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L'honorable Mark Schrager
Cour supérieure du Québec
Palais de justice de Montréal
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Destinataire(s) : **500-11-041305-117 Homburg Invest Inc. et al (Taberna)**

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Message :

Bonjour Maîtres,

Vous trouverez ci-joint une copie de courtoisie du jugement rendu ce jour par l'Honorable Mark Schrager dans la cause citée en rubrique.

Salutations distinguées,

Louise Patenaude, adjointe
Tél.: 514-393-6300 (ip: 52479)

Mark Schrager, j.c.s.

SUPERIOR COURT
(Commercial Division)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL
N°: 500-11-041305-117

DATE : June 30, 2014

PRESIDING : THE HONOURABLE MARK SCHRAGER, J.S.C.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF :

HOMBURG INVEST INC.
HOMBURG SHARECO INC.
CHURCHILL ESTATES DEVELOPMENT LTD.
INVERNESS ESTATES DEVELOPMENT LTD.
CP DEVELOPMENT LTD.
NORTH CALGARY LAND LTD.

Debtors / Petitioners

And

HOMCO REALTY FUND (52) LIMITED PARTNERSHIP
HOMCO REALTY FUND (88) LIMITED PARTNERSHIP
HOMCO REALTY FUND (89) LIMITED PARTNERSHIP
HOMCO REALTY FUND (92) LIMITED PARTNERSHIP
HOMCO REALTY FUND (94) LIMITED PARTNERSHIP
HOMCO REALTY FUND (96) LIMITED PARTNERSHIP
HOMCO REALTY FUND (105) LIMITED PARTNERSHIP
HOMCO REALTY FUND (121) LIMITED PARTNERSHIP
HOMCO REALTY FUND (122) LIMITED PARTNERSHIP
HOMCO REALTY FUND (142) LIMITED PARTNERSHIP
HOMCO REALTY FUND (190) LIMITED PARTNERSHIP
HOMCO REALTY FUND (191) LIMITED PARTNERSHIP
HOMCO REALTY FUND (199) LIMITED PARTNERSHIP

Mises-en-cause

And

STICHTING HOMBURG BONDS

Mise-en-cause

And

TABERNA PREFERRED FUNDIND VI, LTD.
TABERNA PREFERRED FUNDIND VIII, LTD.
TABERNA EUROPE CDO I P.L.C.
TABERNA EUROPE CDO II P.L.C.

Mises-en-cause

And

SAMSON BÉLAIR/DELOITTE & TOUCHE INC.

Monitor

JUDGMENT

JS 1319

FACTS

[1] The Debtors/Petitioners ("Debtors") were subject to an initial stay order issued on September 9, 2011 pursuant to the *Companies' Creditors Arrangement Act* [1] ("CCAA") by the Honourable Justice Louis Gouin. The latter has been charged with the management of the case but due to a conflict of interest with the attorneys the four (4) Taberna entities mises-en-cause in the instant proceedings ("Taberna"), the undersigned presided over the present matter.

[2] After a number of extensions of the CCAA stay order, the Debtors filed an arrangement which was accepted by the statutory majority of creditors under the

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[1] R.S.C., 1985, c. C-36.

CCAA and subsequently sanctioned by the Court on June 5, 2013. Implementation of this plan, including payments thereunder, has begun.

[3] The undersigned is called upon to adjudicate on the Debtor's Re-Amended Motion for Directions which was originally filed on January 25, 2013. The motion seeks resolution of issues regarding the rank *inter se* of, in essence, two series of debentures one held or administered by the mise-en-cause Stichting Homburg Bonds ("Stichting") referred to above and the other by Taberna.

[4] In May 2006, Homburg Invest Inc. ("HII"), one of the Co-Petitioners/ Debtors, entered into a trust indenture with Stichting as trustee providing, *inter alia*, for the issuance of bonds. In 2002, Homburg Shareco Inc. ("Shareco") another Co-Petitioner Debtor entered into an indenture also with Stichting providing for the issuance of additional bonds. The face-amount of the outstanding bonds as at the CCAA filing aggregated in excess of 400 Million Euros (or approximately 500 Million dollars) and constituted the largest single bloc of debt of the Debtor of approximately 1.8 Billion dollars.

[5] In July 2006, HII entered into a "junior subordinate indenture" with Wells Fargo Bank, N.A. ("Wells Fargo") providing for the issuance of 20 Million US dollar notes. A second indenture was signed at the same time providing for the issuance of 25 Million euro notes (hereinafter together, the 2006 Taberna Indentures).

