CR-2020-004615

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND
INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF **GATEGROUP GUARANTEE LIMITED**

AND IN THE MATTER OF **THE COMPANIES ACT 2006**

SUPPLEMENTARY SKELETON ARGUMENT
ON BEHALF OF GATEGROUP GUARANTEE LIMITED

Estimated Reading Time: **1 day**

Estimated Hearing Time: **2 days**

The Court is requested to read the following (to the extent permitted by time):

1. The Company's Main Skeleton Argument (served on 13 January 2021 for the original hearing listed for 15 January 2021);
2. the Fund's Main Skeleton Argument (served on 13 January 2021 for the original hearing listed for 15 January 2021);
3. this skeleton argument;
4. the Second Witness Statement dated 28 January 2021 of Bobby Lee Williams [**HB/G2225**];
5. the Third Witness Statement dated 28 January 2021 of Philip John Davies [**HB/G2288**]; and,
6. a Memo on certain Swiss law issues dated 27 January 2021 prepared by NKF [**HB/2315**], and,
7. an article by Daniel Hayek and Mark Meili of Prager Dreifuss on the recognition in Switzerland of a Part 26A restructuring plan [**HB/G3388**].

The Company apologises for the length of its skeleton arguments, which results from the numerous complex issues arising in the present case. It is intended that the lengthy treatment of the issues in writing will enable the oral hearing to be conducted in an efficient manner.

References:

Hearing Bundle	— **HB/Page/Para** (where appropriate)
Authorities Bundle	— **AB/Tab/Page/Para** (where appropriate)

I INTRODUCTION

1 This skeleton argument is lodged on behalf of the Company to update the Court on certain matters in support of the Company's application ('**the Application**') for an order pursuant to section 901C of the Companies Act 2006 ('**the Act**') convening a single meeting of creditors for the purpose of considering and, if thought fit, approving a proposed restructuring plan in respect of the Company ('**the Plan**').

2 The Company (and the Group) take the view that the Transaction and Plan constitute a fair and a good deal. This appears to be a view shared by the market. As details of the deal entered the public domain, the trading price of the Bonds rose about 9%, from 79 to 86 cents [**HB/G2244/33**].

3 The Application was originally listed to be heard on 15 January 2021 with a time estimate of one day. This is the adjourned hearing of the Application.

A. THE POSITION OF THE FUND

4 On 13 January 2021, Hestia Investments Designated Activity Company ('**the Fund**) served evidence in opposition to the Application and lodged a skeleton argument ('**the Fund's Main Skeleton Argument**'). Because of the number of issues raise by the Fund, it became apparent that the time estimate was no longer sufficient and the parties agreed a consent order (adjourning the hearing and providing for the service of further evidence by both the Fund and the Company) which was approved by Mr Justice Trower.

5 The Fund did not serve any further evidence, as the Company discovered when it made enquiries after the deadline for the service of that evidence had passed. The Company has served further supplementary evidence (a day earlier than was required by the Consent Order).

6 Shortly after the Company's further evidence had been filed and served, the Fund informed the Company that, having considered all the evidence, it was minded not to oppose the Plan. The Fund did, however, raise one issue relating to the new intercreditor agreement ('**New ICA**') that is to be executed pursuant to the Plan [**HB/G2927** et seq] which the Company (and the Group)

needed to clarify. That issue has now been addressed (and is explained further in the subsection that follows below). On 1 February 2021, the Company was able to assure the Fund that the New ICA would be amended in the Transaction to deal with the problem the Fund had identified. Following that assurance, on 1 February 2021 the Fund provided the Company with a letter confirming that in fact that it now supported the Plan. A copy of that letter is attached to this skeleton argument.

7 In relation to the purported disclaimer that had been served by the Fund, purporting to disclaim all of its rights under the Deed Poll ('**the Purported Disclaimer**' [**HB/G2379**]), the Fund has now confirmed that the Purported Disclaimer has been withdrawn, and the Fund and the Company agree that it is of no effect. The Fund accepts that it is a creditor of the Company and a Plan Creditor. There is therefore no need for the Court to address issues relating to the Purported Disclaimer (save in relation to a hypothetical possibility that any other Bondholder might seek to serve a disclaimer of its rights under the Indemnity contained in the Deed Poll, which issue is addressed further below). For the avoidance of doubt, had the Purported Disclaimer not been withdrawn by the Fund, the Company would have contended that it was nevertheless of no effect.

8 No other Bondholder has suggested that it will oppose the Application (or the Plan), despite a small number of Bondholders having registered with the Information Agent and one other Bondholder having expressed an intention to attend the hearing (in a listening capacity).

9 Despite the fact that the Application is now unopposed, there are still several issues that were raised by the Fund in its skeleton argument with which the Court will be asked to deal at this hearing. As a result, this skeleton argument continues to refer to the Fund's Main Skeleton Argument where appropriate, and to deal with those issues (where relevant) below.

B. AMENDMENT TO THE NEW INTERCREDITOR AGREEMENT

10 The issue relating to the New ICA arises as follows.

10.1 The New ICA will subordinate the New Money Facility to the claims of the SFA Lenders and the Bondholders. The New ICA also appoints an "*Intercreditor Agent*" to receive and distribute the proceeds of a "*Distressed Disposal*".

10.2 A "*Distressed Disposal*" is defined in the New ICA as "*a disposal of an asset of a member of the Group which is being effected, after the occurrence of a Senior Acceleration Event, by a Debtor to a person or persons which is, or are, not a member, or members, of the Group*" [**HB/G2931**]. A Senior Acceleration Event is defined as the acceleration of the SFA or the Bonds [**HB/G2935**].

10.3 Luxco II is a guarantor of the SFA. The SFA guarantors will be party to the New ICA as Debtors. Luxco II is also the beneficiary of the loan (the '**Proceeds Loan**') made by the Issuer from the proceeds of the Bonds. The Proceeds Loan is the key asset of the Issuer. If Luxco II were to sell its shares in its subsidiary Luxco IV to a buyer which is not a member of the Group, this would be a Distressed Disposal within the New ICA.

10.4 In this scenario, it should be the case that the New ICA provides for the proceeds of sale to be distributed *pari passu* and *pro rata* between (i) the Issuer (in respect of its claim against Luxco II under the Proceeds Loan) and (ii) the SFA Lenders (in respect of their guarantee claim against Luxco II). Such claims currently rank *pari passu.* The sums distributed to the Issuer would then be distributed to the Bondholders. This would reflect the fact that the Proceeds Loan gives the Bondholders an indirect claim against Luxco II.

10.5 Some or all of the monies advanced to Luxco II under the Proceeds Loan have been advanced by Luxco II to the operating subsidiaries of the Group including those who are Debtors. Debtors will similarly have made loans to other members of the Group. If any of the Debtors of which another member of the Group (including Luxco II) is a creditor effects a Distressed Disposal, the proceeds should also be distributed *pari passu* and *pro rata* between (i) that other member of the Group (in respect of its intercompany claim against the Debtor) and (ii) the SFA Lenders (in respect of their guarantee claim against the relevant Debtor). Such claims currently rank *pari passu.* The sums distributed to the Group company will be paid upstream through the corporate structure to Luxco II and thereafter to the Issuer for onward remission to the Bondholders.

11 The original wording of the New ICA did not have the required effect (i.e. of distribution to both the SFA Lenders and the Issuer, and therefore ultimately to the Bondholders), but instead distributed only to the SFA Lenders. That error has now been corrected in order to clarify that the position of the Bondholders is protected.

12 In particular, in order to ensure that proceeds are distributed in the manner described above, Clause 13.1(b)(ii) of the version of the New ICA to be included in the Plan Document will be amended. Clause 13.1 governs the order of distribution of proceeds by the Intercreditor Agent. Clause 13.1(b)(ii) [**HB/G2955**] will be amended as follows (additional text is underlined, and no deletions have been made from the original text):

13.1 Order of Application

All amounts from time to time received or recovered by the Intercreditor Agent pursuant to the terms of this Agreement (for the purposes of this Clause 13, the "Recoveries") shall be held by the Intercreditor Agent on trust to apply them promptly, to the extent permitted by applicable law (and subject to the provisions of this Clause 13), in the following order of priority:

(a) first, in discharging any sums owing to the Intercreditor Agent;

(b) second, in respect of any amount received or recovered from:

> *(i) the Parent or the Plan Company, in payment or distribution to the Senior Facilities Agent and the Senior Bondholders' Paying Agent for application towards the discharge of the Senior Bank Liabilities and the Senior Bond Liabilities on a pro rata basis in accordance with the terms of the Senior Facilities Agreement and the Senior Bond Documents, respectively; or*
>
> *(ii) any Debtor (other than the Parent or the Plan Company) (the "**First Debtor**"), in payment or distribution to the Senior Facilities Agent and any Debtor which is a creditor of the First Debtor (a "**Second Debtor**") for application towards the discharge of the Senior Bank Liabilities and the liabilities owed to the Second Debtors on a pro rata basis in accordance with the terms of the Senior Facilities Agreement and the relevant debt documentation between the Frist Debtor and the Second Debtor, respectively;*

13 An additional amendment will also be made to Clause 14.1(d) of the New ICA [**HB/G2957**] which regulates amendments to the New ICA. This amendment is to ensure that neither Clause 10.3 of the New ICA which provides for the proceeds of Distressed Disposals to be applied in accordance with clause 13.1 nor clause 13.1 itself can be amended without the prior written consent of the Bondholders. Clause 14.1(d) will be amended as follows (additional text is underlined, no deletions have been made from the original text):

(d) An amendment or waiver or waiver that has the effect of changing (i) Clause 4 (Senior Bond creditors and Senior Bond Liabilities) <u>or (ii) Clause 10.3 (or any other amendment that has an effect on the operation of clause 13.1 which is adverse to the Senior Bond creditors)</u> shall not be made without the Senior Bondholders' prior written consent

14 As a result, the New ICA will now have the intended effect, namely, that in the event of a Distressed Sale, there will be a *pari passu* distribution to both the SFA Lenders and the Issuer, and therefore ultimately also to the Bondholders.

C. <u>RP PROCEEDINGS ARE INSOLVENCY PROCEEDINGS</u>

15 An important issue in this case is the nature of RP proceedings. It is only if such proceedings fall within the bankruptcy exclusion to the Lugano Convention pursuant to Article 1(2)(b) of that Convention that the Court will prima facie have jurisdiction in relation to the Bonds notwithstanding the Swiss Jurisdiction Clause. As explained at paras 49 to 63 and the Annex to the Company's Main Skeleton Argument, RP proceedings are insolvency proceeding. As set out in paragraphs 125 to 135 of the Company's Main Skeleton Argument, RP proceedings therefore falls in the bankruptcy exclusion, with the result that the Swiss Jurisdiction Clause does not deprive the Court of jurisdiction to sanction the Plan seeking to amend and extend the Bonds.

16 In anticipation of further points that were expected to be likely to be made at this hearing by the Fund (but have not in the event been made, because of the Fund's change of position), a further analysis of this issue is included in the Annex to this skeleton argument, which supplements (and should be read together with) the parts of the Company's Main Skeleton Argument identified above. In this Annex, the Company adds to the points already made by adding a detailed analysis of four international instruments with a view further to illuminating the nature of proceedings which fall within the bankruptcy exclusion. Each of these instruments is highly relevant:

16.1 <u>The UNCITRAL Legislative Guide on Insolvency Law</u> constitutes the international 'best practice' guidance on the design and content of an insolvency law and appears to have guided the design of the RP.

16.2 The UNCITRAL Model Law on Cross-Border Insolvency and the Convention on International Interests in Mobile Equipment (the Cape Town Convention) enshrine closely related definitions of "*insolvency proceedings*" and are incorporated in English law.

16.3 The EU Insolvency Regulation[1] provides a treatment of "*judicial arrangements, compositions and analogous proceedings*", the relevant phrase in the definition of the bankruptcy exclusion to the Lugano Convention.

17 In the Annex to this skeleton argument, the Company explains how it is possible to derive a unitary definition of "*insolvency proceedings*" that is common to each of the four international instruments mentioned above. That definition may be analysed in terms of four constituent elements: for a proceeding to qualify as an "*insolvency proceeding*", it must (insofar as relevant to the RP) be for the purpose of reorganisation, conducted under a law relating to insolvency, collective, and subject to court supervision or control.

18 The Annex provides a detailed analysis of how the unitary definition and each of its elements is treated in each of the four international instruments. In short, the conclusion reached is that the RP possesses each of the four elements and falls within the definition. The Company submits that this analysis puts the position beyond any doubt: the RP is an insolvency proceeding falling within the bankruptcy exclusion to the Lugano Convention.

19 For the avoidance of doubt, the Company contends that there are fundamental differences between RPs and Schemes. The submissions in this case are not intended to deal with the position of Schemes.

D. OUTLINE OF THIS SKELETON ARGUMENT

20 The remainder of this skeleton argument is structured as follows:

20.1 **Section II** explains the legitimate use of the Deed Poll in the present case and shows that any "artificiality" of these legal arrangements is not objectionable unless abusive or in

[1] Regulation (EU) 2015/848 (Recast) ('**the EU Regulation**').

breach of public policy, neither of which is the case. The Section also submits that even if any other Plan Creditor were to seek to disclaim before the Plan Meeting, *Lehman* necessity continues to apply; and sets out and explains the effect of the steps that were taken by the Company in response to the Purported Disclaimer.

20.2 **Section III** provides additional arguments to show that the Company meets the threshold conditions to accessing the RP process and responds to Fund's arguments to the contrary.

20.3 **Section IV** deals with additional issues relating to international jurisdiction to show that there is no blot on, or "roadblock" to, the Court's jurisdiction.

20.4 **Section VI** addresses further arguments relating to class issues.

II *LEHMAN* NECESSITY

A. USE OF THE DEED POLL

21 The use of the Deed Poll is a valid structuring technique to engage the jurisdiction of the Court for a restructuring plan (or a scheme).

21.1 Deed poll companies are sometimes involved in order to establish a sufficient connection with England or else to gain Chapter 15 recognition (the Fund's Main Skeleton Argument, para 70(a).

21.2 In the majority of the reported cases, the scheme company has acceded to the relevant finance documents as a co-obligor, and that this can be done without a deed poll (the Fund's Main Skeleton Argument, para 71.

21.3 However, this is not the limit of the case-law on the use of deed poll companies. Such companies can also validly be used for the purposes of engaging the Court's jurisdiction in other cases.

22 In the present case, the Deed Poll was not executed for any purpose of circumventing the agreed contractual accession mechanism in the Conditions of the Bonds.

22.1 The only way that accession could have taken place under the Bonds was for them to be amended. This would have required there to be a meeting of Bondholders, under Condition 14 [**HB/G1851**]. Any such amendment would have needed the attendance of a quorum totalling 66% of the total Bonds outstanding by virtue of Condition 14(g) (and a vote of 66% of those Bondholders who attended under Condition 14(i)) which would have been unlikely to be obtained for the same reasons that necessitate the Plan in the first place.

22.2 The Company could not instead have acceded to the Bonds under Conditions 8.2 and 9 of the Bonds.

22.2.1 Condition 8.2 [**HB/G1849**] relates to the "*substitution*" of the Guarantor (i.e. its replacement) and not the accession of a co-obligor. It is only a substitution that can take place without the consent of the Bondholders. The new Guarantor would step into the shoes of the old one, rather than be added to it.

22.2.2 The same point applies in relation to Condition 9 [**HB/G1850**] which applies to the "*substitution*" of the Issuer, and again only applies where the New Issuer steps into the shoes of the old one.

22.2.3 It therefore follows that in circumstances of accession (rather than substitution), the Conditions do not assist the Company, and the Deed Poll was therefore required.

23 Although the Deed Poll has been used in order to enable the Company (and the Group) to engage the Court's jurisdiction, it is not being used in an *illegitimate* attempt to circumvent governing law and jurisdictional protections set out in the contractual documents (contra the Fund's Main Skeleton Argument, para 74.

24 The Group has been clear about the governing law issues, and has dealt with them head on. In relation to the Bonds in particular, and applying the principles set out by David Richards J in *Re*

Magyar Telecom BV,[2] and the fact that the Issuer's centre of main interest ('**COMI**') is in England, the position is that if the Issuer entered into an insolvency process, it would do so in England. The Swiss Jurisdiction Clause is therefore irrelevant. More particularly:

24.1 The COMI of the Issuer is now in England for the reasons set out in para 38 of the Company's Main Skeleton.[3] Although the Fund's Main Skeleton Argument suggested (at para 203(b)) that the move of the Issuer's COMI to England was not accepted, it does not appear that any submissions are being made by the Fund on this point, and it has not served any further evidence on this matter.

24.2 The Issuer, together with the Parent and other key members of the Group, is in severe financial difficulties.

24.3 The existence and severity of the Group's financial difficulties is public knowledge, as can be seen from the Debtwire report put into evidence by the Fund [**HB/G3413** et seq]. The title of that report is "*Gategroup on brink of possible debt restructuring*", and it has sections on "*Demand side collapses*", "*Profit wiped out in FY20, leverage set to hit 23.8x in FY21*", "*Moody's downgraded Gategroup…*", "*Sizeable maturity wall heightens refi risk*", "*We see material refinancing risk for the company*", and "*Covenant breach has likely occurred*", amongst others. In relation to the Company itself, the position is set out in the Company's evidence [**HB/G2264-5/82-88**] and is considered in detail below.

