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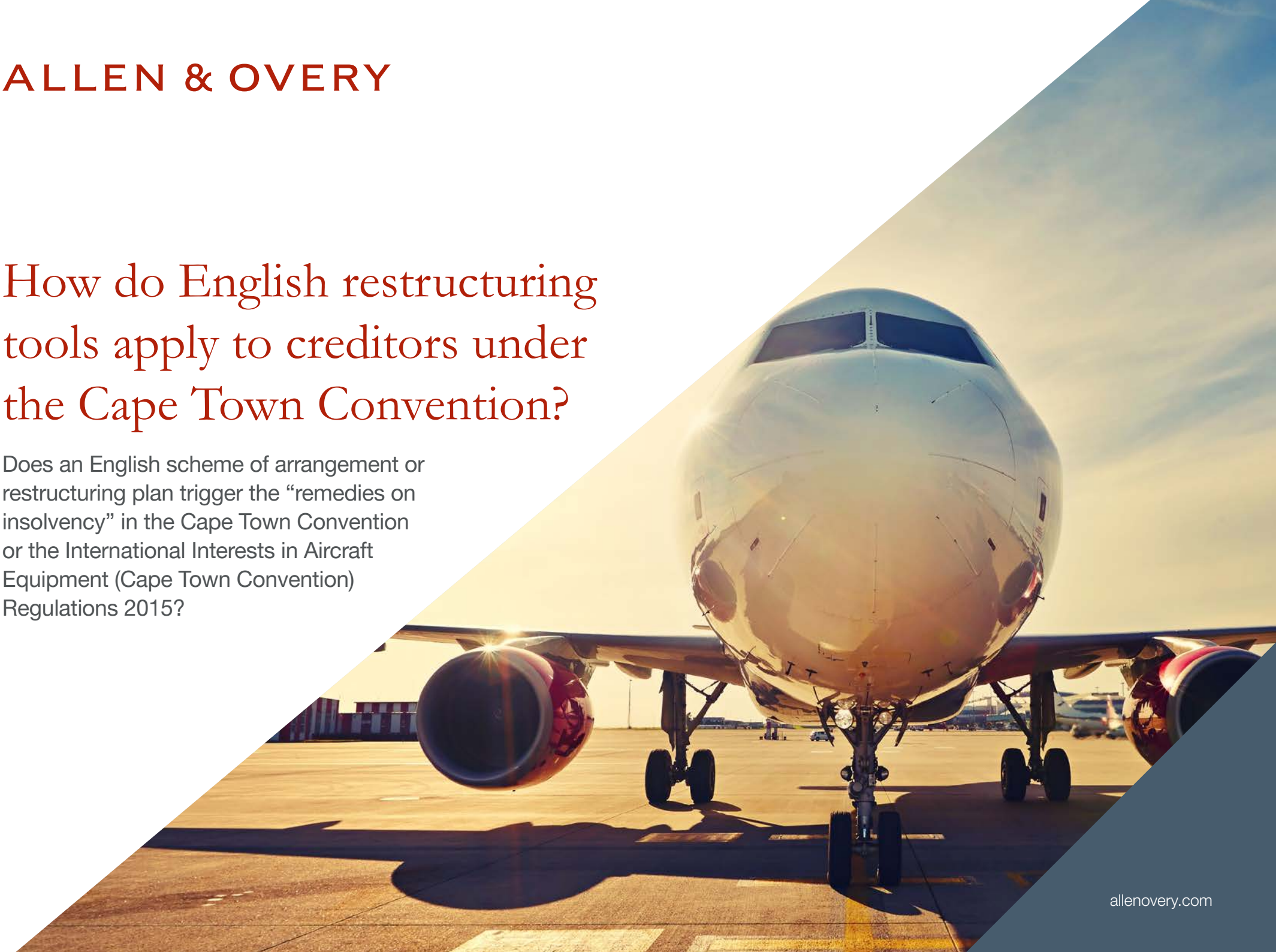
How do English restructuring tools apply to creditors under the Cape Town Convention?

Does an English scheme of arrangement or restructuring plan trigger the “remedies on insolvency” in the Cape Town Convention or the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015?



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Foreword

In the spring of this year, Virgin Atlantic Airways, a highly profitable and popular international airline based in the UK, found itself suffering from liquidity issues as a result of the Covid-19 pandemic. This was hardly surprising. The impact of the pandemic on airlines, both in the UK and abroad, is well known. Take the case of Heathrow airport: the airport dealt with just 1.4m passengers in August 2020, down from 7.7m in August 2019. The aviation industry remains one of the worst affected by the pandemic and a number of airlines across the globe have needed government support or a debt restructuring (either consensually or through the use of a statutory process) to survive. Sadly, in some cases, those airlines have been unable to avoid insolvency proceedings.

As early as March 2020, the UK government warned that there would be no bailout for the aviation industry and that any government intervention would only be bespoke support as a lender of last resort. Accordingly, UK airlines have had to rely on self-help remedies and the strength of the UK restructuring toolkit to navigate the financial impact of the pandemic. Against this backdrop, and using the new Part 26A restructuring plan that was introduced by the UK legislation just days before the process was launched, Virgin Atlantic was able to achieve a successful GBP1.2bn solvent recapitalisation which avoided any insolvency proceedings and lead to substantially better returns for all of its stakeholders than would have been the case if the restructuring plan had not succeeded. The restructuring plan was such a success that it is now being considered by other airlines, whether incorporated in the UK or overseas. When used correctly (and given the existing protections for lessors' property rights under English case law), these restructuring tools can benefit both airlines and their bank, credit card, aircraft lessor, trade and other creditors (and are certainly preferable to an uncontrolled insolvency process which would have a negative impact on all concerned).

It would have been considerably more challenging to have proposed a restructuring plan or scheme of arrangement of Virgin Atlantic if that process had triggered certain remedies on insolvency under the Cape Town Convention: namely, provisions that prevent a company from altering the pecuniary (ie financial) obligations owed to creditors with interests registered under the Cape Town Convention, without obtaining the consent of every single creditor that has the benefit of a Cape Town Convention registered interest. What is often overlooked, in the debate on the applicability of the Cape Town Convention in the context of a restructuring plan or scheme of arrangement, is the fact that aircraft lessors are not the only potentially affected creditors. By way of example, the Virgin Atlantic restructuring plan proposed to alter the pecuniary interests of its senior secured syndicate bank creditors, who via a security agent, collectively held interests registered under the Cape Town Convention as a consequence of this security package (over aircraft and engines, amongst other non-registerable interests such as shares, property, receivables and other assets). If the court were to hold that the restructuring plan or scheme of arrangement were "insolvency proceedings" for Cape Town Convention purposes (notwithstanding that these processes are intended to resolve the financial difficulties and to return the company to profitability), any airline that has granted security in favour of its lenders or its aircraft lessors may be forced to consider other restructuring tools (such as U.S. Chapter 11 proceedings) or, potentially, local insolvency processes if any one or more of its lenders or aircraft lessors refuse to consent to proposals to alter their respective pecuniary obligations. This would be the likely consequence even if, for example, the overwhelming majority of lenders and aircraft lessors supported the airline in its attempt to restructure its balance sheet by utilising either a restructuring plan or scheme of arrangement.

In this important article, Harini Viswanathan, a restructuring associate at Allen & Overy LLP and Lottie Pyper, a barrister at South Square Chambers, consider whether these two restructuring tools should be seen as "insolvency proceedings" for Cape Town purposes. They conclude that they should not. The subject matter of this article is, by its nature, complex and technical (hence the length of this article) but the impact of the conclusions is simple. If the authors are right, the UK now has two powerful tools for restructuring the airline's debts and avoiding a potentially damaging insolvency process. If they are not, the consequences for those involved in the airline industry could be devastating.

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1. Executive summary

1.1 This article looks at whether proposing a scheme of arrangement under Part 26 or a restructuring plan under Part 26A of the Companies Act 2006 (a **Scheme of Arrangement** or **Restructuring Plan** respectively) triggers the "remedies on insolvency" in the Convention on International Interests in Mobile Equipment (2001) (the **Cape Town Convention**) and the Aircraft Protocol to the Cape Town Convention (the **Aircraft Protocol**) and/or The International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 (the **CTC Regulations 2015**)[1]. If Schemes of Arrangement or Restructuring Plans are held to fall within the definition of an "insolvency-related event" in the Cape Town Convention and the Aircraft Protocol, then they are capable of also being regarded as an "insolvency-related event" under the CTC Regulations 2015. However, the question of whether a proceeding is in fact an "insolvency-related event" under the CTC Regulations 2015 depends on the election made by the UK government about which of its domestic insolvency proceedings trigger Alternative A under Article XI of the Aircraft Protocol. The answer to this question may well determine the survival of airlines in the UK and the attractiveness of Schemes of Arrangement and Restructuring Plans for overseas airlines looking to reorganise in response to the Covid-19 pandemic.

1.2 The analysis in the article is broadly structured into four parts: First, the authors analyse each limb of the definition of an "insolvency-related event" in light of statutory, judicial and academic commentary (including the Official Commentary to the Cape Town Convention) and the interpretation of similar definitions in other international legislation (including the UNCITRAL Model Law on Cross Border Insolvency) to conclude that neither Schemes of Arrangement nor Restructuring Plans appear to fall within the scope of an insolvency-related event for the purposes of the Cape Town Convention and the Aircraft Protocol. Second, the authors consider the position under the CTC Regulations 2015, including documents pointing to the UK government's intention about which domestic insolvency proceedings are included in the definition of "insolvency proceedings" in the CTC Regulations 2015, to conclude that the UK did not intend for Schemes of Arrangement or Restructuring Plans to be caught by that definition. Third, the authors consider the consequences for creditors with interests protected by the Cape Town Convention if proposing a Scheme of Arrangement or a Restructuring Plan does not trigger the "remedies on insolvency" to note that:

(i) in light of current UK case law, although it would be possible for such a proceeding to be used to amend the obligations of the debtor regarding pecuniary claims (such as rent payments), it is not possible for those procedures to affect proprietary rights (such as the right to terminate a lease); and

(ii) as both Schemes and Restructuring Plans are subject to the scrutiny of the English court, such a procedure will be sanctioned only if the proposals therein are both procedurally and substantively fair to all creditors whose rights will be affected and if no creditor is "worse off" than they would be in the "relevant alternative". Lastly, the authors respond to the Annotation to the Official Commentary on the Cape Town Convention dated 16 June 2020, which proposes a novel test for determining whether certain reorganisation arrangements are "insolvency proceedings" under the Cape Town Convention and the Aircraft Protocol. Notably, this annotation does not derive from any previous authority and does not have any official standing before the court.

