UK RESTRUCTURING PLAN AND SCHEME OF ARRANGEMENT PROCEEDINGS

EXPERT OPINION ON STATUS UNDER THE CAPE TOWN CONVENTION

PROFESSORS LOUISE GULLIFER AND RIZ MOKAL

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

1 In October 2020, we were instructed in relation to Malaysia Airlines Group Berhad ('**MABG**'), one of the countless businesses to be severely affected by the Covid-19 pandemic and the steps taken in response by authorities around the world. By September 2020, MABG and associated companies were in negotiations with their creditors concerning their financial difficulties. In particular, MABD and two of its subsidiaries, Malaysia Airlines Berhad ('**MAB**') and Malaysia Airlines Berhad Leasing ('**MABL**'), were considering a restructuring of their obligations pursuant to certain operating and finance leases ('**the Leases**') and associated aircraft and engine maintenance contracts. One of the options being considered was for such obligations to be restructured by way of a restructuring plan ('**an RP**') pursuant to the new Part 26A of the UK Companies Act 2006 ('**the 2006 Act**'), inserted by the Corporate Insolvency and Governance Act 2020 ('**the 2020 Act**').

2 Certain interests arising pursuant to the Leases constituted "***international interests***" for the purposes of the Convention on International Interests in Mobile Equipment (the Cape Town Convention or '**the CTC**') as applied to "**aircraft objects**" by the Protocol on Matters Specific to Aircraft Objects ('**the Aircraft Protocol**').[1] Pursuant to the CTC, duly registered international interests remain effective in "*insolvency proceedings against the debtor*".[2] By virtue of the optional "***Alternative A***" of Article XI of the Aircraft Protocol, upon the occurrence of an "*insolvency-related event*" ('**IRE**'), the debtor or its insolvency administrator must either cure all "*defaults*" (other than the occurrence of the IRE itself) in relation to the "*creditor*" with the benefit of the international interest or else surrender to the creditor possession of the relevant aircraft objects. The CTC applies where the debtor is situated in a contracting state,[3] and Malaysia — where MAB and MABL are presumably situated — is a contracting state and has adopted Alternative A.

[1] The CTC and the Protocol are to be read and interpreted together as a single instrument, with any inconsistency resolved in favour of the latter; Article 6 of the CTC.

[2] Article 30 of the CTC.

[3] Article 3(1) read with Article 4 of the CTC.

3 The UK is also a contracting state, having ratified the CTC and the Aircraft Protocol on 27th July 2015. The UK implemented the CTC and the Aircraft Protocol by incorporating them in domestic law through The International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 ('**the Regulations**').[4] However, in relation to MAB and MABL, the version of Alternative A that applies is not that found in Regulation 37 but that found in the Aircraft Protocol itself.[5] [6]

4 We were instructed on behalf of a number of aircraft lessors who are parties to certain of the Leases, and who objected to any non-consensual purported modifications of their rights pursuant to an RP. For the reasons we explain below, we responded as follows to the questions put to us:

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[4] Which came into force on 1st November 2015, being the date referred to in Regulation 2 of the Regulations as the date specified for the commencement of the Protocol; see Treaty Series no. 32 (2015).

The EU (then the EC) acceded to the CTC and the Protocol in 2009, specifying, as it was obliged to do under Article 48(2) of the CTC, the matters governed by the CTC within its competence. The EC decided to make no declaration under Article XXX(3) of the Protocol as regards the application of Alternative A or Alternative B of Article XI of the Protocol. Instead, Member States were to keep their competence concerning substantive law as regards insolvency. See the Council Decision of 6 April 2009 on the accession of the European Community to the Convention on International Interests in Mobile Equipment and its Protocol on Matters Specific to Aircraft Equipment, adopted jointly in Cape Town on 16 November 2001 (2009/370/EC). See also Official Commentary 3.138.

As a result, the text of Alternative A is reproduced in the Regulations at Regulation 37 as a matter of domestic English law. See the information sent to UNIDROIT at the time of deposit of the UK ratification: "*The United Kingdom of Great Britain and Northern Ireland and Gibraltar are implementing Alternative A of Article XI of the Aircraft Protocol through domestic legislation. The waiting period, as set out under the relevant legislation, shall be 60 (sixty) days*.'

[5] Under Article XXX(4) of the Protocol, the courts of Contracting States (thus including the UK) shall apply Article XI in conformity with the declaration made by the Contracting State which is the Primary Insolvency Jurisdiction. This is a choice of law rule, and will apply if Malaysia is the "*Primary Insolvency Jurisdiction*" of MAB and MABL. We have not been asked to advise on this point, but we note that the Primary Insolvency Jurisdiction, defined in Article I(2)(n) of the Protocol, is the Contracting State in which the centre of the debtor's main interest is situated, deemed to be the debtor's statutory seat or, if there is none, the place where the debtor is incorporated or formed unless proved otherwise. We assume that Malaysia falls within this definition in respect of MAB and MABL.

While the text of Article XXX(4) is not expressly incorporated into the Regulations, we consider that the choice of law rule contained within it applies in the UK by virtue of Regulation 6(2), which provides that the Regulations are subject to, and are to be applied in accordance with, the Aircraft Protocol. If that choice of law rule were not followed in the UK because it was not included in the Regulations, then the Regulations would not be applied "*in accordance with*" the Aircraft Protocol.

[6] According to the declaration made by Malaysia by way of subsequent declaration on 18th December 2006. This declaration, which replaced the declaration made by Malaysia on ratification on 2nd November 2005, reads: "*Malaysia declares that it shall apply Article XI, Alternative A, of the Protocol in its entirety to all types of insolvency proceedings, and that the waiting period for the purposes of Article XI(3) of that Alternative shall be sixty (60) working days*."

4.1 *Would an RP constitute an IRE for the purposes of Article I(2)(m) the Aircraft Protocol?* Yes. In summary:

4.1.1 The relevant meaning of "*insolvency-related event*" under Article I(2)(m) of the Aircraft Protocol and Article 37(13) of the Regulations is '*the commencement of insolvency proceedings*".

4.1.2 "*Insolvency proceedings*", which is defined in Article 1(l) of the CTC, must be interpreted according to the interpretation rules of the CTC (Article 5) so as to bear an autonomous meaning consist with the purposes of the CTC and conducive to uniformity and predictability in its application.

4.1.3 The RP is a court-supervised collective proceeding in which the assets and affairs of a debtor which is, or is likely to become, insolvent so as to affect its ability to carry on business as a going concern are reorganised with a view to mitigating the debtor's actual or likely insolvency or its effect.

4.1.4 Accordingly, the RP falls within the natural meaning of the term "*insolvency proceedings*", since it meets the requirements of each of the four elements of CTC definition of this term.

4.1.5 Further, the purposes of the CTC, to which regard is to be had in interpreting the CTC, would not be advanced if a debtor could avoid the application of Alternative A (on the basis of which financing has been given) by choosing a procedure which did not constitute "*insolvency proceedings*" but which had the same substantive effect as "*insolvency proceedings*".

4.2 *Is an RP an IRE for the purposes of Regulation 5 of the Regulations?* Yes. We consider that the term "*insolvency proceedings*" in Regulation 5 of the Regulations must be interpreted so as to bear the same meaning as the equivalent term in the CTC. Further and in any case, it is our view that an RP falls within the definition in Regulation 5 of the Regulations if it is given a literal interpretation taking into account the differences in wording from Article 1(l) of the CTC.

4.3 *How should any discrepancy in the meaning of the term 'IRE' in the Aircraft Protocol and the Regulations be resolved?* There is no relevant discrepancy. Even if there were, English Courts would seek to interpret the Regulations consistently with the Aircraft Protocol. It is only if persuaded by clear evidence that the discrepancy was intended by Parliament that the English Courts would be likely to give effect to the meaning in the Regulations. In our view, there is no such evidence.

4.4 *Is the occurrence of an IRE required in order to trigger Article XI(10) of the Aircraft Protocol, and not merely to trigger Article XI(2) of the Aircraft Protocol?* We consider that, although arguments can be made in favour of the view that the occurrence of an IRE is not necessary to trigger the application of Article XI(10), the stronger arguments oppose this view and support the view that Article XI(10) only applies if an IRE has occurred.

4.5 *Taking all these matters into account, would an English Court sanction an RP which proposed non-consensually to modify the rights of parties to the Leases?* No. Indeed, the Court is unlikely to permit such an RP to be put to the vote in the first place.

5 After we had delivered this Opinion in November 2020, MABL proposed not an RP but a scheme of arrangement pursuant to Part 26 of the 2006 Act ('**Scheme**'). This Scheme offered each holder of a Lease the option ('**the Termination Option**') to terminate the Lease, recover the aircraft object, and receive a termination payment calculated at 115% of what the Lease holder would receive in MABL's liquidation.[7] If the Lease holder chose instead to continue the Lease, then upon the Scheme's being approved by the requisite statutory majority of Lease holders and sanctioned by the Court, Lease holders would receive substantially reduced rents.[8] Because of the Termination Option, the Scheme was compliant with the CTC for the reasons we had explained in paragraph 139 of the original Opinion. Therefore, the question whether a Scheme may in the appropriate circumstances constitute insolvency proceedings for CTC purposes was not at issue: the Court would have jurisdiction to sanction the Scheme irrespective of whether it constituted an insolvency proceeding.

[7] [2021] EWHC 152 (Ch), [24].

[8] [2021] EWHC 152 (Ch), [25].

6 In the convening hearing before Mr Justice Zacaroli,[9] however, MABL nevertheless made submissions on that point, apparently on the basis that if the Scheme constitutes an insolvency proceeding for CTC purposes, then the Court "*cannot sanction a scheme of arrangement which would have the effect of modifying any of the obligations of the company as a debtor, without the consent of each creditor.*"[10] In our view, the proposition that the rights of a class of holders of CTC international interests may not be modified in a CTC insolvency proceeding except with the consent of each member of that class in circumstances where such members are accorded rights akin to the Termination Option is plainly wrong and without any foundation in the CTC itself or in any relevant interpretive material.[11] Further, it is not clear to what extent (if at all) the submissions made by MABL addressed those of the key issues considered below which apply equally to Schemes, including the implications of Article 5(1) of the CTC and the questions whether the Scheme is a collective proceeding in which the debtor's assets and affairs are duly subject to the Court's supervision or control. In any case and while noting that the point had not been taken by any creditor and might not have to be determined in relation to the Scheme proposed by MABL, Mr Justice Zacaroli stated that MABL's written submissions provided "*a powerful case for concluding that the Regulations do not apply.*"[12] By the time of the sanction hearing before Mr Justice Snowden,[13] all Lease holders had consented to the modification of their rights proposed by the Scheme, leaving the Court to note that the issue did not require resolution.[14]

7 We are now instructed on behalf of the Aviation Working Group,[15] and are invited to update the Opinion to address the question whether in appropriate circumstances a Scheme may constitute an insolvency proceeding for CTC purposes. For the reasons we explain below, we consider the answer to be in the affirmative in each of the following scenarios:

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[9] [2021] EWHC 152 (Ch). The hearing took place on 20 January 2021.

[10] [2021] EWHC 152 (Ch), [42].

[11] See the reasons given in Paragraphs 150.6 and 179-183, below.

[12] [2021] EWHC 152 (Ch), [45]. To similar effect, see Barniville J's comments in the High Court of Ireland in *Re Nordic Aviation* [2020] IEHC 445, at [164].

[13] [2021] EWHC 379 (Ch), heard on 23 February 2021.

[14] [2021] EWHC 379 (Ch), [49].

[15] The Aviation Working Group is a not-for-profit legal entity comprised of major aviation manufacturers, leasing companies, and financial institutions, which originally formed in 1994 at UNIDROIT's request to assist in the development of what became the CTC. The Group's statutory objectives are to contribute to the development and acceptance of policies, laws, and regulations which facilitate advanced international aviation financing and leasing and which address inefficiencies in relation to such transactions.

7.1 where the debtor company is insolvent and subject to either liquidation or administration in England (or equivalent proceedings in another jurisdiction);

7.2 where the company is insolvent such that it would be financially eligible to being placed in insolvent winding-up or administration in England (or equivalent proceedings in another jurisdiction), but is not in fact in either such proceeding;

7.3 where the company meets Condition A (as defined below) in relation to RPs and the proposed Scheme substantively meets Condition B (also as defined below) in relation to RPs; and,

7.4 where the likely alternative to the approval and sanction of the Scheme is for the company to enter into insolvent liquidation or administration in England (or an equivalent proceeding in another jurisdiction).

II. BIOGRAPHIES

8 By reason of our background and experience as summarised in this Section, each of us believes that we are competent to provide an expert opinion on the issues raised by the questions put to us.

A. PROFESSOR LOUISE GULLIFER QC (HON), FBA

9 Professor 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.

10 Professor Gullifer recently held 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, the expert list of PRIME Finance 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. In August 2020, she was named amongst the 500 leading global restructuring and insolvency lawyers by Lawdragon.

11 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.[16] 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 Aircraft Protocol,[17] 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.

[16] Jeffrey Wool is the Secretary General of the Aviation Working Group and a senior research fellow of Harris Manchester College, Oxford University.

[17] As well as CTC related writing in more general books, she has published two articles in the Cape Town Convention Journal (one forthcoming).

B. PROFESSOR RIZ MOKAL

12 Professor Mokal is a barrister practising from South Square, Gray's Inn, London, an Honorary Professor in Laws at University College London ('**UCL**'), and an Associate Member of the Centre for Commercial Law at the University of Aberdeen. 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 over two dozen 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.

13 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.

14 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 cross-border 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).

15 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. His practice covers all aspects of English and cross-border insolvency, restructuring, bank resolution, company, commercial, and trust law, and general commercial litigation. He also serves as an expert on all aspects of English, Commonwealth, and comparative commercial, corporate, and insolvency laws. In recent months, his expert evidence has been accepted by the Supreme Court of New York, the High Court of Malaya, and the High Court of Justice of the Isle of Mann.

16 Professor Mokal 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.

III. "*INSOLVENCY-RELATED EVENT*" AND "*COMMENCEMENT OF INSOLVENCY PROCEEDINGS*" IN THE CTC AND THE AIRCRAFT PROTOCOL

A. INTERPRETIVE RESOURCES

17 In this Opinion we refer to a number of sources, but two require explanation. First, when the CTC and the Aircraft Protocol were adopted at the Diplomatic Conference in 2001, the Conference made Resolution No. 5 requesting the preparation of an Official Commentary on the CTC and the Aircraft Protocol to be prepared by the chair of the Drafting Committee, Professor Sir Roy Goode. The Official Commentary prepared pursuant to that resolution in relation to the Aircraft Protocol is in its fourth edition, published in April 2019 ('**Official Commentary**'). While not binding on national courts, the Official Commentary has particularly persuasive status, since it "*results from extensive consultation with negotiating governments and participating observer organisations*"[18] and has been relied upon heavily and extensively by a wide range of industry participants since

[18] Official Commentary, Introduction, paragraph 7.

the CTC and Protocol came into force. In April 2021, Professor Goode and UNIDROIT published the Official Commentary in relation to the Protocol on Matters Specific to Mining, Agricultural and Construction Equipment ('**Official Commentary (MAC)**'). The MAC Protocol (also known as the Pretoria Protocol) was adopted in November 2019. As with the other Protocols to the CTC, many of its provisions are identical to the Aircraft Protocol, and only deviate where required by the different nature of the equipment covered. Article X of the MAC Protocol is identical to Article XI Alternative A of the Aircraft Protocol, the only difference being that there is no equivalent to Alternative B. Thus, the provisions of Article X of the MAC Protocol apply (provided that the Primary Insolvency Jurisdiction of the debtor has made the appropriate declaration under Article XXVIII(3)) upon the occurrence of an '*insolvency-related event*', and the definition of '*insolvency-related event*' in Article I(m) of the MAC Protocol is identical to that in Article I(m) of the Aircraft Protocol. The Official Commentary (MAC) provides guidance as to the definition of "*insolvency proceedings*" — a concept found in the CTC itself and therefore common across all Protocols to the CTC — which somewhat extends beyond and usefully supplements that found in the Official Commentary. Accordingly, we have taken account of the Official Commentary (MAC) in revising our Opinion.

18 Secondly, the Cape Town Convention Academic Project, of which Professor Gullifer is a Director and Academic Lead, publishes Annotations to the Official Commentary dealing with specific points that are not addressed or not fully addressed in the Official Commentary and to provide a neutral and informed analysis for the benefit of all involved with the CTC and the Aircraft Protocol. The facility to produce Annotations has been endorsed by Professor Goode in a personal, and not in any official, capacity. The Annotations have no official standing and do not form part of the Official Commentary, which is the only publication authorised by the 2001 Diplomatic Conference. On 16th June 2020 an Annotation relating to the subject matter of this Opinion was issued ('**the Annotation**').[19] We consider the Annotation at Section III(F), below.

[19] The Annotation is available at https://ctcap.org/wp-content/uploads/2020/06/CTCAP-–-annotation-1-to-OC-4th-Ed-–-reorganisation-arrangements.pdf. An exchange of letters between Jeffrey Wool and Professor Sir Roy Goode which preceded the Annotation and which confirm that its content is consistent with Professor Goode's views on the subject (see at https://ctcap.org/wp-content/uploads/2020/06/CTC-OC-annotation-–-voluntary-arrangements-schemes-of-arrangements-and-restructuring-plans-–-definition-of-insolvency-proceed.pdf). Professor Goode stated that "'*an annotation along the lines you have proposed above would provide valuable assistance to all users of the aircraft Official Commentary*". Further and importantly, the amplification of the meaning of "*insolvency proceedings*" in the Official Commentary (MAC) incorporates key elements of the Annotation.

B. INTERPRETIVE APPROACH

19 Article 5(1) of the CTC requires the CTC's provisions to be interpreted having regard to "*its purposes as set forth in the preamble, to its international character and to the need to promote uniformity and predictability in its application*." This text reflects the standard principles of treaty interpretation,[20] although, as pointed out in the Official Commentary, "*predictability has been substituted for 'good faith', which in high value cross-border financing transactions is considered to create unacceptable uncertainty*".[21]

20 The Official Commentary explains that Article 5(1) is "*an instruction to national courts to avoid national concepts in interpreting the texts*".[22] Thus the provisions of the Convention are to be given an autonomous interpretation as far as possible, having regard to the matters set out in Article 5(1).

21 That there should be an autonomous interpretation, rather than a domestic law interpretation, is also clear from Article 5(2), which provides that "*Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based.*" The Official Commentary describes Article 5(2) as providing "*a cascade approach to interpretation*", with the primary rule being to determine interpretive questions according to the natural and ordinary meaning of the CTC, and secondarily, filling any gaps in accordance with the general principles on which the CTC is based.[23] It is only in the absence of such principles that Article 5(2) provides that matters are to be settled in conformity with the applicable law, namely, the domestic law applicable by virtue of the private international law rules of the forum State.[24]

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[20] UN Vienna Convention on the Law of Treaties 1969 Article 31(1) provides that "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*" The UN Vienna Sales Convention 1980 Article 7(1) provides that "*(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.*"

[21] Official Commentary, paragraph 4.67.

[22] Official Commentary, paragraph 4.68.

[23] Official Commentary, paragraph 2.24.

[24] Article 5(2) is virtually identical to Article 7(2) of the UN Vienna Sales Convention.

C. THE MEANING OF "*INSOLVENCY RELATED EVENT*"

22 "*Insolvency related event*" is defined in Article I(2)(m) of the Aircraft Protocol and Regulation 37(13) of the Regulations. The definitions are materially identical. Each covers:

22.1 the commencement of insolvency proceedings; and

22.2 the declared intention to suspend or actual suspension of payments by the debtor where the creditor's right to institute insolvency proceedings against the debtor or to exercise remedies under the Cape Town Convention is prevented or suspended by law or State action.

23 The second part of the definition relates to the situations where insolvency proceedings in relation to airlines are not permitted or where enforcement remedies otherwise available under the CTC are barred or suspended by State action or judicial or administrative orders falling outside the CTC definition of "*insolvency proceedings*".[25] "*Suspension of payments*" is intended to refer to "*suspension of payments to creditors generally, not merely to a specific creditor or class of creditor and is a phrase used to indicate that the debtor is unable to meet its debts as they fall due.*"[26] It is not applicable to the situation on which we are asked to advise.

24 Therefore, the relevant definition of "*insolvency related event*" is "*the commencement of insolvency proceedings*". The questions to be answered in this Opinion are whether the commencement of a Part 26A RP process in English law constitutes commencement of "*insolvency proceedings*" within the relevant CTC definition, and whether, in appropriate circumstances, a Part 26 Scheme may constitute "*insolvency proceedings"* within that definition.

D. THE CTC'S "*PURPOSES AS SET FORTH IN THE PREAMBLE*"

25 As discussed above, the definition of "*insolvency proceedings*" in Article 1(l) of the CTC must be interpreted having regard to its purposes as set forth in the preamble, as well as to its international

[25] Official Commentary, para 3.121 (the equivalent paragraph in the Official Commentary (MAC) is para 3.105).

[26] Official Commentary, para 3.121.

character and to the need to promote uniformity and predictability in its application. The purposes relevant to this Opinion are as follows:

> "*AWARE of the need to acquire and use mobile equipment of high value or particular economic significance and to facilitate the financing of the acquisition and use of such equipment in an efficient manner,*
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> *RECOGNISING the advantages of asset-based financing and leasing for this purpose and desiring to facilitate these types of transaction by establishing clear rules to govern them,*
>
> *MINDFUL of the need to ensure that interests in such equipment are recognised and protected universally,*
>
> *DESIRING to provide broad and mutual economic benefits for all interested parties,*
>
> *BELIEVING that such rules must reflect the principles underlying asset-based financing and leasing and promote the autonomy of the parties necessary in these transactions,*
>
> *CONSCIOUS of the need to establish a legal framework for international interests in such equipment and for that purpose to create an international registration system for their protection*"

26 It is clear from this preamble, the discussions that led to the CTC and the Aircraft Protocol, the Official Commentary, and the voluminous literature about the CTC and the Aircraft Protocol that has grown up since its adoption, as well as the discussions that preceded the ratification of the treaties by the EU and the UK, that the chief purpose of the CTC and the Aircraft Protocol is the production of economic benefit by increasing the availability of finance and reducing its cost. The CTC system works by increasing ex ante certainty for those providing finance that, if necessary, they will be able to enforce their international interests by obtaining the remedies provided for in the CTC and the Aircraft Protocol, including those on insolvency, as long as the aircraft in question or the determining court is in a contracting state. By 'ex ante certainty' we mean that at the time of making the decision to lend or to enter into a lease, lenders and lessors are able to rely on being able to enforce in this manner on default.

27 Probably the most important enforcement provision in relation to achieving this economic benefit is the insolvency regime in Article XI of the Aircraft Protocol. The Official Commentary says: "*Work in advance of the diplomatic Conference identifies this provision as the single most significant provision*

economically. If the sound legal rights and protections embodied in the Convention and the Aircraft Protocol are not available in the insolvency context, they are not available when they are most needed".[27] In fact, although a contacting state can choose whether to declare in favour of Alternative A or Alternative B or to make no declaration at all, in order to obtain the economic benefits outlined above, a declaration in favour of Alternative A is seen as a prerequisite to achieving economic benefit, for the reasons set out below. Studies undertaken to demonstrate the economic benefits flowing from the CTC and the Aircraft Protocol have assumed a declaration in favour of Alternative A,[28] and such a declaration is part of the package of "***qualifying declarations***" needed to obtain the OECD discount (see the next paragraph).

28 There is very considerable evidence that the reliance by lenders and lessors referred to in paragraph 26 takes place, and that it is reflected in the cost of finance. First, the OECD's Arrangement on Officially Supported Credits has an Aircraft Sector Understanding which includes a "*Cape Town Discount*" of up to 10% of the minimum premium rate granted by government export credit agencies.[29] This Discount is only granted to states who meet certain criteria, one of which is that they have made a declaration in favour of Alternative A,[30] since this is seen as reducing the risk to creditors whose interests are governed by the CTC and the Aircraft Protocol.[31] As pointed out by Zasu and Sato, ratifying the Cape Town Convention with the

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[27] Official Commentary, paragraph 5.60. (The last thirteen words in the counterpart sentence in the Official Commentary (MAC), at paragraph 5.63, are missing.)

[28] See, for example, A. and I. Walter, 'Proposed UNIDROIT Convention on International Interests in Mobile Equipment as Applicable to Aircraft Equipment through the Aircraft Equipment Protocol: Economic Impact Assessment' (1999) 23 Air & Space Law 339; V. Linetsky 'Economic Benefits of the Cape Town Treaty' (at https://ctcap.org/wp-content/uploads/2020/02/Economic-Benefits-of-the-CTC-Vadim-Linetsky-2009.pdf); Warwick Economics, MAC Protocol Economic Assessment (2018). See also V. Linetksy, Accession to the Cape Town Convention by the UK: An Economic Impact Assessment Study, (at https://ctcap.org/wp-content/uploads/2020/02/Acession-to-the-CTC-by-the-UK-Economic-Impact-Study-Linetseky-2010.pdf) and the economic impact assessment carried out by the Department for Business, Innovation and Skills (11th December 2014) paragraphs 10, 72, 76-78.

