17 February 2021

Shankar Menon
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With copy to:

Craig Montgomery
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William Glaister
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Clifford Chance,
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Ref: Proposed scheme of arrangement in relation to the Company ('Proposed Scheme') under Part 26 of the Companies Act 2006 ('Part 26')

Dear Mr. Menon,

Further to our letter of 14 January 2021, we are writing to you on behalf of Aviation Working Group (www.awg.aero, '**AWG**')[1] in connection with the Proposed Scheme.

As a threshold item, as stated in the above-noted letter, AWG is not expressing a view on the merits of the Proposed Scheme or the restructuring contemplated by it (the '**Restructuring**').

This letter is not intended to provide an obstacle to, the hinderance of, or delay in approving or effecting, the Proposed Scheme or the Restructuring.

Rather, having already placed on record AWG's long-standing interpretation of the Cape Town Convention (the '**Convention**') and its Aircraft Protocol (the '**Protocol**'), which are referred to collectively herein as the '**Cape Town Convention**'), our purpose is to

[1] The Company's Skeleton Argument for the convening hearing ('**the Skeleton Argument**'), at paragraph 144, incorrectly describes the AWG as a 'pro-lessor lobbying group'. We are not. Our qualifications to objectively comment on matters pertaining to the Cape Town Convention, as relevant here, are described in paragraph 1 and 2 of our prior letter. Professor Roy Goode acknowledged the role of the AWG in his Acknowledgements to the Official Commentary and referred to its role in the drafting of the Cape Town Convention, in particular at paragraph 1.3. As acknowledged by footnote (9) to the Skeleton Argument, AWG participated in drafting the Cape Town Convention, and, as such, has insights into its proper application and interpretation.

caution against the Company seeking a ruling in connection with the Scheme that goes beyond the scope required for its sanction.

Any such wider ruling would require the Court to decide issues which (a) do not need to be resolved in this matter, (b) have not properly been brought to the Court's attention and on which the Court has not had the benefit of adequate arguments on the other side, and (c) have serious ramifications for the billions of dollars committed to aviation finance transactions in reliance upon the Cape Town Convention. Any such wider ruling would also implicate the United Kingdom's compliance with its treaty obligations.

1. The important point, in this respect, is that, regardless of whether or not a Part 26 proceeding is an 'insolvency proceeding' within the meaning of the Cape Town Convention, the structure of the Proposed Scheme is consistent with Article XI of the Protocol under Alternative A ('**Alternative A**'), given that it provides the option to each creditor either to (1) consensually agree to modified contract terms, or (2) terminate its contract. Our reasoning for that conclusion is as follows.

(a) An 'insolvency proceeding' within the meaning of the Cape Town Convention is compliant with Alternative A, as it relates to leases, if and to the extent that it provides each (relevant) creditor with the option either to (i) consensually agree upon modified terms, or (ii) terminate its lease and take possession of the relevant aircraft objects.

(b) In that respect, the effect of the legal rights established by Alternative A is to place lessor creditors in a position that is familiar to English courts, as they operate somewhat analogously to those of lessors under English law exercising rights of forfeiture. The right of forfeiture may not be modified by a Company Voluntary Arrangement (which is plainly an insolvency proceeding), though associated contractual rights may be varied so long as lessors who object to the proposed variation can bring the rights to an end by forfeiting the lease[2].

(c) Similarly, an appropriately designed scheme of arrangement may, consistent with the rights independently conferred on lessors by Alternative A, properly vary the terms of a lease. That is not because such a scheme falls outside of the definition of an 'insolvency proceeding', but, rather, since the terms of the scheme respect the right of any creditor who objects to the proposed variation to withhold its consent to the modification by exercising an option to terminate the relationship and take possession[3].

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[2] See *Discovery (Northampton) Ltd v Debenhams Retail Ltd* [2020] BCC 9 (Norris J), particularly at [77]-[78], [81], and [99]. See also *Re Instant Cash Loans Limited* [2019] EWHC 2795.