24.4 If the Plan is not approved or not sanctioned, the Issuer would likely enter insolvency proceedings in England. In that event, the English Court would have jurisdiction to sanction a plan affecting the terms of the Bonds notwithstanding the Swiss governing law and the Swiss Jurisdiction Clause.[4]

[2] [2014] BCC 448, at [18]-[25] [**AB/46/864-5**].

[3] By application of the principles set out by Snowden J in *In re Videology* [2019] BCC 195, particularly [44]-[47] [**AB/77/1451-2**].

[4] As indicated in the next paragraph, below, however, for the Issuer itself to propose a plan would constitute an event of default under the Bond Conditions.

24.5 That Plan would be likely to be recognised as part of such recognition as would be accorded to other relevant aspects of the Issuer's English insolvency proceedings.

24.6 This position is a fortiori given, as the Company submits, that the RP process is itself an insolvency proceeding.

24.7 There is independent expert evidence, discussed further below, that the Plan if approved and sanctioned would be recognised and given effect in Switzerland [**HB/G1755-1783**] and Luxembourg [**HB/G1784-1807**], which (as the Fund also noted at para 187 of its Main Skeleton Argument) are the two key jurisdictions for recognition purposes.

25 Further, the Issuer could not itself propose a restructuring plan because to do so would have constituted an event of default under Condition 7(d) of the Bond Terms [**HB/G1844**], which in turn would have triggered potential acceleration and enforcement, thereby further destabilising the Issuer and the Group, to the potential detriment of the Bondholders [**HB/G2293/22**].

26 The alternative to the approval and sanction of the Plan and the consequent completion of the Transaction is the insolvent liquidation of the Company, Issuer, and Parent (amongst others) and an estimated return to Bondholders of between 2.6% and 5.7% [**HB/G2641**].

27 Accordingly, there is no basis for any suggestion that the Deed Poll is being used in an *illegitimate* way to circumvent the governing law or jurisdictional protections. As with any other contractual provisions, such protections do not override the rules of the forum in which the Issuer would undergo insolvency proceedings.

B. THIS IS A *LEHMAN* NECESSITY CASE

28 The present case is one that falls within the *Lehman* necessity principle, as set out in paragraphs 88 to 93 of the Company's Main Skeleton Argument.

29 The Fund had raised a number of reasons why it suggested that the present case does not fall within the *Lehman* necessity principle (the Fund's Main Skeleton Argument, paras 88-9 and 94). None of

these reasons would have cut across the fact that the present case falls within the *Lehman* necessity principle.

29.1 The amendment of the Bonds is necessary to the Plan.

29.2 There are two parts to the Deed Poll:

29.2.1 The first part of the Deed Poll is an indemnity ('**Indemnity**') - an accession of the Company as primary obligor. Under Clause 2.1.1(b) of the Deed Poll [**HB/G1644**], the Company irrevocably agreed as primary obligor to pay to the relevant Bond Finance Party (which includes the Bondholders: [**HB/G1639**]) all sums from time to time payable by any Bond Obligor (i.e. Issuer and Guarantor: [**HB/G1640**]) to that Bond Finance Party under the Bond Documents. The Bondholders have a right against the Company corresponding to this obligation to them of the Company's.

29.2.2 The second part of the Deed Poll is a contribution claim ('**Contribution**'). Pursuant to Clause 3 of the Deed Poll [**HB/G1646-7**], the Company also accepted the obligation to pay to any Obligor (relevantly, the Bond Obligors: [**HB/G1641**]) who became obliged to make payment of any Finance Obligation[5] up to the full amount actually paid by that Obligor.

29.3 The Contribution right of the Parent and the Issuer against the Company continues to exist even if there were a valid disclaimer by a Plan Creditor of its Indemnity right.

29.4 The Contribution right is enforceable in law against the Company by the Parent or the Issuer. It arises whenever an obligation comes due to a Bondholder, including (even if any disclaimer were made by a Plan Creditor of its rights under the Indemnity) in relation to any Plan Creditor which has retained its rights to receive payments and make claims in relation to (relevantly) a Bond against the Issuer as primary obligor or the Parent as guarantor. Variation of the ***Bondholder's*** rights under the Bonds against the Issuer and

[5] Relevantly, any Bond Obligations: [**HB/G1640**]; Bond Obligations include any actual or contingent present or future liabilities incurred by any Bond Obligor to the Bond Finance Parties: [**HB/G1640**].

the Parent are also ***necessary*** in order also to vary the ***Company's*** Contribution liability to the Issuer or the Parent (as relevant)

29.5 The variation of the Bondholders' rights against the Issuer and Parent is not "*merely ancillary*" to the arrangement between the Company and its own creditors (the Fund's Main Skeleton Argument, para 88(a)). The Company is not a party to the Bonds (the Fund's Main Skeleton Argument, para 88(b)). However, it is nevertheless "*necessary*" that the Bondholders' rights (and those of Senior Lenders) should be amended in order to ensure the effectiveness of the compromise or arrangement effected by the Plan between the Company and the Issuer (or, if relevant, the Parent as Guarantor) as the Company's creditor(s) in relation to their Contribution rights, which in turn is necessary in order to address the Company's and Group's financial difficulties in the wider Transaction.

29.6 In this regard:

29.6.1 Variation of the Bondholders' rights (and indeed of their rights together with the Senior Lenders' rights) is <u>not</u> the "*sole purpose*" of the Plan (notwithstanding assertions to this effect that had been made at paras 12, 78-79, 88(a), and 204 of the Fund's Main Skeleton Argument).

29.6.2 In *Re T&N Limited*,[6] David Richards J rejected counsel's argument that the scheme should be looked at in isolation of the larger transaction of which it was part and which it would facilitate, in particular, through the creation of a trust and its governing procedures:

> "*Mr Chivers objected that these effects resulted not from the scheme but from the settlement agreement and arrangement constituted by the trust deed and trust distribution procedures which took effect outside the scheme. In my view, it is not possible to divorce the arrangements in this way.* ***The scheme of arrangement is an integral part of a single proposal affecting all the parties, which includes the trust and the trust distribution procedures to be established pursuant to the scheme.***" [Emphasis added]

[6] [2006] EWHC 1447 (Ch), [52], **AB/29/598**.

29.6.3 Applying that principle, the Plan is an integral part of the broader Transaction. Amongst the purposes of the Plan is not just to amend the Bonds in a vacuum, but rather to do so in order to secure the payment to the Group of CHF 500 million through the New Money Injection, which is conditional upon the Plan's approval, and whose repayment would be subordinated to the Plan Creditors' claims. The overarching purpose of the Plan is to address the Company's and the Group's financial difficulties to the benefit of all creditors, including all Bondholders.

29.6.4 It is not necessary for the release to be both *ancillary* and **also** *necessary* (contrary to the suggestion that had been made in the Fund's Main Skeleton Argument, para 82). A compromise or arrangement may have third party effects if such effect is **either** merely ancillary **or** necessary to ensure the effectiveness of the compromise or arrangement. This is clear from Mr Justice Zacaroli's judgment in *In re Instant Cash Loans Ltd*:[7]

> "*It is within the scope of the scheme jurisdiction to impose such a term on a creditor only if it is ancillary to the compromise of the pecuniary liability* ***or*** *necessary to ensure the effectiveness of the compromise effected by the scheme*." [Emphasis added]

29.7 In addition, contrary to the assertions that had been made by the Fund (the Fund's Main Skeleton Argument, para 88(e) and (f)) the existence of the Company is of vital importance to the Issuer and the Guarantor (and also to the Bondholders). There is no evidence that the Parent/Issuer would wind up the Company if it could not pay the sums due under the Contribution clause of the Deed Poll. The position is quite the contrary.

30 The nature of *Lehman* necessity is legal and commercial (and not merely economic, as the Fund had contended in paragraph 74 of the Fund's Main Skeleton Argument). There is no requirement of *Lehman* necessity for a deed poll only to be used where the deed poll company has assets (such as where it has been set up as the payor of a compensation fund).

31 Further and in any case, when a primary borrower proposes a scheme or plan which provides for the release of a guarantor, it is not a precondition to the existence of *Lehman* necessity that the

[7] [2019] EWHC 2795 (Ch), at [24] [**AB/75/1430/24**].

guarantor be solvent or otherwise of substantial means. Even if the guarantor is insolvent but has the right to claim reimbursement from the primary borrower, this constitutes the ricochet claim giving rise to *Lehman* necessity.

32 The facts of the *AI Scheme* case[8] provide a relevant example of these principles:

32.1 In *AI*, Affinion (an English financial company), had to deal with mis-selling claims from customers potentially in excess of £358 million [**AB/49/923/6**].

32.2 It set up an orphan company ('**Schemeco**') to propose the scheme. Schemeco was not in the ownership of the English company (Affinion), but it was in the ownership of a discretionary trust [**AB/49/923/9**].

32.3 Schemeco entered into the indemnity deed poll in return for what Norris J [**AB/49/924/10**] described as a "*relatively modest amount*", by which it accepted primary liability alongside Affinion and the relevant business partners in respect of successful customer claims.

32.4 Schemeco proposed the scheme by which (i) the customers' claims against Affinion and its partners would be released, as would (ii) the claims between Affinion and the partners. The scheme company would be left as the only obligor in relation to successful claims [**AB/49/924/11**].

32.5 Mr Justice Norris stated [**AB/49/923/9**]:

> "*This scheme company has secured funding from Affinion and from the business partners under which Affinion and the business partners will pay what is called 'the redress amount' to the scheme company in order cover the redress required to be paid to successful claimants. Deeds of undertaking have been completed to secure that funding.*"

32.6 In fact, the Scheme Rules in AI reveal that no payment was contemplated to or by Schemeco. Instead, Schemeco was to "*procure that AI shall pay the Redress Amount to each Scheme Creditor with an Agreed Scheme Claim*" (Rule 5.1.1 of the scheme rules; [**HB/G2433**]) or to

[8] *Re AI Scheme Ltd* [2015] EWHC 1233 [**AB/49**].

"*procure that each Business Partner shall pay on behalf of itself and to the extent appropriate each of its Business Partner Affiliates the Redress Amount to each Scheme Creditor with an Agreed Scheme Claim*" (Rule 5.1.2 of the scheme rules; [**HB/G2433**]). As the explanatory statement noted, "*if you purchased the Card Security Product direct from AI, then AI will pay your compensation; or if you purchased the Card security Product from AI following an introduction to AI from a Business Partner, or direct from a Business Partner, then that Business Partner will pay your compensation*" (Clause 20.1 at [**HB/G2483**]). The explanatory statement in AI also stated that payments to be made in relation to claims against AI or a Business Partners were to be funded by AI or that Business Partner, as appropriate (Clause 21 [**HB/G2484**]).

32.7 It is therefore evident that it was not Schemeco's independent ability to meet claims against it which gave rise to the *Lehman* necessity. It was not sitting on a compensation fund. To the contrary, the funds to pay scheme claims came exclusively from Affinion and its partners, as appropriate.

32.8 The reasons for the existence of *Lehman* necessity in *AI* are set out at para 25 of Norris J's judgment [**AB/49/928/25**]. Norris J noted that while Affinion was solvent, it could not itself promulgate a scheme without triggering an event of default under various financing arrangements. Further, concentrating all potential liabilities in Schemeco reduced the exposure of Affinion and its partners. The scheme also addressed the claims amongst Affinion and those partners.

32.9 It is for these reasons that Norris J accepted [**AB/49/928-9/26**] the argument that "*a deliberately created scheme company does not affect the jurisdiction, though it may affect the exercise of discretion at the sanction stage*" and held that "*there is no reason to read into [section 895] some limitation to exclude entities such as the scheme company. The structure has not been created as a matter of mere artifice; it has a solid grounding in commercial reality.*"

33 The Company draws the Court's attention to the following:

33.1 The Company has been created in order to promulgate the Plan, as Schemeco was created in *AI* to promulgate the scheme. In both cases, the newly created company voluntarily acquired certain pre-existing obligations, and in neither case did the new company have funds of its own.

33.2 The basis of the Plan in the present case is that the extension of maturity of (relevantly) the Bonds, together with the release of the contingent redemption rights, both to be brought about (and together with changes to the Senior Lenders' rights) through the Plan, is essential to the Company's survival. Without it, the Company will not have the funds to meet its obligations under the Deed Poll.

33.3 Further, the evidence shows that the Plan is also essential to the Group's survival.

33.4 If (as is the case) the relevant alternative to the Plan is for the Company and (relevantly) the Parent and Issuer to end up in insolvency proceedings — then the existence of the Company is *not* a matter of indifference to the Group, or indeed to the Bondholders, who, on the evidence before the Court, would be much worse off if the Company did not exist to promulgate the Plan, with the result that the Issuer and Parent would go into insolvency proceedings.

33.5 This remains the case notwithstanding that the value of the Company to the arrangement is legal and commercial, just like that of the scheme company in *AI*, and not economic, i.e. it does not lie in its ability to meet contribution claims independently of its parent's and affiliates' assistance, but in being able to propose a Plan which if approved and sanctioned would likely address the Company's and Group's financial difficulties.

33.6 It follows that the Court has jurisdiction.

C. AMENDMENT OF ALL BONDS IS NECESSARY FOR OR ANCILLARY TO AMENDMENT OF OTHER BONDS AS A MATTER OF SWISS LAW

34 Although the Fund no longer seeks to disclaim its rights under the Deed Poll, the Company nevertheless deals with the hypothetical situation of another Bondholder seeking to disclaim its indemnity rights under the Deed Poll. Even assuming that:

34.1 there were a valid disclaimer made by a Plan Creditor prior to the Plan Meeting, and, 34.2 the Court only has RP jurisdiction to amend the Bonds if Plan Creditors include Bondholders,

amendment of all of the Bonds is, in Mr Justice Zacaroli's words *In re Instant Cash Loans Ltd*:[9] , "*ancillary to the compromise of the pecuniary liability* [of the Company to the Issuer or Parent, as appropriate] *or necessary to ensure the effectiveness of the compromise effected by the* [Plan]".

35 This is because, as a matter of Swiss law, the Conditions governing some Bonds may not be amended while leaving the Conditions governing other Bonds unamended:

35.1 As long as there is at least one Bondholder who is a Plan Creditor, the Court has jurisdiction to convene a Plan Meeting which includes Bondholders who are Plan Creditors.

35.2 If the Plan were approved by the requisite majority at such a meeting, the Court would have jurisdiction to sanction the Plan, thereby amending the Conditions governing the Bonds held by Bondholders who were Plan Creditors.

35.3 However, as a matter of Swiss law, the only way in which the Plan could effectively amend the Conditions of the Bonds of Plan Creditor Bondholders would be if it also amended the Conditions of the Bonds of any Bondholders who were not Plan Creditors. This is for the following reasons [**HB/G2316-8**]:

35.3.1 Pursuant to Article 3(a)(7) of the Swiss Financial Services Act, bonds are defined as "*units in an overall loan subject to uniform conditions*". As NKF, the Group's Swiss Counsel, explain, this means that "*a bond issuance is a specified aggregate amount of a loan (Gesamtdarlehen) issued by an issuer in the form of multiple 'sub-loans' (i.e. the bond units) based on uniform conditions.*" (B.1.1 [**HB/G2316**])

[9] [2019] EWHC 2795 (Ch), at [24] [**AB/75/1430/24**].

35.3.2 The term "*sub-loan*" is to be understood — not as Y sub-lending to Z the loan made to it by X (as there is no one in the position of the intermediate party Y) — but as indicating that each bond is a constituent element of the overall loan. From the bondholders' perspective, the aggregate amount of the bond issue is an asset represented by a single "*Permanent Global Certificate*" ('**PGC**') of which they are all "*quotal co-owners*" (B.1.1 [**HB/G2316**]).

35.3.3 Therefore, while the Bonds are legally separate sub-loans capable of being traded separately, "*it is by definition of a bond required that the bond units of such bond are subject to the same terms and conditions*" (B.3.4 [**HB/G2317**]).

35.3.4 Swiss law treats all bondholders as a "*community*", and it is a "*fundamental principle*" of Swiss law that bondholders have a right to be treated equally. Article 1174 of the Swiss Code of Obligations states (B.3.5 [**HB/G2317**]):

> "*1. The persons making up a community of bondholders must all be equally affected by any resolution to adopt compulsory measures, unless every disadvantaged bondholder expressly agrees to such measures. …*
> *3. Undertakings and dispositions whereby individual bondholders are favoured over others belonging to the community of bondholders are void.*"

35.3.5 This fundamental principle of the Code of Obligations applies expressly to bonds issued by Swiss issuers, and is extended "*by doctrine*" to all bonds governed by Swiss law, including those (such as the Bonds) issued by non-Swiss issuers (B.3.6 [**HB/G2317**]). Therefore:

> "*It is also considered in Swiss legal doctrine that* ***bond terms that would allow for an unequal treatment of bondholders (without complying with the requirement that every disadvantaged bondholder agrees thereto) would be considered void and subject to judicial control****. This is also the consequence of bondholders forming a community of bondholders with the same interests, which demands an equal treatment among them. As a result,* ***any unequal treatment of one bondholder as against all other bondholders may be void unless all the remaining bondholders expressly agrees to such a consequence****.*"

35.3.6 The impossibility of amending some Bonds but not others is not 'merely' one of fundamental principle. It is also *practically* impossible, given that the Bonds are intermediated <u>fully fungible</u> anonymously traded securities which cannot be distinguished one from the other (B.1.2 [**<u>HB/G2316</u>**]):

"*with the deposition of the PGC with SIX SIS and with SIX SIS entering the Bond units into securities accounts of its participants, intermediated securities (Bucheffekten) had been created with respect to each Bond unit. With the creation of the intermediated securities, the quotal co-ownership of the Bondholders in the PGC is suspended and the Bond units are now traded 'electronically', i.e. by transfers/bookings between securities accounts held by customers with their custodian banks. Each Bond unit is currently traded with the same ISIN number and is subject to the (same) Bond Terms. The Bond units carry the same rights and hence are also fully fungible among each other.* ***<u>This is a necessity as Bond units are traded anonymously on the Swiss SIX Exchange and hence it is not possible to track or distinguish between the 70,000 Bond units</u>***."