[29] See OECD, TAD/PG (2020) 1, Arrangement on Officially Supported Credits, Annex III, Part 6 Section 2, paragraphs 34, 36. A predecessor to this Discount was that offered by the US Import-Export Bank which offered a one-third discount in exposure fee on financings of US manufactured commercial aircraft for purchasers in countries that 'sign, ratify and implement' the Convention and Protocol; see K. van Zwieten, 'The insolvency provisions of the Cape Town Convention and Protocols: historical and economic perspectives' (2012) 2 Cape Town Convention Journal 53, 72.

[30] Ibid, paragraph 38 and Annex I

[31] Ibid paragraph 34. See also; M. Chan, 'New OECD Sector Understanding on Export Credits for Civil Aircraft' (2007) 1 Law & Financial Markets Review 511, 512; Y. Zasu and I. Sato, 'Providing credibility around the world: effective devices of the Cape Town Convention' (2012) 33 European Journal of Law and Economics 577, 587; K.

qualifying declarations is a way for a state to acquire (and maintain) credibility in the international capital markets, and thereby enable its airlines to obtain finance at discounted rates by showing ex ante that the Cape Town system of recovery will apply ex post.[32] Malaysia is one of the states which has qualified for the OECD Cape Town Discount.[33]

29 Another indication that ratifying the CTC and the Aircraft Protocol with the relevant declarations increases the availability and reduces the cost of credit comes from the ratings of Enhanced Equipment Trust Certificates, the creation and sale of which is a method of raising finance for the leasing of aircraft from the international capital markets. The ratings take account of the benefit of certainty of enforcement brought by the Cape Town Convention and permit airlines in contracting states that have made the relevant declarations to obtain enhanced ratings.[34]

30 In order to obtain the economic benefit, of which those listed in the last two paragraphs are examples, it is critical that those providing finance can rely on the CTC and Protocol, including the remedies contained in the relevant declarations, applying when an airline defaults, and when it becomes insolvent. If it were possible that aircraft creditors (those with an international interest to which the CTC applies) would not be able to access the CTC enforcement regime when it became necessary, then trust in the Convention would dissipate, the credibility for contracting states referred to earlier would be eroded, and finance would dry up. Thus, to achieve the purposes of the CTC, it is necessary that its provisions be interpreted in a way that enables the benefits to be achieved.

31 This discussion of the purposes of the CTC leads to the conclusion that the term "*insolvency proceedings*" should be interpreted broadly. If it is possible for an airline to choose to enter

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van Zwieten, 'The insolvency provisions of the Cape Town Convention and Protocols: historical and economic perspectives' (2012) 2 Cape Town Convention Journal 53, 72.

[32] Y. Zasu and I. Sato, 'Providing credibility around the world: effective devices of the Cape Town Convention' (2012) 33 European Journal of Law and Economics 577.

[33] See the OECD's Cape Town list available at http://www.oecd.org/trade/topics/export-credits/documents/oecd-export-credits-prevailing-cape-town-list-asu.pdf.

[34] See, for example, Moody's rating of Air Canada's 2017 EETC issuance at https://www.moodys.com/research/Moodys-rates-Air-Canadas-2017-1-EETC-Aa3-to-Class--PR_376711 and Fitch's rating of Air Canada's 2015 EETC issuance, see

https://www.businesswire.com/news/home/20150311005754/en/Fitch-Rates-Air-Canadas-2015-1-Class-A-B-and-C-Certificates. See also the economic impact assessment carried out by the Department for Business, Innovation and Skills (2014) at paragraph 80

proceedings that have the effect of altering the rights of those relying on the CTC protection (which includes the provision that such rights cannot be altered without the consent of the creditor), then the beneficial effects of making a declaration in favour of Alternative A will be lost. Effectively that airline has had its cake (by obtaining cheaper finance on the basis of the declarations made by its home state) and is now eating it (by being subject to a different regime from the CTC regime, despite its creditors having relied on the CTC regime applying). However, were this permitted, while that airline might benefit in the short term, the credibility of the state identified by Zasu and Sato would have been damaged, and future financing of that state's airlines would be scarcer and costlier. Further, and more importantly when considering the interpretation of the CTC, the credibility of the CTC system will have been damaged and the system will no longer achieve its stated purposes. Therefore, the definition of "*insolvency proceedings*" should be given a broad interpretation.

32 It should also be stressed that in order to achieve the purposes of the CTC as described above, it is necessary that there is predictability and uniformity in the application of the remedial regime. One way this is achieved, with respect to a state's declaration under Article XXX(3) in relation to Article XI, is that the declaration made by the "*primary insolvency jurisdiction*" of an airline — defined as the state in which the airline's centre of main interests ('**COMI**') is situated, "*which for this purpose shall be deemed to be the place of the airline's statutory seat or, if there is none, is the place where the airline is incorporated or formed, unless proved otherwise*"[35] — is to be applied by any other contracting state, under Article XXX(4). It is therefore critically important that even if an airline chooses to restructure in a state other than its COMI state, the creditors of that airline should have the protection they would have had in the COMI state, and that that airline cannot, by opting for a particular procedure, achieve an outcome inconsistent with that that would be the outcome in the COMI state.

E. THE MEANING OF "*INSOLVENCY PROCEEDINGS*"

33 "*Insolvency proceedings*" are defined in Article 1(l) of the CTC as "*bankruptcy, liquidation or other collective judicial or administrative proceedings, including interim proceedings, in which the assets and affairs of the debtor are subject to the control or supervision by a court for the purposes of reorganisation or liquidation*".

[35] Article I(2)(n) of the Protocol.

34 For the reasons we have explained, the meaning of "*insolvency proceedings*" in Article 1(l) of the CTC is to be interpreted autonomously having regard to the matters listed in Article 5 rather than applying a domestic law interpretation to the phrase or to the definition.[36] This conclusion is consistent with the need to promote uniformity and predictability, mentioned in Article 5 itself. This need is key to the whole purpose of the CTC and the Aircraft Protocol, which is to provide a uniform international regime for the financing of aircraft objects and, by increasing predictability in how international interests can be enforced, to give intending creditors greater confidence in the decision to grant credit, thus increasing the availability of finance and decreasing its cost.[37] It is critical for this purpose that the provisions of the CTC and the Aircraft Protocol are interpreted consistently by the courts of contracting states.

i. ORIGINS IN THE TRAVAUX PRÉPARATOIRES

35 In considering the meaning of "*insolvency proceedings*" under Article 1(l) it is useful to look at the history of the CTC and the Aircraft Protocol, and the travaux préparatoires leading up to the Diplomatic Conference.[38]

36 The first draft of the CTC and the Aircraft Protocol was put together in the course of a number of meetings of a Study Group, occurring between 1993 and 1998. Three meetings of the Committee of Governmental Experts then took place before the Diplomatic Conference (2001). A draft was put before the first Committee of Governmental Experts in February 1999 which included an early version of what is now Article XI Alternative A. The first paragraph of this draft read:

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[36] The Official Commentary confirms at paragraph 2.24 that this principle of autonomous interpretation applies as much to definitions as to substantive provisions. The point in relation to Article 1(l) is also made very clearly in the Annotation.

[37] See Official Commentary paragraph 2.6, as well as the preamble to the CTC. (Paragraph 2.6 of the Official Commentary (MAC) is in identical terms.)

[38] English courts are able to have regard to travaux préparatoires when interpreting treaties, particularly when they are publicly available and when they are an agreed minute of the understanding upon the basis of which the draft of an article of the convention was accepted, see *Fothergill v Monarch Airlines* [1981] AC 251, 278, 294. The travaux préparatoires for the CTC and the Protocol are available at https://www.unidroit.org/prepwork-2001capetown and at https://ctcap.org/repository/developmental-and-legislative-material/convention-on-international-interests-in-mobile-equipment-and-the-protocol-to-the-convention-on-international-interests-in-mobile-equipment-specific-to-aircraft-equipment-2001/

"*This Article applies where:*

(a) any insolvency proceedings against the obligor have been commenced by the obligor or another person in a Contracting State which is the primary insolvency jurisdiction of the obligor; or

(b) the obligor is located in a Contracting State and has declared its intention to suspend, or has actually suspended payment to creditors generally."

The phrase "*any insolvency proceedings*" was footnoted, pointing out that the phrase "*insolvency proceeding*" would need to be defined.

37 The first Committee of Governmental Experts set up an informal working group to consider the insolvency related provisions of the draft Convention and Protocol. This group ('Insolvency Working Group'), chaired by the head of the UK delegation,[39] met twice between the first and second sessions of the Committee of Governmental Experts. At the first meeting of the Insolvency Working Group, the chair proposed a review of the existing draft of the insolvency provisions "*in particular from the point of view of their compatibility with existing international instruments on insolvency and insolvency assistance (that is, the European Union Convention on Insolvency Proceedings, the European Convention on Certain International Aspects of Bankruptcy and the UNCITRAL Model Law on Cross-Border Insolvency) and national law rules pertaining to transnational insolvency*".[40]

38 The Insolvency Working Group agreed that the type of proceedings referred to in Article 28(2)(a)[41] needed to be defined more precisely. It was agreed to adopt the definition of "*insolvency proceedings*" given in Article 2(a) of the aforementioned UNCITRAL Model Law ('**the Model Law**'). Article 28(2)(a) as thus amended would read as follows: "*(a)* 'insolvency' *means a collective judicial or administrative proceeding in a State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the obligor are subject to control or supervision by a court, for the purpose of reorganisation or liquidation.*"[42]

39 This definition was included in the draft set before the second Committee of Governmental Experts and was slightly changed as a result of the work of an ad hoc inter-sessional drafting group

[39] Catherine Allen, head of the Business Law unit of the Department of Trade and Industry.

[40] Minutes of Insolvency Working Group meeting 1st July 1999, at CGE2 WP 10 Paragraph 7.

[41] This article was the predecessor of what is now Article 30 of the CTC.

[42] CGE2 WP10 paragraph 17. See also the Report of the Insolvency Working Group to the second Committee of Governmental Experts (CGE2 WP19 Annex 1 footnote 3).

between the second and third sessions of the Committee of Governmental Experts. This draft set before the third Committee of Governmental Experts was not substantively discussed, and it was set verbatim before the Diplomatic Conference. This draft read:

> "'insolvency proceedings' *means collective judicial or administrative proceedings, including interim proceedings, in which the assets and affairs of the debtor are subject to control or supervision by a court for the purposes of reorganisation or liquidation*".[43]

40 At the Diplomatic Conference the Egyptian delegation, supported by other civil law delegations, asked if it could be made clear that "*insolvency proceedings*" included "*bankruptcy*", which was seen as a different concept from insolvency. As a result, the draft was slightly changed to its current form: "*bankruptcy, liquidation or other collective judicial or administrative proceedings*",[44] and this was the form adopted by the Diplomatic Conference.

41 This discussion of the development of Article 1(l) shows that the basis for the definition in Article 1(l) was the definition of "*insolvency proceedings*" in the Model Law, partly, at least, on the basis of compatibility. There was no substantive discussion of the draft at any of the sessions of the Committee of Governmental Experts, or the Diplomatic Conference, apart from the discussion leading to the clarification that '*bankruptcy*' was included in the definition. In considering the interpretation of the provision, it is therefore appropriate to consider its meaning under the UNCITRAL Model Law. We analyse the Model Law definition in Section III(E)(iii), below.

ii. UNDERSTANDING THE DEFINITION IN LIGHT OF THE PURPOSES OF THE CTC AND THE OFFICIAL COMMENTARY

42 The Official Commentary explains that the CTC definition "*closely follows Article 2(1) of the UNCITRAL Model Law except for the omission of the word* 'foreign'" and has four elements:[45]

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[43] See DCME 03.

[44] See DCME 61 (interim drafting committee report) and 71 (final report drafting committee)

[45] Official Commentary, para 3.118 (Official Commentary (MAC) para 1.103). Additional paragraphs in the Official Commentary and the Official Commentary (MAC) pertaining to particular elements of the definition are referred to as relevant.

42.1 **Collectivity**: The proceedings must be collective proceedings, "*for the benefit of creditors generally*" and excluding proceedings for the benefit of a particular secured creditor, such as receivership.

42.2 **Judicial or administrative proceedings**: The proceedings may be judicial or administrative, i.e. taking place before an administrative tribunal, though arbitral proceedings dealing with bilateral disputes between parties "*do not constitute collective proceedings*" and are excluded.

42.3 **Control or supervision by a court**: The assets and affairs of the debtor must be subject to control or supervision by a court. According to the Official Commentary, this element of the definition catches "*institutions [sic] such as court-approved refinancing*" as well as debtor-in-possession proceedings in which "*possession and management remain with the debtor company but under the overall control of creditors or a supervisor and the court*". The latter example is given as an instance of the type of proceedings which are covered. We do not read it as if it were statutory text, nor in any case do we consider that the intention is to exclude proceedings not involving overall control by either creditors or a "*supervisor*" (neither mentioned in the text of the CTC itself). What is key is either control or supervision by the court, of the appropriate nature and level, of the debtor's assets and affairs. We take up this important point below.

42.4 **For the purpose of reorganisation or liquidation**: The Official Commentary explains that the purpose of the proceedings must be the debtor's reorganisation or liquidation "*in insolvency*". While the winding up, reorganisation or dissolution of a solvent company falls outside the definition's scope, "*the question whether the debtor is in fact insolvent is irrelevant*". This last point is highly relevant in relation to both Parts 26 and 26A, and we return to it below.

43 It is in our view crucial not to permit this four-step analysis of the elements of the definition of "*insolvency proceedings*" to obscure the obvious and important fact that the definition is a single and unitary one, and that while each element adds something distinctive to it, each also partly takes its meaning from, and must be understood in light of, other elements of the definition.

44 This is clear from the discussion in the Official Commentary. We have already noted one instance of this phenomenon, where the exclusion of arbitral proceedings from the ambit of the "*judicial and administrative proceedings*" element is explained on the basis that arbitral proceedings "*do not constitute collective proceedings*".[46]

45 This necessity to understand one element of the definition in light of others, and indeed of the definition as a whole as characterising insolvency proceedings, is particularly important in relation to two elements of the definitions: "*control or supervision by the court*" and collectivity. We address each in turn, focusing for obvious reasons on reorganisation proceedings (though our analysis holds mutatis mutandis for liquidation proceedings). The Official Commentary describes the "*reorganisation of the debtor*" as "*a reordering of its affairs with a view to its restoration to profitable trading, or to improving the position of creditors on a subsequent liquidation*".[47]

46 Starting with the "*control or supervision by the court*" element:

46.1 Neither the time at which the court must exercise control or supervision of the debtor's assets and affairs nor the extent and form of such control or supervision are defined in the CTC. What we do get from the definition is that "*the assets and affairs of the debtor*" must be "*subject to control or supervision by a court* ***for the purposes of reorganisation***".

46.2 In this light, it is in our view obvious that the timing, extent, and form of court control or supervision of the debtor's assets and affairs that must be present in order to meet the requirements of this element of the definition is whatever is necessary and sufficient to give efficacy to proceedings whose purpose is the debtor's reorganisation (and which are collective and judicial or administrative proceedings).

46.3 We consider any other conception of the requisite timing, extent, and/or form of court control or supervision — such as one which sought, in the abstract, to set a minimum level of control or supervision which all qualifying proceedings must necessarily meet irrespective of their particular nature and indeed of the peculiarities of a particular debtor's

[46] Official Commentary, para 3.118(2) (Official Commentary (MAC) para 3.103(2).

[47] Official Commentary, para 4.21 (3)(a) (see also Official Commentary (MAC) para 4.21 (3)(a) where the concept is further elaborated; see text to footnote 239, below).

assets and affairs — to be gratuitous, alien to the CTC's text, and inconsistent with its purposes. We note that those purposes would be severely undermined if "*international interests*" could be non-consensually modified in proceedings which (as it were) looked, smelt, and tasted like "*insolvency proceedings*" by virtue of being collective judicial or administrative proceedings in which the court was able to exercise all, but no more than, the control and supervision over the assets and affairs of debtors as was required to reorder their affairs with a view to restoring them to profitable trading or else to improving the position of creditors in a subsequent liquidation.

46.4 This reading is supported by the Official Commentary. Among other things:

46.4.1 The Commentary states that all forms of proceedings meeting the requirements set by the other three elements of the definition "*are covered [by the definition] so long as:…the debtor's assets and affairs are subject to control or supervision by a court…, as opposed to control solely by the debtor and its creditors in an informal moratorium or 'workout'*".[48] This indicates that the level of court supervision or control is whatever is appropriate to the proceedings, so long as (i) the debtor's assets and affairs are not under the control solely of the debtor itself or its creditors, and (ii) the process meets the requirements set by the other elements of the definition of "*insolvency proceedings*".

46.4.2 The Commentary also points out that "*It is not necessary that the court should be directly involved in control or supervision of the debtor. It suffices that the insolvency administrator, including a person fulfilling that function as debtor in possession, is subject to the court's control or supervision.*"[49] It follows that the requirement of court supervision or control may be met by the debtor itself, run by the same management which controlled it prior to the commencement of the insolvency proceeding, but which now complies with whatever duties have been placed upon it by the applicable insolvency law.

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[48] Official Commentary, para 4.21, chapeau and subpara (2). (Official Commentary (MAC), para 4.21 is in identical terms.)

[49] Official Commentary, para 3.118 (Official Commentary (MAC), para 3.103). The CTC defines "*Insolvency administrator*" to include "*a debtor in possession if permitted by the applicable insolvency law*"; Article 1(k). See also Official Commentary, para 3.127, which refers to the situation "*where the estate is being administered in insolvency proceedings by a debtor in possession if permitted by the applicable insolvency law. The debtor is then its own insolvency administrator.* 'Debtor in possession' *denotes an insolvent company which, in proceedings for reorganization, is left in the hands of the existing management with power to continue trading in the ordinary course of business under the supervision of creditors and the court*." Official Commentary (MAC), para 3.117 is in identical terms.

Again and by parity of reasoning, there cannot be any minimum level of such duties to which the debtor in possession must be subject, in the abstract. What matters is that any such duties should be sufficient to enable the proceeding to be efficacious.

46.4.3 This point applies to court control or supervision of the debtor's assets as much as to its affairs. The Commentary refers, in a different context, to an agreement by which a debtor in possession in insolvency proceedings agrees to grant a creditor a security interest, where the applicable law subjects the agreement's validity to the court's approval.[50] We consider that the court's power to permit the debtor to encumber or alienate assets, in the context of a reorganisation proceeding and for the purposes of its reorganisation, might constitute all the control over the debtor's assets that was required to meet this element of the definition.

47 A parallel analysis applies to the collectivity element of the definition:

47.1 Again, the CTC does not elucidate on the way in which qualifying proceedings are collective:

47.1.1 It does not specify whether the proceedings must be collective by virtue of the fact that they relate to all or most of the debtor's liabilities, by value, by number of liabilities, by number of obligees, by number of classes of liabilities, by number of classes of obligees, and/or by some other measure.

47.1.2 Mutatis mutandis the debtor's share capital.

47.1.3 Mutatis mutandis the debtor's assets. A collective insolvency proceeding may exclude the debtor's encumbered assets for certain purposes (as does an English winding-up) or instead may include such assets (as does an English administration), without in either case failing to meet the collectivity requirement.

[50] Official Commentary, para 2.40(4) (Official Commentary (MAC), para 2.30(4)).

47.1.4 Relatedly and mutatis mutandis the debtor's other affairs, such as whether some or all of its estate should be subject to a moratorium against creditor action, or against disposal or dilution by the debtor's own management, or both. Again, the extent of the moratorium differs in English winding-up and administration, though both are paradigmatically collective proceedings.

47.1.5 Collectivity may also, or alternatively, be defined by reference to the beneficiaries of the proceeding. Creditors as a whole are an obvious category of beneficiary, but a proceeding may remain collective even though it operates in favour of a subset of creditors, such as when an English administration operates in the interests of secured and preferential creditors because the general unsecured creditors no longer have an economic stake in the debtor's fate (so long as the administrator does not unnecessarily harm the interests of the creditors as a whole[51]).

47.2 Any, some, or all of these elements may be used to characterise the collectivity of an insolvency proceeding, and different insolvency regimes focus on different aspects for the purposes of different types of proceeding. Yet, as noted, the CTC does not expressly throw any light on the nature of the collectivity relevant to it.

47.3 Against this background, we consider that a proceeding which met the requirements of the other elements of the definition would be a collective proceeding so long as it was a proceeding for the benefit of such a class or classes of creditors as had a stake in the proceeding, and not merely a proceeding for the benefit of particular creditors. Any more restrictive an understanding of collectivity is inconsistent with the CTC's text and antithetical to its purposes.

47.4 The Official Commentary, which characterises collective proceedings as those "*for the benefit of creditors generally*", is consistent with our position:

47.4.1 A proceeding which restructured 90%, or 80%, or even 51% by value of the debtor's liabilities — in circumstances where only <u>that</u> set of its liabilities was due

[51] Para 3(4) of Schedule B1 to the 1986 Act.

and in need of restructuring in order to restore a cashflow insolvent debtor to solvency and/or to improve the position of its creditors in a subsequent liquidation — would, by that fact alone, be "*for the benefit of creditors generally*", since, by hypothesis, creditors generally would then have the benefit of a solvent debtor or would enjoy an improved position in a subsequent liquidation.

47.4.2 The same might hold, however, if the debtor's cash flow solvency was threatened by a set consisting of 49% of its liabilities which were due and payable while the debtor was in financial difficulties. Mutatis mutandis if the set included only 40%, or 30%, or 5%. The benefit to creditors generally, in terms of the debtor's restoration to solvency or an improved position in a subsequent liquidation, might be exactly analogous in each case.

47.4.3 To rule out by definitional fiat a proceeding intended to enable the reorganisation of only those classes of liabilities which were the cause of the debtor being in need of reorganisation at all — to require, gratuitously, that the proceeding must necessarily also affect liabilities which there was no need to affect in order to reorganise the debtor — seems to us unsupported by text, purpose, or policy.

47.4.4 Nor could it sensibly be a requirement of collectivity that every single creditor benefit from the proceeding. A fully secured creditor may receive no benefit from a restructuring. Ditto a class of fully secured creditors, or indeed multiple classes all of whom were fully secured, and who together held 5%, 49%, 51%, or indeed 90% by value of the debt. In each of these scenarios, there would seem to us to be no justification for excluding a proceeding which enabled the debtor to reorganise such of its liabilities as, but no more than, was required to restore the debtor to solvency or improve the position of relevant creditor classes in a subsequent liquidation.

47.4.5 Finally on this point, a proceeding which only benefitted a debtor's secured creditors as a class, in circumstances where all other creditor classes were out of the money, might be a collective proceeding so long as it met all other requirements of the definition. This holds whether the class is inhabited by multiple secured creditors or just one. The phenomenon is a very familiar one in

English practice, where an administration often effectively operates in the interests of the sole secured creditor. It would be a novel proposition that in such cases and without more (such as some form of abuse of process), the administration no longer constituted a collective proceeding.

47.5 Further, the Official Commentary (MAC) strongly supports the view we have set out above.

47.5.1 It explains that collective proceedings are those "*for the benefit of creditors generally or a group of creditors representing a significant part of the indebtedness*".[52] The Oxford English Dictionary defines "*significant*", relevantly, as "*Sufficiently great or important to be worthy of attention; noteworthy; consequential, influential*". In our view and for the reasons given above, what constitutes "*a significant part*" of the debtor's indebtedness is whatever part of that indebtedness is worthy of attention or noteworthy in requiring restructuring in order to resolve the debtor's distress and/or to mitigate the effect of such distress. Any other reading of significance would be arbitrary and unjustifiable.

47.5.2 The Official Commentary (MAC) further states that[53] "*schemes, or plans[,] of arrangement in an insolvency setting which are under the control of the court where non-participating members are not bound*" may also meet the collectivity requirement. How to interpret the reference to "*an insolvency setting*" is considered below.[54]

47.6 The Official Commentary (MAC) also highlights[55] the relevance of the meaning of "*collective proceedings*" the EU Insolvency Regulation (Recast) ('**EIR**'):[56]

[52] Official Commentary (MAC), para 3.103(1).

[53] Official Commentary (MAC), para 3.103(1).

[54] See para 136 et seq.

[55] At Official Commentary (MAC), para 3.103(1). It adds: "*However, the Regulation definition is limited to the types of proceeding listed in Annex A [to the EIR] and is therefore narrower than the [CTC] definition.*" We consider the implications of the point about Annex A at Paragraphs 129.1.2, 129.2.4, and 130.

[56] Regulation (EU) 2015/848 (Recast).

"*While the [EIR] is not determine of the meaning of* 'collective proceedings' *for the purposes of the [CTC], Article 2(1) and recital (14) of the Regulation provide helpful clarification of the concept.*"

We highlight the following points:

47.6.1 "*Collective proceedings*" is defined by Article 2(1) of the EIR to mean "*proceedings which include all or a significant part of a debtor's creditors, provided that, in the latter case, the proceedings do not affect the claims of creditors which are not involved in them*".