[6] Both of the 2006 Taberna Indentures contained the following clauses:

> "**SECTION 12.1. Securities Subordinate to Senior Debt.**
>
> The Company covenants and agrees, and each Holder of a Security, by its acceptance thereof, likewise covenants and agrees, that, to the extent and in the manner hereinafter set forth in this Article XII, the payment of the principal of and any premium and interest (including any Additional Interest) on each and all of the Securities are hereby expressly made subordinate and subject in right of payment to the prior payment in full of all Senior Debt.
>
> **SECTION 12.2. No Payment When Senior Debt in Default; Payment Over of ProceedsUpon Dissolution, Etc.**
>
> (a) In the event and during the continuation of any default by the Company in the payment of any principal of or any premium or interest on any Senior Debt (following any grace period, if applicable) when the same becomes due and payable, whether at maturity or at a date fixed for prepayment or by declaration of acceleration or otherwise, then, upon written notice of such default to the Company by the holders of such Senior Debt or any trustee therefor, unless and until such default shall

have been cured or waived or shall have ceased to exist, no direct or indirect payment (in cash, property, securities, by set-off or otherwise) shall be made or agreed to be made on account of the principal of or any premium or interest (including any Additional Interest) on any of the Securities, or in respect of any redemption, repayment, retirement, purchase or other acquisition of any of the Securities.

(b) In the event of a bankruptcy, insolvency or other proceeding described in clause (d) or (e) of the definition of Event of Default (each such event, if any, herein sometimes referred to as a "Proceeding"), all Senior Debt (including any interest thereon accruing after the commencement of any such proceedings) shall first be paid in full before any payment or distribution, whether in cash, securities or other property, shall be made to any Holder of any of the Securities on account thereof. Any payment or distribution, whether in cash, securities or other property (other than securities of the Company or any other entity provided for by a plan of reorganization or readjustment the payment of which is subordinate, at least to the extent provided in these subordination provisions with respect to the indebtedness evidenced by the Securities, to the payment of all Senior Debt at the time outstanding and to any securities issued in respect thereof under any such plan of reorganization or readjustment), which would otherwise (but for these subordination provisions) be payable or deliverable in respect of the Securities shall be paid or delivered directly to the holders of Senior Debt in accordance with the priorities then existing among such holders until all Senior Debt (including any interest thereon accruing after the commencement of any Proceeding) shall have been paid in full.

(c) In the event of any Proceeding, after payment in full of all sums owing with respect to Senior Debt, the Holders of the Securities, together with the holders of any obligations of the Company ranking on a parity with the Securities, shall be entitled to be paid from the remaining assets of the Company the amounts at the time due and owing on account of unpaid principal of and any premium and interest (including any Additional Interest) on the Securities and such other obligations before any payment or other distribution, whether in cash, property or otherwise, shall be made on account of any Equity Interests or any obligations of the Company ranking junior to the Securities and such other obligations. If, notwithstanding the foregoing, any payment or distribution of any character on any security, whether in cash, securities or other property (other than securities of the Company or any other entity provided for by a plan of reorganization or readjustment the payment of which is subordinate, at least to the extent provided in these subordination provisions with respect to the indebtedness evidenced by the Securities, to the payment of all Senior Debt at the time outstanding and to any securities issued in respect thereof under any such plan of reorganization or readjustment) shall be received by the Trustee or any Holder in contravention of any of the terms hereof and before all Senior Debt shall have been paid in full, such payment or distribution or security shall be

> received in trust the benefit of, and shall be paid over or delivered and transferred to, the relevant holders of the Senior Debt at the time outstanding in accordance with the priorities then existing among such holders for application to the payment of all Senior Debt remaining unpaid, to the extent necessary to pay all such Senior Debt (including any interest thereon accruing after the commencement of any Proceeding) in full. In the event of the failure of the Trustee or any Holder to endorse or assign any such payment, distribution or security, each holder of Senior Debt is hereby irrevocably authorized to endorse or assign the same."
>
> (Underlined by the Court)

[7] Senior Debt is broadly defined in the 2006 Taberna Indentures and it is not contested that it includes the debt existing under and pursuant to the Stichting bonds.

[8] Thus, the 2006 Taberna notes were subordinate to the Stichting debt, in that once a payment of capital or interest on the Stichting debt was in default, no payment on account of the 2006 Taberna Indentures was permitted by HII.

[9] The 2006 Taberna Indentures further provided that they are governed by the laws of the State of New York.

[10] In 2011, HII was in default in virtue of certain financial covenants provided in the 2006 Taberna Indentures. Negotiations ensued between the business people followed by exchanges between the lawyers culminating in the signature of an Exchange Agreement on February 28, 2011 providing for the issuance of new indentures and new notes thereunder, to replace the 2006 Taberna Indentures and notes.

[11] Accordingly, and also on February 28, 2011, two new indentures and notes were issued to replace the Dollar and Euro 2006 Taberna Indentures (the "2011 Taberna Indentures"). These notes remain outstanding.