35.4 It follows that as a matter of fundamental principle and practice alike, it is not possible to amend the Conditions governing some Bonds while leaving unamended the Conditions governing others, at least without the express consent of all affected Bondholders (in the present, all those Bondholders the Conditions of whose Bonds would be amended by the Plan).

35.5 Accordingly, amendment of the Conditions of the Bonds of any Bondholders who were not Plan Creditors is necessary or ancillary to the amendment of the Conditions of the Bonds of Plan Creditor Bondholders.

35.6 Such amendments would be recognised and given effect in Swiss law.

35.6.1 Professor Rodrigo Rodriguez explains in his supplementary opinion [**<u>HB/G2509-10</u>**]:

"*A voluntary non-participation of a creditor* [the Fund] *would, in my view, neither raise any issues of proper service nor of ordre public that would alter the conclusions of the [primary] Opinion.*
*In my view, the new assumptions regarding [*the Fund's*] disclaimer would, as a matter of principle, not affect recognition of the Plan in Switzerland, as they do not affect any of the elements of recognition…It is a general feature of insolvency proceedings, also and especially under Swiss law, that the submission of a claim to the terms of the Plan is not a voluntary act, or at least cannot be avoided or circumvented by refusing to participate in the proceedings…*
In my view…the position in Swiss law would be that the terms of the Bonds held by [the Fund] would also be amended in the same way as the participating Bondholders who had not disclaimed the Deed Poll, in each case as provided for under the Plan sanctioned by the English court, and, in particular, that [the Fund] would also have to wait until 28 February 2027 before being able to redeem its Bonds)…the recognition given to the Plan by the Swiss court would mirror whatever effect the Plan had under English law."

35.6.2 Indeed, in Professor Rodriguez's view, leaving the Fund's Bonds unamended would give rise to a "*moderate risk*" that the Swiss court would refuse recognition to the Plan as a whole [**HB/G2512**]:

> "*Finally, there may be incompatibilities with Swiss civil law governing bonds if the Plan sanctioned by an English court would have an effect that there would be different terms for Bonds of the same issuance. If so this may have a further negative effect on the feasibility of recognition of the Plan as compared to a scenario where the Plan would have the effect of amending the terms of all Bonds in the same way and hence treating all bondholders equally.*"

36 Again, it follows that the Court has jurisdiction to convene the Plan Meeting, and if the Plan were to be approved, to sanction it so as to amend the Conditions governing *all* the Bonds.

D. ALL BONDHOLDERS ARE PLAN CREDITORS UNDER THE CONTRIBUTION PAYMENT AGREEMENT

37 All Bondholders are Plan Creditors, by virtue of both the Indemnity provisions and the Contribution provisions in the Deed Poll.

38 Although the Fund no longer seeks to disclaim its rights under the Deed Poll, the Company nevertheless deals with the hypothetical situation of another Bondholder seeking to disclaim its indemnity rights under the Deed Poll. All Bondholders are Plan Creditors, even if another Bondholder were to seek to disclaim its rights under the Indemnity in the Deed Poll, by virtue of the provisions of the Contribution Payment Agreement.

39 On 28 January 2021, the Company executed a deed amending Clause 3 of the Deed Poll to permit an Obligor (including a Bond Obligor) whose obligation was coming due to (relevantly) require the Company to make a Contribution Payment to a designated account. [**HB/G2384**]

40 At the same time, the Company, Parent, Issuer, and other Group entities entered into an English law-governed Contribution Payment Agreement ('**CPA**') [**HB/G2386**]. Pursuant to the CPA and focusing, relevantly, on the position in relation to the Bonds:

40.1 The Issuer or (if appropriate) the Parent as Bond Obligor may give the Company a Payment Instruction requiring it to make up to the full amount of the Contribution Payment to the Principal Paying Agent or the Bondholders (Clause 2.1) [**HB/G2392**].

40.2 The Company may make the Contribution Payment directly or through any other Group company, including at present the Issuer or Parent, and any later acceding Group company (see definition of "Bond Funding Party" at [**HB/G2389**] and Clauses 2.2.1 and 3.1 [**HB/G2393**, **G2394**]).

40.3 The Company shall make this Contribution Payment on behalf of and as the agent of the Issuer or Parent, and the Issuer or Parent shall treat the payment as having been made on its behalf with the purpose and intention of discharging its liability in relation to the Bonds (Clause 2.2.3) [**HB/2393**].

40.4 The Principal Paying Agent and the Bondholders have the right pursuant to the Contracts (Rights Against Third Parties) Act 1999 to enforce the Company's duty to make the Contribution Payment if each of the following conditions ('**the Contingencies**') is met (Clause 5.2) [**HB/2395**]:

40.4.1 the Issuer or Parent comes under the liability to make a payment in relation to the Bonds,

40.4.2 the Issuer or Parent issues a Payment Instruction requiring the Company to make the Contribution Payment, and

40.4.3 the named Recipient is the Principal Paying Agent or the Bondholders.

41 The CPA has two implications for the purposes of *Lehman* necessity.

42 Firstly, the Company's position is by virtue of the CPA now the same as (or a fortiori of) the position of Schemeco in *AI*. In the event of the contingencies coming to pass, it has the right to require the Bond Funding Party (i.e. another Group company) to make the Contribution Payment. It follows that even if it were correct that, for the purposes of *Lehman* necessity, the

Company's contribution has to be of an economic nature, such a requirement is met to at least the same degree as it was in relation to Schemeco in *AI*.

43 Secondly, each Bondholder is a contingent creditor of the Company, for the following reasons:

43.1 When the Contingencies materialise, the Company is liable to make a payment to the Bondholders, either directly or through the Principal Paying Agent acting on the Bondholders' behalf (see Condition 4 of the Bond Conditions [**HB/G1841**]).

43.2 Each Bondholder holds a claim against the Company corresponding to the Company's liability to make the payment to the Bondholders.

43.3 The Bondholders' claim is contingent upon the materialisation of the Contingencies and, when payable, constitutes a debt.

43.4 Once the Contingencies materialise, each Bondholder has the right to enforce the Company's duty to discharge its liability to make the payment.

43.5 As the holder of a contingent monetary claim against the Company which, when payable, constitutes a debt, each Bondholder is a contingent creditor of the Company.[10]

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[10] In *In re Lehman Brothers International (Europe)* [2009] EWCA Civ 1161, [30] [**AB/31/637/30**], Patten LJ cited Lindley LJ's words in *Re Midland Coal, Coke & Iron Company* [1895] 1 Ch 267, 277:

"…the word 'creditor' is used in the Act of 1870 in the widest sense, and that it includes all persons having any pecuniary claims against the company. Any other construction would render the Act practically useless."

At **AB/31/637/31**, Patten LJ cited David Richards J's dicta in *Re T&N Ltd* [2005] EWHC 2870 (Ch), [40]:

"In my judgment, 'creditors' in s 425 is not limited to those persons who would have a provable claim in the winding-up of the company, although it clearly includes all those who would have such a claim. As was submitted by Mr Snowden and other counsel, one of the recognised purposes of s 425 is to encourage arrangements with creditors which avoid liquidation and facilitate the financial rehabilitation of the company…This suggests that as wide a meaning as possible should be given to 'creditors' in the section. Having said that, it is important to bear in mind that s 425 is designed as a mechanism whereby an arrangement may be imposed on dissenting or non-participating members of the class and such a power is not to be construed as extending so as to bind persons who cannot properly be described as 'creditors'."

Patten LJ's own views at **AB/31/644-5/58-59** are to identical effect:

"As mentioned earlier, a 'creditor' will consist of anyone who has a monetary claim against the company which, when payable, will constitute a debt. Contingent claims are included for this purpose…As a matter of ordinary language, a creditor is someone to whom money is owed. The use of this word with that meaning is a long-

43.6 This includes any Bondholder that sought to disclaim its rights in relation to the Indemnity, because the Contribution claim continues to exist, and the CPA makes each Bondholder a contingent creditor of the Company in the event that the Contingencies materialise.[11]

44 Further, a Bondholder may only disclaim its right to be paid by the Company in the event that the Contingencies materialise if the Bondholder also disclaims its right to be paid by the Issuer or Parent (as relevant). This is for the following reasons:

44.1 The Issuer or Parent requires the Company to make the Payment as its agent and on its behalf in discharge of its liability in relation to the Bonds.

44.2 Correspondingly, the Company makes the Payment as the agent and on behalf of the Issuer or Parent (as relevant) and with the intention and purpose of discharging the liability of the Issuer or Parent to the Bondholders.

44.3 The position in this regard is the same as the position of any other agent (A) whom the principal (P) has put in funds and authorised and required to discharge the principal's liability to a third party (T). Unless payment through A is contrary to the parties' agreement or otherwise inappropriate, T may not disclaim the payment from A without disclaiming its right to be repaid by P. The position is a fortiori if T is given a right to require A to make the payment to it.

45 If a Bondholder only disclaimed its rights against the Company under the Indemnity, but did not also disclaim its claims against the Issuer and Parent to be paid in relation to the Bonds, it would

established and essential part of English company law…Given that 'creditor' is not defined in the legislation, it is inconceivable that Parliament should have used the word in the 2006 Act in any but its literal sense."

[11] This remains the case even though the materialisation of the Contingencies is in the Issuer's or Parent's discretion. As Lord Neuberger noted in *In re Nortel* [2014] AC 209 (SC), at **AB/47/911/136**:

"It is not a condition of the right to prove for a debt or liability which is contingent at the date when the company went into liquidation that the contingency should be bound to occur or that its occurrence should be determined by absolute rather than discretionary factors."

also have corresponding (albeit contingent) claims against the Company, and it would only be able to disclaim the latter by disclaiming the former.

46 It follows that a Bondholder that sought to disclaim its rights under the Indemnity would remain a Plan Creditor.

E. GOOD FORUM SHOPPING

47 It is accepted that the use of the Company and the Deed Poll can (in some senses) be regarded as artificial. However, that artificiality is not a basis upon which the Court should decline jurisdiction over the Company (and the Plan). It is necessary to distinguish between good and bad forum shopping. This is an example of good forum shopping. The Company is an English company, has an English COMI, and is wholly owned by the Parent, and thus is a part of the Group. There is nothing artificial about any of these matters.

48 The Group and the Company find themselves in the following circumstances:

48.1 As already noted, the Group and the Company are in severe financial difficulties.

48.2 The only way in which the Group and the Company may survive is by restructuring their debt obligations and receiving significant new funding.

48.3 It is particularly difficult to restructure the Bond debt:

48.3.1 If the Issuer were to call a meeting of the Bondholders pursuant to the terms of the Bonds, it is highly unlikely that the requisite quorum of 66% of Bondholders would attend the meeting with the result even if those attending expressed strong support for the Bonds to be restructured, no such restructuring would take place. The position is explained in para 22 of the Issuer's FWS and paras 18-20 of the Issuer SWS.

48.3.2 There is no suitable way of restructuring the Bonds under Swiss law, particularly given that the Issuer is not incorporated under Swiss law with the result that it cannot use Swiss law restructuring mechanisms such as the moratorium proceedings. Instead, Swiss law envisages the non-Swiss issuer to restructure in either its jurisdiction of incorporation or of COMI (as explained by NKF at B.4.9-10 [**HB/G2318**]).

48.3.3 Luxembourg law (under which the Issuer is incorporated) does not provide suitable mechanisms to enable the Bond debt to be restructured either.[12]

48.4 If the Bond debt cannot be restructured, then neither can the Senior Facilities and the Mezzanine debt, since the restructuring of each of these debt arrangements is conditional upon the restructuring of each other such debt arrangement.

48.5 If the Group's debt is not restructured, the Shareholders will not provide the additional CHF 500 million New Money Injection.

48.6 In that event, it is not merely the Group and the Company who would be harmed from the New Money Injection not being made but also the Bondholders and Senior Lenders, who would be deprived of the benefit of the significant additional funds on a subordinated basis in relation to each of their claims.[13]

48.7 The Group and the Company would run out of liquidity, would default on their loans, and would enter into insolvency proceedings.

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[12] As Sébastien Binard, Partner, and Valentina d'Eufemia, Associate, Arendt & Medernach S.A., Luxembourg, note in 'Reorganisation Proceedings in Luxembourg', (2021) 18(1) *International Corporate Rescue* 42, 43 [**AB/138/2858**]:

"Unfortunately, it has to be said that the effectiveness of these reorganisation proceedings remains limited to such an extent that very few cases of stay of payments, controlled management and composition with creditors [the three Luxembourg restructuring proceedings] have been successfully opened in the past years. Their current lack of success is due to a variety of factors including a cumbersome process requiring among others a high percentage of creditors to vote the reorganisation, their inadequateness for small businesses, a certain level of publicity of the proceedings, the fact that they may only be applied for if the debtor has sufficient funds to pay all reorganisation costs and, last but not least, the ability of the court supervising the process to declare the relevant company in bankruptcy ex officio in order to be liquidated if it is found to meet the conditions for bankruptcy at any stage of the reorganisation process."

[13] For completeness, the Mezzanine Lenders would also suffer if the New Money Injection were not made.

49 Against this background, the Company accepts that the motivation for its creation and interposition in the Group's borrowing arrangements is to enable use of the English Court's RP jurisdiction. In the Company's and the Group's view, that jurisdiction provides the only viable basis for restructuring the Group's debt, including and in particular the Bond debt.

50 The position in that regard is no different from that of the parties in numerous other cases in which steps were taken expressly with a view to establishing the English Court's scheme jurisdiction. By way of illustration:

50.1 In *Re Apcoa Parking Holdings GmbH*,[14] and *In the Matter of Colouroz Investment 2 LLC*,[15] the governing law of the debt was changed.

50.2 In *Re Swissport Fuelling Ltd*,[16] English jurisdiction clauses were inserted in the debt documents.

50.3 In *Re NN2 Newco Limited*[17] and *Re Hema UK I Limited*,[18] the governing law of the debt was changed and an English company acceded to it with a view to making use of the scheme jurisdiction.

50.4 In *Re AI Scheme Limited*,[19] discussed above, *Re Selecta Finance UK Limited,*[20] and *Re Codere Finance 2 (UK) Limited*,[21] a new company was created which voluntarily assumed existing liabilities specifically with the objective of subjecting those liabilities to a scheme. In *Re AI Scheme Limited*,[22] as noted above, the company was formed to enable the making of compensation payments by the original obligors. It had no assets of its own, and no funds

[14] [2015] Bus LR 374 [**AB/58/1027/14**].

[15] [2020] EWHC 2464 (Ch) [**AB/96/1869/18**].

[16] [2020] EWHC 3064 (Ch) [**AB/100/1926/52**].

[17] [2019] EWHC 1917 (Ch) [**AB/71/1374/11**].

[18] [2020] EWHC 2558 (Ch) [**AB/89/1379/15**].

[19] [2015] EWHC 1233 (Ch) [**AB/49**].

[20] [2020] EWHC 2689 (Ch) [**AB/95/1861/3**].

[21] [2020] EWHC 2441 (Ch) [**AB/93/1845/133-4**].

[22] [2015] EWHC 1233 (Ch) [**AB/49**].

would pass through it. Instead, its role was to "*procure*" the making of the payments. The company was set up to avoid difficulties in making the payment directly from the original company.

50.5 The same occurred in *Re Codere*,[23] where Newey J stated:

> "*In a sense, of course, what was done in* the A I Scheme *case, and what is sought to be achieved in the present case, is forum shopping. Debtors are seeking to give the English court jurisdiction so that they can take advantage of the scheme jurisdiction available here and which is not widely available, if available at all, elsewhere. Plainly forum shopping can be undesirable. That can potentially be so, for example, where a debtor seeks to move his COMI with a view to taking advantage of a more favourable bankruptcy regime and so escaping his debts. In cases such as the present, however, what is being attempted is to achieve a position where resort can be had to the law of a particular jurisdiction, not in order to evade debts but rather with a view to achieving the best possible outcome for creditors.* ***If in those circumstances it is appropriate to speak of forum shopping at all, it must be on the basis that there can sometimes be good forum shopping.***"

51 The Company submits that, for the reasons given above, it falls squarely within the ambit of Newey J's dictum about good forum shopping, and that its position is a fortiori that of Schemeco in *AI*.