47.6.2 Recital 14 to the EIR explains that collective proceedings are those which affect at least "*a significant part of the creditors to whom a debtor owes…a substantial proportion of the debtor's outstanding debts provided that the claims of those creditors who are not involved in such proceedings remain unaffected*". Proceedings which "*involve only the financial creditors of a debtor*" are also included. Proceedings which "*lead to a definitive cessation of the debtor's activities or the liquidation of the debtor's assets*" would only qualify as collective if they "*include all the debtor's creditors.*" By contrast, proceedings aimed at "*rescuing the debtor*" may be duly collective even if they do not include all creditors.

47.6.3 We also draw attention to Recital 12 to the EIR, which suggests that proceedings are collective to the extent that all affected creditors are made aware of the opening of the proceedings, are able to lodge claims, and to challenge the jurisdiction of the court which has opened the proceedings.

47.6.4 The Oxford English Dictionary defines "*substantial*" as (relevantly) "*Of ample or considerable amount or size*". In our view, the points we have made above stand mutatis mutandis in relation to what constitutes "*a significant part*" of creditors and a "*substantial proportion*" of the debt. The only non-arbitrary interpretation of these requirements is that the proceeding should be able to address whatever proportion of the debts and creditors must be addressed in order to meet the objectives of the proceeding.

iii. UNCITRAL MODEL LAW

48 Article 2(a) of the Model Law, the inspiration for the CTC definition, identifies a "*foreign proceeding*"[57] as characterised by the following relevant elements:

48.1 a collective judicial or administrative proceeding;

48.2 pursuant to a law relating to insolvency;

48.3 in which proceeding the assets and affairs of the debtor are subject to the control or supervision by a court;

48.4 for the purposes of reorganisation or liquidation.

49 This definition benefits from elucidation by UNCITRAL itself in the revised *Guide to Enactment and Interpretation* ('**the Model Law Guide**'), published in 2014.[58] We consider each of these elements in turn. By way of context, we draw attention to the Model Law Guide's observation that the Model Law definition is designed "*to avoid inadvertently narrowing the range of possible…proceedings that might obtain recognition*" and "*is intended…to refer broadly to proceedings involving debtors that are in severe financial distress or insolvent*".[59]

50 First, as to the requirement of a collective judicial or administrative proceeding:

50.1 Proceedings are collective proceedings if they serve the Model Law's purpose of providing "*a tool for achieving a coordinated, global solution for all stakeholders of an insolvency proceeding*", and

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[57] The reference to "*foreign*" in this definition, which we ignore in subsequent discussion, is explained by the function of the definition in the Model Law as enabling the domestic court asked to recognise a foreign proceeding to assess whether it qualifies for recognition as an insolvency proceeding.

[58] As a matter of English law, Regulation 2(2) of the Cross-Border Insolvency Regulations, incorporating the Model Law in domestic law, makes clear that UNCITRAL's *travaux préparatoires* and the Model Law Guide are admissible as aids to the construction of the domestic implementation of the Model Law; see *In re OJSC International Bank of Azerbaijan* [2018] EWCA Civ 2802, [2019] Bus LR 1130, 1142B-H, at [33]-[34] (Henderson LJ). This includes the revised Guide; *Carter v Bailey* [2020] EWHC 123 (Ch), [110] (Chief ICC Judge Briggs).

[59] The Model Law Guide, pp 38-9, para 65.

not if they are "*merely…a collection device for a particular creditor or group of creditors*".[60] We note in particular that there is no requirement that all the stakeholders of a debtor entity be involved in the proceeding; instead, the requirement is that all stakeholders of an insolvency proceeding be afforded a global solution. This somewhat circular statement is best understood in light of the next point.

50.2 The Model Law Guide clarifies that "*a key consideration*" in relation to collectivity is "*whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors*".[61] The focus here is on the nature and full scope of the proceeding under domestic law: the proceeding should be able to deal with substantially all of the debtor's assets and liabilities, except any excluded by law. Again, where proceedings are capable of dealing with substantially all of the debtor's assets and liabilities, the fact that the law permits the use of such a proceeding in a case in which no effect is intended upon certain categories of the debtor's assets or liabilities does not detract from the proceeding's collective nature.

50.3 The Model Law Guide confirms this reading: "*A proceeding should not be considered to fail the test of collectivity purely because a class of creditors' rights is unaffected by it.*"[62] We read the reference to "*a class*" in this sentence as illustrating the possibility to which we have drawn attention, and not as suggesting that a proceeding which permits exclusion of more than one class is by that fact alone not collective. For example, the Model Law Guide envisages collective proceedings which do not adversely affect certain creditors, giving the example of the treatment of secured creditors in insolvency proceedings in certain jurisdictions.[63] Evidently, there may be multiple classes of secured creditor, holding security interests either in relation to the same assets but with different priorities inter se or else in relation to different assets altogether.

[60] The Model Law Guide, p. 39, para 69.

[61] The Model Law Guide, p. 40, para 70.

[62] The Model Law Guide, p. 40, para 70.

[63] The Model Law Guide, p. 40, para 70.

50.4 Voluntary proceedings are included, as are those "*in which the debtor retains some measure of control over its assets, albeit under court supervision*".[64]

50.5 Qualifying collective proceedings "*may be commenced under specific circumstances defined by law that do not necessarily mean the debtor is in fact insolvent.*"[65] This is consistent with the position taken in the CTC's Official Commentary.

51 Second, proceedings must take place pursuant to a law relating to insolvency. The following considerations are relevant:

51.1 The Model Law Guide emphasises that the formulation "*law relating to insolvency*" was adopted to permit inclusion of proceedings "*conducted under law that is not labelled as insolvency law (e.g. company law), but which nevertheless deals with or addresses insolvency or severe financial distress*"; the formulation is "*sufficiently broad to encompass a range of insolvency rules irrespective of the type of statute or law in which they might be contained and irrespective of whether the law that contained the rules related exclusively to insolvency*".[66] The focus is firmly on whether the proceeding in question is capable of addressing insolvent entities.

51.2 In line with the CTC's Official Commentary, the Model Law Guide notes that judicial or administrative proceedings to wind up a solvent entity as a prelude to the entity's dissolution, and other similar proceedings, are excluded from this element of the definition. However, "*Where a proceeding serves several purposes, including the winding up of a solvent entity, it falls under [the definition] only if the debtor is insolvent or in severe financial distress*".[67] In our view, the same holds of reorganisation proceedings available in relation to both solvent and insolvent entities and those in severe financial distress.

52 Thirdly, as to control or supervision by a court:

[64] The Model Law Guide, p. 40, para 71.

[65] The Model Law Guide, p. 40, para 72.

[66] The Model Law Guide, p. 41, para 73.

[67] The Model Law Guide, p. 22, para 48.

52.1 The Model Law Guide points out that the Model Law does not specify either the level of control or supervision nor the time at which such control or supervision should apply. Further, while such control or supervision "*should be formal in nature*", it may be "*potential rather than actual*".[68] We take this to mean that, once the proceedings are underway, the court should have jurisdiction to exercise such supervision or control as is required to make the proceeding efficacious (such as by requiring provision of information or production, disposal, or encumberment of assets), even if it does not need to or chooses not to exercise that jurisdiction (because, for example, the requisite information has already been provided and all relevant assets are accounted for and need neither be disposed of nor encumbered).

52.2 The Model Law Guide repeats that "*a proceeding in which the debtor retains some measure of control over its assets, albeit under court supervision, such as a debtor-in-possession would satisfy this requirement*".[69]

52.3 The Model Law Guide notes that "*both assets and affairs of the debtor should be subject to control or supervision; it is not sufficient if only one or the other are covered by the foreign proceeding*":[70]

52.3.1 In light of the points already made, this statement should be read, in context, as permitting debtor-in-possession proceedings where the debtor's assets and affairs are potentially subject to the court's formal supervision or control to the extent necessary and sufficient to give efficacy to the proceeding.

52.3.2 Further and importantly, in the paragraph prior to the one in which the need for supervision or control of both the debtor's assets and affairs is noted, the Model Law Guide states that "*Expedited proceedings of the type referred to in the Legislative Guide (see part two, chap IV, paras. 76-94 and recommendations 160-168) should not be excluded.*"[71] As we explain in the next subsection, the relevant proceedings envisaged by the Legislative Guide entail the court's supervision or control not of

[68] The Model Law Guide, p. 41, para 74.

[69] The Model Law Guide, p. 41, para 74.

[70] The Model Law Guide, p. 42, para 76.

[71] The Model Law Guide, p. 41, para 75.

the asset or affairs of the debtor, but of the proceeding itself. That the Model Law Guide expressly provides that such proceedings satisfy the supervision or control requirement strongly supports our view that what is needed is whatever level of supervision or control gives such proceedings efficacy.

53 The fourth element, of the purpose of reorganisation or liquidation, is characterised by exclusion in the Model Law Guide, which states that measures designed to prevent asset dissipation, to prevent detriment to investors rather than to all creditors, and purely contractual measures would not qualify.[72]

iv. UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW

54 Any suggestion that the Model Law definition of "*foreign proceedings*" is somehow inapposite for the purpose of characterisation of insolvency proceedings in a domestic context would in our view be untenable: what is a foreign proceeding when viewed from State X is a domestic proceeding in at least some State Y. It would be pointless for the Model Law to provide an idiosyncratic definition of insolvency proceedings which failed to catch a non-trivial proportion of the types of real-world proceedings around the world that address the insolvency or distress of actual debtors. If anything, notwithstanding the Model Law Guide's statement to the contrary, the Model Law's definition would be likely to err on the side of cautious restrictiveness so as to exclude from recognition proceedings which — for substantive or procedural reasons including those of public policy, such as where proceedings discriminate against foreign creditors — might not pass muster for recognition abroad. By contrast and for the reasons we have explained above, the CTC's definition should be interpreted expansively with a view to giving creditors with "*international interests*" the protections afforded by Article XI Alternative A in all proceedings in relation to insolvent or distressed debtors.

55 In any case, however, we seek to forestall any such misguided objection by referring to UNCITRAL's Legislative Guide on Insolvency ('**the Legislative Guide**'),[73] whose purpose "*is*

[72] The Model Law Guide, p. 42, paras 77-8.

[73] The Legislative Guide has four parts: Parts I and II, dealing with domestic insolvency proceedings concerning an individual debtor, were adopted in 2004. Part III, addressing the treatment of enterprise groups in insolvency, and Part IV, dealing with directors' obligations in the period approaching insolvency, were adopted in 2012 and 2013 respectively.

to assist the establishment of an efficient and effective legal framework to address ***the financial difficulty*** *of debtors. [The Legislative Guide] is intended to be used as a reference by national authorities and legislative bodies when preparing new laws and regulations or reviewing the adequacy of existing laws and regulations…It focuses on insolvency proceedings commenced under the insolvency law and conducted in accordance with that law, with an emphasis on reorganization, against a debtor, whether a legal or natural person, that is engaged in economic activity.*"[74]

56 Further, the Recommendations of the Legislative Guide, together with the World Bank's Principles of Effective Insolvency and Creditor Rights Systems, constitute the "*Insolvency and Creditor Rights Standard*", one of fifteen "*key*" standards, which are "*designated by the [Financial Stability Board] as key for sound financial systems and deserving of priority implementation depending on country circumstances. These standards are broadly accepted as representing minimum requirements for good practice that countries are encouraged to meet or exceed.*"[75]

57 Accordingly, the Legislative Guide together with the World Bank Principles are considered international 'best practice' standards in insolvency law and are used by intergovernmental organizations including the World Bank and the International Monetary Fund as the basis for assessing domestic insolvency regimes and for recommending reform.[76] Assessment of proceedings for the purposes of Article 1(l) of the CTC by reference to the Legislative Guide is therefore likely to comply with the CTC's requirement that it be interpreted having regard to its international character and to the need to promote uniformity and predictability in its application.[77]

58 The Legislative Guide defines "*insolvency proceedings*" as "*collective proceedings, subject to court supervision, either for reorganisation or liquidation*".[78] It explains that "*Most legal systems contain rules on various types of proceeding (which are referred to in this* Legislative Guide *by the generic term* 'insolvency proceedings*') that*

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[74] The Legislative Guide, p. 1, para 1 (emphasis added).

[75] Financial Stability Board, *Key Standards For Sound Financial Systems*; available at http://www.fsb.org/work-of-the-fsb/about-the-compendium-of-standards/key_standards/ .

[76] See International Monetary Fund, *Factsheet: Standards and Codes: The Roles of The IMF*, available at https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/16/25/Standards-and-Codes .

[77] CTC, Article 5(1).

[78] Legislative Guide, p. 5, para 12(u).

can be initiated to resolve a debtor's financial difficulties."[79] We consider the elements of collectivity, court supervision, and (relevantly) reorganisation in turn, while reiterating the importance of reading the definition as a unitary one in which each element takes its meaning in part from other elements. In particular, since reorganisation proceedings are a paradigm of court-supervised collective insolvency proceedings,[80] the Legislative Guide's treatment of reorganisation proceedings in our view clearly guides how the elements of collectivity and court supervision should be understood.

59 First, the Legislative Guide characterises "*collective proceedings*" in the following terms:

59.1 Collective proceedings are those in which claimants holding the same type of claim against the debtor are treated equitably, with the result that like claims are treated alike. Differential treatment within collective proceedings is justified if it reflects the different bargains the debtor has struck with different types of claimant:[81]

> "*The objective of equitable treatment is based on the notion that, in collective proceedings, creditors with similar legal rights should be treated fairly, receiving a distribution on their claim in accordance with their relative ranking and interests. This key objective recognizes that all creditors do not need to be treated identically, but in a manner that reflects the different bargains they have struck with the debtor…Even though the principle of equitable treatment may be modified by social policy on priorities and give way to the prerogatives pertaining to holders of claims or interests that arise, for example, by operation of law, it retains its significance by ensuring that the priority accorded to the claims of a similar class affects all members of the class in the same manner.*"

[79] Legislative Guide, p. 9, para 2 (emphasis added). The terms "*financial difficulty*" and "*financial difficulties*" are used throughout the Legislative Guide as umbrella terms for the state in which a debtor needs the assistance of insolvency law. See for example the Legislative Guide's characterisation of reorganisation proceedings, which we discuss below.

[80] See the Legislative Guide's definition of "*insolvency proceedings*", set out at the beginning of this paragraph. Further, the Legislative Guide declares its own "*focus [to be] on insolvency proceedings commenced under the insolvency law and conducted in accordance with that law, with an emphasis on reorganization, against a debtor, whether a legal or natural person, that is engaged in economic activity*"; p. 1, para 1.

[81] Legislative Guide, p. 11, para 7. To similar effect, see p. 136, para 151.

59.2 This equitable and therefore predictable response to similarly situated claimants enables collective proceedings to counter the incentives creditors otherwise possess to race to enforce their claims individualistically in a way that would result in a disorderly and value-destructive dismemberment of the debtor's estate:[82]

> "*Orderly and effective liquidation proceedings address the inter-creditor problem by setting in motion a collective proceeding that seeks to avoid those actions which, while viewed by individual creditors as being in their own best self interest, essentially lead to the loss of value for all creditors. A collective proceeding is designed to provide equitable treatment to creditors, by treating similarly situated creditors in the same way, and to maximize the value of the debtor's assets for the benefit of all creditors. This is normally achieved by the imposition of a stay on the ability of creditors to enforce their individual rights against the debtor and the appointment of an independent person whose primary duty is to maximize the value of the debtor's assets for distribution to creditors.*
>
> *An orderly and relatively predictable mechanism for the enforcement of the collective rights of creditors can also provide creditors with an element of predictability at the time they make their lending decisions and can more generally promote the interest of all participants in the economy by facilitating the provision of credit and the development of financial markets.*"

59.3 Collective proceedings deter individualistic creditor action which would be harmful to the interests of creditors as a whole:[83]

> "*With regard to creditors, one of the fundamental principles of insolvency law is that insolvency proceedings are collective proceedings, which require the interests of all creditors to be protected against individual action by one of them.*"

59.4 We pause to underline what the excerpt from the Legislative Guide at paragraph 57.2, above, makes clear, that collectivity is marked by "*equitable treatment to creditors, by treating similarly situated creditors in the same way*". Claimants 'race' against each other to enforce claims against a distressed mutual debtor because they rationally fear that tardiness would leave them with little or nothing by way of payment. This race to enforce is likely to result

[82] Legislative Guide, p. 31, paras 35-36. To similar effect, see p. 46, para 23.

[83] Legislative Guide, p. 83, para 26.

in the dismemberment of the debtor's business even if it had greater value as a going concern than would be realised from the piecemeal disposal of assets, to the detriment of claimants as a whole (who together suffer the loss of any such 'going concern surplus'). The moratorium on claim enforcement is a common way of countering these value-destructive individualistic incentives and thereby marking the boundary of the collective regime — as the Legislative Guide puts it in the excerpt, collectivity is "*normally achieved by the imposition of a stay*" — but it is not essential. What matters is the introduction of an alternative to the 'first come, first served' individualistic claim enforcement method. Even in the absence of a stay, a proceeding which distributes the value in the debtor's estate based on the type of claim rather than the order in which the claim is pressed neutralises the incentives claimants otherwise possess to 'race' to enforce their claims.[84] A proceeding is collective, then, to the extent that it provides an alternative to individualistic claim enforcement.

60 Secondly, the Legislative Guide describes court supervision as follows:

60.1 The Legislative Guide states that it uses the word "*court*" in the same way as Article 2 of the Model Law "*to refer to a judicial or other authority competent to control or supervise insolvency proceedings*".[85] In explaining its references to the "*court*", the Legislative Guide further states that it "*assumes that there is reliance on court supervision throughout the insolvency proceedings, which may include the power to commence insolvency proceedings, to appoint the insolvency representative, to supervise its activities and to take decisions in the course of the proceedings.*" The Legislative Guide proceeds to warn, however, that while such reliance on the court may be appropriate as a general principle, alternatives might also be suitable, such as where courts are unable to handle insolvency work and/or supervision by a different authority is preferred.[86]

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[84] Creditors A, B, C, and D no longer have reasons to compete to enforce their claims against their distressed mutual debtor if, irrespective of the order in which they each obtain a judgment and are in a position to enforce it, their claims would be met on the basis that (say) statutory preferential creditors A and D would be paid pro rata inter se before general unsecured creditors B and C are paid pro rata inter se from whatever (if anything) remains in the estate. The point is explained at greater length in R. Mokal, 'Priority as pathology: The *pari passu* myth' (2001 60(3) *Cambridge Law Journal* 581, 590-595.

[85] Legislative Guide, p. 3, para 8. See to identical effect at p. 4, para 12(i).

[86] Legislative Guide, p. 3, para 7.

60.2 The Legislative Guide defines "*debtor in possession*" as "*a debtor in reorganization proceedings, which retains **full** control over the business, with the consequence that the court does not appoint an insolvency representative.*"[87] It explains that "*Where the insolvency law permits a debtor to remain in control of the business, it is desirable that the functions of an insolvency representative that may be performed by that debtor in possession are specified. In some circumstances, that approach may enhance the chances of a successful reorganization by recognizing the debtor's familiarity with the business provided it can be relied upon to carry on the business in an honest manner and obtain the trust, confidence and cooperation of creditors.*"[88]

60.3 The Legislative Guide lists the 20 duties and functions with which an insolvency representative may characteristically be vested, observing, among other things, that (i) "*the different functions may overlap or may not be relevant because of the design of the insolvency law…and some may be more relevant to liquidation than to reorganization*", and that (ii) "*Where reorganization involves a debtor in possession and no insolvency representative is appointed, many of the functions listed above will be performed by the debtor, with varying degrees of supervision by the court or by creditors.*"[89]

60.4 Parts I, II, and IV of the Legislative Guide never use the term "*assets and affairs*". Part III (dealing with enterprise groups), has three mentions: (i) a footnote reproduces the Model Law definition of "*foreign proceeding*",[90] and (ii) a single paragraph uses the phrase in both heading ("*Coordination of the debtor's assets and affairs*") and body to refer to the sort of coordination which is called for when multiple members of an enterprise group are in insolvency proceedings in different jurisdictions in circumstances (such as when one group member's business depends on essential supplies provided by another group member) where such coordination is in the mutual interests of all the relevant stakeholders. In such a context, the Legislative Guide notes that "*Coordinating the debtor's assets and affairs may involve both the courts and the insolvency representatives.*"[91] As is clear from this context, control over the debtor's assets and affairs in insolvency proceedings is not a matter for courts alone but

[87] Legislative Guide, p. 5, para 12(l) (emphasis added).

[88] Legislative Guide, pp. 165-6, para 16.

[89] Legislative Guide, pp. 178-190, paras 49-51.

[90] See e.g. Legislative Guide, Part III, p. 88, fn. 56.

[91] Legislative Guide, Part III, p. 97, para 35.

may also involve the insolvency representative or, as the case may be, the debtor in possession.

60.5 In our view, the absence as well as the appearances of the term "*assets and affairs*" in the Legislative Guide are telling. That the Legislative Guide barely uses it shows that it should not be thought that a proceeding must involve court supervision or control of the debtor's assets and affairs in order to qualify as an insolvency proceeding at all. The three instances of the use of the term, making explicit reference to the Model Law's use of it, indicate that the phrase as used in the Model Law should not be read overly literally, and certainly not as setting up conjunctive requirements. On any fair reading, the Legislative Guide recognises that the debtor's assets and affairs may, in the course of insolvency proceedings of the type that the Legislative Guide describes, be in the supervision or control of the insolvency representative as well as or instead of the court. And as we have already pointed out, the Legislative Guide is clear that the debtor in possession may in some types of insolvency proceeding perform some or all of the functions that other types of proceeding vest in the insolvency representative.

60.6 Consistently with this last, critical point, all parts of the Legislative Guide focus on supervision of insolvency proceedings, and only derivatively refer to supervision of the debtor's assets and/or affairs, which the Legislative Guide treats as being undertaken over the course of the proceedings by some combination of four actors: (i) the court or administrative agency, (ii) an insolvency professional or debtor in possession (i.e. the debtor's pre-commencement management), (iii) the debtor in its own right (so that, for example, the debtor's pre-commencement management may continue to retain management responsibilities even though an insolvency professional acts as an insolvency officeholder), and (iv) a creditor body. There are numerous instances of this phenomenon, including the following:

60.6.1 The very definition of "*insolvency proceedings*" makes clear ("…*collective proceedings, subject to court supervision*…") that what matters is court supervision of the proceedings, not of the debtor, its assets, or its affairs (none of which the definition mentions).

60.6.2 The Legislative Guide draws to lawmakers' attention the importance of considering, amongst the common features of an effective and efficient insolvency law, "*The extent to which the debtor should be allowed to retain control of the business once insolvency proceedings commence or be displaced and an independent party…appointed to supervise and manage the debtor, and the distinction to be made between liquidation and reorganization in that regard*".[92] Again, this shows the Legislative Guide's recognition that difference insolvency regimes may strike a different balance as to the debtor's supervision and management between the debtor's pre-commencement management and an insolvency officeholder, and that this balance may be struck differently as between liquidation and reorganisation proceedings.

60.6.3 Far from requiring court supervision of the debtor's assets and affairs in each type of insolvency proceeding, the Legislative Guide notes the importance for legislators in each jurisdiction carefully to decide the manner and extent of court involvement: "*In designing the insolvency law it may be appropriate to consider the extent to which courts will be required to supervise the proceedings and whether or not their role can be limited with respect to different parts of the proceedings or balanced by the role of other participants, such as creditors and the insolvency representative.*"[93]

60.6.4 Indeed, in recognition of the variations amongst types of reorganisation proceeding in different legal systems around the world, the Legislative Guide recognises the possibility of such a proceeding not involving court supervision at all. It notes that amongst the "*key or essential elements that can be determined*" by an insolvency law in relation to reorganisation proceedings is "*Submission of the debtor to the proceedings (whether on its own application or on the basis of an application by creditors), which may or may not involve judicial control or supervision*".[94]

61 Turning thirdly and finally to reorganisation:

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[92] Legislative Guide, p. 20, Recommendation 7(c).

[93] Legislative Guide, pp. 22-24, para 3.

[94] Legislative Guide, p. 28, para 28(a) (emphasis added).