1.3 As the authors conclude that Schemes of Arrangement and Restructuring Plans do not properly constitute an "insolvency-related event" for the purposes of the Cape Town Convention, Aircraft Protocol, and the CTC Regulations 2015, it is their view that courts will allow airlines and other companies in the aircraft industry to use such procedures (subject to the court being satisfied that conditions of fairness etc. are complied with) to alter a company's pecuniary obligations towards creditors with interests under the Cape Town Convention, without obtaining each creditors' individual consent in advance.

1 These are the regulations implementing the Cape Town Convention (and its associated Aircraft Protocol) in the UK.

2. Introduction

2.1 For many years now, Schemes of Arrangement have been highly regarded as a flexible restructuring tool, open to both English and foreign companies. Schemes are considered one of the mainstays of the UK's restructuring tool-kit. The procedure for implementing a Restructuring Plan introduced under Part 26A of the Companies Act 2006 is a more recent arrival, introduced via schedule 9 to the Corporate Insolvency and Governance Act 2020 (**CIGA 2020**). The CIGA 2020 received Royal Assent on 25 June 2020 in the midst of the Covid-19 pandemic, at a time when domestic and international travel restrictions had brought almost all but essential passenger traffic to a halt.

2.2 The aviation sector remains one of the worst affected by the Covid-19 pandemic and although passenger traffic is slowly increasing (primarily due to essential domestic and international travel), the demand for long haul flights and business travel remains extremely low. Whilst revenue has all but been eliminated, airlines still need to pay for the substantial costs of leasing, insurance, maintenance and purchase of aircraft. Some airports have closed temporarily, but others have remained open or partially open to maintain transport links, repatriate citizens and enable vital services and cargo flights to continue. High fixed costs of airports include policing and security, and the maintenance of airfields and terminals. The International Air Transport Association (**IATA**) estimates that passenger demand will not exceed 2019 levels until 2023/2024[2] and the industry remains largely paralysed.[3] Cargo traffic is less affected as although the substantial reduction in belly capacity (due to the grounding of passenger aircraft) has disrupted air cargo flows, the industry has adapted and it is predicted that cargo revenues will reach a near-record USD110.8 bn in 2020 (up from USD102.4bn in 2019).[4] The situation in the UK mirrors the global crisis. Consider the case of Heathrow airport – the vast majority of the airport's route network remains grounded, and it has reported a loss of GBP1.5bn in the first nine months of 2020. Passenger numbers in Q3 2020 remained down by 84% in comparison to Q3 2019.[5]

2.3 In its financial response to the Covid-19 pandemic, the UK government has not provided any industry specific support package to the aviation sector.[6] Indeed, the UK Chancellor warned the aviation industry in March 2020 that the government was prepared to enter into negotiations with individual companies seeking "bespoke support" as a last resort, only after the company had exhausted other options.[7] The government rejected a bid for support from Virgin Atlantic on this basis. Accordingly, companies in the aviation sector have only been able to access generic government support schemes. This has remained the position since, with the then Minister for Aviation noting in June 2020, that "a bail-out by the taxpayer or any other Government support would need to comply with state aid rules and require us to meet our legal obligations, particularly on climate change."[8] Many governments across Europe, the U.S. and Australia have taken a different approach and supported their aviation sectors with industry-wide measures in addition to bailouts or state subsidies for individual companies. In the U.S. for example, the Coronavirus Aid, Relief, and Economic Security (CARES) Act provides for:

(i) a total of USD46bn in loans and loan guarantees for passenger air carriers, ticket agents, MROs, cargo air carriers, and "businesses critical to maintaining national security";

(ii) USD32bn in direct grants available for passenger air carriers, cargo air carriers, and contractors, to be used exclusively for employee wages, salaries and benefits; and

2 IATA, "Recovery Delayed as International Travel Remains Locked Down" available at https://www.iata.org/en/pressroom/pr/2020-07-28-02/ (28 July 2020).

3 As noted by the IATA's Director General and CEO, "With essentially four in five air travellers staying home, the industry remains largely paralyzed. Governments reopening and then closing borders or removing and then re-imposing quarantines does not give many consumers confidence to make travel plans, nor airlines to rebuild schedules." IATA, "Sluggish Improvement in Passenger Demand Continues in July" available at https://www.iata.org/en/pressroom/pr/2020-09-01-01/ (1 September 2020).

4 IATA, "Industry Losses to Top USD84bn in 2020" available at https://www.iata.org/en/pressroom/pr/2020-06-09-01/ (9 June 2020).

5 Heathrow SP Limited, "Results for the 9 months ended 30th September 2020" available at https://www.heathrow.com/content/dam/heathrow/web/common/documents/company/investor/reports-and-presentations/financial-results/2020/Heathrow-SP-Limited-Q3-2020-results-release-final.pdf.

6 The only industry-specific measures were: (i) airlines were able to defer the payment of charges for air navigation services in UK and European airspace for the months of February-May 2020 for up to 14 months; and (ii) the Civil Aviation Authority introduced a payment plan facility to cover the payment of annual charges.

7 "Sunak warns airlines they will receive only 'bespoke' help" available at https://www.ft.com/content/0ef2e802-6ddd-11ea-9bca-bf503995cd6f (March 2020).

8 See Hansard, 3 June 2020, volume 676, column 850.

(iii) USD10bn in funds to be awarded as economic relief to eligible U.S. airports affected by the prevention of, preparation for, and response to the COVID-19 pandemic.[9]

The European Commission adopted a Temporary Framework to make it easier for EU Member States to provide state aid in response to the Covid-19 pandemic and has since by way of example approved:

(i) a EUR7bn package (consisting of loan guarantees and loans) from the French Government to Air France;

(ii) EUR6bn in support from the German government towards the recapitalisation of Deutsche Lufthansa AG, the parent company of Lufthansa Group; and

(iii) a EUR3.4bn support package from the Dutch government to KLM.

2.4 It is against this backdrop, where airlines globally and in the UK are struggling for survival, that the interaction between the UK's restructuring tools (specifically schemes of arrangement and restructuring plans) and: (i) the Cape Town Convention and the Aircraft Protocol or (ii) the CTC Regulations 2015 becomes a pressing question. The answer could determine the future survival of UK airlines and associated supply chains. There has been an unprecedented level of engagement with these instruments in recent months, with a number of industry leaders, law firms and academics offering views on their proper construction. In particular, on 16 June 2020, an annotation was published by the Cape Town Academic Project (the **Annotation**), which set out an entirely novel test for what constitutes a "reorganisation arrangement" for the purpose of the Cape Town Convention and the Aircraft Protocol. Despite its unofficial status, the substance of that Annotation is now being cited as authoritative in certain other publications. This is unfortunate, as the Annotation does not have any official status, and domestic courts are likely to afford the Annotation the same weight as any other academic opinion. This article therefore aims to provide detailed guidance about the interpretation of the Cape Town Convention, Aircraft Protocol and CTC Regulations 2015, and to respond to the conclusions in the Annotation.

2.5 The key selling point of both Schemes of Arrangement and the new Restructuring Plans is that they permit dissenting creditors to be crammed down. Both procedures allow intra-class cram down, by enabling the court to bind the minority of dissenting creditors in a class that has otherwise approved the scheme. The Restructuring Plan has the additional advantage of enabling cross-class cram down, meaning that the court can sanction a restructuring plan even if an entire class has voted against it. As discussed below, these cram down features are fundamentally at odds with the remedies on insolvency introduced under the Aircraft Protocol and the CTC Regulations 2015, which preclude the obligations of the debtor company towards creditors with certain interests under the Cape Town Convention or the Aircraft Protocol (**CTC Interests**, as defined in paragraph 4.4 below) from being altered without their consent if an "insolvency-related event" has occurred. Therefore, clarity on whether or not a Scheme of Arrangement or a Restructuring Plan are "insolvency-related events" under the Cape Town Convention and its associated Aircraft Protocol or the CTC Regulations 2015 is essential, as this will determine whether and how airlines are able to use these tools to effect rescues as a going concern and avoid entry into a formal insolvency process with a view to winding down the company's operations.

2.6 In this regard it is significant to note that unlike many other countries (for example the U.S. and Germany), airlines in the UK usually cannot operate whilst in a formal insolvency process such as administration or liquidation. This is because, the UK's Civil Aviation Authority (**CAA**) is required to consider whether to suspend or revoke an airlines' Air Operator's Certificate (**AOC**) if there is a risk that the air carrier will not be able to meet its actual and potential obligations for a 12-month period.[10] The CAA has a duty to make an in-depth assessment in this regard when "insolvency or similar proceedings" are opened, but also when there are "clear indications that financial problems exist". Historically, this has meant that an airline's AOC has been revoked when it enters a formal insolvency process, such as administration or liquidation. Accordingly, as all aircraft are grounded, rescue as

9 See the Coronavirus Aid, Relief, and Economic Security (CARES) Act (H.R. 748, Public Law 116-136), signed into law by President Trump on 27, March 2020, available here https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf.

10 Until 31 December 2020, the basis of air operator licensing in the United Kingdom is Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast).

a going concern is near impossible: consider the cases of Monarch Airlines and Thomas Cook by way of example. It is apparent that this assessment could be triggered in the context of a financial restructuring through a Restructuring Plan and/or a Scheme of Arrangement. The CAA has some discretion to decide:

(i) whether to suspend or revoke an airline's AOC and

(ii) if so, whether to grant a temporary licence allowing for financial restructuring while still continuing to fly. As seen from the successful example of the Virgin Atlantic restructuring plan, there is already precedent for the CAA not suspending an airline's AOC when it effects a Restructuring Plan, unlike the historical experience upon entry into an administration or liquidation, but it remains to be seen if the CAA's approach would be affected if the Scheme of Arrangement or Restructuring Plan were to constitute an "insolvency-related event" for the purposes of the Cape Town Convention, Aircraft Protocol and/or the CTC Regulations 2015.