[3] Paragraph 95 of the Skeleton Argument refers to comments made by the Secretary of State in relation to certain amendments to the Corporate Insolvency and Governance Bill to assert that Part 26 schemes of arrangement and Part 26A restructuring plans do not and were not intended to constitute 'insolvency-related events' for the purposes of the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 ('**the Regulations**'). This is wrong. Firstly, the Secretary of State's comments were not addressed to the characterization of schemes or restructuring plans. Secondly, and in the context of Alternative A in particular, the Secretary of State quite correctly noted the long-established view that Alternative A neither (1) gives any creditor a veto right over a scheme, nor (2) requires unanimous agreement to a scheme. Instead and as noted in this letter, Alternative A prevents modification of a Convention creditor's contract without consent unless the creditor is offered the return of the relevant aircraft object as an alternative. Thirdly and following from that, the quoted statement does not support the proposition that the Government intended Part 26 Schemes to fall outside the meaning of 'insolvency proceeding'. Rather, such statement reflected a desire to permit schemes which, as in the present case, are CTC compliant.

(d) For the same reasons, as stated in the above-noted letter, the Proposed Scheme does not conflict with the requirements of the Cape Town Convention.

2. Accordingly, we concur with the position expressed in paragraph 136 of the Skeleton Argument submitted to the court by the Company for the convening hearing: since the Proposed Scheme gives the creditors the option to terminate their leases, take possession of their aircraft assets and recover damages[4], it cannot be seen as imposing a modification of terms upon the creditor without consent, and, therefore, does not conflict with paragraph (10) of Alternative A.

3. For these reasons,[5] the question whether a scheme of arrangement is an 'insolvency proceeding' is not at issue in this matter. Regardless of whether a scheme is or is not an 'insolvency proceeding', the Cape Town Convention does not present an obstacle to the Court's ability to sanction the Proposed Scheme. Any decision on the characterization of the Proposed Scheme would, therefore, constitute *obiter dicta*, and, further, would be made in circumstances where the Court was not presented with adequate arguments for the contrary view.

4. Accordingly, the Company need not and should not seek sanction of the Proposed Scheme ***on the basis*** that the Proposed Scheme does not constitute an 'insolvency-related event' within the meaning of the Cape Town Convention. Seeking a confirmation on that basis would be both unnecessary and detrimental to future financing that would otherwise rely on the special protections afforded by Alternative A. In this regard, reference is made to the views expressed in paragraphs 3 and 4 of our prior letter regarding the substantial adverse effect that such a ruling, even if uncontested and *obiter*, might have, if it were made. Such can reasonably be expected to include negative adjustments to the rating and pricing of transactions governed by English law or which otherwise assume application of Alternative A by UK courts to the potential prejudice of all parties involved, directly or indirectly, in such transactions.

5. There are strong and compelling arguments for the proposition that a scheme proposed (amongst other things) in relation to an insolvent debtor or in circumstances where the alternative to the scheme would be an insolvency proceeding, such as in the present case, itself constitutes an 'insolvency proceeding' within the meaning of the Cape Town Convention, many of which were not addressed in the Skeleton Argument. That meaning must be ascertained in the light of the requirement in Article 5 of the Convention and its requirement that the phrase be interpreted in conformity with the general principles on which the Convention is based. Only that will promote uniformity and predictability in its application[6], which are core treaty requirements. At a minimum, that warrants the court receiving the benefit of fully developed arguments on all sides in a future case where a proposed scheme does not

[4] The Proposed Scheme provides a formula for calculating the damages to which a lessor who elects a lease termination is entitled. In so providing, the Proposed Scheme applies non-treaty law, which is entirely appropriate and consistent with the Cape Town Convention inasmuch as the treaty does not, itself, address the matter of damages, and, instead, leaves that issue to otherwise applicable law.

[5] And consistently with the Court's prediction at paragraph 45 of its Convening Judgment, though because of the nature of the Proposed Scheme and irrespective of the position of the sole non-consenting creditor at that time.

[6] This critical matter of interpretation has not been brought to Court's attention. The Skeleton Argument neglected to address this issue, outlined in paragraphs 7 and 9 of our prior letter, and failed to point out to the Court that Article 6(2) of the Regulations makes the Regulations subject to the Cape Town Convention and requires that the Regulations be applied in accordance with the treaty.

comply with the Convention so that it is a live issue whether the scheme of arrangement is correctly characterized for Convention purposes as an 'insolvency proceeding'.