[12] Sections 12.1 and 12.2 referred to above were altered in that the pertinent portions of the said Sections 12.1 and 12.2 now read as follows:

> **"SECTION 12.1. Securities Subordinate to Senior Debt.**
>
> The Company covenants and agrees, and each Holder of a Security, by its acceptance thereof, likewise covenants and agrees, that, to the extent and in the manner hereinafter set forth in this Article XII, the payment of the principal of and any premium and interest (including any Additional Interest) on each and all of the Securities are hereby expressly made subordinate to the Senior Debt. Notwithstanding anything to the contrary contained herein, the securities issued pursuant to those certain Junior Subordinated Indentures, each dated as of the date hereof, between the

Company and the Trustee shall not be Senior Debt or otherwise entitled to the subordination provisions of this Article XII and the Securities shall rank pari passu in right of payment to such securities.

SECTION 12.2. No Payment When Senior Debt in Default.

(a) In the event and during the continuation of any default by the Company in the payment of any principal of or any premium or interest on any Senior Debt (following any grace period, if applicable) when the same becomes due and payable, whether at maturity or at a date fixed for prepayment or by declaration of acceleration or otherwise, then, upon written notice of such default to the Company by the holders of such Senior Debt or any trustee therefore, unless and until such default shall have been cured or waived or shall have ceased to exist, no direct or indirect payment (in cash, property, securities, by set-off or otherwise) shall be made or agreed to be made on account of the principal of or any premium or interest (including any Additional Interest) on any of the Securities, or in respect of any redemption, repayment, retirement, purchase or other acquisition of any of the Securities."

(Underlined by the Court)

[13] Of most significance and pertinent to these presents is the fact that Section 12(b) and (c) of the 2006 Taberna Indentures were deleted. Section 12.2(b) provided for full payment of the "Senior Debt" (in this case, Stichting) in priority to the Junior Debt (i.e. Taberna) in the event of a bankruptcy or insolvency of HII. Section 12.2(c) provided that in the event of payment received by Wells Fargo as trustee under the Taberna Indentures, in contravention of Section 12.2(b), then such proceeds would be remitted or turned over to Senior Debt holders. Such a clause is commonly referred to as a "turnover provision".

[14] The definition of "Senior Debt" and the New York choice of law have not been modified.

[15] The effect of the foregoing modifications in the context of the CCAA arrangement of the Debtors is the gravaman of this litigation.

[16] According to Taberna, the effect of the drafting changes taken with other factors to be discussed hereinbelow, is that the claim of Taberna notes is no longer subordinate to the Stichting claim and should be paid *pari passu* with Stichting under the plan of arrangement approved by the Court.

[17] As stated above, the Debtors' plan of arrangement was sanctioned by the Court on June 5, 2013, in other words after the Motion for Directions was filed but before the present matter was set down for hearing.

[18] Under the plan of arrangement, all ordinary creditors including holders of Stichting bonds and Taberna notes were grouped in one and the same class. The intention of the Debtors supported by the Monitor was to pay nothing on account of the Taberna claim given the provisions of the subordination clauses referred to above and the fact that Stichting would not, under the plan, be paid in full. This was and is not acceptable to Taberna. However, in order to allow the HII plan to be confirmed and allow HII to move forward with its reorganization, the following was provided in the plan:

> "9.6 b) Notwithstanding any other provision in the Plan, HII and the Monitor shall comply with the Taberna Order in making any distributions on account of the Taberna Claim under the Plan, using the reserves created under the HII/Shareco Plan, as applicable. To the extent that the Taberna Order directs that the distribution entitlement under the Plan in respect of the Taberna Claim shall be remitted to any Person or Persons other than the holders of the Taberna Claim, any Newco Common Shares Cash-Out Election made by any holders of the Taberna claim shall be null."
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> "**Taberna order**" means a Final Order of the Court addressing the distribution entitlement of the holders of the Taberna Claim under the Plan in respect of the Taberna Claim and authorizing and directing HII and the Monitor to rely on such Order in connection with the Plan;"

[19] The present judgment is the Taberna order.

[20] By voting for the plan, the statutory majority agreed with HII that the issue of subordination between Stichting and Taberna would be resolved after the plan was sanctioned. Even though Taberna voted against the plan, it did not oppose this manner of proceeding or insist that HII's Motion for Directions be heard prior to the Court sanction of the plan.

[21] For purposes of the proof and hearing herein, the parties relied on the affidavit in support of the Motion for Directions as well as the exhibits filed by consent and admissions filed in the Court record. Only the expert witnesses testifying on the content and effect of New York law were heard *viva voce*.

SUMMARY OF THE PARTIES' POSITION

Position of Taberna

[22] Taberna submits that it should receive the same treatment as the Stichting bondholders under the plan of arrangement, or in other words be paid on a *pari passu* basis.