61.1 The Legislative Guide defines "*Reorganization*" as "*the process by which the financial well-being and viability of a debtor's business can be restored and the business continue to operate, using various means possibly including debt forgiveness, debt rescheduling, debt-equity conversions and sale of the business (or parts of it) as a going concern*", and "*Reorganization plan*" as "*a plan by which the financial well-being and viability of the debtor's business can be restored*".[95]

61.2 Noting the wide diversity amongst different types of reorganisation proceedings, the Legislative Guide identifies a number of "*key or essential elements*" that a reorganisation law may determine. In addition to the extent to which the debtor may be required to submit to the court (considered above), these elements include whether there would be a mandatory stay of creditor enforcement action — we note again that the stay is not considered necessary — the continuation of the debtor's business, formulation of a reorganisation plan, claimant consideration of and voting on such a plan, "*Possibly, the judicial approval or confirmation of an accepted plan*", and implementation of the plan.[96]

61.3 The Legislative Guide recognises that "*In reorganization proceedings, there is no agreed approach on the extent to which displacement of the debtor [i.e. of its pre-commencement management] is the most appropriate course of action*". The decision to what extent to permit the debtor to (as it were) remain in possession over the course of the proceeding "*may depend upon a number of factors, including local corporate culture; the role of banks; the existence and effectiveness of corporate governance regimes; the effectiveness of insolvency institutions;* ***the level of supervision provided by, or required of, the courts****; the effectiveness and accessibility of the courts; and the extent to which incentives to commence insolvency proceedings are determined to be of importance to the design of the insolvency regime*".[97]

61.4 The Legislative Guide acknowledges that different collective reorganisation proceedings may legitimately affect different categories of claimant to different extents: "*Some laws require that all classes of creditors must support the plan for it to be approved. A few laws, however, enable*

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[95] Legislative Guide, p. 7, paras 12(kk) and (ll).

[96] Legislative Guide, pp. 28-29, para 28 (emphasis added).

[97] Legislative Guide, p. 162, para 4. For other instances of the recognition of legitimate differences as to the manner and extent of external supervision (by the court or insolvency representative) in reorganisation proceedings, see e.g. pp. 163-4, paras 9 and 11; page 166, para 17; page 168, para 23; page 173, Recommendation 112; page 173, paras 36-7; pages 199-200, para 108; page 232, para 72; page 237, Recommendation 157;

support by some classes to make the plan binding on other classes that do not support the plan. For example, a simple majority of the classes may be required or, where less than a majority of classes support the plan, the plan may nevertheless be made binding on dissenting classes that do not support the plan, provided the court is satisfied that certain conditions are met. One law, for example, divides claims into three classes and provides that the plan must be approved by at least two of those classes and that at least one of the approving classes would not recover the full amount of their claims if the debtor were to be liquidated. Another variation requires that at least one of the classes approving the plan will have its rights modified or affected under the plan, to ensure that the plan is not only supported by those creditors whose rights are not modified or affected. Other laws provide that support by classes of unsecured creditors cannot amount to approval of the plan if secured creditors oppose the plan."[98]

61.5 The Legislative Guide also notes that one of the bases on which a claimant class may be excluded from the process of voting on a reorganisation plan is that the plan does not affect the rights of the members of the class: "*The insolvency law should specify that where the plan provides that the rights of a creditor or equity holder or class of creditors or equity holders are not modified or affected by a plan, that creditor or equity holder or class of creditors or equity holders is not entitled to vote on approval of the plan*."[99]

61.6 Similarly, reorganisation proceedings may permit approval of a plan on the basis of different levels of class support: "*Where voting on approval of the plan is conducted by reference to classes, the insolvency law should specify how the vote achieved in each class would be treated for the purposes of approval of the plan. Different approaches may be taken, including requiring approval by all classes or approval by a specified majority of the classes, but at least one class of creditors whose rights are modified or affected by the plan must approve the plan.*"[100]

61.7 Further, the Legislative Guide is clear that a reorganisation plan may leave certain creditor classes completely unaffected: "*It should be noted that a plan need not modify or otherwise affect the rights of every class of creditor.*"[101]

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[98] Legislative Guide, pp. 224-5, para 51.

[99] Legislative Guide, p. 235, Recommendation 147.

[100] Legislative Guide, p. 236, Recommendation 150. The requirement that at least one affected class should approve the plan may be criticised; see R. Mokal, "*The two conditions for the Pt 26A cram down*" (2020) 11 JIBFL 730, 731-2.

[101] Legislative Guide, p. 215, para 18.

61.8 Among the different types of reorganisation proceedings characterised by different levels of court supervision — with completely informal (i.e. contractual) processes on the one end and a full reorganisation proceeding on the other — are expedited proceedings, which the Legislative Guide describes as follows: "*Reorganization may also include, however, proceedings commenced to give effect to a plan negotiated and agreed by affected creditors in voluntary restructuring negotiations that take place prior to commencement, where the insolvency law permits the court to expedite the conduct of those proceedings.*"[102] The Legislative Guide explains that the approach here "*is to secure agreement of the main creditors to a restructuring plan and then use the plan as the basis of a formal court supervised reorganization proceedings in which other creditors participate (sometimes referred to as a 'pre-packaged' plan…)*".[103] The Legislative Guide describes the benefit of such expedited proceedings as being "*to minimize the cost and delay associated with formal reorganization proceedings, while at the same time providing a means by which a restructuring plan negotiated voluntarily by a debtor with some or all of its creditors nevertheless can be approved in the absence of unanimous support of those creditors.*"[104] Amongst the characteristics of such an expedited proceeding are the following:

61.8.1 The proceedings may be commenced on the basis of actual or likely insolvency.[105]

61.8.2 The proceeding may commence automatically upon the making of the application or promptly upon court confirmation that the threshold conditions for accessing the proceeding are met.[106]

61.8.3 The proceeding may only involve claimants whose participation is crucial to the restructuring. The Legislative Guide describes a purpose of such proceedings as being confirmation by the court of a plan resulting from "*voluntary restructuring negotiations, which typically involve restructuring of the debt due to lenders and other institutional creditors and major non-institutional creditors where their participation is crucial to the*

[102] Legislative Guide, p. 238, para 76.

[103] Legislative Guide, p. 25, para 16.

[104] Legislative Guide, pp. 29-30, para 31.

[105] Legislative Guide, pp. 244-5, Recommendations 160(a) and 161(a)

[106] Legislative Guide, p. 245, Recommendation 163.

restructuring, but not involving all categories of creditor".[107] The effect of the commencement of the proceeding "*should be limited to the debtor, individual creditors and classes of creditors and equity holders whose rights are modified or affected by the plan*".[108]

61.8.4 Mutatis mutandis the effect of the plan if approved.[109]

61.8.5 The recommendations on expedited reorganization proceeding[110] do not involve the court exercising supervision or control of the debtor's assets, nor over its affairs except insofar as necessary to enable the plan agreed through voluntary restructuring negotiations (with "*little or no court involvement*") to be expeditiously approved.

61.8.6 That the Legislative Guide does not require the court to have supervision or control of the debtor's assets or (except insofar as necessary to give the proceeding efficacy) affairs in an expedited reorganization proceeding is unsurprising given that, as we have noted, even full reorganisation proceedings may involve little or no court involvement. What characterises these proceedings is court supervision of the *proceedings*, not of the debtor, its assets or affairs.

F. THE ANNOTATION

62 The Annotation addresses proceedings which require something more limited than "*complete submission of the affairs of the debtor to the direct supervision of a court or similar authority*". Having identified such proceedings — expressly including "*schemes of arrangement*" and "*voluntary arrangements*" — as characterised by a statutory process by which the debtor and certain classes of (but not necessarily all) creditors seek to agree on a re-arrangement of the debtor's obligations which depends for effect upon the court's approval, the Annotation states that such proceedings constitute "*insolvency proceedings*" if:

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[107] Legislative Guide, p. 244, "*Purpose*" provision, para a.

[108] Legislative Guide, p. 246, Recommendation 164(b).

[109] Legislative Guide, p. 247, Recommendation 167.

[110] Recommendations 160-168, at pp. 244-247 of the Legislative Guide.

62.1 they relate to an arrangement which is:

62.1.1 "*formulated in an insolvency context, or by reason of actual or anticipated financial difficulties of the debtor company*", and,

62.1.2 "*collective in that [it is] concluded on behalf of creditors generally or such classes of creditor as collectively represent a substantial part of the indebtedness*"; and,

62.2 "*a court acts to facilitate a statutory process, and where the court's approval is required for [the arrangement's] implementation*";

62.3 "*the 'assets and affairs of the debtor are subject to control or supervision by a court for the purposes of reorganization'*"; and,

62.4 irrespective of whether an enforcement moratorium applies.

63 We read the Annotation as fully consistent with the characterisation of insolvency proceedings we have provided above on the basis of our analysis of the CTC, the Official Commentary, the Official Commentary (MAC), the Model Law Guide, and the Legislative Guide. We reiterate our view that the Annotation's reference to "*a substantial part of the indebtedness*" must be understood contextually and purposively as whatever proportion of the debtor's indebtedness is of sufficient amount or size as to require being dealt with in order to address the debtor's financial difficulties.

IV. THE NATURE OF AN RP AS CTC "*INSOLVENCY PROCEEDINGS*"

64 In this Section, we characterise the Part 26A RP by reference to the four elements of the definition of "*insolvency proceedings*" we have considered above. We start by considering whether the RP operates "*for the purpose of reorganisation or liquidation*". This calls for a detailed consideration of legislative history as well as an analysis of the statutory text. We then draw on the same discussion to assess the RP's compliance with the other three elements of the definition.

65 We note, for the avoidance of doubt, that while the term "*insolvency proceedings*" for CTC purposes must bear an autonomous meaning, as we have emphasised, the RP is a creature of UK law and its features — whether it is collective and judicial and whether it involves subjecting the debtor's

assets and affairs to the court's control or supervision for the purposes of reorganisation or liquidation — can only be determined by construing the legislation which creates it by reference (relevantly) to English law interpretive methods and sources.

A. ARE RP PROCEEDINGS "*FOR THE PURPOSE OF REORGANISATION OR LIQUIDATION*"?

66 An RP may only be proposed in relation to a debtor company if two threshold conditions are met.[111] First, pursuant to "**Condition A**", the company must have encountered or must be likely to encounter "*financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern*". And second, pursuant to "**Condition B**", the purpose of the RP "*must be to eliminate, reduce or prevent, or mitigate the effect of, any of [those] financial difficulties*".

67 The particular concept of "*financial difficulties*" enshrined in Condition A — to which Condition B refers — in our view defines the character of an RP and is key to whether an RP constitutes "*insolvency proceedings against the debtor*" for the purposes of the CTC in general and to whether they are "*for the purpose of reorganisation or liquidation*" in particular.

i. INTERPRETIVE APPROACH AND RESOURCES

68 Like any other instance of legal language, the term "*financial difficulties*" in Part 26A takes its meaning from, and must be interpreted in light of, its context and objective setting. The clearest statement of this principle is Lord Steyn's in *R (Westminster City Council) v National Asylum Support Service*: [112]

> "*The starting point is that language in all legal texts conveys meaning according to the circumstances in which it was used. It follows that the context must always be identified and considered before the process of construction or during it. It is therefore wrong to say that the court may only resort to evidence of the contextual scene when an ambiguity has arisen….there is no need to establish an ambiguity before taking into account the objective circumstances to which the language relates.*"

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[111] Sections 901A(2) and (3) of the 2006 Act.

[112] *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38, [5] (Lord Steyn).

69 While these dicta apply to any material constituting "*evidence of the contextual scene*" and "*the objective circumstances to which the language relates*", Lord Steyn had been concerned in particular with the circumstances in which Explanatory Notes may be used as an aid to construction. He addressed the relative potential interpretive utility of such Notes and pre-parliamentary material (such as consultative and response documents) as follows:[113]

> "*In so far as the Explanatory Notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible aids to construction. They may be admitted for what logical value they have. Used for this purpose Explanatory Notes will sometimes be more informative and valuable than reports of the Law Commission or advisory committees, Government green or white papers, and the like. After all, the connection of Explanatory Notes with the shape of the proposed legislation is closer than pre-parliamentary aids which in principle are already treated as admissible*".

70 His Lordship went on to caution, however, that the Notes represent the "*wishes and desires of the Government about the scope of the statutory language*", and it is "*impermissible [to treat them as] reflecting the will of Parliament…The object is to see what is the intention expressed by the words enacted*".[114] Echoing this, the Court of Appeal has recently stated that "*Our task is to construe what Parliament has enacted, not what the Explanatory Notes say it enacted.*"[115]

71 The roots of the phrase "*financial difficulties*" appears to appear to lie in two consultation exercises undertaken by the Government, in 2016 ('**the 2016 Consultation**')[116] and 2018 ('**the 2018 Consultation**'),[117] together with its combined response to both exercises, in 2018 ('**the Response**').[118] While mindful of the warning to construe the statute rather than extra-statutory material, we start by considering these documents and the Explanatory Notes to the 2020 Act in

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[113] *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38, [5].

[114] *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38, [6].

[115] *R (McConnell) v Registrar General for England and Wales (AIRE Centre intervening)* [2020] EWCA Civ 559, [37].

[116] The Insolvency Service, *A Review of the Corporate Insolvency Framework — A consultation on options for reform* (May 2016).

[117] Department for Business, Energy, & Industrial Strategy, *Insolvency and Corporate Governance* (20 March 2018).

[118] Department for Business, Energy, & Industrial Strategy, *Insolvency and Corporate Governance — Government Response* (26 August 2018)

order to extract such illumination as may be found as to the context and objective setting of Part 26A and of the phrase in it, before turning to the legislation itself.

ii. CONSULTATION AND RESPONSE DOCUMENTS

72 In the 2016 Consultation — which first proposed what became the Part 26A RP process — the Government appeared to treat "*financial difficulties*" as synonymous with "*distress*" and "*financial distress*", and both with the state of factual insolvency, viz, the state in which the insolvent company remained in its directors' control as opposed to that of an insolvency practitioner in the context of a formal insolvency proceeding. Further, it is clear throughout the document that the proposals in it are intended to strengthen the country's insolvency framework:

72.1 This equation between "*distress*" and "*financial difficulty*" on the one hand and factual insolvency on the other is clear from the Government's introduction to the consultation exercise, as is the intention for the proposals to affect the country's insolvency framework: "*An efficient and effective insolvency regime is central to the promotion of enterprise and helps to create a business environment that supports growth and employment by ensuring that* ***distressed****, yet viable, businesses can be rescued quickly and efficiently. Where businesses cannot be rescued the insolvency regime should provide procedures for liquidating businesses and returning funds to creditors.*" The consultation sought views on whether "*the UK's regime needs updating in light of international principles developed by the World Bank and [UNCITRAL], recent large corporate failures and an increasing European focus on providing businesses with the tools to facilitate company rescue.* ***It seeks to establish whether legislative change would improve the UK corporate insolvency regime*** *and provide a better environment to achieve the successful rescue of a viable business.*"[119] It stated the Government's belief that "*the measures set out in this document have the potential to encourage greater business rescue by providing new tools for businesses in* ***distress****. The consultation seeks yours views on how we can ensure reforms make a positive difference to viable companies in* ***financial difficulty****, their creditors, investors, lenders and the economy as a whole.*"[120]

[119] At p. 4 of the 2016 Consultation. A similar reference to the Government's aim to strengthen the insolvency framework to facilitate the rescue of distressed but viable companies or business appears at p. 6.

[120] At p. 7 of the 2016 Consultation.

72.2 The proposal for what eventually transmuted into the RP was introduced as "*a statutory, time-limited to 12 months [sic], multi-class restructuring procedure to aid company rescue*", with classes to be proposed by "*the* ***distressed*** *company*". The new procedure would remedy the CVA's inability to affect secured claims, the absence of a moratorium in the Part 26 scheme, and the costly and cumbersome need to combine a scheme with an administration in order to cram down an 'out of the money' class. That the new process was seen as part of the insolvency regime is implicit in the understanding that a claimant class which was crammed down would receive at least as much under the plan as it would in the company's liquidation.[121]

72.3 The proposal for the avoidance of ipso facto clauses was introduced as intended to help "*businesses to continue trading through the restructuring process, including making it easier for companies to maintain contracts that are essential for the continuation of the business. This should make it less likely for companies…to be held 'hostage' by key suppliers seeking to profit from a company's* ***distress****, harming the prospects of a fair and successful rescue solution to benefit all creditors.*"[122] The intention was for "*A distressed business [to] be able to file a Court application to prevent the use of ipso facto clauses…when entering a moratorium…administration, CVA, or the proposals [which became the Part 26A RP].*"[123]

72.4 The proposal for introduction of a new moratorium was intended to facilitate the twin objectives of the reduction "*of the costs and risks of restructuring, to help improve the prospects for viable businesses to reach a compromise with their creditors*", and to encourage directors "*whose company may be facing* ***financial distress*** *to act early to address their company's problems.*"[124] The directors of a business "*experiencing or anticipat[ing]* ***imminent financial difficulty or insolvency***" would be able to obtain a moratorium upon "*demonstrate[ing] that [the company] [was] already or imminently [would] be in* ***financial difficulty****,* ***or [was] insolvent***", and by showing "*a reasonable prospect that a compromise or arrangement [could] be agreed with its creditors*" notwithstanding that "*it [was] experiencing* ***financial difficulties***".[125] While the moratorium was extant, "*the directors may trade as* ***a distressed or insolvent business***

[121] At pp. 22-23, and also p. 25 of the 2016 Consultation.

[122] At p. 6 of the 2016 Consultation.

[123] At p. 20 of the 2016 Consultation.

[124] At pp. 11-12 of the 2016 Consultation.

[125] At pp. 13-14 of the 2016 Consultation.

which could ordinarily lead to exposure for liability, for example a claim for wrongful trading under section 214 of the Insolvency Act 1986."[126] We underline as highly important this early conception of the period of "*distress*" or "*financial difficulties*" as one in which directors are under duties to give due consideration to the interests of the company's creditors (hereafter, '**the creditors' interests duty**').

72.5 There was also a proposal to facilitate the availability of "*specialist rescue finance*" for "*distressed companies seeking new funding*" to assist in their "*rehabilitation*", together with the suggestion that negative pledge clauses, which "*act[] as a strong barrier to distressed companies obtaining rescue finance*", to be rendered ineffective.[127]

73 By the time that the Government published the 2018 Consultation, its understanding of the term "*financial difficulties*" — while still used interchangeably with "*distress*" — appeared to have been subtly refined. The expression now referred to the state in which the company is in a financial state such that its directors should consider the consequences of their decisions for the company's creditors. This meaning of "*financial difficulties*" — restricted in the 2016 Consultation to the suggestion to suspend the creditors' interests duty while the proposed moratorium was in operation — is now clear from each of the seven occurrences of the term in the 2018 Consultation:

73.1 The first reference, in the Executive Summary, occurs in the context of the Government's statement of its overall aim to improve the country's "*business environment*" in order "*to ensure that it facilitates creditors' continued operations beyond periods of* ***financial difficulty*** *or insolvency experienced by debtors. By creating optimal conditions for dealing with the processes and impacts of insolvency, we can help to ensure that creditor stakeholders can continue their operations, pursue new contracts, or make new investment…*"[128]

73.2 The next reference, also in the Executive Summary, concerns a proposal to reverse "*value extraction schemes*" where "*a company in* ***financial difficulties*** *has been 'rescued' by investors who then strip it of its assets to lessen their loss, or protect their profits*", and the company "*eventually*

[126] At p. 16 of the 2016 Consultation.

[127] At pp. 28-31 of the 2016 Consultation. That "*distress*" and "*financial difficulty*" were used synonymously is again obvious from this discussion.

[128] At p. 5 of the 2018 Consultation.

become[s] insolvent". The concern with creditor protection is obvious: "*These [value extraction] arrangements are often complicated and designed to avoid existing protections for creditors.*"[129]

73.3 The third reference appears to treat the expression as synonymous with the situation leading up but prior to the opening of formal insolvency proceedings in which the company is or may be factually insolvent: the heading "*Strengthening corporate governance in pre-insolvency situations*" is followed by the statement that "*This section explores a number of wider corporate governance issues that can be particularly relevant when companies get into* ***financial difficulties****…*"[130]

73.4 The next three references occur in a discussion in the Chapter on "*Sales of Businesses in* ***Distress***", and under the heading "*Sales of Insolvent Subsidiaries*", which concerns loss-making members of corporate groups which are only able to continue to trade because of financial support from a fellow group member. The Government states its concern to be that while "*Directors of an insolvent company must act in the best interests of its creditors*", "*the directors of a holding/parent company cannot be held liable for sale of an insolvent subsidiary, even if it is damaging to the subsidiaries' [sic] creditors and stakeholders*". The Government proposed "*to change this by enabling directors of a parent company to be held to account — and penalised — where the sale of an insolvent subsidiary causes harm to creditors and this was foreseeable at the time of the sale*". More specifically, "*any decision to sell [such a company…in* ***financial difficulty****] outside of formal insolvency proceedings should take into account the interests of its stakeholders.*" The concern with the interests of the subsidiary's creditors is again manifest: "*The proposed requirements ensure that directors would only suffer penalties in exceptional situations where the group subsidiary was in* ***financial difficulty****; the directors could not reasonably have believed that the sale was in the interests of creditors; the group subsidiary has subsequently entered administration or liquidation; and the harm that should have been foreseen has occurred, with creditors suffering losses*".[131]

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[129] At p. 6 of the 2018 Consultation.

[130] At p. 6 of the 2018 Consultation.

[131] At pp. 7-10 of the 2018 Consultation. See also p. 5, which introduces "*Sales of businesses in* ***distress****: This section proposes potential changes to ensure that directors responsible for the sale of an insolvent subsidiary of a corporate group take proper account of the interests of the subsidiary's stakeholders… [The] directors involved in any sale, including directors of a holding company controlling the sale of shares in a subsidiary, should satisfy themselves that the sale would lead to a better outcome for creditors than putting the company into formal insolvency*", and pp. 7-8: "*Even where a company is in* ***financial difficulty****, there may be some value to a third party in its business as a going concern, although it may need new investment or restructuring to return to profitability*".

73.5 The final reference is in the context of payments of dividends by companies which are or may be factually insolvent but not yet in insolvency proceedings: "*Concerns arise where it emerges that a company in* ***financial difficulties*** *and approaching insolvency nevertheless paid dividends to its shareholders, particularly in circumstances where net debt was high or there was a large pension fund deficit*".[132] The reference to the company "*approaching insolvency*" in this context is in our view charitably read as synonymous with "approaching the commencement of insolvency proceedings".

74 The term "*financial difficulties*" appears to have the same meaning as in the 2018 Consultation — of the company's factual but not formal insolvency in the sense in which its creditors' interests should bear on its directors' decision-making, i.e. the creditors' interests duty should come into play — each of the nine times that it is used in the Response, where it is again treated as synonymous with "*distress*" or "*financial distress*":

74.1 The Ministerial Foreword states the Government's intention "*to improve our insolvency regime to support companies in* ***financial distress****, while ensuring appropriate protections for creditors. Set out in this document are reforms to introduce a new moratorium period, and new ways to provide greater opportunities to effect corporate rescues and enable more of our companies not only to survive but to thrive.*"[133] We read the reference to "*new ways to provide greater opportunities to effect corporate rescues*" as including the RP in what subsequently became Part 26A of the 2006 Act.

74.2 The Report echoes the 2018 Consultation in referring to "*Significant concerns…that companies could pay dividends even when in* ***financial distress***",[134] to "*value extraction schemes which have been designed to remove value from a firm at the expense of its creditors when a firm is in* ***financial distress***",[135] to the situation "*when a holding company sells a subsidiary which is in* ***financial difficulties****, [yet] the parent company directors [sic] may fail to take into account whether the sale is in*

[132] At p. 28 of the 2018 Consultation.

[133] At p. i of the Response.

[134] At p. 7 of the Response. See also at p. 17: "*The consultation sought views on whether the UK's current regime based on the concept of 'distributable profits' remains fit for purpose. This was in the context of examples of companies in apparent* ***financial difficulties*** *and approaching insolvency, nonetheless continuing to pay significant dividends.*"

[135] At p. 8 of the Response.

the best interests of the subsidiary's stakeholders as opposed to placing the subsidiary into formal insolvency proceedings",[136]

74.3 The Response refers to the argument by "*the professions*" that "*while most directors are aware of their duties, many may have limited experience of dealing with situations where companies are in* ***financial distress*** *or are entering into insolvency*".[137] Again, we read the reference to "*entering into insolvency*" as synonymous with "commencing insolvency proceedings".

74.4 The Response refers to the proposal to introduce a new moratorium, and notes that the proposal's supporters considered that such a moratorium "*could encourage directors to act earlier to tackle* ***financial difficulties***", while those who opposed the proposal (mostly from creditor groups) were concerned that "*the moratorium would be abused, including by businesses that had no realistic prospect of rescue*."[138] Having noted the Government's suggestion in the 2018 Consultation that the moratorium should only be available to a company "*already, or imminently in* ***financial difficulty or insolvent***", the Response referred to the range of views expressed in response and stated that, upon consideration, "*the Government believes the test for entry into a moratorium should exclude companies that are already insolvent. …[Instead,] the test on financial state should be one of prospective insolvency, that is, based upon the requirement that a company will become insolvent if action is not taken.*"[139] The Government also accepted that it would not suspend the creditors' interests duty over the period that the moratorium was extant, but importantly, did so on the basis that suspension of such duty would undermine creditors' faith in the rescue framework and their support for efforts to address the company's "***financial distress***", and that directors "*need to be clear as to what the law is, so that they are not placed in a position where they are uncertain of what their duties are or to whom they owe those duties.*"[140] We note, again, the implication that the period of "*financial distress*" is conceptualised as one in which the creditors' interests duty is in play.