2.7 Fittingly, Virgin Atlantic Airways Limited was the first company to use the new Restructuring Plan procedure, launching the process just weeks after it came into force. The restructuring plan was convened by Trower J on 4 August 2020[11] and sanctioned by Snowden J on 2 September 2020,[12] in each case without any opposition. The court did not need to consider whether the restructuring plan was an "insolvency-related event" under the CTC Regulations 2015 at either hearing, as the only creditors included in the Restructuring Plan who had not consented in advance of the convening hearing were unsecured trade creditors.
Similarly, in a judgment handed down on 11 September 2020 regarding Nordic Aviation, the Irish High Court held that it did not need to determine this question when asked to sanction a scheme of arrangement under Part 9 of Chapter to the Irish Companies Act 2014, since none of the creditors with CTC interests opposed the scheme or sought to rely on the Cape Town Convention or the Aircraft Protocol.[13] It goes without saying that not every airline is guaranteed to be able to obtain the same level of unanimous support from stakeholders with CTC Interests and for larger airlines, their fleet size may make one-on-one bilateral negotiations untenable. Therefore, it is very likely that a cram-down will be proposed and that the UK court will ultimately be required to consider the issue that is at the heart of this article: namely, what is the interaction between a Scheme of Arrangement/Restructuring Plan and the rights of creditors with CTC Interests?

11 Re Virgin Atlantic Airways Limited [2020] 219 (Ch).

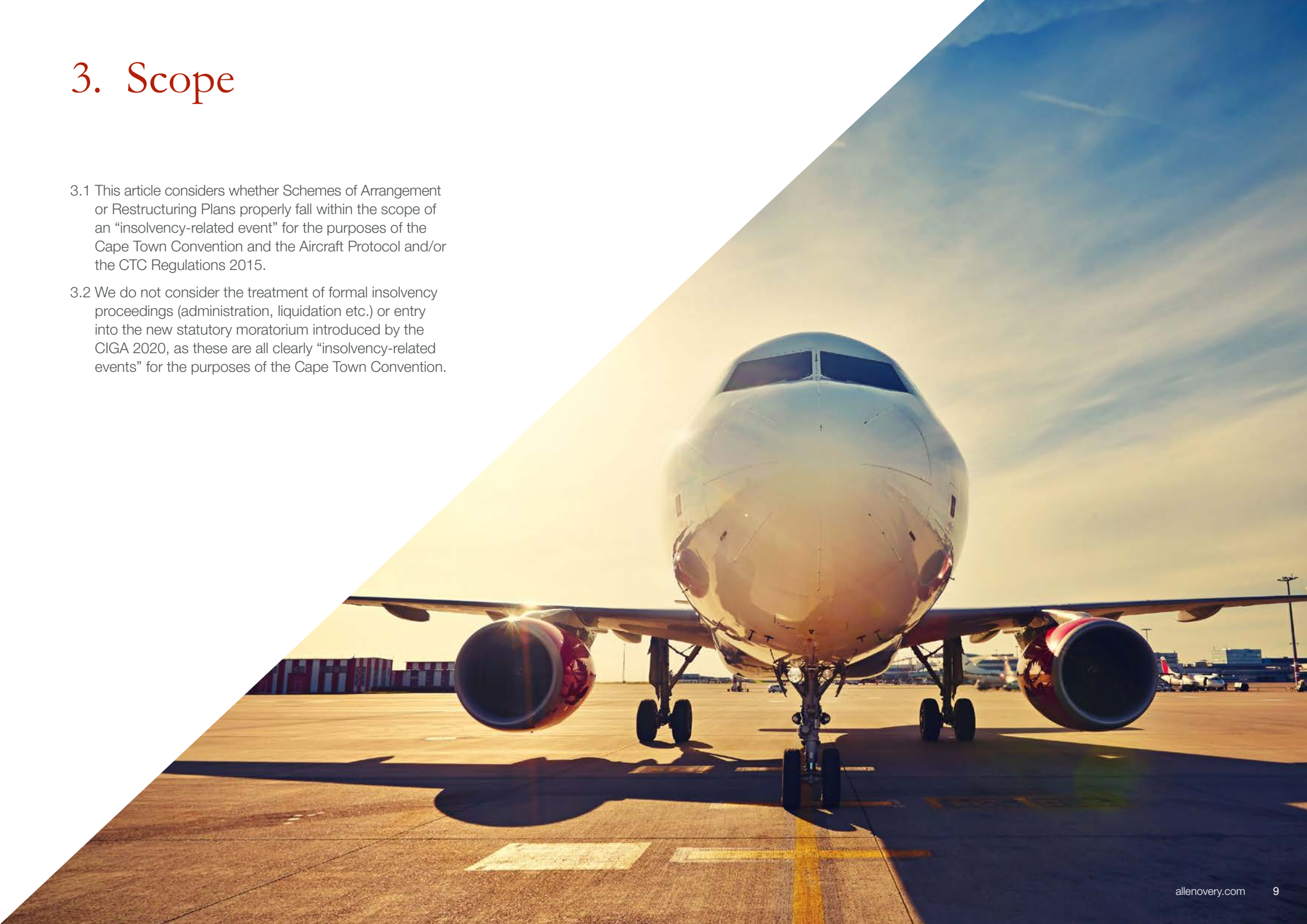
12 Re Virgin Atlantic Airways Limited [2020] 2376 (Ch).

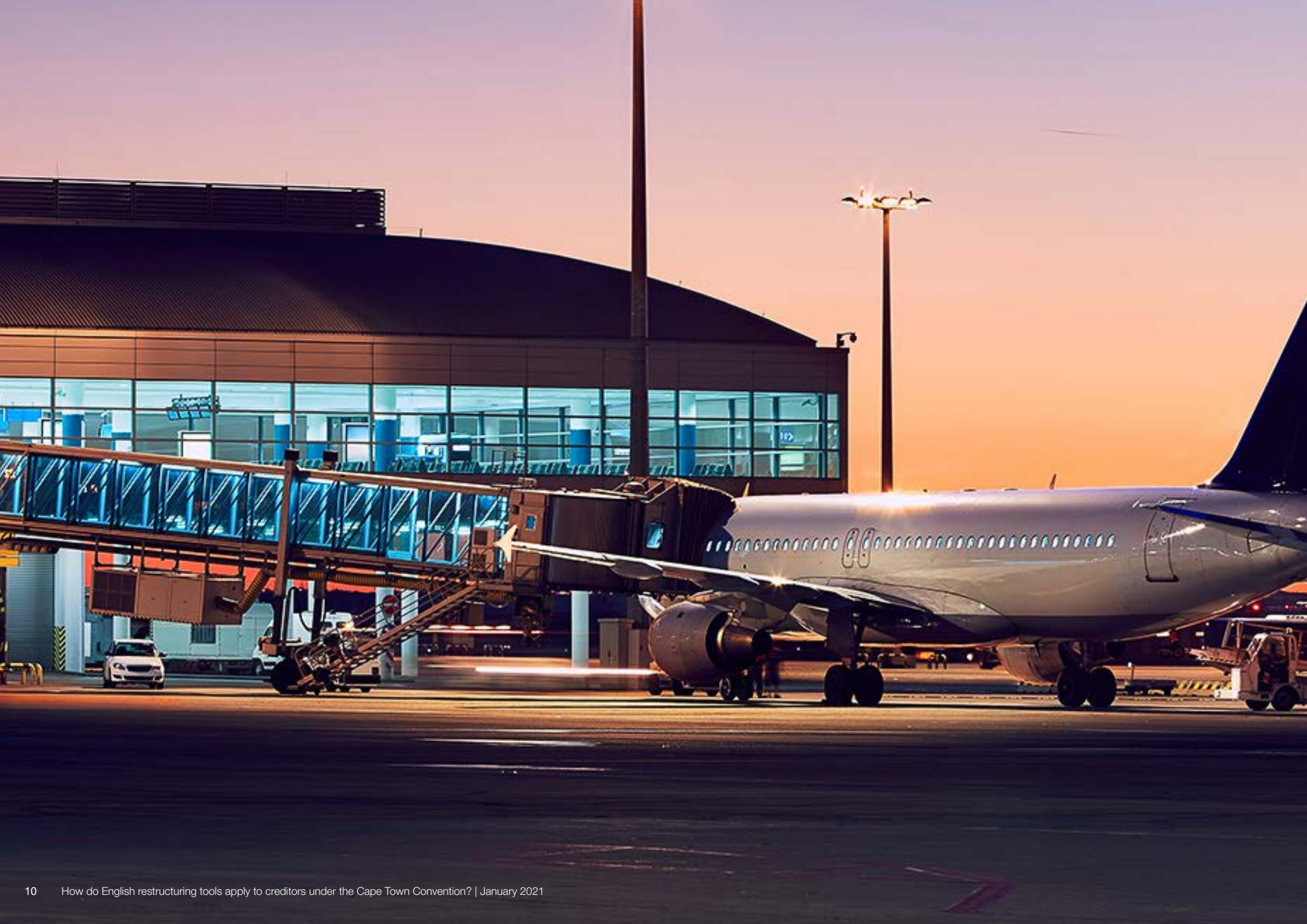
13 Re *Nordic Aviation Capital Designated Activity Company* [2020 No. 162 COS.], paragraphs 162 to 164.

3. Scope

3.1 This article considers whether Schemes of Arrangement or Restructuring Plans properly fall within the scope of an “insolvency-related event” for the purposes of the Cape Town Convention and the Aircraft Protocol and/or the CTC Regulations 2015.

3.2 We do not consider the treatment of formal insolvency proceedings (administration, liquidation etc.) or entry into the new statutory moratorium introduced by the CIGA 2020, as these are all clearly “insolvency-related events” for the purposes of the Cape Town Convention.





4. Brief overview of the Cape Town Convention and Aircraft Protocol

4.1 The Cape Town Convention was concluded in Cape Town on 16 November 2001. Its primary aim was to reduce the cost of raising finance for large, high value mobile assets which routinely cross borders and by their nature, have no fixed location. The Cape Town Convention provides an overarching framework with specific protocols intended for each type of asset. Although there are presently protocols in existence for aircraft equipment, rolling railway stock and space objects, only the Aircraft Protocol (which applies the Cape Town Convention to certain types of airframes, aircraft engines and helicopters (**Aircraft Objects**)[14] has entered into force). The Aircraft Protocol (also concluded on 16 November 2001) and the Cape Town Convention came into force on 1 March 2006. Pursuant to Article 6 of the Cape Town Convention, the Cape Town Convention and Aircraft Protocol are to be read and interpreted together as a single instrument and in case of any inconsistency, the Aircraft Protocol shall prevail.

4.2 The Cape Town Convention and Aircraft Protocol aim to provide certain and uniform rules relating to the buying, selling, leasing and financing of Aircraft Objects including issues relating to defaults, remedies, insolvency, priorities, title, aircraft deregistration and the perfection and filing of liens.

