also submits that from Molson Coors' perspective, the Note gave them a deal which would not otherwise have been done. However, I am satisfied that Molson Coors was quite prepared to do a deal for full payment at closing and expected to do so until late in the negotiations. The idea of the Note came from CVC, and as stated was initially resisted by Molson Coors. As already noted, Molson Coors subsequently required an undertaking and indemnity in the SPA from Starbev in respect of Starbev's obligations to ICEH under the CVR.

258. As against these points, the following matters appear to me to be relevant. As I have explained, once it became clear in about October 2011 that an advantageous sale could be made before 2 December 2012 (when the threshold stepped up), the deal team was concerned to structure the transaction so as to minimise the payment that would be due to ABI under the CVR. I am satisfied that the convertible Note was the structure which in the event they decided upon.

259. As appears from the Final Investment Recommendation of 27 March 2012, the effect of the bond was to reduce the proceeds payable on closing from €1,930m to €1,430m. As ICEH says, Starbev's case is that it was proceeding on the basis that the Investment Amount was €717.5m. The Investment Threshold prior to 2 December 2012 was 2.05 x the Investment Amount. It follows (ICEH says) that on Starbev's case the Investment Threshold above which ABI would participate in the CVC Funds' return was €1,470.8m, which is just above what was paid in cash on closing, that is €1,430m. I do not think that this was challenged. I do not think it is in dispute, but in any case I am satisfied, that the figure of €500m was chosen for the Note because it brought the numbers below, and just below, the threshold that would have required the payment of an Excess Equity Return to ABI.

260. As explained elsewhere, the effect of even the relatively small uplift of €20.4m in the Investment Amount is (ICEH says) sufficient to have the effect that by a narrow margin the threshold would have been exceeded in June 2012. The precise figures are not the subject of determination in this action. However I do not think it is in dispute, and in any case I am satisfied, that the Note was designed so that the maximum return would be payable to the CVC Funds on the closing of the Molson Coors sale, by ensuring that the amount received at closing came in just below the threshold applicable at that time so as not to trigger any return to ABI, by postponing the balance until the threshold rose from 2.05 to 2.50. Given the question under consideration, this is highly relevant.

261. Further, whereas the financial advantage of postponing the receipt of the funds was both certain and very substantial, any rise in the Molson Coors share price was necessarily speculative. As ICEH points out, its base case as presented in the deal team's Final Investment Recommendation shows a "€34m incremental CVC proceeds after payment under the CVR to ABI". I agree with ICEH that the upside case implying a 63% increase in the Molson Coors share price was only ever fanciful.

262. I appreciate that both the 27 March 2012 Final Investment Recommendation and the 2 April 2012 minutes of Starbev GP recording the decision to conclude the sale to Molson Coors record that, to quote the latter, "[t]he purpose of the Consideration Note is to permit Starbev Limited Partnership to participate in the potential upside in the Purchaser's share price following the transaction". However, it is to be inferred that Starbev was well aware at this time of the possible impact of clause 4.4.3 of the CVR, and I cannot give this great weight when deciding objectively as to the purpose of the Note.

263. In conclusion, and applying the objective test, I find that the sale of the Business to Molson Coors and the Note were structured with the purpose of reducing payments due to ABI within the meaning of clause 4.4.3 of the CVR. I do not, however, consider that this was the sole purpose. This is because I am satisfied that the ability to participate in the potential upside in the Molson Coors share price following the sale was a material consideration so far as CVC was concerned. I also consider that there was some benefit to CVC in having the escrow rolled up in the Note so as to operate (in effect) by way of set off. However, these considerations were in my judgment very much subsidiary. I am satisfied that the reduction of payments which would otherwise have been due to ABI was the dominant purpose.

(iii) Did the Note in fact reduce the amount of the payments due to ABI, if the sale to Molson Coors in 2012 would not have gone ahead without it?

264. Starbev submits that even if the Note was structured "with the purpose of reducing the payments due to ABI" under the CVR within the meaning of clause 4.4.3, and even if the Note could be treated, in isolation, as a "transaction", the Note did not in fact reduce the amount of payments "due to ABI" under the CVR. But for the Note, the sale of the Business to Molson Coors would not have gone ahead in 2012 at all. If, instead of the Note, Starbev had been faced with a decision whether to sell entirely for cash in April 2012, Starbev could and would – entirely legitimately – have delayed making the sale to Molson Coors because the economics of the transaction would have been unacceptable.

265. ICEH's case on the facts is that even without the Note, it was a very good deal for CVC, and that the evidence of Mr Watt for Starbev that but for the Note there would have been no sale of the business is not credible.