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[136] At p. 33 of the Response; the same issue is addressed at p. 35: "*…the Government will work with industry to develop guidance on the steps that a director should take when considering the sale of an insolvent subsidiary… The measures will be clearly targeted to minimise the risk of deterring legitimate business rescue and to ensure that directors are clear as to their duties when selling a subsidiary* ***in financial difficulties***."

[137] At p. 24 of the Response.

[138] At p. 42 of the Response. There are two further references to "*financial distress*", neither adding to the present discussion, in relation to the new moratorium at pp. 44-5.

[139] At p. 47 of the Response.

[140] At p. 50 of the Response.

75 Finally as to the proposed new RP procedure, the Government "*remain[ed] firmly of the view that measures of the type consulted on are necessary to support company rescue and fill an existing gap in the company and insolvency frameworks.*"[141] It disclaimed any intention to restrict the new procedure to insolvent companies, focusing instead on the sorts of "*financial difficulties*" that might also afflict solvent companies: "*No financial conditions will be set in order to qualify for a restructuring plan. This means that both solvent and insolvent companies will be able to propose restructuring plans to their creditors…The Government believes allowing solvent companies to address emerging* ***financial difficulties*** *will reduce stigma and encourage earlier action on the part of directors, thereby avoiding value-destructive action and leading to better outcomes on the whole for creditors and other stakeholders in a company.*"[142]

76 The reference in the Response to allowing even solvent companies to address emerging financial difficulties through the RP might be read in one of two ways. Perhaps the more natural reading in the context is that, as the Government stated, there would be no express financial precondition to access the RP process, though in practice, solvent companies would only do so in order to resolve financial difficulties. If this was indeed the Government's intention when the Response was published, it had evidently changed its mind by the time that Part 26A was drafted, and access to the plan was expressly limited to companies in financial difficulties.

iii. EXPLANATORY NOTES

77 Turning to the Explanatory Notes to Part 26A, we draw attention to three points.

78 Firstly, the Notes continue to use "*financial difficulty*" as synonymous with "*financial distress*", and as not identical to insolvency. Further and most importantly, they use the term as characterising the state of a company which might use a CVA pursuant to Part 1 of the 1986 Act:

78.1 The Notes identify the policy underlying the new moratorium as being to allow "*a company in financial distress a breathing space in which to explore its rescue and restructuring options free from creditor action*", and whose aim is "*to facilitate a rescue of the company, which could be via a company voluntary arrangement…(a procedure…that enables a company that is in* ***financial difficulty****, but*

[141] At p. 65 of the Response.

[142] At p. 66 of the Response.

not necessarily insolvent, to make a binding compromise or arrangement with its creditors), a restructuring plan (as also introduced by this Act…) or simply an injection of new funds."[143]

78.2 Again referring to a CVA, the Notes state that "*A company in* ***financial difficulties*** *can agree a voluntary arrangement with its creditors*".[144]

79 Second, the same policy of "*enhancing the rescue opportunities for financially distressed companies*" underlies both the new moratorium and the RP procedure.[145]

80 Thirdly, the Explanatory Notes introduce the RP process as part of the "*Insolvency framework measures*".[146]

iv. MEANING IN PART 26A: RELATION WITH INSOLVENCY

81 Against this background, the better view seems to us to be that the concept of "*financial difficulties*" which in close variants has featured from the conception, and consistently through the development, of what became the Part 26A RP forms part of the context and objective setting for the term as it figures in the statutory text. The term has the following key features:

81.1 It has the same sense as "*distress*" or "*financial distress*". This is clear from both Consultations, the Response, and the Explanatory Notes.

81.2 It is the same state characterising companies which make use of CVAs, which need not be insolvent. This is suggested by the Explanatory Notes, and is consistent with the 2018 Consultation and the Response but not with the 2016 Consultation (which, to reiterate, appears to equate the term with factual insolvency).

[143] Paras 4-5 of the Notes.

[144] Para 59 of the Notes.

[145] Para 33 of the Notes.

[146] See heading prior to Para 58 of the Notes.

81.3 It characterises the RP, which is part of the jurisdiction's insolvency framework. This is also suggested by the Explanatory Notes and is consistent with each of the preceding points.

81.4 It is to be equated either with:

81.4.1 the state of factual insolvency preceding the commencement of formal insolvency proceedings, as indicated by the 2016 Consultation, though this is difficult to square with the Government's express statement in the Response that the RP would not be restricted to insolvent companies, and with the suggestion in Explanatory Notes that "*financial difficulties*" is not the same as insolvency,

or else and more likely, with:

81.4.2 the financial state of the company whose directors are subject to the creditors' interests duty, as indicated by the 2018 Consultation and the Response, and consistently with the Explanatory Notes, and indeed, with the 2016 Consultation (since the creditors' interests duty would apply to the directors of a factually insolvent company).

82 The authoritative treatment of the financial state in which the creditors' interests duty becomes engaged is now Lord Justice David Richards's characteristically powerful judgment in *BAT Industries plc v Sequana SA*.[147] While this judgment postdates both Consultations and the Response, it extracts and crystallises principles which have formed part of English law since no later than the Court of Appeal's judgment in *West Mercia Safetywear Ltd v Dodd*[148] and which are referenced in and preserved by section 172(3) of the 2006 Act. We consider that these principles form part of the objective context for the interpretation of the term "*financial difficulties*" as set out and developed in the Consultations, Response, and Explanatory Notes, and therefore in Part 26A itself.

83 The following observations by Lord Justice David Richards are particularly relevant:

[147] [2019] EWCA Civ 112. The Court of Appeal's decision is under appeal to the Supreme Court, with a hearing set for 4-5 May 2021.

[148] [1988] BCLC 250 (CA).

83.1 There was at the date of the *Sequana* judgement no clear English authority for the proposition that the creditors' interests duty is triggered by anything short of actual insolvency. However, many experienced judges had assumed that the duty was triggered by something less than actual insolvency.[149]

83.2 There are four possible triggers for the creditors' interests duty: [150]

83.2.1 actual insolvency on the cash flow or balance sheet basis;

83.2.2 when the company is on the verge of insolvency or nearing or approaching insolvency;

83.2.3 when the company is or is likely to become insolvent, which is the same as the company being of dubious solvency; and,

83.2.4 when there is a real, as opposed to a remote, risk of insolvency.

83.3 Phrases such as "*parlous financial state*" or "***financial difficulties***" could fall within either the second or third categories, "*assuming they convey something less than outright insolvency*". While possibly useful on the facts of particular cases, such phrases are "*too vague to serve as a useful test for the important step of engaging the creditors' interests duty.*"[151]

83.4 The second to fourth possible triggers of the creditors' interests duty are genuine alternatives and not merely different ways of saying the same thing. In particular, "*a real as opposed to a remote risk of insolvency is a significantly lower threshold than being either on the verge of insolvency or likely to become insolvent.*"[152] This fourth possible trigger is not part of the present law.[153]

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[149] [2019] EWCA Civ 112, [195].

[150] [2019] EWCA Civ 112, [213].

[151] [2019] EWCA Civ 112, [213].

[152] [2019] EWCA Civ 112, [214].

[153] [2019] EWCA Civ 112, [215].

83.5 The creditors' interests duty "*may be triggered when a company's circumstances fall short of actual, established insolvency*".[154] This rules out the first possible trigger.

83.6 Further, the second possible trigger, based on the company being on the verge of insolvency or insolvency being imminent, is misleading in suggesting a temporal test, i.e. that actual insolvency would be established within a very short period. In fact, the company might continue to operate for a considerable period, paying its debts as they fall due, even though insolvency was likely to occur and decisions taken over the interim period might prejudice creditors when insolvency did materialise.[155]

83.7 This leaves the third possible trigger as the correct one: the creditors' interests duty arises when directors know or should know that the company is or is likely to become insolvent, where "likely" means probable.[156]

83.8 Lord Justice David Richards did not have to and did not decide "*the important issue…whether, once the creditors' interests duty is engaged, their interests are paramount or are to be considered without being decisive*", though he did state that "*where the directors know or ought to know that the company is presently and actually insolvent, it is hard to see that creditors' interests could be anything but paramount.*"[157]

84 We note that this understanding of the state in which the creditors' interests duty is triggered — which, incidentally and as shown above, Lord Justice David Richards expressly describes as capable of being characterised as "*financial difficulties*"[158] — is consistent with the financial threshold condition for the Court to make an administration order,[159] viz, that the company is or is likely to

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[154] [2019] EWCA Civ 112, [216].

[155] [2019] EWCA Civ 112, [219].

[156] [2019] EWCA Civ 112, [220].

[157] [2019] EWCA Civ 112, [222].

[158] [2019] EWCA Civ 112, [213]. Strictly, if "*financial difficulties*" is synonymous with actual or likely insolvency, then the words "*has encountered*" in Condition A capture this meaning in full and the words "*or is likely to encounter*" are redundant. However, this risks, both, ignoring the actual context of David Richards LJ's dictum on the trigger for the creditors' interests duty, and reading it as if it were statutory text.

[159] Pursuant to Paragraph 11(a) of Schedule B1 to the 1986 Act.

become unable to pay its debts. However, the threshold condition for the making of an administration order is different in two respects:

84.1 it is more restrictive in that it requires actual or likely cash flow insolvency, whereas the state of "*financial difficulties*" understood as the period in which the creditors' interests duty applies may also include actual or likely balance sheet insolvency; and,

84.2 "*likely to become unable to pay its debts*" means more probable than not,[160] whereas Lord Justice David Richards stated that the creditors' interest duty was triggered when (relevantly) the company was likely, in the sense of probable, to become insolvent. At least on one view, probable is less demanding than more probable than not.

v. Meaning in Part 26A: effect on ability to carry on business as a going concern

85 The term "*financial difficulties*" in Condition A appears to be bolstered by the modifier pertaining to the effect on the company's "*ability to carry on business as a going concern*".[161]

86 Clearly and on any view, not all difficulties affecting the company's ability to carry on business as a going concern would qualify as financial difficulties. For example, where the company's ability to carry on business is affected by a denial of service attack on its computer servers, industrial action by workers, unavailability of essential raw materials, or a lockdown imposed by the government, this in and of itself would not qualify. Where, however, any of these factors or another impaired the company's ability to meet its financial obligations — and if the foregoing analysis is correct, rendered the company actually insolvent or likely to become so — and this in turn affects its ability to carry on business as a going concern, the Condition A threshold would be met.

[160] *Re COLT Telecom Group plc* [2002] EWHC 2815 (Ch), [25] (Jacob J).

[161] At the convening hearing in *Re Virgin Atlantic Airways Limited* [2020] EWHC 2191 (Ch), [37] (second and penultimate sentences), Trower J appears to have read "*its ability to carry on business as a going concern*" as part of the definition of "*financial difficulties*". In a very brief treatment in *PizzaExpress Financing 2 Plc* [2020] EWCH 2873 (Ch), [26], Sir Alastair Norris appeared to take the same tack.

87 We should note that the reference to the company's ability to carry on business as a going concern introduces significant conceptual confusion to Condition A.[162] In brief:

87.1 Preservation of the company's going concern may exacerbate rather than mitigate its financial difficulties where the company is *economically distressed*, that is, where the piecemeal disposal of the productive assets constituting its business would bring higher returns than are being generated by the business as a going concern. Condition A appears premised on the denial of this common occurrence.[163]

87.2 Even where the company is not economically distressed, its financial difficulties may best be mitigated not through the company continuing that business but instead through the going concern sale of that business to another. Again, Condition A appears innocent of this ordinary possibility.[164]

87.3 Finally and most strikingly, if we are wrong and "*financial difficulties*" does not mean actual or likely insolvency, then Condition A appears not to catch balance sheet insolvency at all: a company "*may not encounter financial difficulties* [understood in some weaker sense not including balance sheet insolvency] *affecting its ability to carry on business as a going concern for a significant time, effectively by burning cash and sinking ever deeper into balance sheet insolvency. All this time, it would remain ineligible for a Pt 26A plan under Condition A.*"[165]

88 These conceptual problems notwithstanding, it is reasonably clear that Condition A creates a strong insolvency-related access threshold for the RP: a plan may only be proposed in relation to a company which is or is likely to become insolvent such that its ability to continue its business as a going concern is, will, or may be affected.

89 We now assess the RP proceeding by reference to the four elements of the CTC definition of "*insolvency proceedings*".

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[162] These confusions are traced in R. Mokal, 'The difficulties with "financial difficulties"' (2020) 10 JIBFL 662, 662-663.

[163] Mokal, (2020) 10 JIBFL 662, 663.

[164] Mokal, (2020) 10 JIBFL 662, 663.

[165] Mokal, (2020) 10 JIBFL 662, 663.

*vi. RP PROCEEDINGS ARE "*FOR THE PURPOSES OF REORGANISATION*"*

90 Pursuant to Condition B, the purpose of the proposed RP must be to (i) eliminate, reduce, or prevent any of the Condition A "*financial difficulties*", or (ii) to mitigate the effects of such difficulties:[166]

90.1 Since the financial difficulties referred to in Condition A are the debtor's actual or likely insolvency such that the debtor's ability to carry on its business as a going concern is, will, or may be affected, and since (i) requires the prevention, elimination, or reduction of those difficulties, it follows that (i) envisages a plan whose purpose is to enable or at least make it more likely for debtor to retain its business as a going concern. This fits the Official Commentary's description of one of the key objectives of a reorganisation, viz, to reorder the debtor's affairs with a view to restoring it to profitable trading.

90.2 By contrast, (ii) is perhaps best read, avoiding redundancy, as governing situations in which the debtor is or is likely to become insolvent and cannot retain its business as a going concern, which results in some undesirable "*effect*" which the plan is intended to mitigate. This would appear to fit the Official Commentary's description of the second key objective of a reorganisation, viz, the improvement of the position of creditors in a subsequent liquidation by reducing the effect upon them of the debtor's financial difficulties.

91 Further, the RP meets the CTC's requirement in relation to "*the purpose of reorganisation or liquidation*" element as explained in the Official Commentary because it may not be used for the reorganisation or dissolution of a fully solvent company but only one which is in "*financial difficulties*" in the sense we have explained above. (Indeed, the RP exceeds this element of the CTC definition of "*insolvency proceedings*", given that, for the reasons we explain in Paragraphs 134 to 145, proceedings may qualify even though not designed exclusively for reorganisation *in insolvency*.) Further and as the Official Commentary also states, the RP's ability to deal with companies which are not in fact insolvent does not detract from its compliance with this element of the definition.

[166] Mokal, (2020) 10 JIBFL 662, 663-664.

92 The RP also meets the Model Law's requirement in relation to "*the purpose of reorganisation or liquidation*" element, since it is not a purely contractual mechanism, and since it is not designed to prevent asset dissipation nor to prevent detriment merely to investors rather than to all (relevant) creditors.

93 Further and insofar as the Model Law's requirement that only proceedings pursuant to a law relating to insolvency bear on whether those proceedings are for the purposes of reorganisation or liquidation under the CTC (or for any other element of the CTC definition),[167] the Model Law Guide expressly confirms that the fact that the RP operates pursuant to a statute labelled the Companies Act does not detract from their status as functioning pursuant to a law relating to insolvency, so long as they meet all other requirements of the definition.

94 Finally, the RP meets the Legislative Guide's characterisation of reorganisation proceedings in that its objective is to enable a reorganisation plan to be proposed to mitigate the debtor's financial difficulties or their effect, with or without the imposition of a moratorium, with requirements for the provision of relevant information to creditors and members, provisions for classification and voting, and due involvement of the court in summoning meetings, assessing claimant classification, and considering compliance with the statutory requirements and whether to sanction a plan.

95 We conclude that this element of the definition is present in the RP proceeding.

B. THE RP AS COLLECTIVE PROCEEDINGS

96 The RP is clearly a collective proceeding in the sense explained by the Official Commentary: it is a proceeding not for the benefit of a particular secured (or indeed an unsecured) creditor but operates for the benefit of creditors generally. It does so in the sense explained in the previous subsection. The objective of the proceeding is either:

[167] We note that the "*a law relating to insolvency*" element of the Model Law definition of "*foreign proceeding*" was deleted from the draft CTC definition before the third session of the Committee of Governmental Experts, as a result of inter-sessional drafting work. The words "*bankruptcy [and] liquidation*" were added at the Diplomatic Conference. We understand that this latter change was made as in some jurisdictions it was thought not to be clear that "*insolvency proceedings*" included "*bankruptcy*". See paragraphs 39 to 40 above. We do not consider that this difference in drafting make any material difference to the analysis.

96.1 to relieve the debtor of actual or likely insolvency so as to enable it to continue its business as a going concern, or

96.2 to mitigate the effect upon creditors of such actual or likely insolvency and resulting impairment of the debtor's ability to continue its business as a going concern.

97 In either case, creditors as a group benefit, though, as we have explained, this may not, and need not, mean that each creditor benefits equally or (such as in the case of a fully secured creditor) at all.

98 Further and for the same reasons, an RP proceeding plainly takes places "*in an insolvency setting*" as stated in the Official Commentary (MAC).[168]

99 The RP also meets the requirements of collectivity set out in the Model Law Guide:

99.1 RP proceedings are a powerful tool for achieving a coordinated, global solution for all stakeholders of an insolvency proceeding, and they are not merely a collection device for a particular creditor or group of creditors.

99.2 The RP may deal with substantially all of the assets and liabilities of the debtor, subject to such exclusions as the Court may approve in exercise of its powers pursuant to applicable law. As the Model Law Guide confirms, the fact that one — and indeed, as we have argued, multiple — classes may be left unaffected by the RP proceeding does not detract from the proceeding's collective nature.

100 Further and as confirmed both by the Official Commentary and the Model Law Guide, the fact that the RP may be commenced to address the "*financial difficulties*" of a debtor which is likely but not actually insolvent does not detract from their collectivity (or indeed from their compliance with any other element of the definition).

101 The RP is a collective proceeding for the purposes of the Legislative Guide. It provides for the equitable treatment of claims, including the requirement that like claims be treated alike except

[168] Official Commentary (MAC) paras 3.103(1) and 4.21(3)(a).

with appropriate justification. It therefore counters individual creditors' incentives to race to enforce their claims in a way that might be injurious to the debtor and thus to its stakeholders as a group. Further and while this is neither analytically nor practically necessary for the reasons we have explained, the RP proceeding is capable of being combined with a moratorium so as further to bolster its collective nature.

102 The RP also, finally, meets the requirement for collectivity for which we have argued: it operates for the benefit of whichever class or classes of creditor have a stake in the alleviation of the debtor's "*financial difficulties*" or their effect. This holds regardless of whether the members of the relevant class(es) are secured or unsecured, and of the proportion of the debt they hold.

C. THE RP AS "*JUDICIAL PROCEEDINGS*"

103 The requirements of this element of the definition are readily met:

103.1 The RP process must be started by application to the Court.[169]

103.2 A meeting of one or more claimant classes may only be called by order of the Court.[170]

103.3 The Court may order that members of a claimant class not be permitted to participate in a meeting if the Court is satisfied that none of the members of that class has a genuine economic interest in the debtor.[171]

103.4 Only the Court may sanction the plan.[172]

D. THE COURT'S CONTROL OR SUPERVISION OVER THE DEBTOR'S ASSETS AND AFFAIRS

104 In CTC terms, the RP is a debtor in possession proceeding, with the debtor's management retaining control of the debtor's assets and affairs subject only to such supervision or control by

[169] Section 901C(1) of the 2006 Act.

[170] Section 901C(1) of the 2006 Act.

[171] Section 901C(4) of the 2006 Act.

[172] Section 901F of the 2006 Act.

the Court as is necessary and sufficient for the proceeding's efficacy. The Court's control or supervision is exercised through the imposition of duties pursuant to the applicable insolvency law — i.e. Part 26A itself together with such common law principles developed in the context of Part 26 schemes which would also apply and, arguably, the Practice Statement developed by the judiciary acting in an administrative capacity, which identifies steps the failure to comply with which creates a duty to explain — as are necessary and sufficient to the efficacy of the RP. The most important duties are the statutory duty of the debtor and relevant officers to provide relevant claimants with notices and a statutory explanatory statement with information about the proposed plan, with non-compliance constituting statutory offences.[173]

105 Correspondingly, the Court possesses all, but only, the powers to control or supervise the debtor's assets and affairs as are necessary and sufficient for the purposes of reorganisation pursuant to the RP proceeding itself, i.e. which are necessary to reorder the debtor's affairs with a view to its restoration to profitable trading, or to improvement of the position of its creditors in a subsequent liquidation. In aid of these objectives:

105.1 The Court has power and indeed the duty to assess whether the debtor is in "*financial difficulties*" affecting its ability to continue its business as a going concern. This would characteristically require the Court to be provided with information pertaining to the debtor's assets and affairs globally.

105.2 The Court would also need to understand the "*relevant alternative*", which is whatever the Court considers most likely to occur in relation to the debtor if the plan were not sanctioned.[174]

105.3 The Court would need to understand the current and proposed rights of members of each of the proposed claimant classes, in order to decide whether to order one or more class meetings.

[173] Sections 901E and 901E of the 2006 Act.

[174] Section 901G(4) of the 2006 Act.

105.4 The Court may also need to determine where value breaks in the waterfall of claimants against the debtor, in order to decide whether to permit one or more classes to be precluded from attending the meetings it is to order.[175]

105.5 The Court must assess the debtor in possession's compliance with the latter's aforestated duties.

105.6 Finally, the Court must decide whether to sanction the proposed plan by satisfying itself that it has jurisdiction to do so because all statutory requirements have been met, and by reference to each of the principles for the exercise of its discretion developed in the context of Part 26 schemes as are relevant to the RP, together with the new principles it will be called upon to develop in relation to the exercise of its new cram down power.[176]

105.7 In approving the plan, the Court's order may cause restructuring of the debtor's shareholding or any part of it, cause disposal or encumberment of any or all of the debtor's assets, discharge or modify any of its liabilities, and permit release of the claims its creditors have against third parties such as guarantor and insurers.

106 We again draw attention to the Legislative Guide, which shows, including through its definition of "*insolvency proceedings*", that what matters is the court's control or supervision of the proceeding — which is undoubtedly present in the RP process — and only derivatively and insofar as necessary, of control or supervision of the debtor's assets or affairs. The Legislative Guide makes clear that there is no minimum level of court supervision or control that all insolvency proceedings must satisfy as a matter of definition. And it describes the legitimacy and indeed the utility of debtor in possession proceedings while acknowledging that such proceedings may leave significant or even "*full*" control over the debtor's business in the debtor's pre-commencement management, and that in a particular such proceeding, the court might have little or even no role.

107 In this light, in our opinion, the level of supervision or control of the debtor's assets and affairs provided for by the RP is on any reasonable view sufficient to give efficacy to a debtor in possession

[175] Section 901A(4) of the 2006 Act.

[176] Section 901G of the 2006 Act.

reorganisation proceeding. It follows that the RP quite clearly meets this element of the CTC definition.

E. RP PROCEEDINGS ARE "*INSOLVENCY PROCEEDINGS*"

108 The considerations set out so far seem to us strongly to support the view that the RP procedure is an "*insolvency proceeding*" for the purposes of the CTC, as understood in light of the CTC's purposes, the Official Commentary, and the Model Law and Legislative Guides.

109 Since the term as it figures in the CTC must be given an autonomous meaning, we consider it to be irrelevant that the 1986 Act (as amended) does not refer to the Part 26A proceeding as an "*insolvency proceeding*".[177] Our view is reinforced by the fact that provisions referring to "*insolvency proceedings*" generally seek to preclude the opening of such proceedings, whereas the Part 26A RP is designed to operate in tandem with many such proceedings.

110 Equally irrelevant, for this purpose and for the same reason, is the fact that the RP is characterised as "*a relevant insolvency procedure*" for the purposes of the new prohibition on the exercise of ipso facto clauses.[178] We consider this provision in the next subsection.

F. DATE OF COMMENCEMENT OF THE RP PROCEEDINGS

111 The CTC defines "*commencement of the insolvency proceedings*" as "*the time at which the insolvency proceedings are deemed to commence under the applicable insolvency law*".[179]

112 The following are the most plausible candidates for this date:

112.1 the making of an application for an order summoning a meeting of creditors or members of the debtor company;[180]

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[177] In sections A20(1), A24(1), A43(1), and 436.

[178] See the new Section 233B(2)(g) of the 1986 Act.

[179] CTC, Article 1(d).

[180] Section 901C(1) of the 2006 Act.

112.2 the making of an order summoning a meeting of creditors or members; and,

112.3 the making of the aforementioned application, or, alternatively, order, affecting CTC "*creditors*" who hold "*international interests*" and in right of such interests.

113 The third option, while possibly the most apt for CTC purposes, may be rejected precisely because it focuses on the CTC, which is not mentioned in the 1986 Act.[181] It is unlikely that the RP proceeding begins as a matter of English law upon the occurrence of an event which is not mentioned at all in the governing legislation.