4.3 Central to the above-mentioned purpose is the creation of an international registry for the registration of "international interests" relating to Aircraft Objects. "International interests" are defined in Article I(o) of the Cape Town Convention and include interests:

(i) in an Aircraft Object granted by the chargor under a security agreement (in effect the chargee's security interest in the relevant aircraft object);

(ii) vested in a person who is the conditional seller under a title reservation agreement (in effect the conditional seller's ownership interest in the relevant aircraft object); and

(iii) vested in a person who is the lessor under a leasing agreement (in effect the lessor's interest in the aircraft object which is the subject of the leasing agreement).[15]

4.4 Article 30(1) of the Cape Town Convention provides for the effectiveness of an "international interest" in insolvency proceedings stating that, "in insolvency proceedings against the debtor an international interest is effective if prior to the commencement of the insolvency proceedings that interest was registered in conformity with this Convention."[16] As discussed further in paragraph 5 below, creditors with registered international interests in Aircraft Objects (**CTC Interests**) have certain protections and remedies upon the insolvency of the debtor company. Airlines will invariably have stakeholders with CTC Interests, including the lessors of their Aircraft Objects and financial creditors with security over Aircraft Objects.

14 Airframes, aircraft engines and helicopters are each defined (in identical definitions) in Article I(2) of the Aircraft Protocol and regulation 5 of the CTC Regulations 2015.

15 See Article 2(2) of the Cape Town Convention. Article 7 of the Cape Town Convention sets out the formal requirements for an interest to be constituted as an international interest noting that the agreement creating or providing for the interest must be: (i) in writing; (ii) relate to an object of which the chargor, conditional seller or lessor has power to dispose; (iii) enable the object to be identified in conformity with the Aircraft Protocol; and (iv) in the case of a security agreement, enable the secured obligations to be determined, but without the need to state a sum or maximum sum secured.

16 Article 30(2) of the Cape Town Convention goes on to say, "Nothing in this Article impairs the effectiveness of an international interest in the insolvency proceedings where that interest is effective under the applicable law." The term "registered" herein means registered in the International Registry pursuant to Chapter V of the Cape Town Convention (see Article 1(bb) of the Aircraft Protocol).

5. Remedies on insolvency under the Aircraft Protocol to the Cape Town Convention

5.1 The Cape Town Convention and the Aircraft Protocol include some mandatory provisions and some optional provisions. The remedies on insolvency are optional provisions, which can be implemented at the discretion of the contracting state. These are contained in Article XI of the Aircraft Protocol, which sets out two possibilities: the prescriptive "Alternative A" and the softer "Alternative B."

5.2 Alternative A has three key effects:

(a) It requires the insolvency officeholder to give possession of the relevant aircraft object to the creditor within a certain "waiting period" after an "insolvency-related event" has occurred, unless they have cured all defaults within that time (other than a default caused by the commencement of insolvency proceedings).[17]

(b) It states that unless and until the creditor is given the opportunity to take possession, the insolvency officeholder must preserve the aircraft object and maintain it and its value in accordance with the agreement.[18]

(c) It provides that on the occurrence of an insolvency-related event, *"no obligations of the debtor under the agreement may be modified without the consent of the creditor"*.[19] In this article, we focus on the implications of this part of Alternative A, because it would have the most direct impact on the ability of a company to propose a Scheme of Arrangement or a Restructuring Plan.

5.3 There is no requirement for contracting states to apply either of these alternatives, although in practice, many of them have chosen to do so. This is made clear by Article XXX(3) of the Aircraft Protocol, which provides as follows:

"A Contracting State may, at the time of ratification, acceptance, approval of, or accession to this Protocol, declare that it will apply the entirety of Alternative A, or the entirety of Alternative B of Article XI and, if so, shall specify the types of insolvency proceeding, if any, to which it will apply Alternative A and the types of insolvency proceeding, if any, to which it will apply Alternative B. A Contracting State making a declaration pursuant to this paragraph shall specify the time-period required by Article XI."

5.4 This is followed by Article XXX(4), which provides that "*the courts of Contracting States shall apply Article XI in conformity with the declaration made by the Contracting State which is the primary insolvency jurisdiction.*" Article I(2)(n) explains that *""primary insolvency jurisdiction" means the Contracting State in which the centre of the debtor's main interests is situated, which for this purpose shall be deemed to be the place of the debtor's statutory seat or, if there is none, the place where the debtor is incorporated or formed, unless proved otherwise".*

17 See Article XI (2) read with Article XI(7) of the Aircraft Protocol. As explained further in paragraph 13.3(b)(i) below, unless the English courts deviate from precedent, a lessor's proprietary right to repossess its aircraft cannot be compromised through a Scheme of Arrangement or a Restructuring Plan. Accordingly, assuming that a Scheme of Arrangement or Restructuring Plan will constitute an event of default under most underlying lease agreements, lessors in any event will be able to repossess their aircrafts.

18 See Article XI(5) of the Aircraft Protocol. As defined in Article 1(a) of the Cape Town Convention, "agreement" for this purpose means a security agreement, a title reservation agreement or a leasing agreement (each as further defined in Article 1 of the Cape Town Convention).

19 See Article XI(10) of the Aircraft Protocol.

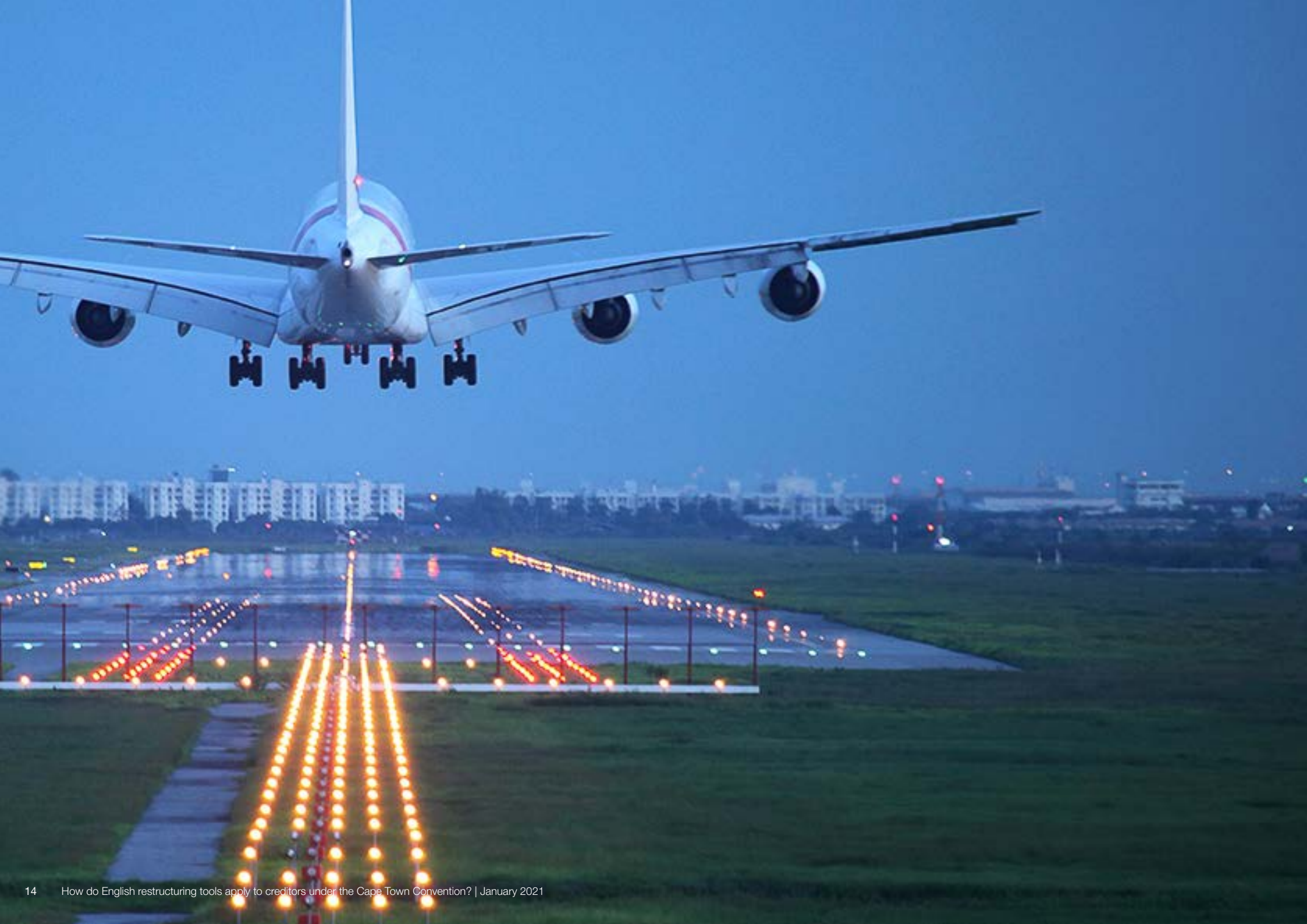
5.5 In light of the above, it is clear that:

(a) The contracting state has a discretion to choose which of its national insolvency proceedings will trigger Alternative A when entered into by debtors whose "primary insolvency jurisdiction" is located in that state.

(b) If the contracting state decides that one or more of its national insolvency proceedings will trigger Alternative A, then the whole of Alternative A must be triggered by those insolvency proceedings.

5.6 As the election made by a country about *which* of its domestic insolvency proceedings trigger Alternative A is a choice that must be made by each contracting state, this choice is not a matter of international law, or a question which can be determined by interpreting the Cape Town Convention or the Aircraft Protocol. Accordingly, irrespective of whether or not a domestic proceeding is an "insolvency proceeding" under the Cape Town Convention and Aircraft Protocol, the question to be considered is whether the contracting state intended for Alternative A to apply to that domestic proceeding. As discussed further below, the background materials produced by the UK government prior to the introduction of the CTC Regulations 2015 and the CIGA 2020 (discussed further in paragraph 12 below), suggest that the UK government did not intend for Schemes of Arrangement or Restructuring Plans to trigger regulation 37 of the CTC Regulations 2015.

5.7 Notwithstanding the wording of Article XXX(3), the contracting state is not bound by its initial choice upon ratifying the Cape Town Convention or the Aircraft Protocol. It has a discretion to make subsequent declarations and to withdraw declarations already made, in according with prescribed procedures, as set out in Articles 57 and 58 of the Cape Town Convention and Articles XXX and XXXIV of the Aircraft Protocol. Consider, for example, the case of Malaysia which withdrew an earlier declaration (where it had adopted Alternative A with a waiting period of sixty working days for the purposes of Article XI(3)) and instead declared that it would adopt a waiting period of forty working days.