[23] Taberna contends that the subordination contained in Section 12 of the 2011 Taberna Indentures no longer has effect because the bankruptcy language and the turnover provisions found in the 2006 Taberna Indentures were deleted so that in a bankruptcy or insolvency, Taberna debt is no longer subordinate and Taberna no longer has the obligation to turnover any entitlements to Stichting.

[24] Taberna continues that the deletion of the language was a result of a negotiation between the business people followed by exchanges between the attorneys after HII's covenant default which led to the Exchange Agreement and the 2011 Taberna Indentures. It was part of the consideration for forbearing the covenant defaults. According to Taberna, the parties involved in the negotiation intended the result that Taberna no longer be subordinate in the event of a bankruptcy or insolvency.

[25] Moreover, the fact that Taberna was placed in the same class for purposes of the plan of arrangement as Stichting (and indeed the same class as all of the unsecured creditors) dictates that Taberna should receive the same treatment as the other unsecured creditors, or in other words not be treated in a subordinate fashion.

Position of the Debtor, Stichting and the Monitor

[26] The other parties contend that the drafting changes left the basic subordination language intact, so that the fundamental legal position of the Taberna debt remains unchanged – i.e. it is subordinate to Stichting and other HII creditors.

[27] The wording of the 2011 Taberna Indentures is clear that Taberna is subordinate and the Court should not and indeed is not permitted by New York law, to look beyond the clear terms of the agreement between the parties. Under the parole evidence rule of New York law, evidence extrinsic to the document should not be considered unless there is an ambiguity on the face of the document. In such regard, no comparison should be made between the 2011 Taberna Indentures and the wording of the 2006 Taberna Indentures, to draw any inference (or ambiguity) from the deletion of the portions of Section 12.2. Equally the Exchange Agreement should not be considered in reading or interpreting the 2011 Taberna Indentures.

[28] The parties other than Taberna add that there is no legal impediment under the CCAA to placing two (2) creditors in the same class for voting purposes though they may not under the plan of arrangement receive equal treatment on distribution or payment of dividends.

[29] It is underlined that Stichting was a third-party beneficiary of the 2006 Taberna Indentures (as well as the 2011 Taberna Indentures), such that its rights

could not be altered without its consent. Thus, the subordination from which it benefited under the 2006 Taberna Indentures could not be modified without its consent. Stichting was not a party to the Exchange Agreement nor to any of the negotiations leading up to the Exchange Agreement. Its consent was not obtained, nor even sought.

[30] Moreover, Section 12.6 of the 2011 Taberna Indentures (section 12.7 in the 2006 Taberna Indentures) provides that a waiver of the subordination may not be presumed so that the fact that the Debtor may have placed Stichting in the same class as Taberna under the plan of arrangement (and Stichting not protesting) cannot be interpreted against Stichting as a waiver of the subordination from which it benefits under the 2011 Taberna Indentures.

DISCUSSION

[31] In virtue of the choice of law clause in both the 2011 Taberna Indentures and the 2006 Taberna Indentures, the law of the State of New York applies. Though New York law applies to the interpretation and the validity of the contract, it is local law that applies to the insolvency estate established pursuant to the CCAA [2] so that issues of distribution in the insolvency or questions of priority of payment are decided by application of the *lex fori* [3]. In Québec private international law, insolvency laws are characterized as procedural, so that the conflict rule indicates that the law of the forum applies [4].

[32] Since New York law is taken as a fact to be proved by expert testimony, each of Taberna, Stichting and the Monitor called expert witnesses who also, in accordance with Article 402.1 C.C.P., had filed reports.

[33] Mr. Howard E. Levine, a practicing attorney and a former New York Court of Appeal Judge opined for Stichting that under New York law a clear and unambiguous contract is deemed "the definitive expression of the contracting parties' intent and must be enforced according to its terms, without reference to extrinsic evidence" (i.e. evidence other than the language used in the contract itself). Such extrinsic evidence may only be invoked where the language of the contract is ambiguous. Extrinsic evidence cannot be relied upon to create an ambiguity in the text of the contract. Since the subordination language used in the 2011 Taberna Indentures is clear and unambiguous, then, under New York law, extrinsic evidence would not be admitted. The lack of a turnover provision does not change the subordinated status of the Taberna notes. Mr. Levine was

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2 DICEY AND MORRIS, The Conflict of Laws, 2000, par. 31-040).

3 *Todd Shipyards Corporation vs Ioannis Daskalelis, The*, [1974] S.C.R. 1248; DICEY, op.cit., par. 7-032.

4 C. EMANUELLI, Droit International Privé Québecois, 3e ed., 2011 para. 582; J. WALKER, CASTEL & WALKER, Canadian Conflict of Laws, 6th ed., pp. 6-7 and 29-7.

adamant that the New York courts strictly apply this parole evidence rule but he conceded that interrelated contracts executed contemporaneously may be read together.