266. The background, as I have explained above, is that very late in the negotiations and following the deal team's request for a convertible bond, Asahi effectively dropped out. CVC was left, therefore, with a single bidder. In those circumstances, I have no doubt that having come that far the deal team would have done everything possible to clinch a deal with Molson Coors. On the other hand, though the process was driven by the deal team, the Investment Committee had the final say. Despite the fact that it was common ground at trial that the multiple of EBITDA in the Molson Coors offer compared with that in the purchase from ABI (11 as against 6.7) made this a successful investment for CVC, Mr Watt said that the feeling of the committee was that the decision was a marginal one because more was hoped for, and that the deal could have been rejected.

267. I accept Mr Watt's evidence that the deal could have been rejected by the Investment Committee. However, I consider that the main reason that the sale to Molson Coors

in April 2012 would not have gone ahead without the Note is not because CVC would have missed out on the possibility of sharing in an increase in the Molson Coors share price (which on CVC's base case was worth €34m) but because of the effect on the CVR payment to ABI (which showed a gain of €129m if the cash proceeds did not exceed the Investment Threshold until 2013).

268. The question is whether anything follows from that finding as a matter of law. Starbev's submission is based on the closing words of clause 4.4.3 which provide that a transaction shall be deemed to be an Equity Return "… solely to the extent that such transaction has reduced the amount of the payments due hereunder". I agree with ICEH that these facts do not bring the case within the closing words of the clause. By clause 14.1, which is part of the dispute resolution mechanism, in the event of disagreement between the parties as to how to calculate the Excess Return Payment, the parties are to appoint independent accountants to make their own good faith determination. This is clearly intended to be an arithmetic exercise, and it cannot have been envisaged that (as ICEH put it) the accountants should "perform a counterfactual enquiry into what might have taken place had events been other than they in fact were". The fact is that the transaction including the Note did go ahead, and the court has to decide whether the anti-avoidance provisions apply to it. I accept ICEH's contention that Starbev's submission is irrelevant as a matter of law.

(iv) Even if the Note did reduce the amount due to ABI, was it to the extent of its €500m face value?

269. Starbev submits that there was never any question of Molson Coors agreeing to pay an additional €500m to Starbev in cash in June 2012. Rather, if there had been no Note, then Molson Coors would have wanted an escrow of €200m to cover any possible claims for breach of warranty, which would not have been released until 2013 at the earliest. Even if Molson Coors had not insisted on an escrow, and had been willing to pay an extra €500m in cash to Starbev in June 2012 without condition, this sum could not all have been distributed to CVC Funds. Starbev would have been obliged to retain in excess of €150m, against the need to resolve any warranty claims.

270. I do not think that the factual premise of this submission is correct. Mr Szőke explains that by 27 March 2012 when the deal team sent its Final Investment Recommendation to the Investment Committee, it had agreed with Molson Coors that the escrow amount for warranty claims under the SPA would be limited to €50m. I accept, however, that a sum to cover possible claims for breach of warranty would have been withheld under escrow arrangements if the Note had not been part of the structure of the transactions. The declarations sought by ICEH have to and do take account of what was eventually agreed between Starbev and Molson Coors in respect of the breach of warranty claims as reducing the proceeds of the Note.

271. Starbev also says that the CVC Funds are only entitled to approximately 93.9% of any distributions by Starbev, since the CVC Funds only own 996,513 of 1,061,288 Ordinary Units in Starbev L.P., and so not all of any sums which could have been distributed by Starbev would have been paid to the CVC Funds. This is a matter of fact to be agreed between the parties.

Outcome on this issue

272. In my view, ICEH is correct to submit that the Note, as part of the sale transaction, is deemed to be an Equity Return for the purpose of determining the Internal Rate of Return, whether the Investment Threshold has been exceeded and whether an Excess Return Payment is required in relation to that transaction to the extent that the Note has reduced the payments due to ICEH under the CVR in relation to that transaction. I consider that ICEH is entitled to the declarations that it seeks.

(4) <u>The construction of Excess Equity Return</u>

273. This is a relatively short though again not easy point of construction. On the basis that there should have been an Excess Return Payment in 2012, the question is as to the treatment of the proceeds of the Note which were distributed in 2013 (and 2014). In summary, if ICEH is correct that the Investment Threshold was exceeded in June 2012, it submits that the same threshold applies to the proceeds of the Note when received in August/September 2013. Starbev submits that the applicable threshold at the time of receipt applies. The issue arises if ICEH succeeds in its contentions concerning the figure for the Investment Amount, but fails in its contentions on the treatment of the Note under clause 4.4.3.

274. The issue therefore is how a further Excess Return Payment is to be calculated in circumstances when, between the two payments, the Investment Threshold steps up from 2.05 x the Investment Amount to 2.5 x the Investment Amount. Because I have held that ICEH is wrong in its contention as to the Investment Amount, the issue does not arise, but it was argued and I will deal with it.