6. Background to the CTC Regulations 2015

6.1 On 28 April 2009 the European Union acceded to the Cape Town Convention, to the extent that it governs matters which EU Member States have transferred their competence to the EU Community, whilst leaving it open to Member States to decide whether and how to implement the optional provisions of the Aircraft Protocol. Its acceding declarations included a statement that *"the Member States keep their competence concerning the rules of substantive law as regards insolvency."*[20]

6.2 The CTC Regulations 2015 were introduced by the Secretary of State pursuant to section 2(2) of the European Communities Act 1972. They implemented the Cape Town Convention and the Aircraft Protocol in the UK, and thereby enabled the UK to make its election about the optional provisions.

6.3 The UK has not lodged a declaration pursuant to Article XXX(3) of the Aircraft Protocol. Instead, the substantive provisions of Alternative A are introduced as regulation 37 of the CTC Regulations 2015. The domestic procedures which trigger the remedies in regulation 37 are therefore those which fall within the definition of an "insolvency-related event" under the CTC Regulations 2015. In accordance with Article XXX(3) of the Aircraft Protocol, the provisions of regulation 37 materially replicate the provisions of Alternative A in the Aircraft Protocol.

20 See paragraph 6 of the Declarations lodged by the European Union under the Cape Town Convention at the time of the deposit of its instrument of accession available here https://www.unidroit.org/142-instruments/security-interests/cape-town-convention-mobile-equipment-2001/depositary/declarations-by-contracting-state/1658-declarations-lodged-by-the-european-union-under-the-cape-town-convention-atthe-time-of-the-deposit-of-its-instrument-of-accession.

7. Principles of Interpretation

7.1 The paragraphs below consider some general principles of interpretation regarding the Cape Town Convention and Aircraft Protocol:

(a) The starting point for the interpretation of the Cape Town Convention and the Aircraft Protocol is Article 5 of the Cape Town Convention itself, which provides that:

"1. In the interpretation of this Convention, regard is to be had to its purposes as set forth in the preamble, to its international character and to the need to promote uniformity and predictability in its application.

2. Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the applicable law.

3. References to the applicable law are to the domestic rules of the law applicable by virtue of the rules of private international law of the forum State.

4. Where a State comprises several territorial units, each of which has its own rules of law in respect of the matter to be decided, and where there is no indication of the relevant territorial unit, the law of that State decides which is the territorial unit whose rules shall govern. In the absence of any such rule, the law of the territorial unit with which the case is most closely connected shall apply."

(b) The Official Commentary was produced pursuant to a resolution of the Cape Town Diplomatic Conference, which recognised the need for an official commentary, and anticipated that it would be produced in close cooperation with key parties who participated in the drafting of the Cape Town Convention.[21]

(c) Article 5 of the Cape Town Convention does not specifically mention the Official Commentary, nor is it referred to in the Aircraft Protocol or the CTC Regulations 2015. However, following guidance set out in the Official Commentary would be consistent with "*the need to promote uniformity and predictability in its application*" (Article 5(1) of the Cape Town Convention). The Official Commentary is therefore likely to be regarded as authoritative in most situations.

(d) However, Article 5(2) of the Cape Town Convention provides that "*Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the applicable law.*" This means that, if a question cannot be answered by looking at the general principles underpinning the Cape Town Convention, it is a matter for the "applicable law."

(e) The Cape Town Convention is a "treaty" for the purpose of the Vienna Convention on the law of treaties (1969) (the **Vienna Convention**). Article 31 of the Vienna Convention sets out general rules of the interpretation of treaties:

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

21 A copy of the draft resolution appears in the *Acts and Proceedings of the Cape Town Diplomatic Conference* (31 October 2001 to 16 November 2001), available at https://www.unidroit.org/english/publications/acts2006capetown.pdf: see in particular page 266. The UNIDROIT website describes *the Acts and Proceedings* as forming a "companion" to the Official Commentary: https://www.unidroit.org/prepwork-2001capetown.

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international laws applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

(f) Article 32 of the Vienna Convention then provides that *"recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable,"*

(g) In the recent Australian decision regarding Virgin Australia, Middleton J in the first instance decision[22] and McKerracher, O'Callaghan and Colvin JJ on appeal[23] considered the interpretative principles contained in the Cape Town Convention itself (Articles 5 and 6) and the provisions of the Vienna Convention in light of the Australian jurisprudence.

(i) The appeal bench summarised the principles governing the construction of the Cape Town Convention and the Aircraft Protocol at paragraph 56 of their decision as follows:

(1) "The Convention and the Protocol "shall be read and interpreted together as a single instrument", and to the "extent of any inconsistency between [them], the Protocol shall prevail". See Arts 6(1) and 6(2) of the Convention.

(2) The guiding principles of interpretation are found in the Vienna Convention on the Law of Treaties (Vienna Convention). Article 31(1) of the Vienna Convention provides that a treaty must be interpreted in good faith, in accordance with the ordinary meaning of the terms in their context and in the light of the object and purpose of the treaty. Interpretative assistance may be gained from extrinsic sources (Art 32) in order to confirm the meaning resulting from the application of Art 31, or to determine the meaning when interpretation according to Art 31 leaves the meaning "ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable".

(3) In interpreting a treaty, "it is necessary to adopt an holistic but ordered approach", which "may require a consideration of both the text and the object and purpose of the treaty in order to ascertain its true meaning". Assistance may also be obtained from "extrinsic sources[,] [t]he form in which a treaty is drafted, the subject to which it relates, the mischief that it addresses, the history of its negotiation and comparison with earlier or amending instruments relating to the same subject". See Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 at 231 (Brennan CJ).

(4) The manner of interpreting an international instrument "is one which is more liberal than that ordinarily adopted by a court construing exclusively domestic legislation; it is undertaken in a manner unconstrained by technical local rules or precedent, but on broad principles of general acceptation". See Pilkington (Australia) Ltd v Minister for Justice and Customs (2002) 127 FCR 92 at 100 [26] (Mansfield, Conti and Allsop JJ).

(5) Regard maybe had to travaux préparatoires if the text is not sufficiently clear in itself, but not otherwise. See, e.g, Commonwealth v Tasmania (1983) 158 CLR 1 at 223 (Brennan J).

22 *Wells Fargo Trust Company, National Association (trustee) v VB Leaseco Pty Ltd (administrators appointed)* [2020] FCA 1269, paragraphs [55] to [74].

23 *VB Leaseco Pty Ltd (administrators appointed) v Wells Fargo Trust Company, National Association (trustee)* [2020] FCAFC 168, paragraph [56] (in Australia).

(6) Although international treaties should be interpreted uniformly by contracting states, the ultimate question is "what does the relevant treaty provide". See Povey v Qantas Airways Ltd (2005) 223 CLR 18 9 at 202 [25] (Gleeson CJ, Gummow, Hayne and Heydon JJ)."

(ii) McKerracher, O'Callaghan and Colvin JJ went on to note that of course, context, object and purpose are to be considered, but "[p]rimacy is to be given to the written text". The basic principle of interpretation is that courts should focus their attention on the "four corners of the actual text" in discerning the meaning of the text.[24]

(iii) Although neither Middleton J nor McKerracher, O'Callaghan and Colvin JJ considered the official standing of the Official Commentary, they all referred to and relied on it in their judgment.

(h) Although the Official Commentary does not appear to fall neatly within Article 31 of the Vienna Convention, its status has never been challenged by any domestic courts. The English court is therefore likely to place reliance on it, particularly given that many other jurisdictions have accepted it as authoritative, including in the case of Virgin Australia.[25]

7.2 The following paragraphs consider some interpretation of provisions in the CTC Regulations 2015:

(a) Where the CTC Regulations 2015 implement substantive provisions of the Cape Town Convention and the Aircraft Protocol, they should be construed in line with the principles cited above, both regarding Article 5 of the Cape Town Convention and Articles 31-32 of the Vienna Convention.

(b) Further, Regulation 6(2) of the CTC Regulations 2015 provide that these Regulations are subject to, and to be applied in accordance with the provisions of *inter alia* the Cape Town Convention and the Aircraft Protocol.

(c) However, in accordance with Article 5(2) of the Cape Town Convention, it is for the UK court to decide any matter which is properly a question of the *"applicable law"* and not a question of general application. In this case, the applicable principles are the ordinary principles of English statutory interpretation.

24 *VB Leaseco Pty Ltd (administrators appointed) v Wells Fargo Trust Company, National Association (trustee)* [2020] FCAFC 168, paragraph [83-85] (in Australia).

25 *See eg VB Leaseco Pty Ltd (administrators appointed) v Wells Fargo Trust Company, National Association (trustee)* [2020] FCAFC 168 (in Australia); *Third Eye Capital Corp. v. Ranch Energy Corp*., [2019] A.J. No. 1355 (in Canada) and *Wilmington Trust SP Services Dublin Limited vs Directorate General of Civil Aviation & another* 2015 DEL 2164 (in India).

8. What is an "insolvency-related event" for the purposes of the Aircraft Protocol and CTC Regulations 2015

8.1 The definition of *"insolvency-related event"* in regulation 37(13) of the CTC Regulations 2015 is as follows: *"the commencement of insolvency proceedings, or the declared intention to suspend or actual suspension of payments by the debtor where the creditor's right to institute insolvency proceedings against the debtor or to exercise remedies under the Cape Town Convention is prevented or suspended by law or State action."* Although this uses identical language to Article I(2)(m) of the Aircraft Protocol[26], it is important to bear in mind that the scope of this definition in the CTC Regulations 2015 is limited by the scope of the definition of "*insolvency proceedings"* in the CTC Regulations 2015. Therefore although the definition of *"insolvency-related event"* is in identical wording to the definition in the Aircraft Protocol, it does not automatically follow that the same procedures are caught by both provisions.

8.2 The definition can be broken down into two limbs:

(a) *"the commencement of insolvency proceedings"* – this is considered in paragraphs 9 and 10 below; and

(b) *"the declared intention to suspend or actual suspension of payments by the debtor where the creditor's right to institute insolvency proceedings against the debtor or to exercise remedies under the Cape Town Convention is prevented or suspended by law or State action"* – this is considered in paragraph 11 below.

26 This definition in the CTC Regulations 2015 is in identical terms to the equivalent definition in the Aircraft Protocol, in accordance with the requirement in Article XXX(3) to apply "the entirety" of Alternative A, if at all.