114 The first option may also be rejected. While the date of commencement of certain other insolvency proceedings, mostly notably winding-up, relate back to the date of the application seeking the commencement order if the Court is persuaded to make the order, there is no indication in either the statutory text or (by analogy) case law governing Part 26 schemes which might justify taking the same view in relation to the Part 26A process. In any case and taking now a CTC perspective, what matters to CTC "*creditors*" is not the making of a possibly ill-founded Part 26A application which the Court would reject without any material effect on CTC creditors, but accession to an application such that the Court issues an order convening a meeting. It is only at this stage that the interests and perhaps the rights of CTC creditors come to be on the line.

115 For these reasons, we prefer the second option, which also coincides with the date at which the company becomes subject to the RP procedure, characterised as "*a relevant insolvency procedure*", for the purposes of the prohibition on ipso facto clauses.[182]

G. THE *GATEGROUP* JUDGMENT

116 In the '***gategroup***' judgment, handed down on 17 February 2021, Mr Justice Zacaroli held that the RP proceeding falls in the "***bankruptcy exclusion***" in Article 1(2)(b) of the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial matters ('**the Lugano**

[181] Except that para 21 of Schedule 4ZZA states that nothing in section 233B affects the Regulations.

[182] Section 233B(2)(g).

Convention').[183] The Lugano Convention allocates jurisdiction in relation to "*civil and commercial matters*" but, by virtue of the bankruptcy exclusion, does not apply to (relevantly) "*judicial arrangements, compositions and analogous proceedings*", including (as a result of the *gategroup* judgment) the RP proceeding. We draw attention to several relevant aspects of the *gategroup* judgment.

i. THE "PECULIARITIES" GROUND

117 The first ground on which the Court concluded that the RP proceedings fall in the bankruptcy exclusion to the Lugano Convention was that such proceedings address the same circumstances and possess the same features that make it inappropriate for the Lugano Convention to apply to paradigmatic insolvency proceedings such as winding-up and bankruptcy.

118 The Court referred to the official explanatory report and other materials relating to the Lugano Convention to find that the types of proceedings mentioned in the bankruptcy exclusion are characterised by "*peculiarities*" requiring special rules as to the allocation of jurisdiction.[184]

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[183] *In re gategroup Guarantee Limited* [2021] EWHC 304 (Ch), at [137]. By way of disclosure, Professor Mokal was part of the counsel team for gategroup Guarantee Limited ('**gGL**'), the company proposing the RP in that matter, and several of the arguments set out in the original version of this Opinion were presented to the Court.

In assessing the weight to be attached to the *gategroup* judgment, it should be borne in mind that the Court received detailed arguments from a creditor of gGL ('**Hestia**'). Acting through leading and junior counsel, Hestia on the eve of the convening hearing lodged what the Court described (at [47]) as "*a 70-page skeleton argument identifying numerous grounds for opposing the Plan*", including to the effect that the RP proceedings do not fall in the bankruptcy exclusion. Hestia's intervention caused the convening hearing to be adjourned and relisted with double the original time estimate. By the time that the adjourned application was heard, Hestia had withdrawn its opposition so that the application was formally unopposed. However, the Court fully considered Hestia's arguments (see in particular at [51], and on the points relevant to this Opinion, at [57]-[68], [73] (Hestia's argument that the RP proceeding "*is conclusively not an insolvency proceeding*"), and [101]).

Further and as set out in Zacaroli J's judgment (at [70]-[72]), after the conclusion of the convening hearing, the law firm Kirkland & Ellis ('**K&E**') — described by the Court as having "*extensive experience in this area*" but no direct interest in the RP proposed by gGL — sent the Court an unsolicited letter marked "*Private and Confidential*", which stated that K&E was "*firmly of the view that the restructuring plan procedure is <u>not</u> an insolvency proceeding*" and that it would be "*extremely unhelpful for the court to decide that a restructuring plan is an insolvency proceeding for the purposes of the Lugano Convention*". The letter "*set out extensive argument in support of that position.*" The letter was provided to gGL's legal team at the Court's instigation and the Court received "*a full response to it*" from the company's counsel team. The arguments set out in the letter were also fully considered by the Court (see in particular at [82], [101], and [128]).

Accordingly, the *gategroup* judgment reflects the English Court's considered view, reached with the benefit of particularly extensive written submissions to the effect that RP proceedings are not insolvency proceedings.

[184] [2021] EWHC 304 (Ch), at [85]-[89].

119 The Court identified such peculiarities as resulting from the fact that insolvency proceedings "*are a collective process, driven by the need to solve the problem that the debtor's assets are insufficient to satisfy the claims of all of its creditors, thus raising at least the possibility of competition among the debtor's creditors and stakeholders*".[185] Accordingly, collective proceedings are characteristically shaped by the principle of universalism, by which "*a unitary bankruptcy proceeding in the court of the bankrupt's domicile…receives worldwide recognition and…should apply universally to all the bankrupt's assets*", though full universalism along these lines is not achievable in practice and is modified to allow exceptions.[186]

120 The Lugano Convention is not apt to apply to collective insolvency proceedings, since the premise on which it allocates jurisdiction is that the dispute the subject of the proceeding would be a bilateral one. A particularly clear instance of this phenomenon, which is endemic to the scheme of the Convention, is Article 23(1), by which primacy is given to a court identified by an exclusive jurisdiction agreement: if a debtor has multiple financing arrangements subject to different exclusive jurisdiction agreements, resolution of the debtor's insolvency would necessitate multiple proceedings in the nominated jurisdictions, thereby violating the principle of modified universalism.[187]

121 Against this background, the Court held that proceedings such as the RP address the same types of circumstances as do paradigmatic insolvency proceedings such as natural person bankruptcy and winding-up and therefore possess the same peculiarities which make the Lugano Convention inappropriate to those paradigmatic insolvency proceedings:[188]

> "*proceedings designed to enable a company in financial difficulties to reach a composition or arrangement (to use the words in the bankruptcy exclusion) with its creditors involves the same peculiar feature as a straightforward bankruptcy or winding-up. The need for the composition or arrangement arises from the company's inability to satisfy the claims of all its creditors. There is inherently competition between the company's creditors, requiring a collective solution that is fair to all. … [R]ules which allocate jurisdiction by reference to the domicile of each creditor, or the legal nature of each creditor's claim, or by reference to bi-lateral contractual provisions with different*

[185] [2021] EWHC 304 (Ch), at [91].

[186] [2021] EWHC 304 (Ch), at [92], quoting from Lord Hoffmann's speech in *Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852 (HL), [61].

[187] [2021] EWHC 304 (Ch), at [96]-[99].

[188] [2021] EWHC 304 (Ch), at [100]; the Court's conclusion on this point is at [103].

creditors, are as inapposite and impractical in the context of Part 26A proceedings, which are premised on the financial difficulties of the company, as they are for traditional insolvency proceedings."

ii. THE "DOVETAILING" GROUND

122 Secondly, it was common ground before the Court that the bankruptcy exclusion to the Lugano Convention should be construed consistently with the materially identical exclusion in relation to EU Regulation 1215/2012 (Recast) ('**Recast Brussels Regulation**').[189] On that basis, the Court followed the "**dovetailing principle**", which provides that the Recast Brussels Regulation should be interpreted to the extent possible so as to dovetail with the EIR without gap or overlap such that a proceeding should either fall under the Recast Brussels Regulation or else should be caught by the bankruptcy exclusion to that Regulation and fall under the EIR.[190] The Court held that the RP proceeding by its nature is capable of falling within the EIR with the result that it would be caught by the bankruptcy exclusion to the Recast Brussels Regulation and therefore is caught by the bankruptcy exclusion to the Lugano Convention.[191]

123 Article 1(1) of the EIR provides, relevantly, that the EIR applies to "*public collective proceedings…which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation…the assets and affairs of a debtor are subject to control or supervision by a court*". The Court held that each of these elements characterises the RP proceeding.

124 Firstly, the Court found, by reference to Recital 14 though interpreted permissively in one respect, that the RP proceeding is a collective proceeding.[192] We return to this point below.

125 Secondly, the RP proceeding is also based on a law relating to insolvency:

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[189] [2021] EWHC 304 (Ch), [57](1) and [58].

[190] [2021] EWHC 304 (Ch), particularly [60], [74]-[84], and [136].

[191] In reaching its conclusion, the Court referred (at [2021] EWHC 304 (Ch), at [67]) to three early decisions in each of which the Judge had assumed or stated that the RP proceeding was a "*civil and commercial matter*" rather than an insolvency proceeding: *Re Virgin Atlantic Airways Ltd* [2020] EWHC 2191 (Ch), [57]-[61] (Trower J), *Re Pizza Express Financing 2 plc* [2020] EWHC 2873 (Ch), [29] (Sir Alastair Norris), and *Re DeepOcean 1 UK Ltd* [2020] EWHC 3549 (Ch), [36] to [38] (Trower J). Zacaroli J noted (at [68]), however, that in none of those cases did the point need to be decided and in none of them did the Court have the benefit of adversarial argument.

[192] [2021] EWHC 304 (Ch), [109]-[110].

125.1 That an RP may be proposed with the aim of mitigating the effects of the debtor's financial difficulties (by increasing the dividends that would be paid out in an eventual liquidation) rather than of rescuing the debtor from such difficulties shows that the RP is an insolvency proceeding.[193]

125.2 Further, however, the Court noted the numerous references in the EIR to its application to "*pre-insolvency*" cases in which "*there is only a likelihood of insolvency and where the relevant proceedings are aimed at preventing insolvency and ensuring the debtor continues as a going concern*".[194] By virtue of the two Conditions, the RP proceeding also meets this extended definition of insolvency.[195]

125.3 While not deciding the issue, the Court was not persuaded by the argument, sketched out above, that the directors of a company which meets Condition A would be subject to the creditors' interests duty.[196] The Judge "*consider[ed] it doubtful that Parliament intended to equate the test within Condition… A…with the duty at common law to take account of the interests of creditors*".[197]

126 Thirdly, the related requirement that the purpose of the proceeding be the debtor's rescue, the adjustment of its debt, its reorganisation, or its liquidation, is met by Condition B.[198]

127 Fourth and finally as to the requirement that the assets and affairs of the debtor be subject to the court's supervision or control:

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[193] [2021] EWHC 304 (Ch), [115].

[194] [2021] EWHC 304 (Ch), [112], and see at [113]-[114].

[195] [2021] EWHC 304 (Ch), [120].

[196] [2021] EWHC 304 (Ch), [116]. While the Court also referred to Condition B, that Condition is not relevant to this argument.

[197] [2021] EWHC 304 (Ch), [117]. In our view, in addition to the arguments we have given at Paragraphs 68 to 81, it would be an anomaly in the law governing directors' duties if the directors of a financially distressed company facing an existential crisis (in the form of an actual or possible inability to carry on business as a going concern) can cause the company to enter into an insolvency proceeding which can result in write-downs and other modifications being 'crammed down' upon the claims of entire classes of dissenting creditors, without being required to consider the interests of such creditors at all.

[198] [2021] EWHC 304 (Ch), [121].

127.1 The Court rejected the argument, made in the K&E letter, that the RP proceeding does not meet this requirement since it does not involve the sort of supervision or control that characterises other types of UK insolvency proceedings, including in particular a company voluntary arrangement pursuant to the 1986 Act ('**a CVA**').[199]

127.2 Instead, the supervision or control requirement is to be interpreted broadly, given that the EIR is undoubtedly intended to apply to proceedings designed solely to restructure the debt of a company which is not yet insolvent but is likely to become so and which is to be left in possession and control of its assets. Further, in relation to debtor-in-possession proceedings whose purpose is to restructure only financial debt, the court would hardly ever (if at all) be required to supervise the debtor's assets or affairs in the way that happens in a CVA.[200]

127.3 Instead (and consistently with our arguments above), Mr Justice Zacaroli stated:[201]

> "***The only need for court supervision is in respect of the process by which the restructuring*** — *e.g. adjustment of debt* — ***is achieved***.
>
> *In such a case, the supervision of the court may nevertheless be said to be over the debtor's affairs and assets in the sense that, while it is for the debtor to determine what arrangement it should reach for the purpose of deploying its assets towards satisfaction of its creditors' claims, the plan devised by the debtor can only come into effect if the court considers it appropriate to convene meetings of creditors and subsequently to approve it.*"

127.4 Finally, the Court rejected the contention, also made in the K&E letter, that the debtor company's ability at any time after the commencement of the RP proceeding to decide not to pursue the RP any further detracts from the requisite level of court supervision.[202]

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[199] [2021] EWHC 304 (Ch), [128].

[200] [2021] EWHC 304 (Ch), [129]-[130].

[201] [2021] EWHC 304 (Ch), [130]-[131] (emphasis added). In the same passages, the Judge also referred to "*a separate specific measure of supervision*" in the form of the control of ipso facto clauses pursuant to section 233B of the 1986 Act. We consider this below.

[202] [2021] EWHC 304 (Ch), [132].

iii. IMPLICATIONS FOR CHARACTERISATION PURSUANT TO THE CTC

128 In our view, the *gategroup* judgment leaves little doubt but that the RP proceeding constitutes an insolvency proceeding for CTC purposes. In particular, the Court's analysis demonstrates that a proceeding which meets the requirements of the EIR definition would meet and exceed the requirements of the CTC definition. Amongst other things:

128.1 Mr Justice Zacaroli's conclusion that there is the requisite court supervision or control[203] holds equally in the CTC context.

128.2 Similarly, the Judge's finding that the RP proceeding is a collective proceeding for the purposes of the EIR carries over to the CTC context, particularly in light of the Official Commentary (MAC)'s express albeit non-determinative reference to the EIR's conception of collectivity.[204] In fact, the CTC does not include a restriction similar to that found in Recital 14 to the EIR to the effect that a proceeding which does not involve all of the debtor's creditors should aim to rescue the debtor in order to be a collective proceeding, and that if a "*definitive cessation of the debtor's activities*" is intended, then the proceeding must involve all creditors in order to be a collective one.

128.3 There is no express requirement in the CTC for the proceeding to be based on a law relating to insolvency.[205] Nor is there any equivalent to the restriction in Recital 16 to the EIR that "*proceedings that are based on general company law not designed exclusively for insolvency situations should not be considered to be based on laws relating to insolvency.*"

129 Finally and most importantly, the reasons why the Lugano Convention and the CTC seek to identify insolvency proceedings are radically different from each other. So, relatedly, are the principles governing the interpretation of the Lugano Convention (and the Recast Brussels Regulation and its predecessors) on the one hand and the CTC on the other.

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[203] Para 127 above.

[204] Official Commentary (MAC), para 3.103(1).

[205] As we have explained at Paragraphs 39 and 40, such a requirement was specifically removed during the drafting process.

129.1 In relation to the Lugano Convention, the Recast Brussels Regulation, and the latter's predecessors:

129.1.1 The reason for identifying insolvency proceedings falling in the bankruptcy exclusion is to be found in the peculiarities ground of Mr Justice Zacaroli's judgment. Insolvency proceedings are collective proceedings in relation to which jurisdiction should be allocated not on a bilateral creditor/debtor basis but instead collectively by reference to appropriate features of the debtor, particularly the location of its COMI or establishment. This collective basis for the allocation of jurisdiction is the exception, however, and as such, the bankruptcy exclusion is to be construed narrowly.[206]

129.1.2 The interpretation of the bankruptcy exclusion in this context is also distorted by the fact that EU member states have significant discretion as to the proceedings they wish to subject to the EIR. In particular, a state may exclude a proceeding meeting the substantive requirements of Article 1(1) from the scope of the EIR by the simple expedient of not seeking to have the proceeding listed in Annex A to the EIR (and counterparts in predecessor legislation). By virtue of Article 2(4), such a proceeding would likely not be regarded as falling under the EIR. In turn, there is then interpretive pressure from the dovetailing principle for the proceeding to be construed as falling within the scope of the Recast Brussels Regulation and therefore also of the Lugano Convention.

129.2 By contrast, in relation to the CTC:

129.2.1 The CTC seeks to identify insolvency proceedings in order to ensure that the rights and remedies made available to the holders of international interests pursuant to the CTC, including those in the declarations made by the State which

[206] See e.g. the decision of the Court of Justice of the European Union in *German Graphics Graphische Maschinen GmbH v van der Schee* [2010] ILPr 1 at [23]-[25], whose effect Beatson J summarised as follows in *Polymer Vision R&D Ltd v Van Dooren* [2012] ILPr 14 at [46]: "*It is common ground that, in the light of the authorities, the reference to 'civil and commercial" matters in the Judgments Regulation is* 'broad in its scope' *but the Insolvency Regulation and art.1.2(b) of the Judgments Regulation* 'should not be broadly interpreted'". See also *Tchenguiz v Grant Thornton* [2015] 2 BCLC 307 (Carr J), [141]-[142]: "*There should be a broad definition of the concept of* 'civil and commercial matters'*…By contrast, the scope of [the bankruptcy exclusion] is narrower and more specifically defined*."

is the debtor's COMI jurisdiction,[207] should remain available whatever the state of the debtor's finances. Only in this way can the reliance by (prospective) lenders and lessors upon the unimpaired availability of their rights and remedies, which is fundamental to the CTC framework, be maintained. This requires giving the concept of "*insolvency proceedings*" a wide interpretation. In particular, the debtor should not be able to defeat lenders' CTC rights or remedies by entering into proceedings which can affect the rights and remedies of holders of international interests but which do not qualify as "*insolvency proceedings*" because this term has been given a restrictive definition.[208]

129.2.2 It should also be remembered that the interpretation of the CTC is autonomous and governed by CTC Article 5.[209]

129.2.3 Further and importantly, the CTC is not subject to any dovetailing principle, with the result that there is no basis on which the scope of its application should be construed narrowly.

129.2.4 Nor should the CTC's interpretation be afflicted with the interpretive distortions to which we have drawn attention in the context of the EIR, the Recast Brussels Regulation, and the Lugano Convention.

130 Accordingly, there is in our view an asymmetric relation between the definition of "*insolvency proceedings*" for the purposes of the Lugano Convention and the CTC:

130.1 All proceedings which fall in the former's bankruptcy exclusion would also constitute "*insolvency proceedings*" for the purposes of the latter. This includes "*pre-insolvency*" proceedings which are initiated when the debtor is not yet insolvent and whose purpose is to avoid such insolvency. This is clear from the statement in the Official Commentary that "*the question whether the debtor is in fact insolvent is irrelevant*".[210]

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[207] See paras 27 to 31 above.

[208] See, in particular, the argument in paragraph 31 above.

[209] See para 19 above.

[210] Official Commentary, para 3.118.

130.2 The reverse does not hold: proceedings which do not fall in the bankruptcy exclusion to the Lugano Convention — for example, solely because of the restrictions in Recitals 14 and 16 to the EIR, discussed above, and/or because they are not listed in Annex A to the EIR[211] — would nevertheless qualify for CTC purposes.

V. THE SCHEME OF ARRANGEMENT AS A CTC '*INSOLVENCY PROCEEDING*'

131 In our view, most of the points we have made in relation to the RP also apply to the Scheme. We briefly consider the respects in which the two types of proceedings are materially similar, before moving on to analyse the implications of the key difference, viz, the absence from the Scheme process of the two Conditions. This is important because in *gategroup*, Mr Justice Zacaroli relied on the fact that Part 26A contains the two Conditions to explain why the RP proceeding is materially distinguishable from the Part 26 Scheme and falls within the bankruptcy exclusion to the Lugano Convention.[212]

A. JUDICIAL PROCEEDINGS SUBJECT TO THE COURT'S CONTROL OR SUPERVISION

132 The Scheme is a judicial proceeding in much the same way as is the RP:

132.1 The Scheme process must be started by application to the Court.[213]

132.2 A meeting of one or more claimant classes may only be called by order of the Court.[214]

132.3 Only the Court may sanction the Scheme.[215]

132.4 Unlike the RP, the Scheme process does not expressly confer upon the Court the power to order that members of a claimant class not be permitted to participate in a meeting

[211] As is made clear by the Official Commentary (MAC), at para 3.103(1).

[212] [2021] EWHC 304 (Ch), [101]-[102] and [119]-[120].

[213] Section 896(1) of the 2006 Act.

[214] Section 896(1) of the 2006 Act.

[215] Section 899(1) of the 2006 Act.

because they lack a genuine economic interest in the debtor. In our view, this makes no difference. It is clear that a claimant class whose members lack an economic interest in the company need not be consulted in relation to the Scheme.[216] Further and in any case, there is no basis in the CTC and its interpretive material for the proposition that the existence of such a power is a necessary precondition to the characterisation of a proceeding as a judicial proceeding.

133 The assets and affairs of a debtor undergoing the Scheme process are also subject to the Court's supervision or control in much the same way as they are in the RP process, for the same reasons that we have explained at Paragraphs 42.3, 46, 52, 60, 61.3, 61.8, 104 to 107, and 127. Further:

133.1 Mr Justice Zacaroli's statement in relation to the RP in *gategroup* — that in debtor-in-possession proceedings whose purpose is to restructure solely the debtor's financial debt, the only need for court supervision is in respect of the restructuring process itself, and that such supervision is present to the requisite degree if the Court has power to decide whether to permit the convening of creditor meetings and subsequently whether to sanction the plan[217] — is equally applicable to the Scheme, which is a debtor-in-possession proceeding in which the debtor may propose an arrangement or compromise solely to its financial lenders.

133.2 Unlike the RP process, the Court has no power in relation to Schemes to disapply ipso facto clauses. The presence of this power is not, however, necessary to a proceeding meeting the supervision or control requirement, as is clear from the fact that no such power is available in winding-up. Further and in any case, there is no basis in the CTC and its interpretive material for the proposition that the existence of such a power is a necessary precondition to a proceeding meeting this requirement.

133.3 The Official Commentary (MAC) in our view puts the matter beyond dispute.

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[216] See e.g. *Re Tea Corp Ltd* [1904[1 Ch 12 (CA), 23 (Vaughan Williams LJ); *Re Bluebrook Ltd* [2010] BCC 209 (Ch), 219, at [25] (Mann J).

[217] [2021] EWHC 304 (Ch), [130]-[131].

133.3.1 It states, relevantly, that schemes of arrangement in which the debtor retains control and the court exercises supervision by approving the scheme and steps leading up to such approval are intended to be covered:[218]

> "*institutions such as court-supervised schemes, or plans, of arrangement and the 'debtor in possession', where possession and management remain with the debtor company but under the overall control of creditors or a supervisor and the court, whether the supervision or control takes the form of a requirement of approval of the scheme or of steps leading up to it or otherwise*."

133.3.2 Echoing the Official Commentary, the Official Commentary (MAC) further explains that the debtor in possession itself may act as "*supervisor*".[219]

133.3.3 It follows that the Scheme — in which the debtor company retains possession and management of its assets and affairs and may act as its own supervisor and the Court's supervision or control takes the form of approval of the Scheme and of the steps leading up it — plainly meets the supervision or control requirement.

B. "*IN INSOLVENCY*"

134 We turn next to the statement in the Official Commentary that a proceeding would only qualify if its purpose is to effect the debtor's reorganisation or liquidation "*in insolvency*".[220]

135 The Scheme was originally designed exclusively for companies in the course of being liquidated, and it took some 45 years for it to be made available without the requirement that the company proposing it be in winding-up:

135.1 Pursuant to the Companies Act 1862, a company which was about to be or was in the course of being wound up could propose an arrangement to its creditors which would be binding on the company if approved by 75% of its members, and binding on the creditors

[218] Official Commentary (MAC), 3.103(3).

[219] Official Commentary (MAC), para 3.103 (final paragraph).

[220] See Paragraph 42.4.

if approved by 75% of creditors by value and number.[221] Court approval was not required, though a creditor or member had three weeks to challenge the arrangement, with the Court being given the power to amend, vary, or confirm the arrangement.[222] Further, the liquidator could enter into a compromise with creditors with the sanction of the court or an extraordinary resolution of the members, as appropriate.[223] There was no power to bind dissentients.

135.2 The Joint Stock Companies Arrangement Act 1870 consolidated the provisions concerning compromises and arrangements with creditors, with the Court being given the power to order that a meeting of the relevant creditors be summoned.[224] The compromise or arrangement had to be approved by a majority in number and three-quarters in value of creditors and sanctioned by the Court. Dissentient were now bound. However, only a company in the course of being wound up could propose such a compromise or arrangement.

135.3 The Companies Act 1900 extended this provision to enable the company to propose a compromise or arrangement to its members.[225]

135.4 In 1906, the Company Law Amendment Committee proposed that the requirement for the company to be in the course of winding up be removed:[226]

> "*Where **a company is in difficulties** it often happens under the present law that there is no remedy except liquidation, with its attendant disadvantages — although large majorities of its creditors and shareholders may be willing to consent to an arrangement **for rehabilitating the company**; for it is only in a winding up that the Joint Stock Companies Arrangement Act, 1870, becomes available. It seems anomalous, and is in practice found inconvenient, that a winding up should be required as a preliminary condition to an arrangement between the company and its creditors. We*

[221] Section 136.

[222] Section 137.

[223] Sections 137 and 159.

[224] Section 2.

[225] Section 24.