275. I have set the relevant provisions out above but repeat them here for convenience. Clause 4.1.1 of the CVR (under the heading "Payments") provides that:

> "If a Determination Event occurs and the euro Equivalent of the Cash proceeds received by the Investor in connection with such Determination Event (together with the euro Equivalent of all previous Cash proceeds received by the Investor in connection with prior Determination Events) exceeds both (i) the Investment Threshold and (ii) the IRR Threshold (a '**Trigger Event**'), then Starbev shall pay to ABI an amount in euro equal to the product of (a) 40% and (b) the Excess Equity Return at that date (such amount, an '**Excess Return Payment**'). Thereafter, if the Investor receives any further Excess Equity Return, Starbev shall pay to ABI an Excess Return Payment equal to the product of 40% and such Excess Equity Return."

276. It is common ground that clause 4.1.1 has the effect that, in order to determine whether a Distribution to the CVC Funds gives rise to a *first* Excess Return Payment to ABI, the aggregate of all Cash proceeds received by the CVC Funds must exceed both the IRR Threshold and the Investment Threshold (the 'Trigger Event'), with ABI being entitled to 40% of the difference between those proceeds and the higher of the two thresholds. This is the Excess Equity Return. I have described the two thresholds above.

277. The dispute between the parties arises because of the definition of "Excess Equity Return" in clause 1.1 of the CVR and specifically the terms of the illustration within it:

> "'**Excess Equity Return**' means any Equity Return (other than an Equity Return with respect to which an Excess Return Payment has already been made) (i) accruing, as of the relevant date of determination, on or after the date on which the Trigger Event has occurred and (ii) that is in excess of the Equity Return required for the Equity Return of the Investor to exceed both the IRR Threshold and the Investment Threshold. By way of illustration, if, on the date that both the IRR Threshold and the Investment Threshold are exceeded for the first time, the Internal Rate of Return upon a Determination Event is 30% and the Investment Threshold has been exceeded by €500 million, the Excess Equity Return would represent the lower of (a) the Equity Return corresponding to the 5% excess of the Internal Rate of Return over the IRR Threshold and (b) €500 million, and any Equity Return accruing after such date would also constitute an Excess Equity Return to the extent that the Equity Return continues to exceed the IRR Threshold;"

278. The argument focuses on the passage "by way of illustration". The illustration says that if on the date that both the IRR Threshold and the Investment Threshold are exceeded for the first time, the Internal Rate of Return upon a Determination Event is 30% and the Investment Threshold has been exceeded by €500 million, the Excess Equity Return would represent the lower of (a) the Equity Return corresponding to the 5% excess of the Internal Rate of Return over the IRR Threshold and (b) €500 million. The 5% comes into the illustration because the IRR Threshold under the CVR was 25% of the Investment Amount (and this did not change). This part of the illustration is not in dispute.

279. However, the illustration goes on to say that any Equity Return accruing *after such date* would also constitute an Excess Equity Return to the extent that the Equity Return continues to exceed the IRR Threshold. There is no reference to it also exceeding the Investment Threshold (which of course did change with the step-ups which I have described). In substance, Starbev says that a reference to the Investment Threshold is nevertheless to be read into the illustration, whereas ABI says it should be read literally and take effect accordingly.

280. Both parties pray in aid business common sense. ICEH says the effect of Starbev's interpretation is that the "tap" of sharing is turned on and off. It denies ICEH the right to share in part of what was a "super return" which the CVR is intended to provide and protect. The stepping-up of the Investment Threshold is intended to correlate risk with reward, it submits, but on Starbev's interpretation that progressive approach is destroyed because, if ICEH's right to share in the cash proceeds of the Note is determined by reference to the Investment Threshold as it applied in 2013, Starbev would be rewarded as though it had retained its risk in the Business until 2013, when as a matter of fact it surrendered that risk in 2012. Not to apply the words of the illustration demonstrating the meaning of Excess Equity Return would be contrary

both to the commercial purposes underlying the CVR and to the reasonable expectations of the parties as inferred from the terms of the CVR.

281. Starbev submits that there is a clear commercial logic to the requirement in clause 4.1.1 that ABI be paid only 40% of the Excess Equity Return. There is no justification for calculating the payments to ABI differently as between the Trigger Event and subsequent dates. Starbev's construction adopts a consistent approach to the calculation of Excess Return Payments. The parties agreed that ABI's entitlement to Excess Return Payments should be a function of when the CVC Funds achieved Equity Returns, with ABI's entitlement being greater if it was in the first three years after SPA Completion: hence the Investment Threshold which increased in steps in those first three years. This being so, it would be contrary to the parties' intentions for the increasing Investment Threshold simply to be ignored for Excess Return Payments after the Trigger Event.