9. Limb 1 – "commencement" of insolvency proceedings "under the applicable insolvency law"

9.1 The definition of the "commencement of insolvency proceedings" in the CTC Regulations 2015 (see regulation 5) is in identical terms to the same definition in the Cape Town Convention at section 1(d). In both instances, the phrase means *"the time at which the insolvency proceedings are deemed to commence under the applicable insolvency law".*

9.2 When is a Scheme of Arrangement or a Restructuring Plan deemed to commence?

(a) The concept of insolvency proceedings being "deemed to commence" is not easily applicable to a Scheme of Arrangement or a Restructuring Plan given there is no concept of commencement of a Scheme of Arrangement or a Restructuring Plan under English law. Notably, paragraph 4.13 of the Official Commentary[27] states that Regulation (EU) 2015/848[28] (the **EU Recast Insolvency Regulation**) shall determine the time at which insolvency proceedings commence for EU Member States. As considered in further detail at paragraph 10.7 below, neither Schemes of Arrangement nor Restructuring Plans have ever been (nor were ever intended to be) included in the list of in-scope proceedings in Annex A to the EU Recast Insolvency Regulation.

(b) The substantive provisions of a Scheme of Arrangement or a Restructuring Plan cannot be deemed to have "commenced" prior to the Scheme of Arrangement or Restructuring Plan becoming effective, having been sanctioned by the court. The U.S. Bankruptcy Court has followed this analysis when recognising Schemes of Arrangement or Restructuring Plans under Chapter 15 of the U.S. Bankruptcy Code, and recognition is traditionally sought once a sanction order has been made. This makes sense in the context of Chapter 15, which enables the debtor company to enforce the effects of the Scheme of Arrangement or Restructuring Plan abroad. However, it does not sit comfortably with the remedies on insolvency under the Cape Town Convention or CTC Regulations 2015, because if a Scheme of Arrangement or Restructuring Plan does not commence until a sanction order is made, then no "insolvency-related event" will have occurred prior to that stage. In addition, the effect of a sanction order is usually to alter and improve the company's financial position, such that any previous financial difficulties may no longer exist. Furthermore, if the sanction order is deemed to be the commencement of insolvency proceedings, then there is no obvious exit point from being in insolvency proceedings in the future. We therefore consider that the better view is that, if a Scheme of Arrangement or Restructuring Plan were to constitute an insolvency proceeding for the purpose of the Cape Town Convention or CTC Regulations 2015, commencement would be deemed to occur at an earlier stage, such as issuance of the practice statement letter, or the making of a convening order, or the scheme meetings themselves

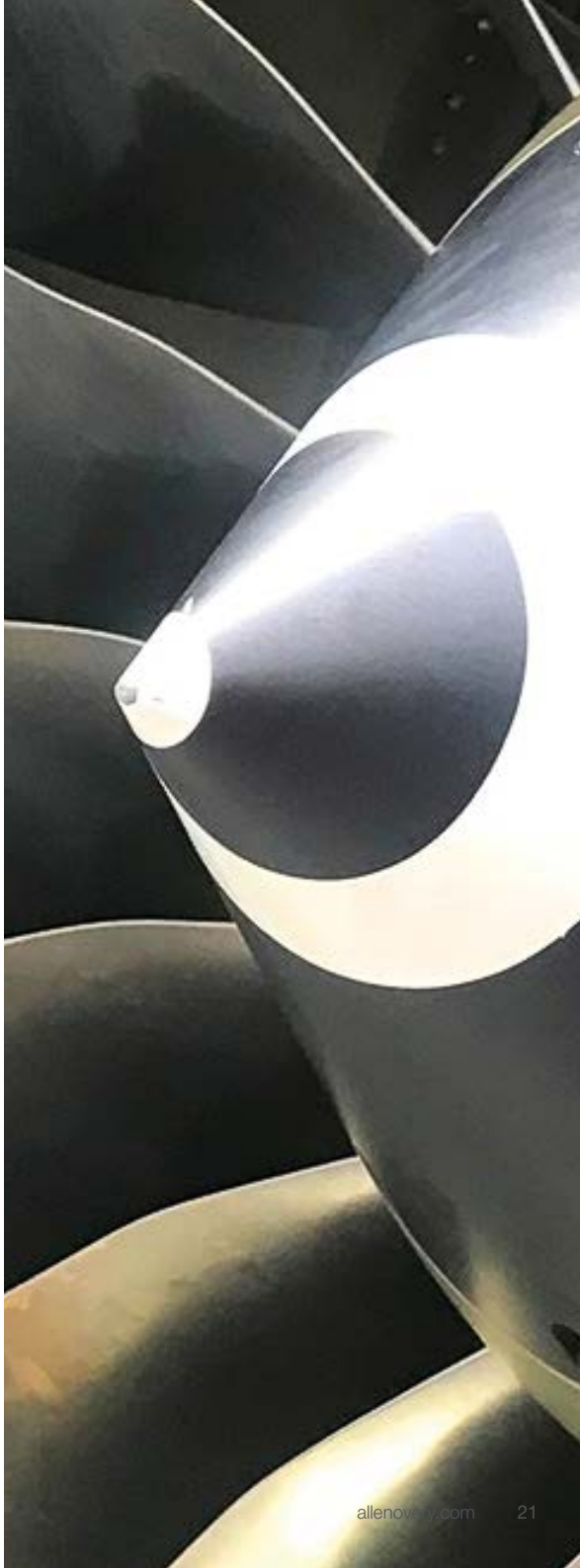
27 Official Commentary on the Convention on International Interests in Mobile Equipment and the Protocol thereto on Matters specific to Aircraft Equipment – Fourth Edition (2019).

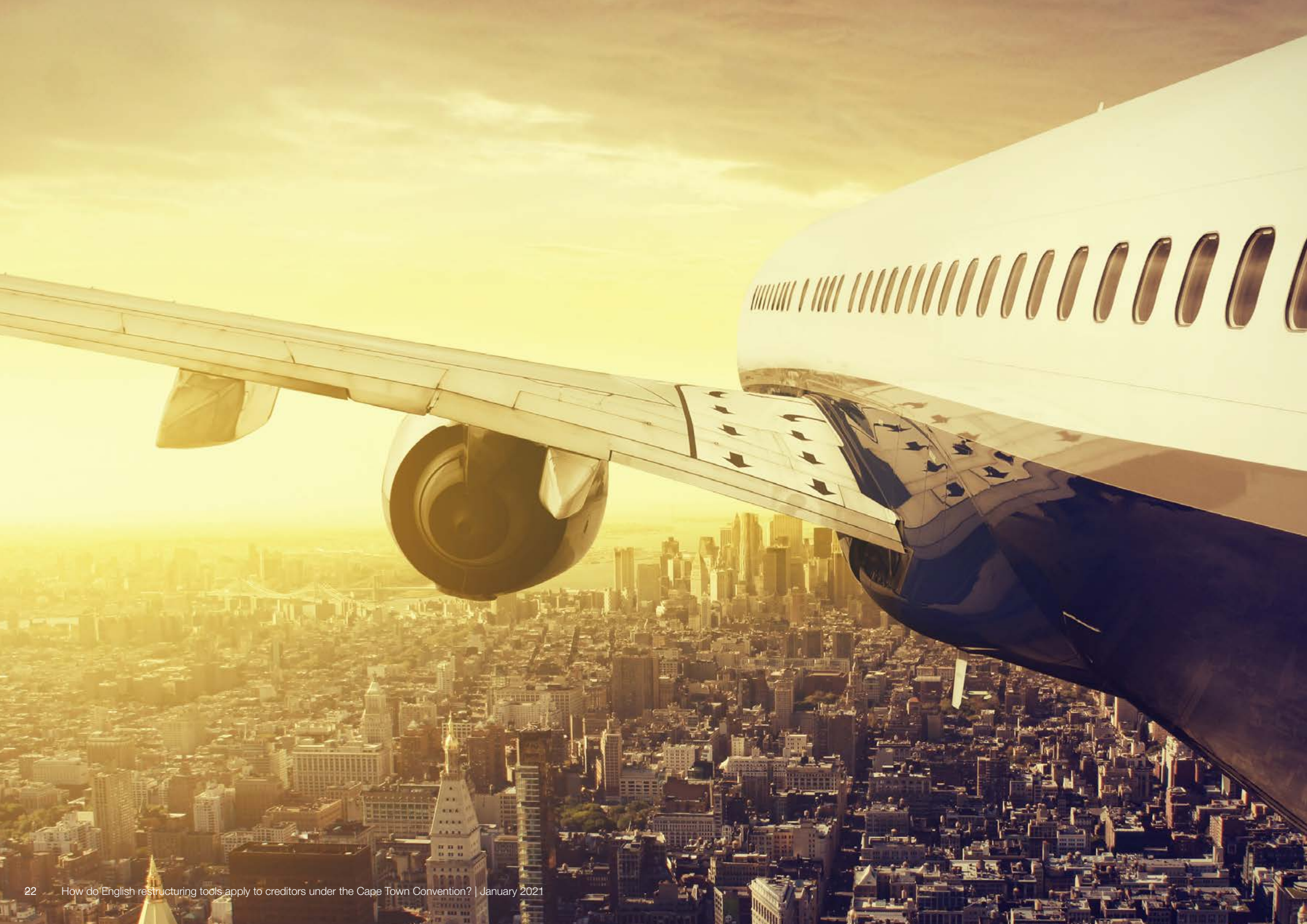
28 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).

(c) In respect of a Restructuring Plan, there is an argument that the relevant trigger for this purpose is the issuance of a convening order as: (i) that is the relevant trigger for the ban on the operation of *ipso facto* clauses under section 233B of the Insolvency Act (however, notably, nothing in section 233B affects the CTC Regulations 2015[29]); and (2) this is when the court considers whether the financial difficulty threshold is satisfied. However even if this analysis were adopted for Restructuring Plans, it is unclear whether or how the same approach would be taken to Schemes of Arrangement. The same point also arises as to when Restructuring Plans and/or Schemes of Arrangement would cease to be an insolvency proceeding for the purposes of the Cape Town Convention, Aircraft Protocol and/or the CTC Regulations 2015. If it is accepted that a Restructuring Plan and/or a Scheme of Arrangement is an insolvency proceeding that commences on the making of a convening order, it would follow that the insolvency proceedings conclude on the making of a sanction order. However, this analysis does not sit comfortably with the underlying purpose of Schemes of Arrangement or Restructuring Plans, which are designed to be consensual procedures which enable creditors (or members) to vote on proposed changes to their rights.