[226] Cd. 3052, at para 54 (emphasis added).

think that the provisions of the Joint Stock Companies Arrangement Act, 1870, should he extended so as to enable a company, without going into liquidation, to effect a compromise or arrangement with its creditors subject to the sanction of the Court, and with the safeguards imposed by the Act."

135.5 The underlined words show that, while the Committee favoured removal of the requirement for the company to enter into winding-up before proposing a compromise or arrangement, its focus was on the rehabilitation of companies in difficulties. The Committee made a separate albeit similar proposal for a company to be able, by special resolution and with the Court's sanction, to reorganise its capital without entering into liquidation.[227]

135.6 The Committee's proposals were enacted by the Companies Act 1907.[228] Insofar as relevant to this analysis, the process has since remained unchanged.

136 While solvent schemes have long been commonplace, our concern is with Schemes proposed in any of the following four scenarios:

136.1 The debtor company is insolvent and subject to either liquidation or administration in England (or equivalent proceedings in another jurisdiction).

136.2 The company is insolvent such that it would be financially eligible to being placed in insolvent winding-up or administration in England (or equivalent proceedings in another jurisdiction), but is not in fact in either such proceeding.

136.3 The company meets Condition A in relation to RPs and the proposed Scheme substantively meets Condition B in relation to RPs.

136.4 The likely alternative to the approval and sanction of the Scheme is for the company to enter into insolvent liquidation or administration in England (or an equivalent proceeding in another jurisdiction).

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[227] At para 55.

[228] Sections 38 and 39, respectively. The substance of the two sections was combined in section 120 of the Companies (Consolidation) Act 1908.

137 Each of these scenarios presents what the Official Commentary (MAC) calls an "*insolvency setting*".[229] And while it is clear as a matter of domestic law that solvent and insolvent Schemes are governed by the same basic principles (though the exercise of the Court's discretion may differ),[230] our concern is with whether Schemes proposed in any of the four scenarios fall to be characterised as "*insolvency proceedings*" for CTC purposes even if a Scheme proposed in relation to (say) an indubitably solvent company would not be so characterised. This is an autonomous question to be answered in the first instance by reference to the purposes of the CTC and the general principles underlying it. The most important relevant consideration is the one discussed above, viz, that a debtor should not be able to defeat CTC rights and remedies by making use of proceedings which can affect the rights and remedies of holders of international interests but which, because of a restrictive interpretation of "*insolvency proceedings*", are not classified as such.

138 With that in mind, it is our view that a court is required to consider on a case by case basis whether a Scheme has been proposed in an insolvency setting (that is, in any of the four scenarios mentioned above), and if it arrives at an affirmative answer, to treat the Scheme proceeding in that case as a CTC "*insolvency proceeding*". We take this view for three cumulative reasons.

139 Firstly, this approach is suggested by the definition of "*insolvency-related event*" as (relevantly) "***the commencement*** *of the insolvency proceedings*".[231] The indicates that the proceeding to be assessed by reference to the definition is one which has been commenced. The assessment is not one of the nature of the proceeding considered in the abstract by reference to the name of the type of proceeding or the breadth of the statutory provision under which it is brought.

140 Secondly, this approach is consistent with that adopted by Mr Justice Zacaroli in *gategroup*:

140.1 We have noted above that pursuant to Recital 14 to the EIR, a proceeding may qualify as collective in the requisite sense if, either, it involves all of the debtor's creditors and leads

[229] Official Commentary (MAC), paras 3.103(1) and 4.21(3)(a).

[230] See e.g. the judgment of the Court of Session (inner house (first division)) in *Scottish Lion Insurance Co Ltd v (First) Goodrich Corp* [2010] BCC 650, 664-5, at [43] (Lord Hamilton, P).

[231] CTC, Article 1(2)(m)(i).

to the "*definitive cessation of the debtor's activities*", or, it does not include all creditors and aims at the debtor's rescue.

140.2 Recital 14 does not on its terms cover a case such as *DeepOcean*, where the RP was proposed in relation to some (but not all) creditors, yet its purpose was to improve the position of creditors in a subsequent solvent wind down (that is, the RP was a prelude to a definitive cessation of the debtor's activities).[232]

140.3 In *gategroup*, Mr Justice Zacaroli referred to this aspect of *DeepOcean* but nevertheless held that the RP proceeding complies with the EIR's collectivity requirement since "*it undoubtedly encompasses a plan aimed at 'rescuing the debtor'*".[233]

140.4 This suggests that a type of proceeding may qualify as collective so long as it is undoubtedly capable of being used in cases which possess all elements of collectivity (relevantly, a proceeding involving only some creditors which is capable of effecting the debtor's rescue). This conclusion is not undermined by the fact that some of the cases which make use of that proceeding do not exhibit all such elements (as in *DeepOcean*, where the proceeding involved only some creditors yet did not aim to effect the debtor's rescue).

140.5 By parity of reasoning, a proceeding may qualify as a proceeding whose purpose is to effect the debtor's reorganisation *in insolvency* so long as the proceeding is undoubtedly capable of being used for this purpose. This conclusion is not undermined by the fact that some of the cases in which the proceeding effects reorganisation do not concern reorganisations *in insolvency*.

141 Thirdly, the approach set out in paragraph 138 is necessitated in relation to proceedings which are undoubtedly insolvency proceedings when applied to insolvent companies and undoubtedly not insolvency proceedings when applied to solvent companies. The UK winding-up process provides an example:

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[232] *Re DeepOcean 1 UK Ltd* [2020] EWHC 3549 (Ch), [48]-[49] (Trower J).

[233] [2021] EWHC 304 (Ch), at [110].

141.1 Pursuant to the 1986 Act, a company may be wound up by the Court if it has resolved by special resolution so to be wound up ('**the resolution ground**'),[234] or if it is unable to pay its debts ('**the insolvency ground**').[235] The first of these grounds may be used by the members of a solvent company, while the second defines the state of the company's insolvency.

141.2 In considering whether the UK winding-up fell within or outwith the Brussels Convention, the official report ('**the Schlosser Report**') to the convention by which Denmark, Ireland, and the UK acceded to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters ('**the Brussels Convention**') commented as follows in relation to predecessor legislation providing for the resolution and the insolvency grounds:[236]

> "*A winding-up by the court cannot, of course, be automatically excluded from the scope of the [Brussels] Convention. For although most proceedings of this kind serve the purpose of the liquidation of an insolvent company, this is not always the case. The Working Party decided to exclude from the scope of the [Brussels] Convention only those proceedings which are or were based on [the insolvency ground]... This would, however, involve too narrow a definition of the proceedings to be excluded, as the liquidation of an insolvent company is frequently based on one of the other grounds referred to in [the predecessor legislation], notably [the resolution ground], which states that a special resolution of the members is sufficient to set proceedings in motion.*
>
> *There is no alternative therefore to ascertaining the determining factor in the dissolution in each particular case. … If a winding-up in the United Kingdom…is based on a ground other than the insolvency of the company, the court concerned with recognition and enforcement in another Contracting State will have to examine whether the company was not in fact insolvent. Only if it is of the opinion that the company was solvent will the [Brussels] Convention apply*."

[234] Section 122(1)(a).

[235] Section 122(1)(a) and (f), respectively.

[236] No C 59/91, para 57, RHS, final para.

141.3 This mirrors the process we consider to be required when a court is called upon to decide whether a Scheme constitutes an insolvency proceeding for CTC purposes.[237]

142 For these reasons, it is our view that a Scheme proposed in an insolvency setting is proposed for the debtor's reorganisation or liquidation "*in insolvency*".

C. FOR THE PURPOSE OF REORGANISATION OR LIQUIDATION IN INSOLVENCY

143 It is trite that Schemes are commonly used to restructure debt,[238] and at least in the normal course, a Scheme proposed in an insolvency setting would be proposed, in the language of the Official Commentary and mirroring the position of the RP, for the purpose of "*reorganisaion of the debtor, namely a reordering of [the debtor's] affairs with a view to its restoration to profitable trading or to improving the position of creditors on a subsequent liquidation*".[239] This provides the equivalent of RP Condition B. The Official Commentary (MAC) adds that this element of the CTC definition "*would include schemes of arrangement*".[240] There is no requirement in the CTC or its interpretive material that the purpose of the proceeding be set out expressly in statutory text as opposed to being operationalised in practice.

144 It is also true that the Scheme process does not provide for the equivalent of Condition A. Again, however, a proceeding may undoubtedly be an insolvency proceeding even if it may be commenced without demonstrating anything like the debtor's insolvency:

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[237] In relation to the EU instruments on civil and commercial proceedings on the one hand and the EIR and its predecessor on the other, *In re Rodenstock GmbH* [2011] Bus LR 1245, [51], left the door open to such an outcome.

By contrast, in *Re Magyar Telecom BV* [2014] EWHC 3800 (Ch), [29], in the context of a scheme proposed without opposition by an insolvent company, David Richards J took a different view, namely, that the Scheme falls within the ambit of the predecessor to the Recast Brussels Regulation. He did so, however, on the basis of the dovetailing principle, namely, that if a judgment did not fall within the predecessor to the EIR, it must fall within the Judgments Regulation.

While we have not been able to obtain the company's skeleton argument in *Magyar*, we understand that this issue was raised by David Richards J himself during the hearing and was not the subject of argument. In any case and crucially, the dovetailing principle has no relevance in the CTC context, so that conclusions based on it do not hold in relation to the CTC.

[238] As Zacaroli J noted in *gategroup* [2021] EWHC 304 (Ch), at [110].

[239] Official Commentary, para 4.21(3)(a).

[240] Official Commentary (MAC), para 4.21(3)(a). The sentence continues with other elements of the definition of an insolvency proceeding: "…*or other restructuring plans under the control of the court and concluded in an insolvency setting where the schemes cover a substantial part of the indebtedness and do not involve creditors outside the scheme*".

144.1 The UK administration process provides the first example:

144.1.1 Administration may be started either by application to the Court, or out of court by the company or its directors or else by a qualifying floating charge holder ('**QFCH**').[241]

144.1.2 It is a precondition to the Court making an order appointing an administrator at the behest of anyone other than a QFCH applying as such that the company is or is likely to become unable to pay its debts.[242] Similarly, an appointment made by the company or its directors is only effective if the appointor makes a statutory declaration that the company is or is likely to become unable to pay its debts.[243]

144.1.3 By contrast, the QFCH need not demonstrate the company's inability to pay but may make an out-of-court appointment simply on the basis of a 'technical' default (i.e. one not related to the company's payment obligations) so long as the charge is enforceable.[244] Further, the QFCH is afforded a route of its own by which to apply to the Court for an administration order without having to demonstrate the company's inability to pay debts.[245]

144.1.4 Regardless of the mode of appointment, the administration operates on the same principles, and the administrator is an officer of the Court[246] and is subject to the same substantive duties.[247]

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[241] Paras 12(1), 14(1), and 22 of Schedule B1 to the 1986 Act.

[242] Para11(a) of Schedule B1 to the 1986 Act.

[243] Para 27(2)(a) of Schedule B1 to the 1986 Act.

[244] Para 16 of Schedule B1 to the 1986 Act and *SAW (SW) 2010 Ltd v Wilson* [2017] EWCA Civ 1001, [33] (Briggs LJ).

[245] Para 35(2)(a) of Schedule B1 to the 1986 Act.

[246] Para 5 of Schedule B1 to the 1986 Act.

[247] Including, in particular, the duties to perform their functions (i) with one of three statutory objectives, (ii) in the interests of creditors as a whole (or else so as not unnecessarily to harm such interests), and (iii) as quickly and efficiently as is reasonably practicable; Paras 3(1), 3(2), 3(4), and 4 of Schedule B1 to the 1986 Act.

144.1.5 This demonstrates that an administration is (amongst other things) a proceeding for the debtor's reorganisation or liquidation in insolvency, even when commenced without the requirement to establish the debtor's insolvency.

144.2 The CVA in this jurisdiction and proceedings in an insolvency setting pursuant to both Chapters 7 (Liquidation) and 11 (Reorganization) of the US Bankruptcy Code are also paradigmatic insolvency proceedings each of which is commenced without the requirement to establish insolvency.

144.3 Finally on this point, consider a jurisdiction with insolvency legislation materially similar to that in England but which permits the making of a winding-up order solely on the basis that the court is "*of the opinion that it is just and equitable that the company should be wound up*".[248] The practice of courts in this jurisdiction is to make a winding-up order if satisfied that the company is unable to pay its debts. Again, the resulting winding-up proceeding would paradigmatically be an insolvency proceeding even though not formally commenced on the basis of insolvency. Further, this conclusion would not be undermined if, in relation to a solvent company, the courts' practice is to make the order if satisfied that the company's members had duly resolved that the company should be wound up.

145 For these reasons, we consider that a Scheme proposed in an insolvency setting would (at least in the normal course) be proposed for the purpose of the debtor's reorganisation.

D. COLLECTIVITY

146 Finally, a Scheme proposed in an insolvency setting is a collective proceeding in the same way and for the same reasons as is the RP. These reasons are explained in Paragraphs 47, 50, 59, 61.4, 96 to 102, and 128.2.

147 Further, the Scheme is also characterised by the same "*peculiarities*" which mark the RP proceeding, and which we consider at Paragraphs 117 to 121.[249]

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[248] In other words, on the basis of wording identical to that of Section 122(1)(g) of the 1986 Act.

[249] The characterisation of the type of proceeding marked by such peculiarities provided by Zacaroli J in *gategroup* [2021] EWHC 304 (Ch), at [100], is equally applicable to a Scheme proposed in an insolvency setting. Zacaroli J

E. THE *AIRASIA X* JUDGMENT

148 Our analysis is broadly consistent with the judgment of Judicial Commissioner Ong Chee Kwan in the High Court of Malaya in *In the matter of AirAsia X Berhad*,[250] delivered on 19 February 2021. AirAsia X Berhad ('**AAX**') is a regional airline severely affected by the Covid-19 pandemic and the resulting lockdowns, and it was common ground that it was insolvent.[251] AAX applied for an order convening meetings of certain of its creditors.[252] The scheme debts included those owed qua guarantor to lessors of 27 aircraft objects leased to eleven subsidiaries of AAX. The lessors argued that (amongst other things) the debts owed to them were protected pursuant to the CTC. AAX resisted, in part on the basis of an expert opinion prepared by Professor Jennifer Payne on the assumption that the proposed scheme was governed by Part 26 of the 2006 Act.[253]

149 Professor Payne accepted for the purposes of her opinion that the Scheme is a collective proceeding for the purpose of reorganisation, but took the view that it does not exhibit the requisite court control or supervision of the debtor's assets and affairs.[254] In this regard, Professor Payne highlighted the importance of the following factors (amongst others):

149.1 The Scheme proceeding leaves the debtor in control of its assets and affairs, with the possession and management of the company remaining with the company's pre-Scheme

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noted that English Courts have split on whether the Scheme process possesses certain of these peculiarities and that the matter remains unresolved; see at [62]-[66] and [100]. We note that the dovetailing principle was a key premise in some or all of the reasoning of the Court on the characterisation question in each of those English decisions.

[250] WA-24NCC-467-10/2020.

[251] At [272].

[252] Pursuant to section 366(1) of the Malaysian Companies Act 2016. This provision is located in the "*Arrangements and Reconstructions*" Subdivision of the Act, which appears to be materially similar to the Scheme process in Part 26 of the 2006 Act. Further, the Court made extensive reference to English authority.

[253] At [232].

[254] At [235]-[236]. Our arguments for the view that the Scheme meets the supervision or control requirement are at Paragraphs 42.3, 46, 52, 60, 61.3, 61.8, 104 to 107, 127, and 133. Amongst other things, we consider that Professor Payne's position on the supervision or control requirement does not survive Zacaroli J's treatment of the issue in the RP context in *gategroup*, as discussed at Paragraph 127, above.

management and no control passing to creditors, a creditors' representative, supervisor, or the Court.[255]

149.2 The Court merely has such control over particular issues as is ceded to it by the debtor company, namely, as to the terms of the Scheme including class composition and overall fairness. Therefore, the Court at most has control and supervision over the Scheme proceeding.[256]

149.3 This contrasts sharply with the nature of control over the company's assets in liquidation and administration as well as debtor-in-possession proceedings such as US Chapter 11, and does not meet the CTC requirement that "*the* 'assets and affairs' *of the debtor are under the control* ***and*** *supervision of the Court*".[257]

150 The Court did not accept these arguments. It provided a provisional view[258] based on the following grounds (amongst others):

150.1 The question whether a Scheme is an insolvency proceeding for CTC purposes is to be decided by reference not to national law but to the principles underlying the CTC.[259]

150.2 The Annotation supports the view that a Scheme formulated in the context of an insolvency constitutes an insolvency proceeding; this view in turn is endorsed by Professor Goode, albeit in his personal capacity; and these factors demand due consideration.[260]

150.3 The Scheme is a collective proceeding whose implementation is subject to the Court's approval.[261]

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[255] At [236].

[256] At [238].

[257] At [239] (emphasis added).

[258] At [276].

[259] At [262].

[260] At [266]-[271]. We note that Professor Goode's view on this point is now set out in paragraphs 3.103 and 4.21(3)(a) of the Official Commentary (MAC).

[261] At [273]-[274].

150.4 Professor Payne had taken an overly restrictive view of the control or supervision requirement. The requirement is not that the debtor's entire assets and affairs be covered by the Scheme, nor does it matter that possession and management of the company outwith the ambit of the Scheme remain with the debtor. "*All that is required is that the proceedings [be] collective proceedings…such that it involves assets and affairs of the debtor being subject to the control* ***or*** *supervision of the court.*" The Scheme meets this requirement. This is further demonstrated by the fact that the Scheme must receive the Court's sanction and the debtor and creditors must comply with the Court's directions as to the Scheme's implementation.[262]

150.5 The Court stated that its view was fortified by several of the arguments we had made in the original version of this Opinion in relation to the control or supervision requirement as applied to the RP proceeding.[263]

150.6 Finally, since the Scheme provided the lessors with a Termination Option protecting their Article XI rights, its approval did not require the consent of each and every lessor. Instead, the requisite majority of the relevant class may bind the dissentient minority.[264]

151 In our view, an English Court confronted with the question whether a Scheme proposed in an insolvency setting constitutes an insolvency proceedings for CTC purposes would likely give considerable weight to Judicial Commissioner Kwan's judgment, not only because it is a reasoned judgment of a fellow common law court in relation to materially similar proceedings given with the benefit of extensive adversarial argument including Professor Payne's opinion, but also and in particular because of the imperative to interpret the definition of "*insolvency proceedings*" with due regard to (amongst other things) the CTC's purposes and international character and to the need to promote uniformity and predictability in its application.[265] Accordingly, the English Court would be likely to require strong arguments for distinguishing the *AirAsia X* judgment and/or for considering it to be materially wrong in relevant respects. In the absence of such arguments, the

[262] At [277]-[279].

[263] At [281]-[282].

[264] At [290]-[295] and [297] (though [290] is unclear and, read in context, appears inadvertently to contain an unnecessary negation).

[265] Article 5(1) of the CTC.

English Court is likely to follow the Judicial Commissioner's reasoning to the conclusion that an English Scheme proposed in an insolvency setting also constitutes a CTC insolvency proceeding.

F. DATE OF COMMENCEMENT OF THE SCHEME PROCEEDINGS

152 For reasons materially identical to those we have explained in relation to the RP at paragraphs 111 to 115, we consider that for CTC purposes, the Scheme proceedings begin upon the making of an order summoning a meeting of creditors or members of the debtor company.[266]

VI. CHARACTERISATION PURSUANT TO REGULATION 5

153 The definition in Regulation 5 of the Regulations is as follows: "*liquidation, bankruptcy,* ***sequestration*** *or other collective judicial or administrative* ***insolvency*** *proceedings, including interim proceedings, in which the assets and affairs of the debtor are subject to the control or supervision by a court* ***(or liquidation committee)***". Comparing that definition to the CTC definition, the words highlighted in bold are added in the definition in the Regulations while the phrase "*for the purposes of reorganisation or liquidation*" is omitted.

154 We will now address the point as to whether the definition in the Regulations should be interpreted differently, by an English court, from the definition in the CTC.

155 We start with the observation that, under English law, where a treaty is implemented in domestic law by incorporation in domestic legislation, the treaty should be given an autonomous interpretation rather than a domestic interpretation.[267]

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[266] Pursuant to Section 896(1) of the 2006 Act.

[267] See *In re H* [1998] A.C. 72, 87 where Lord Browne-Wilkinson said "*In my view these English law concepts have no direct application to the proper construction of article 13 of the Convention. An international Convention, expressed in different languages and intended to apply to a wide range of differing legal systems, cannot be construed differently in different jurisdictions. The Convention must have the same meaning and effect under the laws of all contracting states. I would therefore reject any construction of article 13 which reflects purely English law rules as to the meaning of the word "*acquiescence*." I would also deplore attempts to introduce special rules of law applicable in England alone (such as the distinction between active and passive acquiescence) which are not to be found in the Convention itself or in the general law of all developed nations*."

A. THE TERM IN REGULATION 5 MUST BE INTERPRETED SO AS TO ACCORD FULLY WITH ITS CTC PROGENITOR

156 First, having ratified the CTC and the Aircraft Protocol, the UK would be in breach of its treaty obligations if it failed to implement a CTC provision in a way that had the same meaning as the provision in the CTC. The principle of statutory interpretation in relation to a treaty that has been implemented by incorporation in UK legislation is that "*there is a presumption that where a statute is passed in order to give effect to the United Kingdom's international obligations, the statute should if possible be given a meaning that conforms to that of the treaty*".[268] In *Salomon v Commissioners of Customs and Excise*,[269] Diplock LJ points out that although the sovereign power of the Queen in Parliament extends to breaking treaties and any remedy for breach of an international obligation lies in a forum other than the English courts, there is a prima facie presumption that Parliament does not intend to act in breach of international law, including specific treaty obligation, and "*if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred.*"

157 If Parliament does intend to infringe an international obligation, this must be made plain, as, for example, in *Collco Dealings Ltd. v Inland Revenue Commissioners*,[270] where this intention was held by the House of Lords to exist because of the plain words of the statute. Viscount Simonds said "*neither comity nor rule of international law can be invoked to prevent a sovereign state from taking what steps it thinks fit to protect its own revenue laws from gross abuse, or to save its own citizens from unjust discrimination in favour of foreigners. To demand that the plain words of the statute should be disregarded in order to do that very thing is an extravagance to which this House will not, I hope, give ear.*" As can be seen from that case, it is only in an extreme case, and where the words of the statute are very plain, that the presumption of compliance with treaty obligations will be rebutted.

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[268] D. Bailey and L. Norbury (with D. Feldman, consultant editor), *Bennion on Statutory Interpretation* (7th edn, 2017) 24.16. See also P. Sales and J. Clement, International law in domestic courts: the developing framework (2008) 24 LQR 388, 400, speaking of where an international treaty has been incorporated into domestic law '*Where Parliament has clearly drawn upon a treaty when formulating domestic legislation, a provision in the treaty may be a particularly strong guide to the meaning which Parliament intended the domestic provision to bear….Once Parliament has chosen to give effect to international treaty obligations in domestic law, the courts must apply the provisions of domestic legislation interpreted in the light of those treaty obligations..'*

[269] [1967] 2 QB 116, 142.

[270] [1962] A.C. 1.

158 In relation to Regulation 5 of the Regulations, there is no evidence of any intention to depart from the treaty obligation in the CTC, and the matters discussed in the next two paragraphs militate strongly against the rebuttal of the presumption.

159 Secondly, Regulation 6(2) of the Regulations states that '*These Regulations are subject to, and to be applied in accordance with, the provisions of the (a) Cape Town Convention, (b) the Aircraft Protocol…*'.[271] This is a very clear indication that the interpretation of any provision in the Regulations which implements a provision in the CTC must be interpreted in the same way as the CTC provision would be interpreted, and in accordance with the interpretation rules of the CTC discussed above.

160 Thirdly, the Explanatory Memorandum to the Regulations, at paragraph 3.3,[272] makes clear that the Regulations follow the text of the CTC and the Aircraft Protocol, and only depart from it intentionally in two instances on the basis of errors pointed out in the Official Commentary. These two areas are identified as Regulation 16(3) (implementing Article 29 of the CTC as modified by Articles III and XIV of the Aircraft Protocol) and Regulation 31 (implementing Article 35 of the CTC). If it had been intended for the text of Regulation 5 to depart from the meaning of the CTC in the definition of "*insolvency proceedings*" this would have been listed in the Explanatory Memorandum.[273] The Regulations were passed under the negative resolution procedure, that is, subject to annulment, and the text was not debated in Parliament or in the Secondary Legislation Scrutiny Committees.[274] Parliament must therefore be taken to have intended that the text of the Regulations was not intended to change the meaning of "*insolvency proceedings*" in the treaty which was implemented by the Regulations.

161 In further support of these points, we note that the definition of "*insolvency proceedings*" in Regulation 5 is clearly part of the implementation of the CTC in English law, as opposed to the text of Regulation 37, which is the enactment in English law of the text of Article XI Alternative

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[271] The CTC and the Protocol are appended as schedules to the Regulations.