[34] Mr. Jeffrey D. Saferstein, a New York insolvency attorney, was called as an expert by the Monitor and echoed Mr. Levine's opinion on contract law and added an insolvency dimension.

[35] Mr. Saferstein agreed that the subordination language in the 2011 Taberna Indentures was clear and unambiguous so that given the default, "Senior Debt" (i.e. the Stichting claims) must be paid in full before any monies can be received by Taberna noteholders. Turnover provisions are usually found in New York subordination agreements, but the absence of such a clause does not dilute the effect of the remaining subordination language. The turnover language reinforces the subordination, but its absence does not fundamentally alter the subordinated rights. In a New York insolvency, the US Bankruptcy Court would look at New York state law as the law of the contract and based on the parole evidence rule would exclude extrinsic evidence and give effect to the clear terms of the subordination of the 2011 Taberna Indentures, according to Mr. Saferstein.

[36] Mr. Peter S. Partee, Taberna's expert, is also a New York insolvency lawyer. His quality as an expert was challenged since he is a partner in the law firm representing Taberna and it was argued that he did not have sufficient independence to be qualified as an expert. The undersigned dismissed the objection at the hearing, considering that the issue would go to probative value of the testimony rather than the qualification of Mr. Partee as an expert. This is particularly so because the principal concept of foreign law dealt with by the experts (i.e. the exclusion of extrinsic evidence when the terms of the parties' contract are clear and unambiguous) is not really that "foreign" at all. Québec law shares similar rules of evidence and interpretation.

[37] Mr. Partee finds in the fact of the deletion of the turnover provisions from the 2006 Tarberna Indentures and in the extrinsic evidence, proof of the parties' intent that the subordination of the Taberna debt cease to have effect in an insolvency filing. The presence of a turnover provision is common and the fact of its deletion is significant and does not constitute parole evidence, so that the deletion would be considered by a New York court in the opinion of Mr. Partee. Absent the turnover, a court would not impose such an obligation on Tarberna – i.e. to turnover any entitlement to or funds received in an insolvency. Mr. Partee analyzed the turnover clause in the context of US bankruptcy proceedings where turnover provisions allow senior and subordinated debts to be classified together in a plan (for voting purposes) but not to receive the same financial treatment since the subordinated creditor will be obliged to turnover what it receives pursuant to its contractual obligations.

[38] Mr. Partee also underlined in his testimony that the recitals of the 2011 Taberna Indentures refer explicitly to the concurrent Exchange Agreement which in turn refers to the 2006 Taberna Indentures. Thus, he argues, those documents are not extrinsic to the 2011 Taberna Indentures and may be considered in the interpretation exercise.

[39] Counsel for Taberna went further, arguing that certain drafting inconsistencies brought about ambiguity so that the negotiations and email exchanges between the business people and counsel of the Debtors and Taberna leading up to the signing of the 2011 Taberna Indentures should be considered by this Court.

[40] The undersigned does not believe that this Court must choose one expert's opinion over the other. The resolution of the differing expert's opinions does not change the outcome. The subordination clause clearly establishes the principal. The extrinsic evidence adduced by Taberna is not convincing of any intention to change the principal of subordination that existed under the 2006 Taberna Indentures. Canadian insolvency law (with Québec civil law as suppletive) provides that the effect of that subordination in the insolvency of the Debtor is that the Taberna debt is to be treated as subordinate and not paid unless and until full payment has been made to the Senior Debt (including Stichting) .

[41] The undersigned has considered the Exchange Agreement as a concurrent document and thus has considered it not to be extrinsic evidence. Since the Exchange Agreement specifically refers to the 2006 Taberna Indentures, the undersigned has considered the previous subordination drafting.

[42] It is accepted in Canadian insolvency law that in proposals under the *Bankruptcy and Insolvency Act* [5] ("BIA"") to which CCAA arrangements are fundamentally similar, the rights of the debtor vis-à-vis its creditors is altered under the proposal but not the rights of the creditors *inter se* [6].

[43] Subordination clauses are fully enforceable in a bankruptcy or insolvency context [7]. Giving effect to a subordination clause as HII proposed does not make a plan unfair or unreasonable [8] as the fair and reasonable criterion for court sanction of a CCAA plan of arrangement does not require equal treatment of all creditors [9].

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5 R.S.C., c. B-3.

6 *Merisel Canada Inc. vs 2862565 Canada Inc.,* 2002 R.J.Q. 671 (QCCA)..

7 Re *Maxwell Communications Corp,* [1994] 1 All.E.R. 737 (Ch.D.) pp. 13-14, 21; *Bank of Montréal vs Dynex*; (1997) 145 D.L.R. 4th 499 (Alta Q.B.) confirmed on other grounds 182 D.L.R. 4th 640 (Alta C.A.) and [2002] 1 S.C.R. 146.