F. "ARTIFICIALITY" IS NOT OBJECTIONABLE UNLESS IT CONSTITUTES ABUSE

52 The fact that the use of the Deed Poll is 'artificial' does not mean that it is abusive. To the contrary, the use of the Deed Poll is a genuine use of the RP process in a proper manner.

53 An objection to "artificiality" most frequently arises where the parties seek to use their freedom of contract to circumvent statutory requirements, such as the protections afforded to leaseholders (which are not available to licensees) or to preferential creditors (which are only available in relation to assets encumbered by floating charges but not to other security arrangements). In such contexts, there is a public interest in not permitting the parties to circumvent statutory protections by adopting artificial structures which do not reflect the underlying substance.

[23] [2015] EWHC 3778 (Ch) [**AB/56/991/18-19**].

54 In *Re Spectrum Plus Ltd*, the House of Lords held that where the chargee in the ordinary course of its business could unilaterally remove the encumbered assets from the ambit of the charge, the charge was to be characterised as floating irrespective of what the parties had chosen to call it. As Lord Walker explained:[24]

> "*it is the court's duty to characterise the document according to the true legal effect of its terms … In each case there is a public interest which overrides unrestrained freedom of contract. On the lease/licence issue, the public interest is the protection of vulnerable people seeking living accommodation. On the fixed/floating issue, it is ensuring that preferential creditors obtain the measure of protection which Parliament intended them to have.*"

55 The characterisation process seeks to ascertain the legal substance of the transaction. As Romer LJ stated in *Re George Inglefield, Ltd*:[25]

> "*The only question that we have to determine is whether, looking at the matter as one of substance, and not of form, the discount company has financed the dealers in this case by means of a transaction of mortgage and charge, or by means of a transaction of sale; because, of course, financing can be done in either the one way or the other, and to point out that it is a transaction of financing throws no light upon the question that we have to determine.*"

56 Importantly, however, the focus is on the transaction's <u>legal</u> rather than economic substance. The clearest statement of this point is in the judgment of Robert Walker J in *Re Polly Peck International plc (in administration)*,[26] having cited a passage from Staughton LJ's judgment in *Welsh Development Agency v Export Finance Co Ltd*:[27]

> "*Those were statutory contexts (registration of charges and regulation of moneylending) but I think they also support the general proposition that when the law is looking for the substance of a matter, it is normally looking for its legal substance, not its economic substance (if different). As Robert Goff LJ put it in* Bank of Tokyo Ltd v Karoon *[1986] 3 All ER 468 at 486, [1987] AC 45 at 64, we are concerned not with economics but with law.*"

57 Further, and importantly, the only way of identifying the substance of the transaction — except where extrinsic evidence shows the existence of a sham or pretence — is by looking at the terms of the transaction agreed by the parties. As Lord Herschell LC explained in the House of Lords in the Irish case of *McEntire v Crossley Brothers Ltd*:[28]

> "…*I quite concede that the agreement must be regarded as a whole — its substance must be looked at. The parties cannot, by the insertion of any mere words, defeat the effect of the transaction as appearing from the whole of the agreement into which they have entered. If the words in one part of it point in one direction and the words in another*

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[24] [2005] 2 AC 680 (HL), 730G-H [**AB/25/463/142**].

[25] [1933] Ch 1 (CA), 27 [**AB/144/3022**].

[26] [1996] 2 All ER 433 (Ch), 444d-e [**AB/12/212**].

[27] [1992] BCLC 148 (CA), 185: "…*One can start from the position that statute law in this country, when it enacts rules to be applied to particular transactions, is in general referring to the legal nature of a transaction and not to its economic effect…*"

[28] [1895] AC 457, 462-3 [**AB/3/31-2**].

part in another direction, you must look at the agreement as a whole and see what its substantial effect is. But ***there is no such thing…as looking at the substance, apart from looking at the language which the parties have used. It is only by a study of the whole of the language that the substance can be ascertained**.*"

58 The same point was reiterated by Lord Wilberforce in *Lloyds & Scottish Finance Ltd v Cyril Lord Carpets Sales Ltd*, where the House of Lords rejected an attempt to recharacterise a block discounting agreement as a security arrangement:[29]

"*It would be a strange doctrine of 'looking for the substance' or 'looking through the documents' which would produce a contractual intention so clearly negated by the documents and by oral evidence.*"

59 Just as the language used by the parties is a guide to the substance of the transaction, so is the structure. A transaction and the way it is structured is not "*artificial*" in any legally relevant way simply because it could have been structured or executed in some more 'natural' way. The Court does not readily ignore or override that structure chosen by the parties in favour of some 'objective' or more 'natural' understanding of some underlying 'objective' reality. This point has been made many times,[30] and is clearly explained by Lightman J in *Wire TV Ltd v CableTel (UK) Ltd*:[31]

"*… in construing an agreement (which is not a sham) for the purpose of analysing its legal character and the legal rights and obligations to which it gives rise, regard must be had to the substance of the transaction as disclosed by the language used, and this includes the form and shape of the transaction and the labels chosen by the parties. The parties to a transaction frequently have a choice as to the way it shall be structured, whether there should be one or more contracts and as to the rights and obligations to be created: an example is as to how consideration shall be appropriated to different components in any package or to different packages of goods or services being sold or provided by the same vendor to the same purchaser.* ***For the purposes of legal analysis the court must respect the structure and appropriation adopted, and cannot treat the transaction as giving rise to different legal rights and obligations because those different legal rights and obligations would have been more natural and more in accordance with some objective view of the substance of the transaction**.*"

60 Further and in any case, artificiality is not objectionable in and of itself unless it involves abuse or a violation of the public interest. The Court of Appeal has recently emphasised this point in the context of the use of insolvency proceedings in *Secretary of State v PAG Asset Preservation Limited*.[32]

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[29] [1992] BCLC 609, 615b [**AB/11/195**].

[30] See e.g. *Re George Inglefield, Ltd* [1933] Ch 1 (CA), 26-27 (Romer LJ) [**AB/144/3022-3**] and *Orion Finance Ltd v Crown Financial Management Ltd* [1996] 2 BCLC 78 (CA), 86g-88a (Millett LJ) [**AB/13/225-7**]; see also *Norglen Ltd v Reeds Rains Prudential Ltd* [1999] 2 AC 1 (HL), 13G-14A (Lord Hoffmann) [**AB/15/261-2**].

[31] *Wire TV Ltd v CableTel (UK) Ltd* [1998] CLC 244, 258 [**AB/14/243**].

[32] [2020] EWCA Civ 1017 [**AB/81**].

61 In the present case, there is no question of abuse or a violation of the public interest:

61.1 It is no objection that the Company, like the entities in the *PAG* case, has been created in order to make use of the particular features of an insolvency proceeding.

61.2 There is no public policy or interest against the use of entities such as the Company, of the Company being able to execute the Deed Poll as amended, the Company and other parties being able to enter into the CPA, and the Company seeking to make use of the RP process.

61.3 There is no suggestion that either the Deed Poll or the CPA are shams or mere pretences, that is to say, intended to give a false impression of the parties' intentions. The parties in fact intend to comply with the terms of the Deed Poll and the CPA.

61.4 Since there is no violation of public policy or interest, and since there is no evidence that the Deed Poll and/or the CPA are shams or mere pretences, the Court should construe the legal (as opposed to economic) substance of the arrangements created by them according to their language, terms, and structure. The Court should reject any invitation to 'look through' the documents as 'artificial' and to an alleged objective substance.

61.5 The Company has been created to achieve the objectives of the RP proceeding, namely, to resolve its and the Group's serious financial difficulties. The RP is therefore being used for the purpose for which it was created by statute.

61.6 The motives of the Company's creators and controllers in seeking to use the RP to resolve the Company's and Group's financial difficulties support rather than impugn the creation of the Company and its entry into the Deed Poll and the CPA.

61.7 The fact that the Company and its directors must live with the predetermined fate plotted for the Company, including through the Deed Poll as amended and the CPA, is not objectionable.

61.8 That the assumption of existing liabilities by the Company by way of the Deed Poll as amended and the intended movement of funds through the Company to make payments on behalf of (relevantly) the Issuer or Guarantor by way of the Deed Poll and the CPA may be characterised as artificial or even "*entirely artificial*" would be no objection to either the Deed Poll or the CPA. Nor is the fact that the money would be provided by other members of the Group (as is also clear from Norris J's judgment in the *AI* case).

62 For these reasons, there is no proper basis for any objection based upon the use of the RP process by the Company, or of its interposition through the Deed Poll and the CPA in the Group's existing debt arrangement.

III THRESHOLD CONDITIONS

A. CONDITION A

63 Condition A is dealt with in paragraphs 51-59 and 95-96 of the Company's Main Skeleton Argument. In addition, the following points, arising in response to points that had been raised in the Fund's Main Skeleton Argument, are also relevant.

64 The Company adopts the general principles of statutory interpretation set out by the Fund in paras 96 to 103 of the Fund's Main Skeleton Argument.

65 The Company also accepts (as had been noted in the Fund's Main Skeleton Argument at para 105), that it is the Company itself, and not merely members of the Group of which the company is part, that must satisfy Condition A. Although a great deal of the evidence in the present case deals with the position of the Group (because it affects the Company), there is also evidence of the position of the Company, which position has now been put beyond any doubt in the Company's supplementary evidence:

65.1 By virtue of the Deed Poll [**HB/G1638**], the Company has accepted contingent liabilities mirroring and equal in quantum to the sum of the liabilities of the Bond Obligors and the Senior Facilities Obligors. The obligees include the Bondholders and Senior Lenders pursuant to the indemnity clause [**HB/G1644/2.1.1**] and the Bond and Senior Facilities Obligors, respectively, pursuant to the contribution clause [**HB/G1646/3**].

65.2 The Company's liability in relation to the Bonds amounts to CHF 350 million plus interest [**HB/G0179/2.2**] and its liability in relation to the Senior Facilities Obligations amounts to EUR 665 million [**HB/G0178/2.1**]. Upon any of the liabilities maturing and the obligee making a claim, the Company's liability would crystallise.

65.3 In addition, under the CPA, if and when the Issuer or Parent makes a Payment Direction, the Company will be part of the process of the making of that payment to the Ultimate Beneficiary. This will also be part of the business of the Company. The position in relation to the Group in the absence of the Transaction (and in particular its current liquidity need) will be a direct cause of financial difficulties to the Company, as the monies will not be able to be made available to the Company to make the payments [**HB/G2263/81**].

65.4 The Company does not have assets with which to meet its liabilities, which means that it is balance sheet insolvent. It does not have revenues with which to service these liabilities as they fall due, leaving it at risk of cashflow insolvency.

65.5 Therefore, the Company is in financial difficulties which threaten its ability to carry on business as a going concern.

66 The fact that the Company has been newly incorporated is not a bar to the application of Condition A. There is nothing in the terms of Condition A that suggest that a newly incorporated Company cannot propose a Plan merely because it is newly incorporated. The Fund had sought to suggest that a newly incorporated company could not satisfy Condition A because such a company cannot have previously (a) carried on business or (b) carried it on as a going concern that can be affected by its financial difficulties (the Fund's Main Skeleton Argument, paras 106-107). If this were the case, such a restriction would limit the scope of the RP process. In fact, any such suggestion would have been misconceived.

67 Any suggestion that a newly incorporated company cannot satisfy Condition A is incorrect because it confuses the company and its business.

67.1 A business consists of the productive assets, traditionally categorised as land, labour, capital, and entrepreneurship. A company is the legal person which owns or has rights to use the assets constituting the business, incurs debts and liabilities in running the business, and receives the resulting revenues.[33]

67.2 A company can carry on business as a going concern even if it did not previously exist and carry on that business (i.e. the business was not its *own* pre-existing business).

67.3 Further, multiple companies may be engaged in operating the same one business. This is what corporate groups often do: for example, there may be a property holding member, a cash managing entity, an employer, a holding company, and so on. All these group members may, and may need to, work together in order to operate the same one business.

67.4 In addition, the answer to the question as to what constitutes a business depends on why the question is being asked. The present matter provides an example: the Group's activities are undertaken by hundreds of different companies, but with pooled cash at gategroup Financial Services Sàrl, a subsidiary of the Parent [**HB/G0038-40/52-59**]. From one perspective, it is possible to view the Group's activities as consisting of multiple different businesses distinguished along regional or activity lines (e.g. distinguishing between the onboard catering business and the food packaging and service ware business). Even on this view, each such (sub-) business is operated by multiple companies together. From another perspective, however, the Group owns a single business which, as such, benefits from synergetic value, such as through its global cash pooling arrangements.

[33] The distinction between the company and its business has been made in the context of the interpretation of Condition A by R. Mokal, 'The Difficulties with "Financial Difficulties"' (2020) 35(10) *Journal of International Banking & Financial Law* 662, 662 RHS [**AB/137/2852**].

67.5 The business of a company can therefore predate the existence of that company, which upon being formed and having acquired the business may also immediately suffer financial difficulties if the costs of operating the business exceed its revenues. Such financial difficulties may be so severe as to affect the newly formed company's ability to <u>continue</u> the business (which was in operation prior to its current owner's creation) as a going concern.

67.6 This will mostly likely be the case where, as in the present case, a new company is created within a corporate group which is *already* suffering financial difficulties. Just as a new company in a well-resourced group may inherit riches, a new company in a distressed group may inherit part of the distress, for example, by being vested with onerous assets, i.e. assets whose value is exceeded by the liabilities associated with owning them (as it is in the present case).

67.7 Condition A therefore does not exclude new companies as a matter of definition. A new company incorporated in a group with pre-existing financial distress is able to meet Condition A.

68 Moreover, in the present case, the Company has in fact (a) carried on its own business and (b) carried it on as a going concern in another sense (contrary to the suggestion that had been made in the Fund's Main Skeleton Argument, paras 113 and 114).

68.1 The purpose for which the Company was incorporated was to facilitate the Transaction [**<u>HB/G0070/16</u>**, **<u>HB/G2228-9/10-13</u>**.]

68.2 In pursuit of this purpose, the Company's business is (and will continue to be) to take on indemnity and contribution obligations under the Deed Poll with a view to proposing a plan which, if approved and sanctioned, would likely address the financial difficulties of the Company itself and of the Group of which it is part. That is the business that the Company was created to carry on. The Company does not lack any assets which it needs in order to carry on this business (as it does not need any such assets). And it is carrying on this business.

68.3 If the Plan is sanctioned, the Company (and the Group) will (likely) no longer be in financial difficulties. The New Money Injection will be provided (on a subordinated basis) and the Bonds and Senior Lenders will be paid in full.

68.4 In that event, the Company would continue as a going concern to pursue its purpose of facilitating the Transaction by remaining as the obligor and making Contribution payments as provided for under the CPA until the "*Long-Stop Date*", defined in the Deed Poll [**HB/G1641**] as 28 February 2027, which is the extended date of maturity of the Bonds as proposed in the Plan [**HB/G0230/4.3**, **G0237/1**].

68.5 At the Long-Stop Date, the purpose for which the Company was created, viz, to facilitate the Transaction, would be met.

68.6 By contrast, if the Plan is not approved or is not sanctioned, the purpose for which the Company was created would fail, and it would likely no longer be able to continue business as a going concern.

68.7 What happens in either of those contingencies would depend on the decisions of the Company's directors.

69 The Company's position in these various contingencies is no different from the position of any other company created to pursue a time-limited objective.

70 Moreover, a restriction of Condition A to pre-existing companies is not supported by either the legislative history or the terms of Condition A.

70.1 New companies are often created specifically for the purpose of proposing a compromise or arrangement pursuant to a Part 26 scheme. The scheme company in *AI* is an example; the special purpose vehicles in *Swissport*[34] and *Codere*[35] provide other examples. New companies can be (and are) created to propose a compromise or arrangement because

[34] *Re Swissport* [2020] EWHC 1499 (Ch) [**AB/86/1695/47-52**].

[35] *Re Codere Finance 2 (UK) Ltd* [2020] EWHC 2441 (Ch) [**AB/93/1824/31**].

it is not possible for any existing entity to do so. For example, the proposal of a compromise or arrangement by any existing group member may trigger cross-defaults in borrowing arrangements, thereby counterproductively triggering the collapse of the group. In other instances, regulatory considerations rule out an existing entity making the proposal. In these contexts, the only feasible option may be to create a new entity, often as an orphan SPV, to propose the compromise or arrangement through a Part 26 scheme.

70.2 If the Fund had been right, however, a new entity would have been able to propose a compromise or arrangement under Part 26, but would not have been permitted to propose a compromise or arrangement under Part 26A.

70.3 It is noted that the Fund had asserted that in introducing the Condition A entry threshold, Parliament must have intended this restriction of the scope of the RP compared to that of the scheme. However, it had not supported that assertion with any analysis of the legislative history and materials.

70.4 CIGA itself provides other instances where a newly formed company might be involved in a rescue as a going concern. For example, by section A31(2), the court is given the power to permit a company subject to a moratorium to dispose of charged property if that would "*support the rescue of the company as a going concern*". A similar power but only in relation to unencumbered assets is given to the monitor (A29(3)). A newly created company might be incorporated to assume certain liabilities, be vested with certain assets, and be placed in the moratorium. In such circumstances, it may become appropriate to permit it to dispose of some of its assets with a view to rescuing it as a going concern. If the Fund had been right, then newly incorporated companies would also not be able to use the moratorium.