6. The academic community, with particular expertise in relation to the Cape Town Convention, has clearly sided with the view that schemes of arrangement fall within the definition of 'insolvency proceedings' in the Cape Town Convention where they are formulated in an insolvency context, or by reason of actual or anticipated financial difficulties of the debtor company.[7] That is the position of Professor Roy Goode CBE, QC, Emeritus Professor of Law University of Oxford, who acted as the Chair of the Drafting Committee for the Cape Town Convention and is the author of the Official Commentary, as outlined in annex 1 to this letter.[8] It is confirmed in Annotation 1 to Professor Goode's Official Commentary, issued by the Cape Town Academic Project, which operates under the joint auspices of the University of Cambridge and UNIDROIT, the legal depositary of the treaty. The purpose of the Academic Project is to facilitate and further the academic study and assessment of the CTC and its Protocols[9].

7. In November last year, we obtained an expert opinion from Professor Louise Gullifer QC (hon) and Professor Riz Mokal (full details of their respective qualifications being set out in annex 2 to this letter) in relation to whether a restructuring plan under Part 26A would constitute an 'insolvency proceeding' for purposes of the Cape Town Convention as that was the process originally envisioned for the Company. Their joint opinion concluded that:

(a) a restructuring plan constituted an 'insolvency proceeding' for the purposes of the Cape Town Convention, noting that the plan proceeding met the requirements of each of the four elements of Cape Town Convention definition of that term as well as the corresponding definition in Regulation 5, based on the natural meaning of the term; and

(b) the purposes of the Cape Town Convention would not be advanced if a debtor could avoid the application of Alternative A by choosing a procedure which did not constitute 'insolvency proceedings' but which had the same substantive effect as 'insolvency proceedings'.

8. Much of the reasoning in the opinion applies to the Proposed Scheme under Part 26 and compels the same conclusion. In view of the rules of interpretation required by Article 5 of the Cape Town Convention, it cannot be right that a company in the situation of MAB may seek to achieve commercially identical results in commercially identical circumstances by instituting proceedings under either Part 26 or Part 26A of the

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[7] The Skeleton Argument suggests that there is a split of academic authority regarding this issue. This is another reason for the Court to require full argument before deciding on the question of characterization. Further, we are aware of Professor Payne's opinion, as cited in the Skeleton Argument, but while Professor Payne's expertise in relation to schemes of arrangement is beyond dispute, we do not believe she has conducted or published research on the Cape Town Convention.

[8] This exchange of correspondence is published at: https://ctcap.org/wp-content/uploads/2020/06/CTC-OC-annotation-%E2%80%93-voluntary-arrangements-schemes-of-arrangements-and-restructuring-plans-%E2%80%93-definition-of-insolvency-proceed.pdf

[9] The Academic Project is incorrectly described at paragraph 138 of the Skeleton Argument as 'a group of academics at Cambridge', and as having goals associated with industry objectives based on its association with our organization. In fact, the Project is a joint undertaking of the University of Cambridge Faculty of Law and UNIDROIT, operating pursuant to the procedures established by those two institutions, and, as noted in paragraph 8, its purposes are aligned with the proper understanding of the law and not with the promotion of commercial interests from the perspective of any particular constituency. The undersigned acts within the Project in his academic capacity, as a senior research fellow at Harris Manchester College, University of Oxford.

Companies Act, but that one type of proceeding should be an 'insolvency proceeding' for the purposes of the Cape Town Convention and the other not.

9. Since the Company has changed course to proceed by way of Part 26, rather than Part 26A, we are instructing Professors Gullifer and Mokal to revise their joint opinion. While the revised opinion will not seek to identify all the circumstances in which a scheme may function as an 'insolvency proceeding' for purposes of the Cape Town Convention, Professors Gullifer and Mokal have confirmed to us their view that a scheme under Part 26 proposed in any of the following four scenarios would qualify: (1) where the company is insolvent and subject to another insolvency proceeding (such as liquidation or administration); (2) where the company is insolvent but is not in another insolvency proceeding; (3) where the company meets Threshold Condition A in relation to Part 26A plans and the proposed scheme substantively meets Threshold Condition B in relation Part 26A plans; and (4) where the likely alternative to the approval and sanction of the proposed scheme is for the company to enter into insolvency proceedings. It seems clear that at least two of these four scenarios fit this matter.