8 *Bank of Montréal vs. Dynex*, ibid.

9 *Air Canada*, (2004) 2 C.B.R. (5th) 4 at para 2. and 11 (Farley, J.).

[44] Subordination clauses not containing express language addressing the effect of the subordination in a bankruptcy are given effect in a bankruptcy, nonetheless [10].

[45] Subordinate creditors have been ordered to turnover to senior creditors monies received in an insolvency based on general subordination language – i.e. absent a turnover clause [11].

[46] Significantly, in *Stelco* [12], the Ontario Court of Appeal confirmed Farley, J. that a debtor may group subordinate with senior debt in classification. The creditors are classified according to their rights vis-à-vis the debtor [13]. Both Stichting and Taberna are unsecured note or debenture debt. It is their rights *inter se* which differ.

[47] It is noteworthy that on the facts of the *Stelco* case, there was a turnover clause which was characterized as reinforcing the subordination [14], which in turn reinforces Mr. Safestein's testimony before the undersigned that the general language is sufficient.

[48] The Ontario Court of Appeal has stated that classification that would jeopardize plans of arrangement should not be favoured [15]. In *Stelco* as here, junior debt was grouped with senior debt since the junior debt was "out of the money" and accordingly would vote against the plan, as did Taberna in the present case. If placed in their own class, the Taberna noteholders could either defeat the plan, or not be bound by the plan so that the Debtor would be unable to arrange all of its debts. The debt of all the other creditors, senior to Taberna would be arranged but that of Taberna would not be arranged since they would not be bound by the plan.

[49] Mr. Partee and Mr. Saferstein explained that in US bankruptcy law, the cram down provisions of the US Bankruptcy Code could allow the Court to sanction a plan and bind a creditor in a separate class who had voted against the plan. However, this possibility does not exist under the CCAA so that the "cram down" must exist at the voting level by grouping subordinate debt with senior debt. Otherwise, junior debt would have a veto or an option of not being bound which is what Farley, J. characterized as the "tyranny of the minority" [16].

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10 *Air Canada*, ibid.
11 *Merisel Canada Inc. vs. 2862565 Canada Inc.*, op.cit.
12 *Re Stelco*, (2005) 15 C.B.R. (5th) 297 (Ont S.C.); affirmed (2005) 15 C.B.R. (5th) 307 (Ont. C.A.).
13 See s. 22 CCAA concerning criteria for classification.
14 Re *Stelco*, 2007 ONCA 483; , para.483; para. 41-45.
15 Re *Stelco*, (2005), C.A.,op.cit. para. 36.
16 Re *Stelco*, (2005), op.cit., para. 15.

[50] In the second round of *Stelco* litigation, the Ontario Court of Appeal again confirmed the trial judge (this time, Wilton-Siegel, J.) in giving effect to the subordination (*albeit* containing a turnover) but emphasizing the principle applicable here that a plan vote and implementation do not alter the rights of creditors *inter se.*

[51] Accordingly, applying principles of Canadian insolvency law to the subordination in the present cause, Taberna remains subordinate in the insolvency and this absent the specific bankruptcy language and a turnover clause.

[52] Unfortunately for Taberna, the extrinsic evidence adduced is not helpful to its case.

[53] The testimony of Mr. Miles, the officer of HII involved in the business negotiation of the 2011 Taberna Indentures, at best, might support an argument that the new language was intended to eliminate subordination in the event that HII went into a bankruptcy liquidation [17]. However, the present regime is that of a plan of arrangement under the CCAA. There is no proof that there was a meeting of the minds that subordination ended within an insolvency filing.

[54] The email exchanges of draft wording between the attorneys charged with preparing the 2011 Taberna Indentures are not proof of any meeting of the minds either. Initially, a draft was sent by Taberna's lawyer eliminating the whole subordination section from the 2006 Taberna Indentures. HII counsel replied with a request that the omitted subordination language be reinserted into the document. The end-result was the present wording. After HII consulted Dutch and Canadian counsel, the present wording was accepted. Taberna's counsel at trial invokes this exchange as part of its argument that it was agreed that there would be no turnover obligation in the event of an insolvency. However, the position of Canadian and Dutch counsel is equally consistent with the position of the Canadian case law summarized above that the general subordination language was sufficient to continue the status of Taberna debt as fully subordinated notwithstanding an insolvency filing and notwithstanding the absence of specific turnover language. Taberna counsel may have sought an advantage for Taberna in the drafting but no meeting of the minds to change the basic subordination concept has been demonstrated.