70.5 Given the legislative focus on helping distressed companies during the pandemic, it is to be expected that Parliament has sought to create *more* options for the rehabilitation of distressed companies and not fewer.

71 There is also no requirement in Condition A that only companies which would be in financial difficulties independently of the RP could have been intended by Parliament to make use of the RP process (contrary to the suggestion that had been made in the Fund's Main Skeleton Argument, paras 108-109).

71.1 Again, it is noted that the Fund had made this assertion as a conclusion but had provided no explanation as to why this should be the case.

71.2 Again, such a proposed narrowing of the scope of the RP compared to that of a scheme was unsupported by evidence and did not comply with the stated legislative intent.

71.3 It is irrelevant that the Company's financial difficulties are "*self-inflicted*" for the sole purpose of promulgating the Plan (the Fund's Main Skeleton Argument, para 115). The purpose of putting forward the Plan is a valid purpose. Acceptance of liabilities in order to propose a compromise or arrangement is a legitimate restructuring technique, and there is no basis for a suggestion that, in creating the Condition A threshold, Parliament intended to outlaw this technique in the context of plans.

72 The Company's compliance with Condition A is an essential part of the Transaction. Without it, the Transaction will not complete (because of the inter-conditional nature of the steps) As a result, it is clear from the evidence that the Company itself (as opposed to the Group) falls within Condition A (contrary to the suggestion that had been made in the Fund's Main Skeleton Argument, paras 116-118):

72.1 That this is the case is put beyond doubt in the supplementary evidence, which mostly refers back to and consolidates the information provided in the Company's original evidence [**HB/G2264-5/83-88**].

72.2 The inter-conditionality derives from the fact that the New Money Injection will not be provided to the Group by the Shareholders unless the Bonds and the Senior Facility liabilities are extended, which is the result of the Plan. It is therefore an essential part of the restructuring.

72.3 As for liabilities, these arise from the Deed Poll and are substantial:

72.3.1 The Company agreed, as a primary obligation, to become liable to the Senior Lenders for all sums payable by any SFA Obligor and to the Bondholders to all sums payable by any Bond Obligor to the Bondholders.

72.3.2 The Company also agreed in the Deed Poll that it would provide a right of contribution to any SFA Obligor or Bond Obligor who was required to make a payment under the Senior Facilities or the Bonds, respectively.

72.3.3 As such, the Company is currently liable for up to CHF 350 million plus interest in respect of the Bonds and approximately EUR 665 million in respect of the Senior Facilities.

72.4 As for assets, the Company does not have any assets. As a result, the Company is currently balance sheet insolvent. Further, the Company will also be cash flow insolvent to the extent that any demand is made on it by the Issuer or Guarantor (or any Bondholder) as it does not have the funds to meet those payments.

72.5 Pursuant to the CPA, the Company has the right to direct other Group companies which are Funding Parties under the CPA to make payments. However, if the Plan were not approved and sanctioned, those Funding Parties themselves — and in relation to the Bonds in particular, the Issuer and Parent — would become insolvent and enter into insolvency proceedings. This would leave the Company unable to continue its business as a going concern.

73 There is therefore sufficient evidence that the Company is in financial difficulties affecting its ability to continue business as a going concern.

B. CONDITION B

74 For similar reasons, Condition B is satisfied, as is also set out in paragraphs 97 to 100 of the Company's Main Skeleton Argument.

75 The Plan proposes to address the Company's financial difficulties, and not merely those of the Group (and specifically the financial difficulties of the Issuer and Parent) (contrary to the suggestions that had been made in the Fund's Main Skeleton Argument, paras 119-120, 124-125).

76 As Mr Williams explains on the Company's behalf [**HB/G2265-7/88-94**]:

76.1 If the Plan is approved and sanctioned, it will likely eliminate, reduce, or mitigate the effects of the Company's financial difficulties as well as those of the Group.

76.2 The Company would then continue as a going concern in execution of the purpose for which it was created (viz, the facilitate the Transaction) until the Long-Stop Date

76.3 This is the case, even though, as originally structured, the Company had no assets. The relevant alternative to the Plan is the entry of the Company, Parent, Issuer, and other Group entities into insolvency proceedings, then it follows that Condition B will be satisfied, as it is the Company which is proposing the Plan that stands in the way of that value-destructive outcome. Therefore, its fate is of very significant concern to the Group and to all Plan Creditors.

IV INTERNATIONAL JURISDICTION: NO BLOT OR ROADBLOCK

77 Even prior to the Fund's withdrawal, the ambit of the disagreement between the parties on the Lugano Convention point had been narrow.

78 First, the Company agrees with much of what is said in the Fund's Main Skeleton Argument about the law on the Lugano Convention, as it relates to the position of Schemes. The present case does not, however, relate to Schemes, but to RPs.

78.1 The Company does not seek to suggest that Part 26 Schemes fall into the bankruptcy exclusion of Lugano (or Brussels).

78.2 There is no issue in the present proceedings about the position of schemes as civil or commercial matters. As a result, none of the points made in paras 139 to 151 of the Fund's Main Skeleton Argument need to be addressed.

78.3 For the same reason, the point made about Schuldschein debt in para 177 of the Fund's Main Skeleton Argument is not of any assistance, as that question has only arisen in the context of Schemes and not RPs

79 Secondly, prima facie the Lugano Convention is capable of applying if the RP is a civil and commercial matter.

80 Thirdly, the provisions of the Lugano Convention should be construed in the same way as the corresponding provisions of the Brussels Regulation. (As a result, the Court need not be concerned with paras 159-168 of the Fund's Main Skeleton Argument.)

81 Fourthly, if the Lugano Convention were to apply, the Swiss Jurisdiction Clause would prevent this Court from sanctioning the RP, and that this would be a jurisdictional roadblock. (There is therefore no issue taken by the Company with paras 169-174 of the Fund's Main Skeleton Argument.)

82 Fifth, the Company does not assert that the Swiss Jurisdiction Clause is not relevant because the Company is not a party to the Bonds or the Guarantee. (As a result, the Court need not be concerned with para 176 of the Fund's Main Skeleton Argument.)

83 However, where there had been an issue between the Company and the Fund was in relation to the question whether RPs are civil and commercial matters (i.e. are the same as schemes). As set out in the Company's Main Skeleton Argument at paragraphs 49-63 and 131-135, RPs are not civil and commercial matters. They fall into the bankruptcy exclusion. They are different from schemes for the reasons set out in the Company's Main Skeleton Argument.

84 That this is the right conclusion is supported by the Company's Swiss law expert advice, as set out in the opinion at [**HB/G1755**], which sets out the position in Switzerland

85 The Court can be confident that Professor Rodriguez's view is not idiosyncratic but that it is shared across the Swiss legal profession. Indeed, it appears that the Fund had been taking a position in these proceedings which is contrary to an article published by its own Swiss counsel, Prager Dreifuss [**HB/G2212/2]** "*Recognition of a Part 26A Restructuring Plan in Switzerland and the EU*", on 24 December 2020 [**HB/G3388**]. The position taken in the article is identical to Professor Rodriguez's view in all material respects [**HB/G3388**]:

"*A major difference [from schemes of arrangement] is that the Part 26A restructuring plan is limited to companies in financial difficulties, whereas the scheme of arrangement may be used by solvent or insolvent companies…from a Swiss law perspective it is relevant that bankruptcy, winding-up, judicial arrangements, compositions and analogous proceedings are explicitly excluded from the scope of the Lugano Convention.* ***In our view a Part 26A restructuring plan falls under this bankruptcy matters exemption and therefore the Lugano Convention would not be applicable to the recognition of a Part 26A restructuring plan in Switzerland****.*

Consequently, the rules of the Swiss Private International Law Act (PILA) govern the recognition of a Part 26A restructuring plan. Thereunder, the request for recognition will be granted if

- *the foreign act (i.e. the UK court sanctioning the Part 26A restructuring plan) is enforceable in the country in which it has been rendered;*
- *the foreign act has been rendered in the country of the debtor's corporate seat or in the country where the debtor has its centre of main interest (COMI), provided that the debtor was not domiciled in Switzerland at the time of the opening of the foreign insolvency proceedings; and*
- *there are no grounds for refusal of recognition under art. 27 of the PILA, i.e. the decision is not incompatible with Swiss public policy.*

…

From a Swiss law perspective, ***the possible accession of the UK to the Lugano Convention will not make any difference, since the exemption provision of the Lugano Convention will in any case remain applicable****.*"

V CLASS ISSUES

86 The general principles relating to questions of class composition and the way in which they bear on this case have already been set out in paragraphs 101 to 119 of the Company's Main Skeleton Argument and are not repeated here.

87 However, given the points that had been made in the Fund's Main Skeleton Argument about class composition, the following additional points are made.

A. <u>MATERIAL DIFFERENCES DO NOT NECESSARILY FRACTURE THE CLASS</u>

88 The rights of those included in a single class can be subject to material differences, provided that they are not "*so dissimilar as to make it impossible for them to consult together with a view to their common interest*". This has been made clear in numerous cases.

89 For example, in *Re Telewest Communications plc*,[36] David Richards J said that:

> "*… a broad approach is taken and that the differences may be material, certainly more than de minimis, without leading to separate classes.*"

90 In *Re Metinvest BV*,[37] Proudman J said:

> "*If there is a material difference between the rights [of the creditors] they will constitute different classes if, and only if, such difference makes it impossible for different groups to consult together with a view to their common interest.*"

91 In *Re DX Holdings Ltd*,[38] Floyd J said:

> "*The test for whether a class of creditors forms a separate class depends on whether their rights are so dissimilar as to make it impossible for them to consult together with a view to their common interest: see Sovereign Life Assurance v Dodd [1892] 2 QB 573 at 583. Thus it is not every difference in the rights of the members of a class which would mandate the creation of a separate class. That there can be differences is acknowledged in the way the test is stated. <u>A</u> <u>difference is only sufficient to mandate the creation of a separate class if it is sufficiently great to</u> <u>make consultation with a view to their common interest impossible</u>. That is a value judgment which involves, amongst other things, the materiality of the difference in rights in comparison with the common rights under discussion.*" (emphasis added)

92 In *Re Lehman Brothers International (Europe)*,[39] Hildyard J said:

> "*… <u>a material difference in legal rights does not necessarily preclude their respective holders from</u> <u>being included in a single class</u>: for the second part of the test enables that provided that they are not "so dissimilar as to make it impossible for them to consult together with a view to their common interest". That, unusually and perhaps confusingly, introduces into a jurisdictional issue a subjective assessment, which may account for changing judicial perceptions over the years as to class constitution in the light of the developing and prevailing inclination of judges to recognise the dangers of giving a veto to a minority group …*" (emphasis added)

93 In *Re Castle Trust Direct plc*,[40] Trower J said:

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[36] [2004] BCC 342 at 354A [**AB/23/397/37**].

[37] [2016] EWHC 79 (Ch) at [17] [**AB/60/1096**].

[38] [2010] EWHC 1513 (Ch) at [5] [**AB/33/687**]

[39] [2019] Bus LR 1012 at [70] [**AB/79/1540-1**].

[40] [2020] EWHC 969 (Ch) at [16] [**AB/145/3027**].

"*The fourth principle is that the court has to consider, on the one hand, the rights of the creditors in the absence of the scheme and, on the other hand, any new rights to which the creditors become entitled under the scheme. If, having carried out that exercise, there is a material difference between the rights of the different groups of creditors, they may, but not necessarily will, constitute different classes. Whether they do so depends on a judgment as to whether such a difference makes it impossible for the different groups to consult together with a view to their common interest*." (emphasis added)

94 The first APCOA scheme provides a notable example of a material difference in rights which did not fracture the class.[41] In that case, the scheme was an 'amend and extend' of a first lien facility and a second lien facility. The second lien facility was contractually subordinated to the first lien facility, and the company was a party to the subordination agreement. Despite the fact that the first lien facility and the second lien facility had different rankings (and would thus receive different returns in a formal insolvency proceeding), Hildyard J held that they should be placed into the same class. He said (at [29]-[33]):

"*In this case, the classes proposed are as follows. As regards the APHG scheme it is proposed that the priority senior lenders and the second lien lenders should vote together in a single meeting. The justification for that is that their rights as against the company, which is the appropriate test, are not so dissimilar as to make it impossible for them to consult together with a view to their common interests. Put another way, the differences in their respective rights as against the company, whether as regards termination or as regards repayment or fees and margins payable in respect of the indebtedness, are not such that acting sensibly they cannot discuss together what is best for them in the circumstances which have arisen.*

In so far as the APHG scheme is concerned, the second justification advanced is that if the APHG scheme does become effective, the rights of the lenders in both, as it were, constituencies will be affected in materially the same way. The maturity date of the facilities will each be extended to the same date …

As has been stressed in the authorities, particularly recently, it is important in assessing the constitution of classes which is proposed to consider the comparator: that is, what would be the alternative if the scheme does not proceed: for that will necessarily inform, and in many if not most cases be the most important factor in, the discussions. The comparator in this case flows from the determination of the management that unless the termination date is extended there is a real likelihood, which I understand the management consider to be a high likelihood, that at least in the case of the holding company, some insolvency process in Germany, which has strict rules in that regard, would have to be implemented.

In short, given the comparator of liquidation and given the limited effect of the scheme and the similarities in the rights between the various constituencies, I consider at this stage, at any rate, that the classes proposed are appropriate. I will approve the class meetings accordingly."

B. IMPORTANCE OF AVOIDING CLASS PROLIFERATION

[41] *Re APCOA Parking (UK) Ltd* [2014] Bus LR 1358 [**AB/45/855-6**].

95 It is important to avoid the unnecessary proliferation of classes. This policy has been highlighted in a number of authorities:

95.1 In *Re Anglo American Insurance Co Ltd*,[42] Neuberger J stated that the Court must guard against being "*too picky about different classes*" and ending up "*with virtually as many classes as there are members of a particular group*".

95.2 In *Re Hawk Insurance Co Ltd*,[43] Chadwick LJ referred to the risk that "*by ordering separate meetings the court gives a veto to a minority group*". His Lordship said it was "*important*" that the test for class composition "*should not be applied in such a way that it becomes an instrument of oppression by a minority*".

95.3 In *Re UDL Holdings Ltd*,[44] Lord Millett (sitting as a Non- Permanent Judge of the Court of Final Appeal in Hong Kong) stated that "*the risk of empowering the majority to oppress the minority ... is not the only danger. It must be balanced against the opposite risk of enabling a small minority to thwart the wishes of the majority. Fragmenting creditors into different classes gives each class the power to veto the scheme and would deprive a beneficent procedure of much of its value*".

95.4 In *Re APCOA Parking Holdings GmbH (No. 2)*,[45] Hildyard J referred to "*the inclination of judges to prefer the more flexible tool of discretion and an overall appreciation of fairness tested by reference to the real alternatives rather than the straitjacket of jurisdiction, especially where rigidity may result in fragmentation of classes to avoid jurisdictional issues, but at the cost of enabling a small group to hold out unfairly against a majority*".

95.5 In *Re Hibu Group Ltd*,[46] Warren J stated: "*Importantly, classes should not be allowed to proliferate beyond what is necessary (to quote Hawk, lest by ordering separate meetings the court gives a veto to a minority group)*".

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[42] [2001] 1 BCLC 755 at 764d-e [**AB/16/279**].

[43] [2001] BCLC 480 at 310G-H, [33] [**AB/20/352**].

[44] [2002] 1 HKC 172, 184A-B [**AB/21/373**].

[45] [2015] Bus LR 374E at [54] [**AB/58/1032**].

[46] [2016] EWHC 1921 (Ch) at [50] [**AB/61/1109**].

95.6 The same policy is also highlighted in *Re Noble Group Ltd*[47] and *Re Lehman Brothers International (Europe)*.[48]

96 The practical impact of this policy is illustrated by the recent decision of Snowden J in *Re ColourOz Investment 2 LLC*.[49] In that case, Snowden J reached the conclusion that a consent fee under a lock-up agreement was sufficiently material to influence the way in which a recipient was likely to vote. He nevertheless decided that the class should not be fractured for the following reasons:

> "*However, I do not think that these uncertainties should lead me to sub-divide the classes, essentially for pragmatic reasons. If were to do so, I would have to create a separate class of those creditors who have not signed or acceded to the lock-up agreement (or possibly those who would not have done so prior to the scheme meetings). On the current figures, that would create a separate class of lenders under the first lien term facilities comprising a significant number of creditors (about 65) but who together would hold only 2.2% by value of the debt due under the first lien term facilities. Such a sub-division would, in effect, be creating a right of veto over the schemes for the holders of only 2.2% in value of the relevant Scheme claims. That cannot be a sensible approach bearing in mind the warnings in the authorities such as Hawk against creating just such a right of veto, and also bearing in mind the point made both by Chadwick LJ in* Hawk *and by David Richards J in* Seat Pagine *(above) that any concerns about the impact of the consent fee can always be raised at sanction as part of the court's exercise of discretion*."

C. <u>MORE TO UNITE THAN TO DIVIDE</u>

97 When deciding whether creditors with different rights should vote in a single class, the Court often asks if there is "*more to unite than to divide*" the relevant creditors. This phrase is particularly apposite in cases where there is a stark difference between the outcome in the comparator (which may be a very poor return in a liquidation) and the outcome under the scheme (which may be a much better return). In such cases, even if the creditors have different rights, they are still very much on the same side of the negotiating table, since they all face the catastrophic prospect of a liquidation if the scheme is not sanctioned.