10. You may also be aware that earlier today, the English High Court decided in the Gategroup matter that the Part 26A restructuring plan is an insolvency proceeding falling in the bankruptcy exclusion to the Lugano Convention.[10] Much of the Court's reasoning overlaps with Professors Gullifer and Mokal's opinion as to the characterization of restructuring plans as 'insolvency proceedings' for the purposes of the Cape Town Convention. We note in particular the following aspects of the Gategroup judgment:

(a) It is significant that the Court found that the restructuring plan is a collective proceeding in which the assets and affairs of the company are subject to the court's control or supervision to the requisite degree. We note that the Court's reasoning on these points is equally applicable to schemes of arrangement under Part 26, which are collective proceedings in which the company's assets and affairs are subject to the court's supervision or control in exactly the same way as is the case in relation to a restructuring plan. This undermines the very significant reliance on these elements of the definition of 'insolvency proceedings' both in Professor Payne's opinion and in the Skeleton Argument.

(b) It is right to acknowledge that in reaching the conclusion that restructuring plans constitute insolvency proceedings, the Court placed weight on the differences between the restructuring plan and the scheme of arrangement, and in particular, on the Part 26A Threshold Conditions A and B. Needless to say, however, the Court was not concerned with deciding whether schemes constitute 'insolvency proceedings', nor with deciding that issue for Cape Town Convention purposes, and did not have the benefit of argument as to the circumstances in which a scheme should be characterized as an insolvency proceeding, in particular for the purposes of the Cape Town Convention, such as in any of the four scenarios referred to in paragraph 9, above. This is amongst the issues on which the Court should hear full argument in order properly to characterize schemes of arrangement.

11. Finally, we note that a decision on whether the Proposed Scheme is an 'insolvency proceeding' under the Cape Town Convention implicates international treaty obligations of the United Kingdom, a further reason why it would be preferable for the

[10] [2021] EWHC 304 (Ch) (Zacaroli J); see the Court's conclusion at paragraph 137.

Court to have the benefit of full argument on this matter in a case in which it is a live issue before issuing a ruling.

Please let us know whether you or, in due course, the Court considers that it would be useful for us to provide the Court with a more detailed discussion of these matters.

We respectfully request that this letter is provided to the Court by your legal advisers in good time ahead of the sanction hearing in relation to the Proposed Scheme, which we understand is listed for 22 February 2021. If you anticipate any difficulties in complying with this request, please notify us at the earliest opportunity.

Sincerely yours,

Jeffrey Wool

secretary general

Aviation Working Group

jeffrey.wool@awg.aero

Annex 1

UNIVERSITY OF CAMBRIDGE
Faculty of Law

Cape Town Convention Academic Project

UNIDROIT

Director – Jeffrey Wool (jeffrey.wool@awg.aero; + 1 646 531 7117)
Academic lead – Louise Gullifer (lg421@cam.ac.uk; + 44 1223 332400)

12 June 2020

Professor Sir Roy GoodeCBE QC FBA
42 St John Street, Oxford OX1 2LH, United Kingdom

Re — Cape Town Convention and aircraft protocol – voluntary arrangements, schemes of arrangements, and restructuring plans – definition of insolvency proceedings

Dear Professor Sir Roy Goode,

I write to you in my capacity as director of the Cape Town Convention Academic Project (‘**CTCAP**’).

In light of the need for enhanced guidance, the CTCAP is working on annotations to paragraphs 3.118 and 4.21 and any other the relevant provisions of the Official Commentary 4th Edition for the Cape Town Convention (the ‘**Convention**’) and its Aircraft Protocol (the ‘**Aircraft Protocol**’) to address the abovereferenced matters.