[55] Taberna counsel's argument that the modification to the subordination was the consideration for Taberna forbearing the HII covenant default is not supported by the evidence. It is axiomatic that unsecured creditors generally benefit from their debtor continuing in business and avoiding forced liquidation. Particularly in this case, Taberna received letters of credit aggregating

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[17] Deposition of James Miles, February 21, 2013, pp. 29 to 30, and page 34.

approximately $2 Million. Payment under the letters of credit was not subordinated. Taberna also received fee compensation in the six figures as additional consideration for entering into the Exchange Agreement and the 2011 Taberna Indentures. Payment to Taberna under the letters of credit is explicitly stated in the 2011 Taberna Indentures not to be subject to the subordination. Clearly, if the bargain had been that subordination would cease on bankruptcy or insolvency filing, then the parties could have easily so stated as they did for the payment under the letters of credit.

[56] Most significantly, and in itself fatal to Taberna's position is the fact that Stichting was not a party to the negotiations leading up to the 2011 Taberna Indentures nor to the documents themselves.

[57] Section 1.10 of both the 2006 and 2011 Taberna Indentures provides as follows:

> **"SECTION 1.10** ***Benefits of Indenture***
>
> Nothing in this Indenture or in the Securities, express or implied, shall give to any Person, other than the parties hereto and their successors and assigns, the holders of Senior Debt and the Holders of the Securities any benefit or any legal or equitable right, remedy or claim under this Indenture."

[58] Accordingly, and in virtue of Section 1.10, Stichting can rely on the terms of the Taberna Indentures and claim the benefit thereof.

[59] Moreover, Section 12.7 of the 2006 Indentures (equivalent to Section 12.6 in the 2011 Taberna Indentures) provides as follows:

> **"SECTION 12.7** ***No Waiver of Subordination Provisions***
>
> *(a)* No right of any present or future holder of any Senior Debt to enforce subordination as herein provided shall at any time in any way be prejudiced or impaired by any act or failure to act on the part of the Company or by any act or failure to act, in good faith, by any such holder, or by any noncompliance by the Company with the terms, provisions and covenants of this Indenture, regardless of any knowledge thereof that any such holder may have or be otherwise charged with.
>
> *(b)* Without in any way limiting the generality of paragraph (a) of this Section 12.7, the holders of Senior Debt may, at any time and from to time, without the consent of or notice to the Trustee or the Holders of the Securities, without incurring responsibility to such Holders of the Securities and without impairing or releasing the subordination provided in this Article XII or the obligations

> hereunder of such Holders of the Securities to the holders of Senior Debt, do any one or more of the following: (i) change the manner, place or terms of payment or extend the time of payment of, or renew or alter, Senior Debt, or otherwise amend or supplement in any manner Senior Debt or any instrument evidencing the same or any agreement under which Senior Debt is outstanding, (ii) sell, exchange, release or otherwise deal with any property pledged, mortgaged or otherwise securing Senior Debt, (iii) release any Person liable in any manner for the payment of Senior Debt and (iv) exercise or refrain from exercising any rights against the Company and any other Person."

[60] Accordingly, Stichting senior rights existing at the time of the 2011 Taberna Indentures could not be waived or altered by HII dealing with Taberna alone, the whole in virute of the 2006 Taberna Indentures. Stichting's agreement was necessary.

[61] This is clear on the basis of the afore-mentioned provisions and is underscored by the application of the principles of the Québec Civil Code dealing with the stipulation in favour of a third-party beneficiary to a contract (see Article 1444 and following of the Québec Civil Code).

[62] There is no evidence of any revocation of the stipulation in favour of Senior Debt agreed to by Stichting. Indeed, the stipulations in their favour (Article 1.10) are reiterated in the 2011 Taberna Indentures.

[63] In view of all of the foregoing, any debt under the 2011 Taberna Indentures is subordinate to the Stichting debt and based on the clear terms of the 2011 Taberna Indentures cannot receive payment unless and until Senior Debt including Stichting debt is paid in full.

[64] Taberna's argument that the plan implementation changed the foregoing, is simply not correct. As stated above, the plan of arrangement does not alter the rights of creditors *inter se* [18]. Moreover, the process undertaken of seeking a judgment on the matter and writing into the plan that Taberna's claim would be dealt with on the basis of the Court order to be issued pursuant to such legal proceedings was not only a valid manner of dealing with the issue, but was a commercially practical manner of allowing the plan to move forward for the benefit of HII and all of the creditors and other stakeholders. Such an approach attains the policy objectives of the CCAA and was lauded by the Ontario Court of Appeal in *Stelco* [19], in similar circumstance to this case.

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[18] Re *Stelco*, 2007, op.cit, para. 41-45.