98 The phrase "*more which unites than divides*" is ultimately derived from the decision of David Richards J in *Re Telewest Communications plc*.[50] In *Re APCOA Parking Holdings GmbH*,[51] Hildyard J said:

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[47] *Re Noble Group Ltd* [2019] BCC 349, 369, [86]-[88] [**AB/78/1483**].

[48] [2019] Bus LR 1012, at [70] per Hildyard J [**AB/79/1540-1**].

[49] [2020] BCC 926, [110] [**AB/88/1732**].

[50] [2004] BCC 342 at [40] [**AB/23/397**].

[51] [2015] Bus LR 374, 391H-392A at [52] [**AB/58/1031-2**].

"*The modern approach ... is to break the question into two parts, and ask first whether there is any difference between the creditors in point of strict legal right ... and if there is, to postulate, by reference to the alternative if the scheme were to fail, whether objectively there would be more to unite than divide the creditors in the proposed class, ignoring for that purpose any personal or extraneous motivation operating in the case of any particular creditor(s).*"

99 Hildyard J concluded that, in light of the very low returns that creditors would receive in a formal insolvency, there was more to unite than to divide them. He stated (at [114]- [117] **AB/58/1046**]):

"*I am satisfied that the strong likelihood is that the insolvency of the APCOA Group would result in far lesser overall recovery than if the group is saved by the reconstruction and re- financing which the Schemes are designed to enable …*

It seemed and seems to me that the advantage of avoiding insolvency and being able to share in a larger cake would sufficiently outweigh the wish to have a larger share than others in a much smaller cake. I do not consider that a creditor in the position of FMS, if acting rationally and reasonably and without any inadmissible collateral or extraneous interest, would prefer the prospect of doing proportionately better than the Consenting Lenders and especially the Existing SSFA Lenders amongst them, at the expense of doing considerably less well in terms of that creditor's overall recoveries.

Accordingly, whilst I accept that the risk of imminent insolvency is not to be used as a solvent for all class differences, in this case in my judgment it would have caused reasonable existing SFA creditors to unite in a common cause."

100 In *Re Codere Finance 2 (UK) Ltd*,[52] Falk J took a similar approach. In that case a series of benefits were conferred on an ad hoc committee of creditors which would enhance their returns by about 4.2% when compared with those of other creditors: see the judgment at [117] [**AB/93/1842**]. Falk J concluded that this did not fracture the class. One of the factors relied upon by Falk J was as follows (at [118]-[119], ibid):

"*I also take account of the very significant expected difference in outcome between the most likely alternative of a liquidation (which represents the rights to be released or varied under the Scheme) and the Scheme being implemented (which represents the new rights conferred by the arrangement) (Re Hawk at [30]). It is in that context that materiality should be judged. The comparison in this case is very stark.*

I have however borne in mind that the risk of insolvency cannot, as Hildyard J said in Re APCOA Parking Holdings GmbH [2015] Bus LR 374 at [117], "be used as a solvent for all class differences". Otherwise, creditors who might be assumed to be clearly in separate classes, for example with different priority rights on a liquidation, could still be treated as a single class if they will all be materially better off if a scheme proceeds, even if the levels of return available under the scheme (and therefore the degree of compromise) differ significantly. But in this case, when combined with my assessment of the evidence of the differences between the benefits available to AHC members and others, the alternative liquidation scenario does enable me to conclude that those differences are not so great that it is impossible for all holders of Existing Notes to consult together with a view to their common interest." (emphasis added)

[52] [2020] EWHC 2441 (Ch) [**AB/93**].

101 In *Re Noble Group Ltd*,[53] Snowden J adopted the same approach when assessing the materiality of a backstop fee. He compared the returns that the creditors would receive in a liquidation against their returns under the scheme, and concluded that the backstop fee did not fracture the class.

D. DIFFERENT INTEREST RATES

102 The different contractual interest rates are irrelevant to the "rights in".

103 The "rights out" are not the same, as the interest for each is maintained as it was before the Plan (and not adjusted to the same date). It is correct to say that it appears that in all previous reported cases, the interest rate has been maintained (and not merely retained).

104 However, even though there are differences of interest rates coming out of the Plan, they do not give rise to any the rights that are so dissimilar as to make it impossible to consult together.

104.1 The Plan proceeds on the basis that all will be paid in full, and that the Bondholders will have interest paid to them for the extra year before maturity.

104.2 Further and importantly, the differences in the likely overall recoveries of Senior Lenders and Bondholders are not material. On each CHF 1,000 of their loan, Bondholders would receive interest of CHF 150 over the proposed extended maturity period. By comparison, Senior Lenders would receive between CHF 93.5 and 206 on each CHF 1,000 of their loan if the interest were not capitalised and CHF 223.7 if it were. The comparison is set out in the following tables [**HB/G2284**]:

[53] [2019] BCC 349 (convening judgment), [153]-[154] [**AB/78/1494**].

Table 1: assumes interest is not capitalised

	Recoveries for Senior Lenders (per CHF 1000 of Senior Facilities)		Recoveries for Bondholders (per CHF 1000 of Bonds)
	Low	High	
Principal	1,000	1,000	1,000
Interest	93.5	206	150
Total	1,093.5	1,206	1,150

Table 2: assumes that the highest rate of interest is payable and that all interest is capitalised

	Recoveries for Senior Lenders (per CHF 1000 of Senior Facilities)	Recoveries for Bondholders (per CHF 1000 of Bonds)
	High	
Principal	1,000	1,000
Interest	223.7	150
Total	1,223.7	1,150

105 Further, the differential treatment under the Plan pales into insignificance when compared with the losses that the Plan Creditors would sustain in the comparator to the Plan. There is more to unite the Plan Creditors than to divide them on this issue.

E. DIFFERENT MATURITY DATES

106 The difference in maturity dates in relation to "rights in" are not relevant, in the light of the relevant alternative (namely insolvency).

107 The "rights out" are not the same, as the maturity date for each is extended by the same number of years (5 years) but not to the same date. It is correct to say (as did the Fund in its skeleton argument) that it appears that in all previous reported cases, the maturity date has been extended to the same date (and not merely by the same number of years).

108 However, even though there are differences of maturity date in the present case, they do not give rise to any the rights that are so dissimilar as to make it impossible to consult together. The overall returns to Senior Lenders and Bondholders are likely not to be materially different, as explained above.

109 The Fund had also objected to the different credit risk (the Fund's Main Skeleton Argument, para 223). However, in circumstances where there is a sound underlying business of the Group — what the Fund in its evidence calls "*strong underlying fundamentals despite the ongoing Covid crisis*" [**HB/G2214/9**] — there is no real "maturity bonus", and in any case, none that is sufficient to fracture the class.

110 Further, again the differential treatment under the Plan pales into insignificance when compared with the losses that the Plan Creditors would sustain in the comparator to the Plan. There is more to unite the Plan Creditors than to divide them on this issue.

F. REDEMPTION RIGHT UPON CHANGE OF CONTROL

111 The Fund had contended that the amendment to the Bonds insofar as it relates to the change of control rights is relevant to questions of class (the Fund's Main Skeleton Argument, paras 230-233).

112 The change of control issue arises as follows.

112.1 When the New Monies are inserted, they will carry with them a right to convert the debt further into additional shares any time after 3 April 2026. As Temasek, one of the Shareholders is providing a greater proportion of the New Money than RRJ, the other Shareholder (CHF 337.5m and CHF 137.5 m, respectively [**HB/G3301**]), after 3 April 2026 Temasek will have a right to gain control of more than 50% of the Group.

112.2 As the Bonds will not mature until 28 February 2027 if the Plan is implemented, it is necessary for a waiver of the change of control provision in the Bonds (which gives Bondholders a right to redeem their Bonds at par when any entity gains control of more than 50% of the Group) to be provided in advance, so that the purpose and effect of the Transaction is not defeated if and when the existing Shareholder acquires control of more than 50% of the Group. The proposed waiver of the change of control right is a very narrow waiver and is limited to that Shareholder acquiring more than 50% of the Group, and does not apply to any third party acquiring control. [**HB/G2296-7**]

112.3 The change of control provision in the SFA currently already allows for the existing Shareholders to acquire more than 50% of the Group and so there is no need to amend those rights.

113 In relation to rights in, there was a change of control right in the Bonds, but not in the SFA in respect of the existing Shareholders. In the relevant comparator, insolvency, there would be no change of control rights. As a result, there is no relevant class issue in relation to change of control.

114 There is no difference in rights out, as all creditors have the same rights out (i.e. no change of control).

115 In any event, the need for the change of control rights to be removed from the Bondholders is only because it is necessary for the benefit of all, to get in the New Money and to do this deal that is in the interests of all. There is therefore more to unite than to divide the Bondholders and the Lenders on this, and it is not an issue that fractures the class.

G. THE INTERIM FACILITY

116 Similarly, the Lenders are subordinated to the Interim Facility, and the Bondholders are not (Fund's Skeleton Argument, paras 234-238). That is because they are creditors against different entities. The Lenders are creditors of the LuxCo (and the Parent), and the Bondholders are creditors of the Issuer (and the Parent).

117 There is therefore a difference in "rights in" but no difference in "rights out".

118 The Interim Facility will be paid in full as part of the deal. Again, this is the price to be paid for the interests of all [**HB/G2296/30**]. There is more to unite than to divide, in circumstances where the alternative is insolvency. In particular, the Alix Relevant Alternative figures take into account the subordination of the SFA to the Interim Facility and still show the SFA recovering more than the Bonds [**HB/G2641**], so the effect of the SFA subordination is not significant.

H. DIFFERENT GUARANTEE PACKAGES

119 The SFA and the Bonds benefit from different guarantee packages.

120 The relevant "rights in" are the rights against the Company (the Fund's Main Skeleton Argument, para 243).

121 The relevant rights out do not provide for any variation of creditors' rights against third parties. No releases of the guarantees are being proposed (the Fund's Main Skeleton Argument, para 245) and no new rights are being conferred under the Transaction (the Fund's Main Skeleton Argument, para 247). There is nothing new, therefore, that is in the "rights out".

I. DIFFERENT INFORMATION RIGHTS

122 There is no class issue arising from the different information rights given to the Senior Lenders and the Bondholders:

122.1 That this is an issue for sanction and not class is clear from the quotation from *Sunbird* in paragraph 252 of the Fund's Main Skeleton Argument.

122.2 In addition, the different rights come from the Swiss listing rules, as compared to the private arrangement with the lenders under the SFA.

123 In any event, in circumstances where the essential information has been made clear to all Plan Creditors, there is more to unite than to divide the creditors, particularly where the alternative to the Plan is insolvency.

J. MATERIALITY ANALYSIS

124 In any event, in deciding whether any of the class issues fracture the class, the Court must look at the cumulative effect of the various differences in rights. In the present case, for the reasons set out above, there is more to unite than to divide the class.

125 In particular, where the only restructuring available to the creditors is the Transaction, and where the alternative to the Transaction is the poor return in insolvency, the opportunity for all creditors to be paid 100% of their claims in the Transaction, of which the Plan is an essential part, suggests that there is more to unite than to divide the Senior Lenders and the Bondholders.

K. INCLUSION OF SENIOR LENDERS IN THE SAME CLASS

126 Although only mentioned in passing, the Fund had sought to suggest that if it achieves a two class meeting, the Company would not be able to seek cross-class cram down because, the Fund had submitted (the Fund's Main Skeleton Argument, paras 258-261), a fully locked up class — in this case, the Senior Lenders — cannot cram down another class. As to this:

126.1 Such a contention would be a matter for sanction, and not the convening hearing.

126.2 Such a contention would only be relevant if there were two classes convened, which the Company submits is not the correct result.

126.3 In any event, any such contention has been overtaken by Mr Justice Trower's sanction judgment in *DeepOcean*. Four class meetings had been called in that case. The first class, consisting of finance creditors, was fully locked up from the beginning.[54] The second class, whose sole member was a landlord creditor,[55] and the third class, which included owners of vessels under the plan companies' use,[56] reached agreements with the plan companies shortly before the plan meetings.[57] Nevertheless, Trower J held that the cramdown power was in play[58] and exercised his discretion to cram down the fourth class,[59] consisting of all other

[54] *Re DeepOcean 1 UK Ltd* [2020] EWHC 3549 (Ch) [**AB/102/1953-4/7**].

[55] [**AB/102/1954/9**].

[56] [**AB/102/1954/10**].

[57] *Re DeepOcean 1 UK Ltd* [2021] EWHC 138 (Ch) [**AB/108/2249-50/11-15**].

[58] [**AB/108/2254-57/27-42**].

[59] [**AB/108/2262/69**].

(non-excluded) creditors of the plan companies, even though that class had not been locked up and the finance creditors had been fully locked up.[60]

VI <u>CONCLUSION</u>

127 In these circumstances, it is appropriate for a single meeting of the Plan Creditors to be convened in order to enable them to vote on the Plan. The Court is asked to make an order in the terms of the draft convening order, an updated version of which is attached to this skeleton argument.

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[60] [**AB/102/1954/11**].

ANNEX

A. THE INSTRUMENTS

i. UNCITRAL Legislative Guide on Insolvency Law

128 The first instrument is the Legislative Guide on Insolvency ('**the Legislative Guide**'),[61] promulgated by the United Nations Commission on International Trade Law ('**UNCITRAL**'). The purpose of the Legislative Guide

> "*is 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.*"[62]

129 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.*"[63]

130 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.[64] Assessment of proceedings by reference to the Legislative Guide is therefore appropriate in order to determine

[61] 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.

[62] The Legislative Guide, p. 1, para 1 (emphasis added) [**AB/141/2913**].

[63] 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/ . [**AB/129/2664**; and **2666**]

[64] 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 .

[**AB/131/2679**; and **2680**]

whether proceedings fall within the bankruptcy exclusion for the purposes of Article 1(2)(a) of the Lugano Convention.

131 Further, assessment of the RP proceeding by reference to the Legislative Guide is particularly apt given that it appears to have guided (at least in part) the consultation process which resulted in the creation of the RP proceeding as well as the design of the proceedings:

131.1 The Legislative Guide was referred to when the Government first consulted in 2016 on the proposals which were eventually enacted in Part 26A of the Act.[65] The Government stated that it

> "*[sought] views on whether the UK's [corporate insolvency] regime needs updating in the light of international principles developed by the World Bank and [UNCITRAL]…It seems 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*".

131.2 In 2018, responding to the consultation exercise in 2016 and another earlier in 2018, the Government stated that the RP proceeding was designed in light of guidance provided by the Legislative Guide.[66] The Government noted that

> "*Recent changes in the insolvency regimes in a number of different countries show a general convergence in the principle [sic] features of restructuring and rescue frameworks of sophisticated market economies…This is reflected in…texts such as the UNCITRAL Legislative Guide on Insolvency Law, which give recommendations on the core provisions for an effective and efficient insolvency law. By way of illustration, the…Legislative Guide…sets out provisions relating to a stay of enforcement action, treatment of contracts,* ***a reorganisation plan*** *and finance in its examination of core features of effectives frameworks,* ***provisions which share much in common with the Government's proposals which were developed with these in mind*** *and tailored to ensure the right fit for business in Great Britain.*"[67]

132 The Legislative Guide defines "*insolvency proceedings*" as "*collective proceedings, subject to court supervision, either for reorganisation or liquidation*".[68] It explains that "*Most legal systems contain rules on various types of*

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[65] The Insolvency Service, *A Review of the Corporate Insolvency Framework — A consultation on options for reform* (May 2016), at p. 4 (footnotes omitted) [**AB/140/2870**].

[66] Department for Business, Energy, & Industrial Strategy, *Insolvency and Corporate Governance — Government Response* (26 August 2018) [**AB/128**].

[67] At pp. 41-2, para 5.3 [**AB/128/2624-5**].

[68] Legislative Guide, p. 5, para 12(u) [**AB/141/2916**].

proceeding (which are referred to in this Legislative Guide *by the generic term '*insolvency proceedings*') that can be initiated to resolve a debtor's* ***financial difficulties****.*"[69]

ii. UNCITRAL Model Law

133 Article 2(a) of the UNCITRAL Model Law on Cross-Border Insolvency [**AB/142/2983**], incorporated in English law through the Cross-Border Insolvency Regulations 2006, identifies a "*foreign proceeding*"[70] as characterised by the following relevant elements:

133.1 a collective judicial or administrative proceeding;

133.2 pursuant to a law relating to insolvency;

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

133.4 for the purposes of reorganisation or liquidation.

134 This definition benefits from elucidation by UNCITRAL in the revised *Guide to Enactment and Interpretation* ('**the Model Law Guide**'), published in 2014.[71] The Guide states that the Model Law definition is designed "*to avoid inadvertently narrowing the range of possible…proceedings that might*

[69] Legislative Guide, p. 9, para 2 (emphasis added) [**AB/141/2918**]. 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 discussed below.

[70] The reference to "*foreign*" in this definition, which is ignored 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.