[272] The text of paragraph 3.3. is "*The Regulations follow the text of the Convention and Protocol but depart from it in two areas on the basis of an error in the text identified in the Official Commentary on the Convention on International Interests in Mobile Equipment and Protocol thereto on matters specific to Aircraft Equipment by Professor Roy Goode (as approved for distribution by Unidroit.*"

[273] See also the Transposition Note, which states that "*Regulation 1 implements Article 1 [of the CTC]*".

[274] See Joint Committee on Statutory Instruments, Second Report 2105-16 (The Regulations are listed in the 'Instruments not Reported') House of Lords Secondary Legislation Scrutiny Committee Second Report 2015/16.

A.[275] The definition is not only relevant to the definition of "*insolvency-related event*" but is also relevant to several Articles in the Convention itself, namely Articles 30, 37 39, and 45. These articles are themselves implemented in the Regulations.

162 For the reasons set out above, we conclude that Regulation 5 of the Regulations must be interpreted in accordance with Article 1(l) of the CTC, and that the interpretation must be an autonomous one rather than a domestic law interpretation of the phrase "*insolvency proceedings*" or of the definition text. The autonomous interpretation should have regard to the matters set out in Article 5 of the CTC.

B. THE TERM IN ANY CASE MEANS THE SAME IN REGULATION 5 AS IN THE CTC

163 However, we also consider that even if it is the case that the difference in wording between Regulation 5 of the Regulations and Article 1(l) of the CTC indicates that Parliament intended to change the meaning of Article 1(l) of the CTC when incorporating it into English law, an RP and a Scheme proposed in an insolvency setting each still falls within the definition in Regulation 5. This is for a number of reasons.

164 First, the changes made to the wording in the definition in Regulation 5 (apart from the addition of the words '*sequestration'* and "*or liquidation committee*" which are not material to the matters considered in this Opinion) can be seen as connected, and, thus, not changing the meaning in any meaningful way. The two relevant changes are that the phrase "*other collective judicial or administrative proceedings*" has been changed to "*other collective judicial or administrative* ***insolvency*** *proceedings*" (our emphasis). Further, the phrase "*for the purposes of reorganisation or liquidation*" have been omitted from the CTC phrase "*in which the assets and affairs of the debtor are subject to control or supervision by a court for the purposes of reorganisation or liquidation*".

165 As we discuss above,[276] the control or supervision by the court within relevant proceedings must be for the purposes of those proceedings. In our view, if proceedings are insolvency proceedings, they can only be either reorganisation or liquidation proceedings.[277] Therefore, once it is clear

[275] See footnote 5.

[276] See in particular paragraphs 44, 58, and 102-6.

[277] This view is consistent with the approach taken in the Model Law and the Legislative Guide (see paragraph 46.4, 51, and 56 in particular) but is also consistent with the nature of insolvency proceedings under English law,

that the "*collective judicial or administrative proceedings*" referred to in Regulation 5 are "*insolvency proceedings*", it is implicit that the control or supervision of the court within those proceedings is for the purposes of reorganisation or liquidation. This renders redundant any further reference to "*for the purposes of reorganisation or liquidation*".

166 Secondly and relatedly, the fact that the Regulation 5 definition includes the explicandum ("*insolvency proceedings*") in the explicans renders that definition radically inclusive. Pursuant to it, liquidation, bankruptcy, and sequestration are simply instances of "*collective judicial or administrative insolvency proceedings…in which the assets and affairs of the debtor are subject to control or supervision by a court*". This covers everything which falls within the four-element CTC definition of "*insolvency proceedings*". The converse is also true, unless — contrary to our previous point — there are collective judicial or administrative insolvency proceedings in which the assets and affairs of the debtor are subject to control or supervision by a court but not for the purposes of reorganisation or liquidation. Since there are no such proceedings, the Regulation 5 definition is identical to its CTC progenitor.

167 Thirdly and finally on this point, even if the wording of the definition is changed deliberately, the principle of interpretation in Article 5 of the CTC still applies by virtue of Regulation 6(2) of the Regulations. Thus, regard must be had to the purposes of the Convention and, particularly, to the need to promote uniformity and predictability in its application. Thus, it should be interpreted consistently with the autonomous interpretation of Article 1(l) of the CTC, so long as this is not impossible given the change in wording. We are of the view that, for the reasons we have given in this subsection, it is not impossible to give it the interpretation that an RP and a Scheme in an insolvency setting each falls within the definition in Article 5.

VII. ARTICLE XI(10) / REGULATION 37(9)

168 We are asked to consider whether the definition of an "*IRE*" is relevant only to trigger Article XI(2) (and the corresponding Regulation 37(1) of the Regulations) or whether it is also a requirement for the application of Article XI(10) (and the corresponding Regulation 37(9) of the Regulations). Our view is that, although there are arguments in favour of the view that an IRE is

where insolvent corporate debtors may be liquidated in winding-up or reorganised in administration or through a company voluntary arrangement or, indeed, the Part 26A RP.

not required to trigger the operation of Article XI(10), the argument in favour of the view that an IRE is required is stronger.

169 We will consider Article XI(10) in this discussion rather than Regulation 37(9) as it is Article XI(10) which would apply in the hypothetical presented to us, of a Malaysian company undergoing proceedings in the UK court.

170 Article XI Alternative A provides protection for an aircraft creditor (that is, a holder of an international interest) in a number of respects, which are set out in very short form here:

170.1 It prescribes that possession of the aircraft object must be given by the insolvency administrator (or the debtor) to the creditor at a particular date (Article XI(2)), (3) (4)).

170.2 It requires the insolvency administrator (or the debtor) to preserve and maintain the aircraft object pending any giving of possession (Article XI(5), (6)).

170.3 It enables the insolvency administrator (or the debtor) to retain possession if all defaults are cured and it agrees to perform all future obligation (Article XI (7)).

170.4 It requires the authorities in a contracting state where the aircraft object is situated to assist the creditor in taking advantage of the remedies of deregistration, and export and physical delivery, of the aircraft (if the creditor is entitled to those remedies) (Article XI(8)).

170.5 It prohibits the prevention or delay of the exercise of CTC or Protocol remedies after the date specified in Article XI(2).

170.6 It prevents the obligations of the debtor being modified without the consent of the creditor (although this does not affect any authority of the insolvency administrator to terminate the agreement) ((Article XI(10),(11)).

170.7 It prohibits any rights or interests, except for non-consensual rights or interests covered by a declaration, from having priority in insolvency proceedings over the creditor's registered interest (Article XI(12)).

171 In relation to the matters set out in the subparagraphs of the previous paragraph, we note as follows:

171.1 The provisions relating to the matters set out in subparagraphs 1, 2, and 3 above are clearly predicated on there having been an IRE. This flows from the first clause of Article XI(2) ("*Upon the occurrence of an insolvency-related event*"), which governs the matter set out in subparagraph 1. The first part of Article XI(5) reads "*Unless and until the creditor is given the opportunity to take possession under paragraph 2*" and therefore the matters set out in 2 clearly depend on there having been an IRE. Similarly, the situation in subparagraph 3 is the converse of that in subparagraph 1: it sets out when the insolvency administrator or debtor can, contrary to subparagraph 1, retain possession of the aircraft object.

171.2 The matter set out in subparagraph 7, while not explicitly related to the occurrence of an IRE, refers expressly to priority 'in insolvency proceedings' and therefore only applies if insolvency proceedings have been commenced.

171.3 The matter set out in subparagraph 4, while not logically dependent upon an IRE having occurred, is closely connected with the regime set out in subparagraphs 1, 2 and 3. Taking into account the rest of the CTC and the Aircraft Protocol, it seems that Article XI(8) is designed only to apply if that regime is triggered. If, absent that trigger, the creditor wishes to exercise the remedies specified in Article IX(1) (de-registration, and export and/or physical transfer, or the aircraft) there are routes provided in the Aircraft Protocol which enable it to do so, with the assistance of the registry and other administrative authorities, without relying on Article XI(8). These two routes are set out in the Official Commentary at 5.47 to 5.51.[278] It follows from this that Article XI(8) only deals with the situation where there has been an IRE, and this is reflected in its treatment in the Official Commentary, which says that if the duty of the insolvency administrator or the debtor to give up possession under Article XI(2) has not yet arisen, or the insolvency administrator or the

[278] The first is for the creditor to apply to court for advance relief under Article 13, in which case Article X governs and the Article X(6) provides for similar assistance from the relevant authorities as in Article XI(8). The second is for the creditor to procure an irrevocable de-registration and export request authorisation, in which case Article IX (5) and (6) and Article XIII provide for assistance from the relevant authorities. Each route depends on the state of registry of aircraft having made the necessary declarations.

debtor has obtained the right to retain possession under Article XI(7) then the requisite authorities will not be obliged to provide assistance to the creditor.[279]

171.4 The matter set out in subparagraph 5 also requires an IRE to have taken place. It preserves the creditor's right to remedies available under the CTC and the Aircraft Protocol, after the date specified in Article XI(2), that is, once the creditor has become entitled to possession after the IRE. Moreover, this provision is said in the Official Commentary (at 5.66) to displace Article 30(3)(b). That provision provides that nothing in Article 30 affects any rules of procedure relating to the enforcement of rights to property which is under the control or supervision of the insolvency administrator, and only applies in "*insolvency proceedings*".

172 The matter set out in subparagraph 6, then, would be a real outlier in the context of the Article if it were the case that an IRE was not required to trigger Article XI(10). However, an argument can be made in favour of this proposition along the following lines:

172.1 First, it could be said that, unlike the other matters set out above, Article XI(10) is not logically connected to Article XI (2), and could, therefore, be free-standing in that an IRE is not required to trigger it.

172.2 Second, Article XI(10) gives protection to the creditor against any court order or legal action which modifies the obligations of the debtor under the agreement without the creditor's consent. This protection could arise in relation to any court order or legal action, not just those made under 'insolvency law' (that is, those made after an IRE). While such a court order or legal action could (and normally would) arise by operation of insolvency law, if, contrary to our view, a Part 26A RP were held not to be "*insolvency proceedings*" under the definition in Article 1(l) but under such an RP the obligations of a debtor could be modified, then, in a contracting state which has declared in favour of Alternative A, a creditor has this protection irrespective of the fact that an IRE has not occurred.

172.3 These arguments could be supported by reference to the Official Commentary at 5.66. It does not say expressly that Article XI(10) only applies once an IRE had occurred. The

[279] Official Commentary 5.64, and 3.46.

relevant parts say: "*Under this Alternative it would not, for example, be open to the insolvency courts of a Contracting State to…vary the terms of the agreement, without the consent of the creditor….Similarly,* ***any provisions of domestic law*** *modifying or empowering a court to modify the debtor's obligations must be disapplied where these would conflict with paragraph 10. The underlying rationale of Alternative A is to give aircraft object financiers and lessors the assurance of a clear and unqualified rule.*" It could be argued that insolvency law is given as an example, and that what the Official Commentary says is that Article XI(10) applies to any provision of domestic law.[280]

173 Against this argument, a number of points can be made:

173.1 First, the heading of Article XI is "*Remedies on Insolvency*". While this cannot be definitive, it would be an odd construction were an IRE required for all the other paragraphs of an article with this heading, but not for paragraph 10.

173.2 Second, the Official Commentary links the discussion of Article XI(10) with the discussion of Article XI(9), which, as discussed above, is clearly dependant on an IRE having occurred. Paragraph 5.66 starts with the words 'Alternative A further restricts the operation of the relevant insolvency law by precluding any order or action which prevents or delays the exercise of remedies after expiry of the waiting period or would modify the obligations of the debtor without the creditor's consent (paragraphs 9 and 10).' Both paragraphs are seen as applying where insolvency law would otherwise reach a conclusion contrary to the protection desired to be given to creditors under Alternative A.

173.3 Third, an examination of the travaux préparatoires reveals no indication that Article XI(10) was intended to operate except when insolvency proceedings had been commenced.

173.3.1 The relevant provision in the early draft of the Aircraft Protocol prepared by the Study Group with input from the Aviation Working Group read, in July 1997, 'No obligations of the obligor under the agreement and related transactions may be modified without the consent of the obligee.' Professor Goode revised the draft of the CTC and the Aircraft Protocol for the Steering and Revisions Committee

[280] OC 3.132 is in a similar vein.

of the Study Group, which met in June 1998. In so doing, he introduced a number of amendments in square brackets, which he considered to be minor amendments which did not affect the substance but which might be considered to be necessary.[281] In relation to the relevant provision, Professor Goode inserted the words "*in insolvency proceedings*" in square brackets after the word "*modified*". These words remained in square brackets in subsequent drafts until Article XI was entirely redrafted by the ad hoc drafting group, set up by the Drafting Committee after the second Committee of Governmental Experts, in November 1998, when Article XI(10) appeared in its current form.[282]

173.3.2 Before that redraft, the content of Article XI(10) was discussed on several occasions. There is nothing in the discussions to indicate that the provision was intended to apply outside of "*insolvency proceedings*". Moreover, paragraph 2 of the draft of Article XI at this stage read: "*This Article applies where (a) any insolvency proceedings against the obligor have been commenced by the obligor or another person in a Contracting State which is the primary insolvency jurisdiction of the obligor.*"

173.3.3 This paragraph indicates that it was the intention at that time that the whole Article (including what is now Article XI(10)) was only to apply if insolvency proceedings had commenced).[283]

173.3.4 In the two meetings of the Insolvency Working Group set up by the first session of the Committee of Governmental Experts, there was considerable debate about the inclusion of what is now Article XI(10), which was seen by some as a one-sided rule, although the argument that it was an essential feature of the 'hard option' (Alternative A), and would be chosen by Governments who wanted access to the international capital markets, prevailed.[284] A new draft was proposed by

[281] See Study Group Doc 41 (minutes of the Steering and Revision Committee 27 – 29 June 1998) paragraph 8

[282] See CGE 3 02 App IV.

[283] It should be noted that this text was later redrafted, and the requirement that the insolvency proceedings had to be commenced in the primary insolvency jurisdiction, as opposed to in another contracting state, was substantively changed.

[284] See minutes of first meeting of Insolvency Working Group (1 – 2 July 1999) CGE2 WP10 paragraph 37; report of second meeting of Insolvency Working Group (24 – 26 August) to the second Committee of Governmental Experts CGE 2 WP19 2.6.14.

the Insolvency Working Group, which was sent to the Drafting Committee by the second Committee of Governmental Experts with some reservations. This new draft included references to "*the insolvency administrator*" and was clearly intended only to apply in insolvency proceedings.[285] However, as mentioned above, the ad hoc drafting reverted to the previous version of Article XI(10) but without the words in square brackets, thus producing the text that was eventually adopted (without discussion) by the Diplomatic Conference.[286]

174 Thus, for reasons of interpretation of the text, the approach of the Official Commentary and the approach during the travaux préparatoires, we consider that the stronger argument is that an IRE is required for Article XI(10) to apply. However, this also strengthens the argument made above that, for the purposes of the CTC and the Aircraft Protocol to be advanced, any proceedings in which a creditor can be crammed down must be 'insolvency proceedings' within Article 1(l).

VIII. CONCLUSION AND COMMENTS ON CTC-COMPLIANT RPS AND SCHEMES

175 For the reasons we have explained, we are of the view that an RP and a Scheme in an insolvency setting both fall within the CTC definition of "*insolvency proceedings*" in Article 1(l) of the CTC. Therefore, the English Court is in our opinion highly unlikely to sanction an RP or a Scheme in an insolvency setting which proposed non-consensually to affect "*international interests*".

176 While we are invited to consider the Court's likely response by reference to the jurisprudence on "*blots*",[287] the more accurate frame of reference in our view is what Mr Justice Snowden has

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[285] See CGE 2 WP19 2.6.14.

[286] The Diplomatic Conference had before it an explanatory report drafted by Professor Goode (DCME IP/2) in which he comments on Article XI (9) and (10): "*Alternative A further restricts the operation of the* ***relevant insolvency law*** *by precluding any order or action which prevents or delays the exercise of remedies after expiry of the waiting period or would modify the obligations of the debtor without the creditor's consent. Accordingly under this Alternative it would not, for example, be open to* ***the insolvency courts of a Contracting State*** *to suspend the enforcement of a security interest over an aircraft object, or vary the terms of the security agreement, without the consent of the creditor. The underlying rationale of Alternative A is to give aircraft object financiers and lessors the assurance of a clear and unqualified rule.*" (our emphasis).

[287] While often attributed to a passage in *Buckley on the Companies Acts* (such as by Jonathan Parker J in *Re BTR plc* [1999] 2 BCLC 675, 680f), the notion of a blot on the scheme in fact derives from Lindley LJ's judgment in *In re English, Scottish, and Australian Chartered Bank* [1893] 2 Ch 385 (CA), 409. While the usage has become more flexible in recent jurisprudence, the notion of a blot originally referred to a factor which might cause the Court to refuse to sanction a scheme notwithstanding that it had attracted requisite majority support. As we explain in the text to follow, a plan proposing non-consensually to violate CTC international interests would probably not be allowed to go to a vote at all.

described as a "*fundamental roadblock to the scheme*"[288] and Mr Justice Zacaroli as a "*show stopper*",[289] which is some factor drawn to the Court's attention at the convening hearing which ought to prevent the plan being put to a meeting.

177 Such factors may go to the Court's jurisdiction, or, in David Richards J's words in *In re T & N Ltd (No. 4)*,[290] "*although not strictly going to jurisdiction, are such that they should unquestionably lead the court to refuse to sanction the scheme*". In *T & N*, Mr Justice David Richards's own example of the latter was a scheme which proposed changes to claims under certain employers' liability insurance policies in such a way as to give rise to possible violations of duties pursuant to the Employers' Liability (Compulsory Insurance) Act 1969.[291]

178 An RP or Scheme in an insolvency setting proposing to affect CTC creditors' rights inconsistently with Article XI Alternative A protections, if put to a vote, would effectively invite creditors to vote to amend CTC creditors' rights in violation of the Regulations (which implement in English law the Aircraft Protocol's protection against non-consensual modifications of such rights). By analogy with *T & N*, we consider that this fact would constitute a fundamental roadblock or show stopper to the Court acceding to the application to convene meetings in relation to the proposed RP or Scheme. Consistently with this view, at both the convening and sanction hearings in the MABL case, the Court appeared to accept that if, consistently with our view, a Scheme in an insolvency setting fell within the CTC definition of "*insolvency proceedings*", it would be a blot or showstopper for a Scheme to propose a violation of rights protected by the CTC.[292] There is no doubt that the same holds for an RP.

179 The conclusion that that RPs and Schemes in an insolvency setting fall within the CTC definition of "*insolvency proceedings*" does not imply that these procedures are not available to airlines who wish to use them for restructuring their debt. To the contrary and as we have indicated at Paragraph 5, it is perfectly possible for an RP or Scheme to comply with the requirements of Article XI Alternative A of the Aircraft Protocol, and Regulation 37 of the Regulations, by

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[288] *Re Indah Kiat BV* [2016] BCC 418, 426, [28].

[289] *Re The Royal London Mutual Insurance Society Ltd* [2018] EWHC 2215 (Ch), [10].

[290] [2006] EWHC 1447 (Ch), [19].

[291] [2006] EWHC 1447 (Ch), [19]. On the facts, the Judge found that there was no such violation; see in particular at [102]-[104] (first issue) and [105], [110]-[117], and [123]-[124] (second issue).

[292] [2021] EWCH 152 (Ch), [42] and [44] (Zacaroli J); [2021] EWHC 379 (Ch), [38] and [48]-[50 (Snowden J).

including a Termination Option in the proposal. This is because the terms of such an RP or Scheme respect the right of any CTC creditor who objects to the proposed variation to the terms of the secured loan or the lease to withhold its consent to the modification by exercising the option to terminate its relationship with the debtor and take possession. The RP or Scheme does not impose a modification of the debtor's obligations under the agreement upon the creditor without consent, and, therefore, does not conflict with paragraph (10) of Alternative A or Regulation 37(9).

180 In this respect, the effect of the legal rights established by Alternative A is to place lessor creditors in a position analogous to that of lessors exercising English law forfeiture rights. The right of forfeiture may not be modified by a CVA (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.[293]

181 Such a Termination Option was included in the Scheme proposed by MABL.[294] A similar option was that accorded to "*Operating Lessor Plan Creditors*" in the Virgin Atlantic RP,[295] which provided CTC creditors with the option to terminate the relevant lease, take possession of the relevant aircraft objects, and sue for damages, as an alternative to accepting a rent deferral or rent reduction under an arrangement accepted by (at least the statutory majority of) the CTC creditor class, although this would only be CTC compliant if the exercise of the option occurs without modification of the debtor's obligations under the agreement relating to putting the aircraft into a state ready for possession to be given up to the creditor, pursuant to Article XI(2).[296]

182 The original draft of the Companies Insolvency and Governance Bill which introduced the RP included a provision relating solely to "*aircraft related interests*", that is, registered CTC international interests.[297] This provided that creditors with aircraft related interests may not attend a meeting summoned under section 901C, and that *"[t]he court may not sanction the compromise or arrangement under*

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[293] 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 (Ch), particularly at [25] (Zacaroli J).

[294] See paragraph 5 above.

[295] See Trower J's judgment after the convening hearing, [2020] EWHC 2191 (Ch), [8], [15(b)], and [50]-[52]; and Snowden J's judgment after the sanction hearing, [2020] EWCH 2376 (Ch), [10]-12].

[296] Examples of such obligations would be a duty to remove liens or to put the aircraft in a returnable condition.

[297] Draft Bill Sch 9 clause 1, amendment to Companies Act 2006, section 901I.

section 901F if it includes provision in respect of any relevant creditor who has not agreed to it."[298] Such a provision would have had the effect that, even in a CTC-compliant RP, a single creditor who chose not to exercise the Termination Option could prevent the sanction of the RP merely by not agreeing to it. As the Under-Secretary for Business, Energy and Industrial Strategy said in the House of Commons second reading of the Bill,[299] the provision would have "*constrained the ability of a financially distressed airline to restructure without creditor consent, either using existing tools under the Companies Act 2006 or the new restructuring plan procedure that is being introduced by the Bill.*" Critically, the Under-Secretary further noted that the proposed provision extended the protection of aircraft creditors beyond what was required by the CTC and the Aircraft Protocol. This is correct: Article XI Alternative A (and Regulation 37) does not require unanimous approval to an RP or Scheme, neither does it give any creditor a veto over an RP or Scheme. What it does do is to prevent modification of an aircraft creditor's agreement with the debtor without consent unless the creditor is offered the option of the return of the relevant aircraft object.

183 For these reasons, after the views of interested stakeholders in the airline industry and restructuring profession had been made known to the Department for Business, Energy and Industrial Strategy,[300] the provision was withdrawn from the Bill at its second reading. The RP, in its final iteration in the 2020 Act, can, if properly drawn up, preserve the rights and remedies of aircraft creditors under the CTC and therefore be sanctioned by the Court.[301] The same is true of a

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[298] Section 901I(4).

[299] Hansard, vol. 626 column 966 (3rd June 2020)

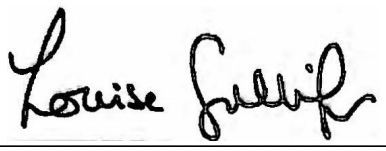
[300] By way of disclosure, amongst these views were those expressed in an email dated 29 May 2020 from Mr Kenneth Gray of Norton Rose Fulbright, which (amongst other things) recommended removal from the Bill of section 901I. The email stated that Mr Gray had discussed its contents with Professor Roy Goode and Professor Gullifer (amongst others), and that both of them agreed with those contents.

[301] For the avoidance of doubt, we also note that any attempt to interpret the Regulations incorporating the CTC in domestic law by reference to the legislative history of CIGA would be fallacious. It is a general rule of statutory construction that a later enactment cannot be used as an aid to the construction of an earlier enactment. This is because legislation is to be construed in light of its context and objective setting (as noted in Paragraphs 68 to 70, above), and such context and setting do not include a later enactment or its legislative history. This point has been made numerous times, including at the highest judicial level.

For example, in *R v Barnet London Borough Council ex p Shah* [1983] 2 AC 3 09 (HL), 348H-349A, Lord Scarman stated that "*It cannot be permissible in the absence of a reference (express or necessarily to be implied) by one statute to the other to interpret an earlier Act by reference to a later Act.*"

In *R (ZYN) v Walsall Metropolitan Borough Council* [2014] EWHC 1918 (Admin), [52], Leggatt J said that "*the meaning of legislation must be ascertained by reference only to circumstances existing at the time of its enactment and cannot be affected by later events ... This follows, as I see it, from the nature of the interpretation and the constitutional principle of parliamentary sovereignty*".

Scheme in an insolvency setting. There is, therefore, no reason of policy for the definition of "*insolvency proceedings*" in the CTC not to include RPs and Schemes in an insolvency setting, and many reasons for the definition to do so, as set out in this Opinion.



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And in *Miller v Secretary of State for Exiting the European Union* [2017] UKSC 5, [113], the joint majority judgment stated that "*A statute cannot normally be interpreted by reference to a later statute, save in so far as the later statute intends to amend the earlier statute or the two statutes are in pari materia*".