[19] Re *Stelco*, op.cit. no 2, para. 43

[65] Equally, neither Stichting nor the Monitor can validly argue that Taberna renounced its position or waived any right by not contesting the classification. The Motion for Directions was tabled prior to the plan. Everyone involved knew what the issue was. Taberna voted against the plan and awaited its day in court on the Motion to learn how its claim would ultimately be treated. It bought into the same commercially reasonable approach as the other parties in resolving the issue while allowing the plan to move forward. There was no waiver or renunciation by Taberna of its rights.

[66] The Monitor aggressively supported Stichting's position. Mr. Saferstein, the expert produced by the Monitor, provided useful evidence since he brought a bankruptcy perspective into the evidence of US or New York law. There was however an inevitable overlap with Stichting's expert evidence made through Mr. Levine who did not deal with the the bankruptcy law effects of the subordination but solely the effect as between the parties. Accordingly, Stichting will be awarded costs including those of Mr. Levine fixed at US$76,413.00 according to the evidence filed at the hearing. Since no proof was made of the applicable exchange rate, this will be subject to taxation. The Monitor will be awarded one half of its expert's costs which will be subject to taxation since invoices were not filed at the hearing. Also, the Monitor did not testify nor file a report as is customary in order to bring the Court up to date on the state of the CCAA file. In view of the foregoing, no judicial costs of the Monitor will be awarded other than half of its expert fees.

[67] Since HII's position was essentially represented by Stichting and the Monitor, no costs will be awarded to HII.

[68] HII's counsel amended the conclusions of the Motion for Directions at the request of the undersigned to avoid reference to terms defined outside of the conclusions. The other parties did not contest the wording so that the conclusions in this judgment will follow such wording.

FOR ALL OF THE FOREGOING REASONS, THE COURT:

[69] **GRANTS** the Petitioners' *Re-amended Motion for Directions* (the "Motion");

[70] **DECLARES** that the payment of any and all amounts owing under and pursuant to:

70.1. Taberna Preferred Funding VI, Ltd.'s US $12 million interest pursuant to a Junior Subordinated Indenture dated as of July 26, 2006 (the "2006 USD Indenture") by and between Homburg Invest Inc. ("HII") and Wells Fargo Bank, N.A. ("Wells Fargo") for the

issuance of US $20 million junior subordinated notes due 2036 (the "Original Taberna VI Note");

70.2. The note issued to Taberna Preferred Funding VIII, Ltd. ("Taberna VIII") pursuant to a Junior Subordinated Indenture dated as of February 28, 2011 (the "2011 Taberna VIII Indenture") by and between HII and Wells Fargo (the "2011 Taberna VIII Note"); and

70.3. The notes issued to Taberna Europe CDO I P.L.C. and Taberna Europe CDO II P.L.C. on February 28, 2011 witnessing their respective interest of €20 million and €5 million pursuant to a Junior Subordinated Indenture dated as of February 28, 2011 (collectively with the 2006 USD Indenture and the 2011 Taberna VIII Indenture, the "Taberna Indentures") by and between HII and Wells Fargo for the issuance of €25 million junior subordinated notes due 2036 (the "2011 Taberna Europe Notes");

(the Original Taberna VI Note, the 2011 Taberna VIII Note and the 2011 Taberna Europe Notes are collectively referred to as the "Current Taberna Notes") is subordinated to the full and complete payment of any and all amounts owing in respect of the principal of and any premium and interest on all debt of HII (excluding trade accounts payable or liabilities arising in the ordinary course of business), whether incurred on or prior to the date of the Indentures or thereafter incurred, unless it is expressly provided in the instrument creating or evidencing the same that such obligations are not superior in right of payment to the Current Taberna Notes (the "Senior Debt"), including without limitation Stichting Homburg Bonds' claims against HII pursuant to a Trust Indenture dated as of December 15, 2002, and any related supplemental indentures thereto, and a Trust Indenture dated as of May 31, 2006 as guaranteed by HII pursuant to a Guarantee Agreement dated as of December 15, 2002 (the "Bonds"), unless and until the Senior Debt is fully satisfied;

[71] **ORDERS** that for the purpose of any distribution to occur under the Fourth Joint Amended and Restated Plan of Compromise and Reorganization of HII and Homburg Shareco Inc. dated as of March 27, 2014 (the "Plan"), any distribution to the holders of the Current Taberna Notes by virtue of their status as unsecured creditors and holders of the Current Taberna Notes shall be remitted to the holders of the Senior Debt on a pro-rata basis, including without limitation the Bonds, unless and until the Senior Debt is fully satisfied;

[72] **CONDEMNS** the mis-en-cause Taberna entities to judicial costs in favour of the mis-en-cause Stichting Homburg Bonds including experts' fees of US$76,413.00 subject to taxation but only for conversion to Canadian dollars, and to one half the expert costs of the Monitor regarding the report and testimony of Mr. Jeffrey Saferstein subject to taxation.

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Dates of Hearing: June 10, 11 and 12, 2014