(d) In any event, the position here is most unclear (unlike the clear commencement of an administration or liquidation or even entry into a moratorium). Given that certainty of treatment is one of the main pillars of the Cape Town Convention, Aircraft Protocol and accordingly the CTC Regulations 2015, if the courts consider that a Scheme of Arrangement or a Restructuring Plan are "insolvency proceedings", judicial clarity on when these proceedings are deemed to commence will be imperative. This is especially because the applicable waiting period would need to be computed from that date.

29 Paragraph 21 of Part 4 of Schedule 4ZZA of the Insolvency Act 1986 (inserted by the CIGA 2020) states that, "Nothing in section 233B affects the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 (S.I. 2015/912)."





10. Limb 1 – what constitutes an "insolvency proceeding"?

10.1 As noted previously, both the purpose and meaning of the definitions of *"insolvency proceedings"* differs under the CTC Regulations 2015 and the Cape Town Convention. Whereas the definition in the Cape Town Convention sets out *all* of the procedures that are capable of triggering Alternative A, the definition in the CTC Regulations 2015 sets out which domestic insolvency procedures actually trigger Alternative A in the UK. In any event, for the reasons set out in paragraphs 10.2 to 10.8 (inclusive) below, we submit that a Scheme of Arrangement or a Restructuring Plan is not an "insolvency proceeding" either under the Cape Town Convention and Aircraft Protocol or under the CTC Regulations 2015.

10.2 The definition of insolvency proceedings:

(a) under Article 1(l) of the Cape Town Convention, is *"bankruptcy, liquidation or other collective judicial or administrative proceedings, including interim proceedings, in which the assets and affairs of the debtor are subject to control or supervision by a court for the purposes of reorganisation or liquidation."*

(b) under regulation 5 of the CTC Regulations 2015 is *"liquidation, bankruptcy, sequestration or other collective judicial or administrative insolvency proceedings, including interim proceedings, in which the assets and affairs of the debtor are subject to control or supervision by a court (or liquidation committee)".*

10.3 Plainly, a Scheme of Arrangement or a Restructuring Plan is not a liquidation or bankruptcy or sequestration. Therefore, in order to fall within the definition of insolvency proceedings, they would need to be "collective judicial or administrative proceedings" (emphasis added below):

(a) under Article 1(l) of the Cape Town Convention, *"*bankruptcy, liquidation *or other collective judicial or administrative proceedings, including interim proceedings, in which the assets and affairs of the debtor are subject to control or supervision by a court for the purposes of reorganisation or liquidation"*; and

(b) under regulation 5 of the CTC Regulations 2015, *"*liquidation, bankruptcy, sequestration *or other collective judicial or administrative insolvency proceedings, including interim proceedings, in which the assets and affairs of the debtor are subject to control or supervision by a court (or liquidation committee)."*

10.4 Notably, the definitions whilst similar are not identical. There is an argument that, by enacting regulation 5 in its current form, through its express addition of the word "insolvency" before proceedings and replacement of the reference to "for the purposes of *reorganisation* or liquidation" with "(or liquidation committee)", the UK government wanted to ensure that Schemes of Arrangements were excluded from the definition (Restructuring Plans not having been introduced at the time when the CTC Regulations 2015 came into force). Although Schemes of Arrangement are a key restructuring tool in the UK, they are not traditionally regarded as insolvency proceedings under UK or EU law and are inserted into the Companies Act 2006 rather than being part of UK insolvency legislation. The same is true of Restructuring Plans.

10.5 Analysis by reference to the Official Commentary:

(a) Paragraph 4.21 of the Official Commentary provides that for a proceeding to constitute an "insolvency proceeding" for the purpose of Article 1(l) of the Cape Town Convention, three criteria need to be satisfied:

(i) the proceeding must be a collective proceeding;

(ii) the debtor's assets must be subject to the control and supervision of the court; and

(iii) the purpose must be the reorganisation of the debtor or immediate liquidation. The Official Commentary is clear that *each* of these criteria needs to be satisfied in order for a proceeding to be an insolvency proceeding under the Cape Town Convention, and therefore if even one of these criteria are not met it will not qualify.

(i) What constitutes a collective proceeding?

(A) Paragraph 3.118 of the Official Commentary notes that:

"The proceedings must be collective proceedings, that is, *proceedings for the benefit of creditors generally, therefore excluding proceedings designed primarily for the benefit of a particular secured creditor, such as receivership.* Bankruptcy and liquidation (or winding-up) are expressly covered, while "other" proceedings would include interim proceedings, for example, a stay of enforcement of rights pending the hearing of the substantive insolvency proceedings."

(B) The definition of a foreign proceeding under the UNCITRAL Model Law also includes the requirement for the procedure to be collective. Paragraph 70 of the Guide to the Enactment and Interpretation of the UNCITRAL Model Law (2014) notes that: *"In evaluating whether a given proceeding is collective for the purpose of the Model Law, a key consideration 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. A proceeding should not be considered to fail the test of collectivity purely because a class of creditors' rights is unaffected by it."*

(C) Similarly, in Article 2(1) of the EU Recast Insolvency Regulation, the term "collective proceeding" is defined as "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 expands on this definition by stating that *"The collective proceedings which are covered by this Regulation should include all or a significant part of the creditors to whom a debtor owes all or 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 should also be covered. Proceedings which do not include all the creditors of a debtor should be proceedings aimed at rescuing the debtor. Proceedings that lead to a definitive cessation of the debtor's activities or the liquidation of the debtor's assets should include all the debtor's creditors."*

(D) We therefore consider that Schemes of Arrangement and Restructuring Plans are likely to be regarded as "collective", if they include a substantial part of the debtor's liabilities. This is consistent with the approach of the U.S. Bankruptcy Court, which routinely recognises Schemes of Arrangement and, more recently, Restructuring Plans as foreign proceedings under Chapter 15 of the U.S. Bankruptcy Code, which also requires those proceedings to be collective.

(E) The position might be less clear, however, if the Scheme of Arrangement or Restructuring Plan only deals with a part of the company's indebtedness (for example a particular class of financial creditors) whilst not affecting the majority of creditors (for example trade creditors).

(ii) Are the debtor's assets and affairs subject to the control and supervision of the court?

(A) The Official Commentary:

I. Paragraph 4.21 describes this requirement as follows: "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""

II. Paragraph 3.118 states that "the assets and affairs of the debtor must be subject to control or supervision by a court. Excluded, therefore, are informal workouts and contractual restructuring arrangements where the debtor is left in control of its assets and affairs. Subject only to the terms of the contract. However, the definition covers institutions such as court-approved refinancing and the "debtor in possession", where possession and management remain with the debtor company but under the overall control of creditors or a supervisor and the court."

(B) This provision is very likely to be satisfied where the procedure requires the appointment of an insolvency practitioner, who is usually an officer of the court. However, where the procedure does not require the appointment of an insolvency practitioner, it is necessary to determine whether it gives the court *"overall control"* of the debtor's *"assets and affairs"*: see by way of analogy recital 10 to the EU Recast Insolvency Regulation, which sets out an equivalent requirement for insolvency proceedings covered by that regulation.[30]

(C) Consider the position of company voluntary arrangements (**CVAs**) under the Insolvency Act 1986, which are insolvency proceedings under the EU Recast Insolvency Regulation. They are required to be supervised by a qualified insolvency practitioner, who can be replaced by the court.[31] Sealy and Milman explain that *"the "supervisor" must be a person who is qualified to act as an insolvency practitioner in relation to the company; and in this way the legislation ensures that no voluntary scheme can be implemented without independent professional approval and supervision"*, and there is a presumption that the supervisor holds any money or other property of the company on trust for the CVA creditors.[32]

(D) There is clearly scope to argue that, because Schemes of Arrangement and Restructuring Plans must be convened and sanctioned by the court, they satisfy this requirement. However, we consider that the better view is that this requirement is not satisfied, because the role of the court in a Scheme of Arrangement or Restructuring Plan is extremely limited. There is no requirement to appoint an insolvency practitioner to supervise the procedure, either to propose or implement it. At the convening and sanction hearings, the court's role is limited to considering whether certain statutory requirements are met and the overall fairness of the proposal. Once a sanction order has been made, the court has no further involvement. In these circumstances, it is difficult to see how the court can be said to have "*overall control*" of the debtor's "*assets and affairs.*" We consider the particular features of the court's role in more detail below.

(E) The role of the court in a restructuring plan was considered in Virgin Atlantic where Trower J and Snowden J followed the principles established for Schemes of Arrangement when determining whether to convene and sanction the restructuring plan. Trower J also considered that the threshold conditions in section 901A were met, given that the restructuring plan was being proposed in order to avoid the airline

30 *"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. It 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."*

31 See sections 1 and 2 of the Insolvency Act 1986.

32 *Re Leisure Study Group Ltd* [1994] 2 B.C.L.C 65.

having to enter administration. Although Virgin Atlantic did not require cross class cram down, there is little doubt that the role of the court in that scenario is fundamentally similar, save that it is also required to take account of the additional conditions for a cross-class cram down as part of considering whether to exercise its discretion to sanction the Scheme of Arrangement. In this regard, see also paragraph 10.6(c)(v) where we consider the text of the Explanatory Notes and, the Practice Statement (Companies: Schemes of Arrangement under Part 26 and Part 26A of the Companies Act 2006).

(F) From scheme jurisprudence we know that:

I. the debtor rather than the court determines which creditors are included in the scheme (including formulating the appropriate class composition) with the court not intervening as long as the classes are constituted fairly and in a commercially rational manner.[33] The tests applied by the court are considered in more detail in paragraph 13 below; and

II. the role of the court is limited to satisfying itself that the statutory conditions are met and that it is appropriate to exercise its discretion to sanction the scheme. Provided these conditions are met, the court will not judge its commercial merits or usurp the views of the company, even if the scheme is not the best or only fair scheme.[34]

(G) Outside the terms of a Scheme of Arrangement (and by analogy a Restructuring Plan), the debtor company is in control of its assets. No supervisor is appointed and the company can continue to manage its affairs without any supervision of the court. This is in contrast to the position under formal insolvency proceedings (administration, liquidation etc.) where the control over the assets of the company passes to an insolvency officeholder under the supervision of the court.

(H) As discussed at limb (i) above, a Scheme of Arrangement or Restructuring Plan can deal with a subset of the creditors of a company or group. In such a scenario, the court's control and supervision extends only to such proportion of the company's assets and affairs that are brought within the scope of the restructuring plan or scheme. As the condition here is for the "assets and affairs" of the debtor to be under the control and supervision of the court, the position under a Scheme of Arrangement or Restructuring Plan falls short of that. Notably, the position under a Scheme of Arrangement or Restructuring Plan (where the exclusion of creditors is permitted) is in contrast to a formal debtor-in-possession proceeding such as a U.S. Chapter 11 where although the debtor is in possession, *all* of the debtor's assets and affairs are engaged in the reorganisation.