[71] 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) [**AB/80/1584**]. This includes the revised Guide; *Carter v Bailey* [2020] EWHC 123 (Ch), [110] (Chief ICC Judge Briggs) [**AB/84/1678**].

obtain recognition" and "*is intended…to refer broadly to proceedings involving debtors that are in severe financial distress or insolvent*".[72]

iii. Cape Town Convention

135 The Convention on International Interests in Mobile Equipment (the Cape Town Convention or '**the CTC**') as applied to "*aircraft objects*" by the relevant Protocol to the Convention ('**the Protocol**'), is incorporated in English law through the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015.[73] Pursuant to the CTC, duly registered international interests remain effective in "*insolvency proceedings against the debtor*".[74] By virtue of the optional "*Alternative A*" of Article XI of the Protocol [**AB/120/2401-2**], 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.

136 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:[75]

136.1 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.

136.2 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.

[72] The Model Law Guide, pp 38-9, para 65 [**AB/142/2987-8**].

[73] [**AB/120**].

[74] Article 30 of the CTC [**AB/110/2274**].

[75] Official Commentary, para 3.118 [**AB/124/2465-6**].

136.3 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. It should not be read as if it were statutory text, nor as excluding 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 <u>or</u> supervision <u>by the court</u>, <u>of the appropriate nature and level</u>, of the debtor's assets and affairs.

136.4 For the purpose of reorganisation or liquidation: 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 Part 26A, as explained below.

iv. The EU Insolvency Regulation

137 The EU Regulation expressly provides that the proceedings it covers include (amongst other things) "*judicial arrangements, compositions and analogous proceedings*".[76] The Regulation therefore provides useful guidance on the types of proceedings that fall within this formula. While the Regulation also states that only those proceedings which are listed in its Annex A fall within its ambit, this has no probative value in relation to the RP proceeding for the reasons explained at para 131 of the Company's Main Skeleton Argument.

138 The EU Regulation applies to proceedings meeting each of the following four requirements:[77]

138.1 they are public collective proceedings,

138.2 based on laws relating to insolvency,

[76] Recital 7 [**AB/118/2368**].

[77] Article 1(1) [**AB/118/2369**].

138.3 in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation,

138.4 any of three things occurs:

138.4.1 a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed; or,

138.4.2 the assets and affairs of a debtor are subject to control or supervision by a court; or,

138.4.3 a temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted provide for suitable measures to protect the general body of creditors.

139 Where a proceeding meeting these criteria may be commenced in situations where there is only a likelihood of insolvency, they fall within the ambit of the EU Regulation only if their purpose is to avoid the debtor's insolvency or the cessation of its business activities.[78]

B. <u>INSOLVENCY PROCEEDINGS *FOR THE PURPOSES OF* THE BANKRUPTCY EXCLUSION</u>

140 Four common elements emerge from this overview of the definition of insolvency proceedings in the four international instruments: the proceedings must be (relevantly):

140.1 for the purpose of reorganisation,

140.2 conducted under a law related to insolvency,

140.3 collective, and

[78] Article 1(1) [**AB/118/2369**].

140.4 subject to court supervision or control.

141 The following four sub-sections of this skeleton argument consider each of these four elements in turn, in the context of each of these four international instruments, in order to show that each is present in the RP proceeding.

142 However, the following analysis subject to two crucial provisos:

142.1 First, this four-step analysis of the elements of the definition of "*insolvency proceedings*" should not obscure the fact that the definition is a single and unitary one. While each element adds something distinctive to the definition, each also partly takes its meaning from, and must be understood in light of, other elements of the definition. This is clear from both the Legislative Guide and the CTC and the Official Commentary:

142.1.1 The Legislative Guide's definition of "*insolvency proceedings*" as "*collective proceedings, subject to court supervision, either for reorganisation or liquidation*" is plainly a single definition in which each of the specified elements takes its meaning from its context, and therefore from each other specified element. In particular, since reorganisation proceedings are one of the two types of court-supervised collective insolvency proceedings considered in the Guide,[79] its treatment of reorganisation proceedings guides how the elements of "*collectivity*" and "*court supervision*" should be understood.

142.1.2 The same holds in relation to the CTC. For example, the Official Commentary. explains the exclusion of arbitral proceedings from the ambit of the "*judicial and administrative proceedings*" element on the basis that arbitral proceedings "*do not constitute collective proceedings*".[80]

[79] 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 [**AB/141/2913**].

[80] Official Commentary, para 3.118(2) [**AB/124/2465**].

142.2 Secondly and in any event, the Court's concern in the present case is with the phrase "*judicial arrangements, compositions and analogous proceedings*", which forms the relevant part of the bankruptcy exclusion to the Lugano Convention. This phrase does not specify that such proceedings also have to be collective. Moreover, while the bankruptcy exclusion does require the proceedings to be judicial ones,[81] it does not specify the nature or level of judicial supervision. Of particular importance here is the point, made below, that there is no express requirement that there be judicial supervision of the <u>debtor's assets or affairs</u>, as opposed to judicial conduct of <u>the proceedings</u>.

C. <u>FOR THE PURPOSE OF REORGANISATION</u>

143 Starting with the Legislative Guide:

143.1 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*".[82]

143.2 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 further below), these elements include whether there would be a mandatory stay of creditor enforcement action — although 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, "*<u>Possibly</u>, the judicial approval or confirmation of an accepted plan*", and implementation of the plan.[83]

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[81] As is clear from its reference to "*<u>judicial</u> arrangements…*"; the point is further explained in the Company's Original Skeleton Argument, para 132.2 and fn. 78.

[82] Legislative Guide, p. 7, paras 12(kk) and (ll) [**AB/141/2917**].

[83] Legislative Guide, pp. 28-29, para 28 (emphasis added) [**AB/141/2925-6**].

143.3 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*".[84]

143.4 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 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*."[85]

143.5 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*."[86]

143.6 Similarly, reorganisation proceedings may permit approval of a plan on the basis of different levels of class support:

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[84] Legislative Guide, p. 162, para 4 [**AB/141/2935**]. 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 [**AB/141/2936-7**]; page 166, para 17 [**AB/141/2939**]; page 168, para 23 [**AB/141/2940**]; page 173, Recommendation 112 [**AB/141/2941**]; pages 199-200, para 108 [**AB/141/2955-6**]; page 232, para 72 [**AB/141/2960**]; page 237, Recommendation 157 [**AB/141/2963**].

[85] Legislative Guide, pp. 224-5, para 51 [**AB/141/2958-9**].

[86] Legislative Guide, p. 235, Recommendation 147 [**AB/141/2961**].

"*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.*"[87]

143.7 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.*"[88]

143.8 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.*"[89] 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…)*".[90] 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.*"[91] Amongst the characteristics of such an expedited proceeding are the following:

143.8.1 The proceedings may be commenced on the basis of actual or likely insolvency.[92]

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[87] Legislative Guide, p. 236, Recommendation 150 [**AB/141/2962**].

[88] Legislative Guide, p. 215, para 18 [**AB/141/2957**].

[89] Legislative Guide, p. 238, para 76 [**AB/141/2964**].

[90] Legislative Guide, p. 25, para 16 [**AB/141/2924**].

[91] Legislative Guide, pp. 29-30, para 31 [**AB/141/2926-7**].

[92] Legislative Guide, pp. 244-5, Recommendations 160(a) and 161(a) [**AB/141/2965**, **2966**].

143.8.2 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.[93]

143.8.3 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 restructuring, but not involving all categories of creditor*".[94] 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*".[95]

143.8.4 Mutatis mutandis the effect of the plan if approved.[96]

144 As to the Model Law, the "*for the purpose of reorganization*" element of the definition 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.[97]

145 Turning to the CTC, the CTC 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*".[98]

146 Finally as to the EU Regulation:

[93] Legislative Guide, p. 245, Recommendation 163 [**AB/141/2966**].

[94] Legislative Guide, p. 244, "*Purpose*" provision, para a [**AB/141/2965**].

[95] Legislative Guide, p. 246, Recommendation 164(b) [**AB/141/2967**].

[96] Legislative Guide, p. 247, Recommendation 167 [**AB/141/2968**].

[97] The Model Law Guide, p. 42, paras 77-8 [**AB/142/2991**].

[98] Official Commentary, para 4.21 (3) [**AB/124/2468-9**].

146.1 The relevant requirement is met if the purpose of the proceedings is to rescue or reorganise a debtor or to adjust its debt.[99]

146.2 Recital 10 [**AB/118/2373**] provides that "*The scope of this Regulation should extend to proceedings which promote the rescue of economically viable but distressed businesses... It should, in particular, extend to proceedings which provide for restructuring of a debtor at a stage where there is only a likelihood of insolvency*".

146.3 There are numerous references to proceedings in which a "*restructuring plan*" is proposed and approved, as is clear from Recitals 44 and 45 [**AB/118/2377**]. Article 47 governs the power of the insolvency practitioner to propose a restructuring plan, composition, or comparable measure [**AB/118/2383**].

147 The RP meets this requirement:

147.1 An RP may only be proposed in relation to a debtor company if two threshold conditions are met.[100] 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*".

147.2 The particular concept of "*financial difficulties*" enshrined in Condition A — to which Condition B refers — 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.

147.3 First, 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

[99] Article 1(1) [**AB/118/2369**].

[100] Sections 901A(2) and (3) of the 2006 Act [**AB/113/2286**].

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.

147.4 Secondly, the RP also meets the Model Law's requirement in relation to "*the purpose of reorganisation or liquidation*" element:

147.4.1 The RP is not a purely contractual mechanism, and it is not designed to prevent asset dissipation nor merely to prevent detriment to investors rather than to all (relevant) creditors.

147.5 Thirdly, the RP meets the CTC's requirement in relation to "*the purpose of reorganisation or liquidation*" element as explained in the Official Commentary:

147.5.1 The RP may not be used for the reorganisation or dissolution of a fully solvent company but may only be used in relation to a company which is in "*financial difficulties*" in the sense explained at paras 49 to 63 and the Annex to the Company's Main Skeleton Argument. For this reason (and as the CTC 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.

147.5.2 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:[101]

147.5.2.1 Since the financial difficulties referred to in Condition A are the debtor's actual or likely insolvency such that the debtor's ability to

[101] R. Mokal, 'The Difficulties with 'Financial Difficulties': The Threshold Conditions for the New Part 26A Process' (2020) 35(10) *Journal of International Banking & Financial Law* 662, 663-664 [**AB/137/2853-4**].

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 CTC 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.

147.5.2.2 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 CTC 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.

147.6 Fourth, the RP meets the relevant element of the EU Regulation definition:

147.6.1 The purpose of the RP proceeding is to rescue the debtor by facilitating its reorganisation, particularly through the adjustment of its debts.

147.6.2 It is available in relation to debtors which are insolvent or likely to become insolvent, in either case so as to affect their ability to carry on business as a going concern.

147.6.3 It is based on the proposal of a restructuring plan by the company's liquidator or administrator (amongst others).[102]

148 For these reasons, this first element of the definition is plainly present in the RP proceeding.

[102] Article 901C(2)(c) and (d) [**AB/113/2288**].

149 By way of comparison, while a Part 26 scheme may also address a company's insolvency, distress, or financial difficulties, the existence of such insolvency, distress, or financial difficulties is not a precondition to the scheme's use. For that reason, it is difficult to characterise the scheme process <u>in and of itself</u> as an insolvency proceeding (though there is a respectable basis for considering a scheme in relation to an <u>insolvent</u> company to be an insolvency proceeding).[103]

D. LAW RELATING TO INSOLVENCY

150 This requirement is again not expressly provided for in Article 1(2)(b) but is likely implicit in relation to all proceedings which fall within the bankruptcy exclusion. Each of the relevant international instruments is dealt with in turn below.

151 The Legislative Guide adopts the phrase "*the law relating to insolvency*" in addressing the regulation of directors' duties in the period where the directors remain at the helm even though the solvency of the company is in doubt.

151.1 It states:[104]

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[103] The position of Part 26 schemes is comparable to that explained in the Schlosser Report in relation to the winding up of companies pursuant to section 222 of the (UK) Companies Act 1948. Noting that the company being wound up might be solvent (as under section 222(a)) or insolvent (as under section 222(e)), Schlosser commented (at No C 59/91, para 57, RHS, final para) [**AB/139/2866**]:

"There is no alternative therefore to ascertaining the determining factor in the dissolution in each particular case. The English version of Article 1, second paragraph, point (2), of the 1968 [Brussels] Convention has been worded accordingly. It was not, however, necessary to alter the text of the Convention in the other languages. If a winding-up in the United Kingdom or Ireland 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 1968 Convention apply."

By parity of reasoning and now that the UK is no longer party to the EU Regulation — whose applicability was determined by reference not primarily to the nature of a proceeding but to whether it was scheduled in Annex A — it would be open to the English courts to determine whether a <u>particular</u> Part 26 scheme constitutes a "*civil and commercial matter*" or instead falls in the bankruptcy exclusion by considering whether the company in question was or was likely to become insolvent. *In re Rodenstock GmbH* [2011] Bus LR 1245, [51] [**AB/35/710**], leaves the door open to just such an outcome.

By contrast, since the RP is by its nature an insolvency proceeding, this point in the Schlosser Report does not apply: the Court cannot decide case by case whether the proceeding is an insolvency one.

[104] Part IV, p. 7, para 11 [**AB/141/2971**].

"*Director obligations and liabilities are specified in different laws in different States, including company law, civil law, criminal law and insolvency law and in some instances, they may be included in more than one of those laws or be split between those laws. In common law systems, the obligations may apply by virtue of common law, as well as pursuant to relevant legislation. Moreover, different views exist as to whether the obligations and liabilities of directors are properly the subject of insolvency law or company law. These views revolve around the status of the company as either solvent, which is typically covered by laws such as company law, or subject to insolvency proceedings, which is addressed by insolvency law (although there are examples where no such clear distinction can be drawn).*"

151.2 The Guide then explains in a footnote: "*Recognizing this issue, the recommendations in this part adopt the flexible approach of referring to '***the law relating to insolvency***'.*"[105]

151.3 It then continues:

"*A period before the commencement of insolvency proceedings, when a debtor may be factually insolvent, raises concerns that currently may not be adequately addressed by either company law or insolvency law. However, the imposition of obligations enforceable retroactively after commencement of insolvency proceedings may lead to an overlap between the obligations applicable under different laws and it is desirable that, in order to ensure transparency and clarity and avoid potential conflicts, they be reconciled.*"

151.4 Explaining its focus, the Guide states:[106] "*This part [Part IV of the Guide] does not deal with the obligations of directors that may apply under criminal law, company law or tort law, focussing only on those obligations that may be included in* ***the law relating to insolvency*** *and become enforceable once insolvency proceedings commence.*"

152 The most useful discussion of this criterion in provided by the Model Law Guide:

152.1 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*".[107] The focus is firmly on whether the proceeding in question is capable of addressing insolvent entities.

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[105] Part IV, p. 7, para 11, fn. 7 [**AB/141/2971**].

[106] Part IV, p. 8, para 15 [**AB/141/2972**].

[107] The Model Law Guide, p. 41, para 73 [**AB/142/2990**].

152.2 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*".[108]

152.3 The Legislative Guide proceeds to make recommendations for the creation of a liability mirroring that for wrongful trading arising under section 214 of the 1986 Act. Each such recommendation is addressed to the "*the law relating to insolvency*".[109]

153 The EU Regulation provides a similar understanding of this element:

153.1 The Regulation only applies to proceedings designed exclusively for insolvency situations, even if such proceedings are conducted under general company law. According to Recital 16 [**AB/118/2373**], "*This Regulation should apply to proceedings which are based on laws relating to insolvency. However, 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.*"

153.2 Importantly, however, "*insolvency situations*" include not only current financial difficulties but also those anticipated as threatening the debtor's liquidity or ability to continue as a going concern several months or even longer in the future. Recital 17 states [**AB/118/2374**]:

> "*This Regulation's scope should extend to proceedings which are triggered by situations in which the debtor faces non-financial difficulties, provided that such difficulties give rise to a real and serious threat to the debtor's actual or future ability to pay its debts as they fall due. The time frame relevant for the determination of such threat may extend to a period of several months or even longer in order to account for cases in which the debtor is faced with non-financial difficulties threatening the status of its business as a going concern and, in the medium term, its liquidity. This may be the case, for example, where the debtor has lost a contract which is of key importance to it.*"

[108] The Model Law Guide, pp. 32-3, para 48 [**AB/142/2985-6**].

[109] Part IV, at p. 13 Recommendation 225 [**AB/141/2973**], p. 16 Recommendation 257 [**AB/141/2974**], p. 18 Recommendation 258 [**AB/141/2975**], p. 24 Recommendations 259-60 [**AB/141/2976**], p. 25 Recommendation 261 [**AB/141/2977**], and pp. 28-9 Recommendations 262-6 [**AB/141/2978-9**].

154 RP proceedings are therefore conducted under a "*law relating to insolvency*":

154.1 They meet the Legislative Guide's criteria by being available only to companies in "*financial difficulties*" in the sense required by Condition A. For the reasons explained in paras 49 to 63 and the Annex to the Company's Main Skeleton Argument (particularly paras 147.6, 148, and 151), this is exactly the period in which the company's directors are subject to the creditors' interests duty, and therefore subject to "*the law relating to insolvency*".

154.2 Also because of Condition A, the RP proceeding meets the Model Law's requirement, since it deals with or addresses a company in insolvency or severe financial distress even though found in a statute labelled the Companies Act.