Based on our discussions and assessments, can you kindly confirm that the following reflects your views on these matters:

1) the question of whether a proceeding for a restructuring of debt and/or equity, such as a voluntary arrangement, scheme of arrangement, restructuring plan or similar falls within Article 30 of the Convention and Article XI of the Aircraft Protocol is to be determined by the definition of ‘insolvency proceedings’ in Article 1(l) of the Convention, not by national law;

2) such proceedings fall within the definition of ‘insolvency proceedings’ in the Convention where they are proceedings that (a) are formulated in an insolvency context, or by reason of actual or anticipated financial difficulties of the debtor company, and (b) are collective in that they are concluded on behalf of creditors generally or such classes of creditor as collectively represent a substantial part of the indebtedness;

3) for purposes of the definition of ‘insolvency-related event’:

a. such a proceeding, in which a court acts to facilitate a statutory process, and where the court’s approval is required for its implementation, constitutes one where the ‘assets and affairs of the debtor aresubject to control or supervision by a court for purposes of reorganization’, and

a. b. whether or not a moratorium on enforcement applies during a scheme is not relevant.

Please confirm that you intend to address these matters in a similar way in future Official Protocols.Finally,

please confirm that we may share this letter, and your reply to it, with interested parties.

Sincerely yours

Jeffrey Wool
Director, Cape Town Convention Academic Project

CC: Louise Gullifer, University of Cambridge

Ignacio Tirado, UNIDROIT

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Professor Jeffrey WoolDirector

Cape Town Academic Project 12 June 2020

Dear Professor Wool,

Annotation to the aircraft Official Commentary

Thank you for your letter of today's date.

As you know, I have always avoided involvement in these annotations, which are a matter for the Cape Town Convention Academic Project. But I have from the outset supported theannotations, which further develop the analysis for the benefit of the those working with theCape Town Convention.

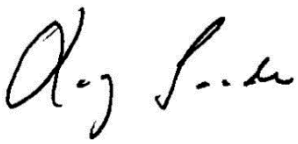
The proposed outline for the annotations you have sent me very much follow the approach I took, and with which you and other members of our group agreed, in our discussions relatingto the UK Corporate Insolvency and Governance Bill now going through Parliament. I agreewith its content.

In fact, I have included material very much along the same lines in the preliminary draft Official Commentary on the Cape Town Convention and Pretoria Protocol and intend to do soin any future edition of any of the existing Official Commentaries.

It will be quite some time before any new edition of the MAC Official Commentary is published and even longer for any new edition of the aircraft Official Commentary. I think therefore that just as readers have benefited from annotations to the Official Commentary inthe past an annotation along the lines you have proposed above would provide valuable assistance to all users of the aircraft Official Commentary.

Please feel at liberty to share this letter with other interested parties.

With best wishes



Annex 2

BIOGRAPHIES of Professors Gullifer and Mokal

A. PROFESSOR LOUISE GULLIFER QC (HON), FBA

Prof Gullifer is currently the Rouse Ball Professor of English Law at the University of Cambridge, and a Fellow of Gonville and Caius College, Cambridge. Before that she was Professor of Commercial Law at the University of Oxford and Fellow and Tutor in Law at Harris Manchester College, Oxford. She has edited, written and co-written a number of books and articles on secured financing and insolvency law. The most relevant books are: L Gullifer and Professor Sir Roy Goode, Goode and Gullifer on Legal Problems of Credit and Security (6th edn, Sweet & Maxwell 2017), H Beale, M Bridge, L Gullifer and E Lomnicka, The Law of Security and Title Financing (3rd edn Oxford University Press 2018), O Akseli and L Gullifer (eds), Secured Transactions Law Reform: Principles, Policies and Practice (Hart Publishing 2016). She was elected a Fellow of the British Academy in 2019. She practised full time at the English Bar from 1985 to 1990 at what is now 3 Verulam Buildings, and is now an honorary member of those chambers, and a bencher of Gray's Inn. She was made an honorary QC in 2018.

Professor Gullifer holds a temporary Professorship of International Commercial Law at Radboud University, Nijmegen, and has been a visiting Professor at Leiden University, Universidad Carlos III, Madrid, the National University of Singapore, City University, Hong Kong, and Columbia Law School. She is an elected member of the International Insolvency Institute and the International Academy of Commercial and Consumer Law. She was for many years the UK delegate to UNCITRAL Working Group VI on the Model Law on secured transactions and related instruments, and is a member of the Working Group in UNIDROIT projects on Factoring and Digital Assets.