282. So far as the appeal to business common sense is concerned, I prefer Starbev's submission. The CVR provides for stepped Investment Thresholds during the first three years after completion, and the commercial rationale put forward by ICEH for "locking into" the threshold applicable at the time of first receipt is not in my view convincing. (The situation under consideration is not one in which the anti-avoidance provisions apply.)

283. There was some discussion between the parties as to the fact that the provision relied on by ICEH appears within an "illustration". ICEH's case essentially is that the illustration provides expressly for the situation in point, and should be given effect to according to its terms. On this basis, subsequent Equity Returns need only exceed the IRR Threshold, because that is what the illustration says.

284. Parties do sometimes include illustrations or examples within their contracts. The parties were not able to find any authority directly in point, though ICEH drew attention to the analogy of explanatory notes helping to resolve difficulties in drafting (see *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 W.L.R. 896 at 910C and 913G-H). There is in my view no reason why illustrations or examples should be construed differently than any other term in a contract. It could be said in the context of lengthy contracts in financial transactions with much boiler plate that illustrations or examples deserve particular attention as something to which the parties particularly turned their minds.

285. Ultimately, it depends on the terms of the illustration read in context. In this case, as Starbev says, there is no evident reason why the definition should have specified that any subsequent Equity Return would also constitute an Excess Equity Return "to the extent that [it] continues to exceed the IRR Threshold". This is because once exceeded, the IRR Threshold remains exceeded, because it is fixed at 25%, and the only permissible outflow for the IRR is the Investment Amount, which is by definition an outflow which can only occur at Completion. I do not think that this is in dispute.

286. Further, though as a "reality test" ICEH cited the views of Mr Meredith and Mr Obloj as expressed in emails as to the effect of the provision, it accepts that their views as to the meaning of the contract are neither relevant nor admissible.

287. Starbev's main contention is that ICEH's construction fails to have regard to the wording of clause 4.1.1. This is the clause that provides for the payment. Starbev's submission is as follows:

(1) The second sentence of clause 4.1.1 provides that ABI shall be paid 40% of any further 'Excess Equity Return'; it does not provide that ABI shall be paid 40% of any further 'Equity Return'.

(2) Clause 4.1.1 thus requires analysis of the definition of Excess Equity Return in clause 1.1, the key words of which limit Excess Equity Returns to:

> " … any Equity Return ... (i) accruing, as of the relevant date of determination, on or after the date on which the Trigger Event has occurred and (ii) that is in excess of the Equity Return required for the Equity Return of the Investor to exceed both the IRR Threshold and the Investment Threshold. …"

(3) The parenthesis in the first part of the definition of Excess Equity Return, omitted from this extract – "(other than an Equity Return with respect to which an Excess Return Payment has already been made)" – excludes from the calculation of Excess Equity Returns any previous Excess Equity Returns, so that ABI is not paid twice in respect of the same Excess Equity Return.

(4) The calculation of Excess Equity Return therefore always requires a comparison with both the IRR Threshold and the Investment Threshold on the relevant date.

(5) There is no doubt (Starbev submits) that these words are intended to apply as much to the calculation of subsequent Excess Return Payments as to the calculation of Excess Return Payments on the date of the Trigger Event: the wording expressly identifies the relevant date of determination as being "on or after the date on which the Trigger Event has occurred".

288. My conclusion is as follows. There is clearly force in ICEH's construction based on the express language in the illustration in the definition of Excess Equity Return. However, on balance, I prefer Starbev's construction. The payment obligation arises under clause 4.1.1 of the CVR. In the event of the occurrence of a Determination Event (that is, any payment by Starbev to CVC), to trigger an Excess Return payment to ABI the payment must exceed both the Investment Threshold and the IRR Threshold. The clause expressly deals with subsequent receipts as well: "Thereafter, if the Investor receives any further Excess Equity Return, Starbev shall pay to ABI an Excess Return Payment equal to the product of 40% and such Excess Equity Return".

289. This means that ABI is to be paid 40% of any further "Excess Equity Return", which as defined is an Equity Return exceeding both the IRR Threshold and the Investment Threshold. I consider (in agreement with Starbev) that the part of the illustration that deals with subsequent returns must be read as referring to both thresholds, since otherwise the Equity Return would not constitute an Excess Equity Return. The practical consequence is that where there is a Trigger Event prior to 2 December 2012, and a subsequent Equity Return after 2 December 2012, the calculation of the Excess Equity Return as regards the latter payment is to be calculated on the basis of

an Investment Threshold of 2.50 x the Investment Amount. This is the basis of calculation which, as I understand it, Starbev has in fact applied based on its understanding of the relevant figures. (As I have stated above, this issue is not concerned with the effect of the anti-avoidance provisions.)

Outcome

290. The overall outcome is that Starbev succeeds in relation to issues (1) and (4), and ICEH succeeds in relation to issues (2) and (3). I am grateful to the parties for their assistance, and will hear them as to any consequential matters that arise.