154.3 Again for the same reason, the EU Regulation's requirement is met: the RP process is designed exclusively for companies in "*financial difficulties*" in the Condition A sense, can address actual or future inability to pay debts, and pursuant to Condition B, can only be used to propose plans whose objective is to alleviate those financial difficulties or their effect.

154.4 The mere fact that the RP is contained in the Companies Act and not the Insolvency Act has no bearing on the correct answer to this question, as the Model Law Guide makes clear.

E. COLLECTIVE PROCEEDING

155 There is no express requirement of collectivity in Article 1(2)(b) of the Lugano Convention. Therefore, collectivity is relevant only if and to the extent that "*judicial arrangements, compositions and analogous proceedings*" must by nature be collective proceedings in order to fall within the bankruptcy exclusion.

156 Further, since Article 1(2)(b) does not mention collectivity, it does not specify any sense in which proceedings must be collective. Amongst other things:

156.1 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.

156.2 Nor is it clear whether the relevant collectivity relates to the treatment of the debtor's share capital.

156.3 Similarly, it is unclear whether there must be collectivity in relation to 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.

156.4 Relatedly, it is not clear whether collectivity relates to 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. Similarly, an English CVA, also a collective proceeding, may operate without a moratorium.

156.5 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[110]).

[110] Para 3(4) of Schedule B1 to the 1986 Act [**AB/121/2414**].

157 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, Article 1(2)(b) of Lugano does not expressly mention, and therefore does not throw any light on, the nature of the collectivity, if any, which is relevant to it. The Court should bear this in mind when considering the remainder of this discussion. In other words, it may well be the case that collectivity is not relevant, or only marginally relevant.

158 The Legislative Guide characterises "*collective proceedings*" in the following terms:

158.1 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:[111]

> "*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.*"

158.2 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:[112]

> "*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.*

[111] Legislative Guide, p. 11, para 7 [**AB/143/2992-3**]. To similar effect, see p. 136, para 151 [**AB/141/2934**].

[112] Legislative Guide, p. 31, paras 35-36 [**AB/141/2928**]. To similar effect, see p. 46, para 23 [**AB/141/2931**].

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."

158.3 Collective proceedings deter individualistic creditor action — the race to enforce — which would be harmful to the interests of creditors as a whole:[113]

"*With regard to creditors, one of 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*."

158.4 As these excerpts from the Legislative Guide make clear, 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 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.[114] A proceeding is collective, then, to the extent that it provides an alternative to individualistic claim enforcement.

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[113] Legislative Guide, p. 83, para 26 [**AB/141/2932**].

[114] 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 [**AB/136/2846-51**].

159 Turning to the Model Law:

159.1 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 not if they are "*merely…a collection device for a particular creditor or group of creditors*".[115] The Court will 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.

159.2 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*".[116] 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.

159.3 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.*"[117] The reference to "*a class*" in this sentence should be read as illustrating the possibility referred to above, 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.[118] There

[115] The Model Law Guide, p. 39, para 69 [**AB/142/2988**].

[116] The Model Law Guide, p. 40, para 70 [**AB/142/2989**].

[117] The Model Law Guide, p. 40, para 70 [**AB/142/2989**].

[118] The Model Law Guide, p. 40, para 70 [**AB/142/2989**].

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.

159.4 Voluntary proceedings are included, as are those "*in which the debtor retains some measure of control over its assets, albeit under court supervision*".[119]

159.5 Qualifying collective proceedings "*may be commenced under specific circumstances defined by law that do not necessarily mean the debtor is in fact insolvent.*"[120]

160 As for the CTC:

160.1 The Official Commentary provides that proceedings are collective if they are "*for the benefit of creditors generally*" (para 3.118 [**AB/124/2465-6**]), and that proceedings for the benefit of a particular secured creditor, such as receivership, are excluded. No further elucidation is given. For that reason and as submitted above, a proceeding which met the requirements of the other elements of the CTC definition would likely 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 would be inconsistent with the CTC's text and antithetical to its purposes.

160.2 This understanding of collectivity overlaps but is not coterminous with the Official Commentary's explanation of this element.

160.2.1 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 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*",

[119] The Model Law Guide, p. 40, para 71 [**AB/142/2989**].

[120] The Model Law Guide, p. 40, para 72 [**AB/142/2989**].

since, by hypothesis, creditors generally would then have the benefit of a solvent debtor or would enjoy an improved position in a subsequent liquidation.

160.2.2 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.

160.2.3 To rule out a proceeding intended to enable the reorganisation of <u>only</u> 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 — is unsupported by text, purpose, and policy.

160.2.4 Nor can it sensibly be a requirement of collectivity that <u>every single creditor</u> 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 is no justification for excluding a proceeding which enabled the debtor to reorganise <u>such of its liabilities as, but no more than, was required to restore the debtor to solvency</u> or improve the position of <u>relevant</u> creditor classes in a subsequent liquidation.

160.2.5 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 can operate in the interests of a 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.

161 Turning finally to the requirement of collectivity in the EU Regulation:

161.1 Recital 12 [**AB/118/2373**] 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.

161.2 "*Collective proceedings*" is defined by Article 2(1) [**AB/118/2378**] 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*". Recital 14 [**AB/118/2373**] 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. Also covered are proceedings which do not affect all creditors but whose purpose is to rescue the debtor.

161.3 In understanding what constitutes "*a significant part*" of creditors and a "*substantial proportion*" of the debt, the points made above in relation to the CTC apply. The only non-arbitrary interpretation of these requirements is that the proceeding should be able to address whatever proportion of the debts and creditors that must be addressed in order to rescue the debtor.

162 If and to the extent that collectivity is a requirement for a proceeding to fall within the bankruptcy exclusion to the Lugano Convention, the RP process is a collective proceeding:

162.1 Firstly, the RP is clearly a collective proceeding in the sense explained above: 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 above. The objective of the proceeding is either:

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

162.1.2 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.

162.2 In either case, creditors as a group benefit, though, as submitted, 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. 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.

162.3 Second and following from the previous two points, 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 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 to collectivity, the RP proceeding is capable of being combined with a moratorium so as further to bolster its collective nature.

162.4 Third, the RP also meets the requirements of collectivity set out in the Model Law Guide:

162.4.1 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.

162.4.2 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 argued, multiple — classes may be left unaffected by the RP proceeding does not detract from the proceeding's collective nature.

162.5 Fourth, the RP meets the CTC requirement of collectivity since they facilitate the implementation of a compromise or arrangement with the aim of alleviating the debtor's financial difficulties to enable it to carry on its business as a going concern, or else to mitigate the effect of those difficulties. In either case, they operate to the benefit of creditors generally at least in the sense that all creditors with an economic stake in the debtor benefit.

162.6 Fifth 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).

162.7 Sixth, the RP proceedings are collective in the sense specified in the EU Regulation: they can address whatever proportion of the debtor's debts and creditors must be addressed in order to rescue the debtor.

162.8 Seventh, while an RP does not need to apply to all of a company's creditors in order to be a collective proceeding, the position is a fortiori when the RP does apply to all a company's creditors. This is the case with the Plan, which applies to all of the Company's creditors.

F. COURT'S CONTROL OR SUPERVISION

163 While a proceeding must be a judicial proceeding in order to fall within the bankruptcy exclusion to the Lugano Convention, the Convention provides no guidance on the timing, extent, or nature of judicial involvement in or oversight of the proceedings.

164 Accordingly, the following discussion is intended to assist the Court in assessing the permissible ways in which a proceeding may be a judicial proceeding for the purposes of the bankruptcy exclusion.

165 The Legislative Guide describes court supervision as follows:

165.1 The 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*".[121] In explaining its references to the "*court*", the Legislative Guide further states [**AB/141/2914**] 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.[122]

165.2 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.*"[123] 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.*"[124]

165.3 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*

[121] Legislative Guide, p. 3, para 8 [**AB/141/2914**]. See to identical effect at p. 4, para 12(i) [**AB/141/2915**].

[122] Legislative Guide, p. 3, para 7 [**AB/141/2914**].

[123] Legislative Guide, p. 5, para 12(l) (emphasis added) [**AB/141/2916**].

[124] Legislative Guide, pp. 165-6, para 16 [**AB/141/2938-9**].

functions listed above will be performed by the debtor, with varying degrees of supervision by the court or by creditors."[125]

165.4 Parts I, II, and IV of the Legislative Guide do not 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*",[126] 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.*"[127] As is clear from this context, control over the debtor's assets <u>and</u> affairs in insolvency proceedings is not a matter for courts alone but may also involve the insolvency representative or, as the case may be, the debtor in possession.

165.5 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 <u>and</u> 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 (as described below), 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 already pointed out, the Legislative Guide is clear that the debtor in possession

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125 Legislative Guide, pp. 178-180, paras 49-51 [**AB/141/2942-4**].

126 See e.g. Legislative Guide, Part III, p. 88, fn. 56 [**AB/141/2969**].

127 Legislative Guide, Part III, p. 97, para 35 [**AB/141/2970**].

may in some types of insolvency proceeding perform some or all of the functions that other types of proceeding vest in the insolvency representative.

165.6 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:

165.6.1 The 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).

165.6.2 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*".[128] Again, this shows the Legislative Guide's recognition that different 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.

[128] Legislative Guide, p. 20, Recommendation 7(c) [**AB/141/2920**].

165.6.3 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.*"[129]

165.7 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*".[130]

166 Turning to the Model Law's treatment of this element, 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 must exist in a formal sense, it may be "*potential rather than actual*".[131] This suggests 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).

167 Turning to the CTC:

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129 Legislative Guide, pp. 33-34, para 3 [**AB/143/2994-5**].

130 Legislative Guide, p. 28, para 28(a) (emphasis added) [**AB/141/2925**].

131 The Model Law Guide, p. 41, para 74 [**AB/142/2990**].

167.1 Again, 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. Instead, the definition requires that "*the assets and affairs of the debtor*" must be "*subject to control or supervision by a court* ***<u>for the purposes of reorganisation</u>***".

167.2 It follows 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 <u>whatever is necessary and sufficient to give efficacy to proceedings whose purpose is the debtor's reorganisation</u> (and which are collective and judicial or administrative proceedings).

167.3 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 assets and affairs — to be gratuitous, alien to the CTC's text, and inconsistent with its purposes. Indeed, 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 <u>all</u>, <u>but no more than</u>, 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.

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

167.4.1 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'*".[132] This indicates that the level of court supervision or control is whatever is

[132] Official Commentary, para 4.21, chapeau and subpara (2) [**AB/124/2468**].

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*".

167.4.2 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.*"[133] 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. 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.

167.4.3 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.[134] By way of important example, 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.

[133] Official Commentary, para 3.118 [**AB/124/2465-6**]. The CTC defines "*Insolvency administrator*" to include "*a debtor in possession if permitted by the applicable insolvency law*"; Article 1(k) [**AB/110/2271**]. See also Official Commentary, para 3.127 [**AB/124/2467**], 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.*"

[134] Official Commentary, para 2.40(4) [**AB/124/2462**].

168 Turning to the EU Regulation,[135] it is clear that the position is the same as under the previous three instruments:

168.1 Firstly, there is no doubt but that proceedings in which the debtor's pre-distress management remains fully in control of the debtor, its business, and its affairs may nevertheless fall under the scope of the Regulation. This is made clear by Recital 10 [**AB/118/2373**]:

> "*The scope of this Regulation should extend to proceedings which promote the rescue of economically viable but distressed businesses and which give a second chance to entrepreneurs.* ***It should, in particular, extend*** *to proceedings which provide for restructuring of a debtor at a stage where there is only a likelihood of insolvency, and* ***to proceedings which leave the debtor fully*** *or partially* ***in control of its assets and affairs***."

168.2 Immediately after the text excerpted above, Recital 10 states that the EU Regulation

> "*should also extend to proceedings providing for a debt discharge or a debt adjustment in relation to consumers and self-employed persons, for example by reducing the amount to be paid by the debtor or by extending the payment period granted to the debtor. Since such proceedings do not necessarily entail the appointment of an insolvency practitioner, they should be covered by this Regulation if they take place under the control or supervision of a court. In this context,* ***the term 'control' should include situations where the court only intervenes on appeal by a creditor or other interested parties***."

168.3 This shows that a proceeding may qualify even if no insolvency practitioner is appointed, the court's control is over the proceedings (and not over the debtor's assets or affairs), and such control is (to use the Model Law Guide's terminology) potential rather than actual.

168.4 While the text of Recital 10 addresses proceedings concerning natural persons, it is clear that the same approach applies to proceedings concerning corporate debtors:

168.4.1 Article 2(3) [**AB/118/2379**] defines "*debtor in possession*" to mean "*a debtor in respect of which insolvency proceedings have been opened which do not necessarily involve the appointment of an insolvency practitioner or the complete transfer of the rights and duties to*

[135] Article 1(1)(b) [**AB/118/2378**].

administer the debtor's assets to an insolvency practitioner and where, therefore, ***<u>the debtor remains totally</u>*** *or at least partially* ***<u>in control of its assets and affairs</u>***".

168.4.2 The EU Regulation envisages that all the usual functions which in a management displacement regime might be performed by an insolvency practitioner may instead be performed by the debtor in possession. This includes bringing avoidance actions (Article 6(2) [**AB/118/2380**]), representing the proceeding in another members state (Articles 28-9) [**AB/118/2381**], causing secondary proceedings to be opened in another member state (Article 38) [**AB/118/2382**], accepting proofs of claim (Article 55(5) and (7) [**AB/118/2385**]), and performing the full range of functions in the context of corporate groups that are governed by Chapter V of the EU Regulation (Article 76) [**AB/118/2386**].

168.4.3 These provisions, and in particular those governing the cross-border insolvency of corporate groups in Chapter V, in which the debtor in possession may operate while "*totally…in control of its assets and affairs*" removes any doubt but that the inclusiveness indicated by the final two sentences of Recital 10 (quoted above) also applies to proceedings in relation to corporate debtors.

168.5 It follows that a proceeding may fall within the ambit of the EU Regulation even when it leaves the corporate debtor, acting through its pre-distress management, "*totally…in control of its assets and affairs*" not just as against the court but also as against an insolvency practitioner. What matters, as submitted, is court has such control or supervision of the <u>proceedings</u> as is necessary to give efficacy to those proceedings. Control or supervision of the debtor's assets and/or affairs is relevant if and only insofar as required to give those proceedings efficacy.

169 The RP therefore also meets this element of the definition of insolvency proceedings.

169.1 Firstly, it is clear that the RP proceedings are judicial proceedings:

169.1.1 The RP process must be started by application to the Court.[136]

169.1.2 A meeting of one or more claimant classes may only be called by order of the Court.[137]

169.1.3 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.[138]

169.1.4 Only the Court may sanction the plan.[139]

169.2 Second and importantly, the RP is a debtor in possession proceeding as defined in the four international instruments analysed above. In the RP, the debtor's management retains control of the debtor's assets and affairs subject only to such supervision or control by the Court as is necessary and sufficient <u>for the proceeding's efficacy</u>. 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, 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.[140]

169.3 Third and correspondingly, the Court possesses <u>all, but only,</u> the powers to control or supervise the debtor's assets and affairs as are necessary and sufficient <u>for the purposes</u>

[136] Section 901C(1) of the 2006 Act [**AB/113/2288**].

[137] Section 901C(1) of the 2006 Act [**AB/113/2288**].

[138] Section 901C(4) of the 2006 Act [**AB/113/2288**].

[139] Section 901F of the 2006 Act [**AB/113/2290-1**].

[140] Sections 901D and 901E of the 2006 Act [**AB/113/2289-90**].

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:

169.3.1 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.

169.3.2 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.[141]

169.3.3 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.

169.3.4 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.[142]

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

169.3.6 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

[141] Section 901G(4) of the 2006 Act [**AB/113/2292**].

[142] Section 901C(4) of the 2006 Act [**AB/113/2288**].

RP, together with the principles it is starting to develop in relation to the exercise of its new cram down power.[143]

169.3.7 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.

169.4 Fourth and critically, the Court should recall that the Legislative Guide 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.

170 In this light in the Company's submission, the level of court involvement in the RP, including supervision or control of the debtor's assets and affairs insofar as necessary, is on any reasonable view sufficient to give efficacy to a debtor in possession reorganisation proceeding. It follows that the RP quite clearly meets this requirement, if and insofar as relevant to Article 1(2)(b) of the Lugano Convention, to qualify as falling within the bankruptcy exclusion.

G. INSOLVENCY ACT DISTINCTION BETWEEN "*INSOLVENCY PROCEEDING*" AND "*INSOLVENCY PROCEDURE*"

143 Section 901G of the 2006 Act [**AB/113/2288**] and see Trower J's discussion of the principles guiding the Court's cramdown discretion in *In re DeepOcean* [2021] EWHC 138 (Ch) [**AB/108**].

171 The 1986 Act (as amended) does not refer to the Part 26A proceeding as an "*insolvency proceeding*".[144] This is because 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.

172 Crucially and as previously noted in the Company's Main Skeleton Argument, at paragraph 63, the RP is characterised as "*a relevant insolvency procedure*" for the purposes of the new prohibition on the exercise of ipso facto clauses.[145]

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[144] In sections A20(1) [**AB/121/2404**], A24(1) [**AB/121/2405**], A43(1) [**AB/121/2406**], and 436 [**AB/121/2411**].

[145] See the new Section 233B(2)(g) of the 1986 Act [**AB/121/2407**].