Professor Gullifer has had a long association with the Cape Town Convention and has been one of the academic leads of the Cape Town Convention Academic project since its inception in 2011. The purpose of this project is to facilitate and further the academic study and assessment of the CTC and its Protocols, for the benefit of scholars, students, practising lawyers, judges, governments officials, and others working in the relevant industries. The project is now run jointly by the University of Cambridge and UNIDROIT, and was formerly run by the University of Oxford and the University of Washington. The directors of the project are Professor Gullifer, the Secretary General of UNIDROIT, and Jeffrey Wool. (Jeffrey Wool is the Secretary General of the Aviation Working Group and a senior research fellow of Harris Manchester College, Oxford University.) The project hosts a repository of materials on the CTC, runs an annual academic conference, and produces an academic journal. It also issues the Annotations referred to in paragraph 16, below, and runs other research projects. In the course of her role as academic lead of the project, Professor Gullifer has been heavily involved in research and writing about the CTC and the Protocol (as well as CTC related writing in more general books, she has published two articles in the Cape Town Convention Academic Journal), and has spoken on, and been involved in discussions about, many aspects of the CTC in numerous contexts. She was part of the UK delegation for the two Committees of Governmental Experts meetings and the Diplomatic Conference for the Mining, Agricultural and Construction Equipment Protocol, which was adopted in 2019, and is now part of the UK delegation to the Preparatory Commission.

B. PROFESSOR RIZ MOKAL

Professor Mokal is a barrister practising from South Square, Gray's Inn, London, and an Honorary Professor in Laws at University College London ('UCL'). He is the author or co-author of three books and a contributor to three others on English and comparative commercial, insolvency, and restructuring laws, and the author or co-author of some thirty scholarly articles in leading law journals on financial sector regulation, corporate insolvency, bankruptcy, and restructuring, property and trusts, and legal theory. This work has influenced law reform in the UK and elsewhere. Most recently, the European Union Directive on Preventive Restructuring Frameworks (2019) incorporated a new 'creditor best interest' test and a new 'relative priority rule' advocated in Stanghellini, Mokal, Paulus, and Tirado, Best Practices in European Restructuring (2018), the product of a four-country project funded by the European Commission. Professor Mokal's work has also been cited with approval by several courts, including the House of Lords, the Australian High Court, and the Courts of Appeal of England & Wales, New Zealand, Ontario, and Victoria.

From 2009 to 2013, Professor Mokal served as Senior Counsel to the World Bank and Head of the Bank's Global Initiative on Insolvency and Creditor/Debtor Regimes. In this capacity, he worked with the governments of twenty World Bank member states to undertake policy analyses of existing laws and practices, develop new legislation, and train judges, lawyers, insolvency practitioners, central bankers, and other stakeholders. He also held the Chair of Law and Legal Theory at UCL (2008-2016) and, upon resigning the Chair to take up full-time practice, was appointed an Honorary Professor. He was a Visiting Professor in Law at the University of Florence from 2015 to 2018, a Research Associate at Cambridge University's Centre for Business Research from 2003 to 2007, and a Lecturer (2001-2004) and then Reader (2004-2008) in Laws at UCL. As head of the World Bank's delegation to the United Nations Commission on International Trade Law ('UNCITRAL') from 2009 to 2013 and a member of the United Kingdom delegation from 2013 to 2018, Professor Mokal was part of the group that negotiated and authored the new UNCITRAL model laws on the enforcement of insolvency-related judgments and on the crossborder insolvency of enterprise groups, as well as the revised guide to interpretation of the Model Law on Cross-Border Insolvency and the treatment in the Legislative Guide on Insolvency Law of directors' duties in the period approaching insolvency. He was also commissioned by the International Association of Insolvency Regulators to draft the Principles for the Regulatory Regime for Insolvency Practitioners (2018).

Professor Mokal holds several university degrees including a BCL from Oxford and a doctorate in corporate insolvency law from UCL, and was called to the Bar of England and Wales in 1997. He is one of nine UK-based Fellows of the American College of Bankruptcy, and an invited member of each of the World Bank's Global Task Force on Insolvency Law, the International Insolvency Institute, the Bowen Island Group, the International Exchange of Experience on Insolvency Law, and several expert groups on aspects of insolvency law convened by the UNCITRAL Secretariat. In August 2020, he was named amongst the 500 leading global restructuring and insolvency lawyers by Lawdragon.