In this regard, it is pertinent to note that paragraph 3.118(3) of the Official Commentary, expressly excludes "informal workouts and contractual restructuring arrangements where the debtor is left in control of its assets and affairs" from the definition of insolvency proceedings.

(iii) The purpose must be the reorganisation of the debtor or immediate liquidation:

(A) As noted previously, the definition of "insolvency proceedings" under regulation 5 of the CTC Regulations has omitted reference to this condition.

(B) When construing what is intended by this condition, it is helpful to consider two specific paragraphs of the Official Commentary.

I. Paragraph 4.21(3) of the Official Commentary notes that the purpose must be either liquidation or a reorganisation of the debtor's affairs "*with a view to its restoration to profitable trading or to improving the position of creditors on a subsequent liquidation*".

II. Paragraph 3.118(4) of the Official Commentary notes that "*[t]he winding up, reorganisation or dissolution of a solvent company falls outside the scope of Article XI*".

33 *Sea Assets v. PT Garuda* [2001] EWCA Civ 1696.

34 *Re Telewest Communications Plc* (No. 2) [2005] BCC 36; *Re Equitable Life Assurance Society* [2002] EWHC 140; *Re Realm Therapeutics plc* [2019] EWHC 2080; *Re Virgin Atlantic Airways Limited* [2020] EWHC 2376 (Ch) 68.

(C) Applying this principle to Schemes of Arrangement:

I. the company's financial position is irrelevant to its ability to propose a Scheme of Arrangement. A Scheme of Arrangement can be proposed for a variety of purposes which need not have anything to do with improving the company's financial position.

II. This is supported by the classification of Schemes of Arrangement under English insolvency law, the Cross-Border Insolvency Regulations 2006, the UNCITRAL Model Law, and under EU law – see paragraphs 10.6, 10.7 and 10.8 below.

(D) Applying this principle to Restructuring Plans:

I. The threshold conditions required for a Restructuring Plan are (i) the company is to satisfy the court that it "*has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern*" (section 901A(2) of the Companies Act 2006) and (ii) that the purpose of the compromise or arrangement is "*to eliminate, reduce or prevent, or mitigate the effect of, any of [these] financial difficulties*" (section 901A(3) of the Companies Act 2006).

II. It is clear that the threshold conditions in subparagraph I above could be satisfied by a solvent company that is encountering some financial difficulties that may, or may not, affect its ability to carry on business as a going concern.

III. Whether a Restructuring Plan fulfils the condition under this limb (iii) is fact specific and depends among other aspects on the relevant alternative – we do not consider that it is possible to make a blanket statement that all restructuring plans will satisfy this condition.

IV. This is supported by the classification of Restructuring Plans under English insolvency law, Cross-Border Insolvency Regulations 2006, the UNCITRAL Model Law and under EU law – see paragraphs 10.6, 10.7 and 10.8 below.

35 Paragraph 3.118(1) of the Official Commentary on the Convention on International Interests in Mobile Equipment and the Protocol thereto on Matters specific to Aircraft Equipment – Fourth Edition (2019).

10.6 It is worth drawing an analogy with the equivalent definition in the UNCITRAL Model Law on Cross Border Insolvency (**Model Law**):

(a) The definition of "insolvency proceedings" in the Cape Town Convention and the CTC Regulations 2015 is very similar to the definition of a "foreign proceeding" under the Model Law.[35] This is no accident: the Official Commentary to the Cape Town Convention and the Aircraft Protocol states that the definition of insolvency proceedings "*closely follows*" the Model Law. On this basis, when interpreting the definition of "insolvency proceedings", the scope of the equivalent definition in the Model Law is a natural starting point.

(i) A "foreign proceeding" is defined in article 2(i) of the Model Law as follows:

"foreign proceeding" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation".

(ii) Accordingly, in order to be a foreign proceeding under the Model Law, the relevant procedure must be "*pursuant to a law relating to insolvency.*" Although the phrase "pursuant to a law relating to insolvency" does not appear in the definition of "insolvency proceedings" in the Cape Town Convention or the CTC Regulations 2015, the same effect is achieved by the definition of the "*commencement of insolvency proceedings*" as "*the time at which the insolvency proceedings are deemed to commence under the applicable insolvency law*".

(iii) This concept of the relevant procedure being "pursuant to a law relating to insolvency" is explained in the Guide to the Enactment of the Model Law (2014) at paragraph 73:

"*This formulation [viz. the reference to a "law relating to insolvency"] is used in the Model Law to acknowledge the fact that liquidation and reorganisation might be conducted under law that is not labelled as insolvency law (eg company law), but which nevertheless deals with or addresses insolvency or severe financial distress. The purpose was to find a description that was 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. A simple proceeding for a solvent legal entity that does not seek to restructure the financial affairs of the entity, but rather to dissolve its legal status, is likely not one pursuant to a law relating to insolvency or severe financial distress.*"

(iv) It is clear from this that the relevant procedure must be triggered by "*insolvency or severe financial distress*".[36] More recently, ICC Judge Briggs (sitting as a High Court Judge) has held that the company must in fact *be* insolvent or in severe financial distress in order for the procedure to be a foreign proceeding, and therefore set aside an order recognising a just and equitable winding-up of a solvent company.[37]

(b) Does a Scheme of Arrangement satisfy the requirement of a "foreign proceeding" under the Model Law?

(i) The company's financial position is irrelevant to its ability to propose a Scheme of Arrangement and there is no entry threshold relating to insolvency or severe financial distress. Although the question has not fallen to be determined by the courts, the leading commentators agree that a Scheme of Arrangement falls outside the definition of a "foreign proceeding" under the Model Law.[38]

36 *Re Agrokor d.d.* [2018] Bus LR 64, [63].

37 *Re Sturgeon Central Asia Balanced Fund Ltd* [2020] EWHC 123 (Ch).

38 See, for example, Goode, *Principles of Corporate Insolvency Law* para 16-25 and para 16-29(2) and Wood, *Principles of International Insolvency* at para 66-022.

(ii) It is, however, very common for Schemes of Arrangement to be recognised under Chapter 15 of the U.S. Bankruptcy Law. The reason for the different approach taken is that the definition of "*foreign proceedings*" under Chapter 15 of the U.S. Bankruptcy Code includes additional language capturing "*a law relating to insolvency or adjustment of debt.*" Indeed, it is the inclusion of the phrase "*adjustment of debt*" that enables Schemes of Arrangement to be recognised under Chapter 15 as "*collective proceedings for the adjustment of debt*". There is no reference to an "adjustment of debt"[39] in the Model Law, the Cape Town Convention, the Aircraft Protocol or the CTC Regulations 2015. This different approach taken in the U.S. serves to underline the fact that Schemes of Arrangement are not regarded as foreign proceedings under the Model Law. It could be conversely argued that while the extra words "or adjustment of debt" have been added to the U.S. definition of "foreign proceeding" for the purposes of Title 11 of the Bankruptcy Code, the U.S. definition includes the same criterion of court control or supervision we consider not met by a Scheme of Arrangement or a Restructuring Plan. Therefore, it could be argued that the recognition of Schemes of Arrangement under Chapter 15 implies that, from a U.S. perspective, such procedures do meet the control and supervision element of the definition of "foreign proceedings" under Chapter 15 of the U.S. Bankruptcy Code. This element of the U.S. definition has never been substantively challenged however and so it is hard to predict how the court will consider such an argument.

(iii) This is supported by the classification of Schemes of Arrangement under English insolvency law, the Cross-Border Insolvency Regulations 2006, the UNCITRAL Model Law and under EU law – see paragraphs 10.6, 10.7 and 10.8 below.

(c) Does a Restructuring Plan satisfy the requirement of a "foreign proceeding" under the Model Law?

(i) It is submitted that the same approach would be taken to Restructuring Plans. The key difference between the procedures for these purposes is the threshold condition contained in section 901A of the Companies Act 2006. This requires a company to satisfy the court that it "*has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern*" (section 901A(2) of the Companies Act 2006) in order to propose a Restructuring Plan. Although this requires the court to consider the company's current and future financial position at the convening hearing, this standard falls short of requiring the company to actually be insolvent or in severe financial distress. For example, the threshold required for a Restructuring Plan could be satisfied by a solvent company that is merely likely to encounter some financial difficulties that may, or may not, affect its ability to carry on business as a going concern. The point being that while this situation would meet the threshold condition for a Restructuring Plan, it will not necessarily be sufficient to obtain a winding up order or an administration order as entry into a formal insolvency will require proof that a company is unable to pay its debts as they fall due.[40]

(ii) This conclusion is consistent with the UK Government's views, which were initially set out in its response to the consultation carried out regarding the original proposals for reform, titled "*Insolvency and Corporate Governance – Government Response*; (26th August 2018)". This stated that "*The Government believes allowing solvent companies to address emerging financial difficulties will reduce stigma and encourage earlier action on the part of directors, thereby avoiding value-destructive action and leading to better outcomes on the whole for creditors and other stakeholders in a company*"[41] and therefore that "*there will be no financial entry criteria*" to propose a restructuring plan.

39 *In re Avanti Communications Group plc* 582 BR, 614.

40 See *Re Colt Telecom Group Plc* [2002] EWHC 2815 (Ch) at [26].

41 See "Insolvency and Corporate Governance – Government Response; (26th August 2018)", available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736163/ICG_-_Government_response_doc_-_24_Aug_clean_version__with_Minister_s_photo_and_signature__AC.pdf, paragraphs 5.131-5.132.

42 See Commons briefing paper, "Corporate insolvency framework: proposed major reforms", available at https://commonslibrary.parliament.uk/research-briefings/cbp-8291/, pages. 27-8.

(iii) The following year, in December 2019, a House of Commons library briefing titled "*Corporate Insolvency framework: proposed major reforms*" reiterated this point[42], stating that "The Government proposes the introduction of a new standalone restructuring procedure that may be proposed by solvent or insolvent companies". The briefing also noted that "there would be no financial entry criteria" to using Part 26A.

(iv) The Explanatory Notes to the CIGA 2020 (the **Explanatory Notes**) confirm that the Government intended to maintain its previous position about Part 26A, since "*the new Part represents the culmination of the policy work undertaken since a restructuring plan procedure for companies was consulted on as part of 'A Review of the Corporate Insolvency Framework', published in May 2016.*"

(v) The Explanatory Notes also emphasise that "*the new restructuring plan procedure is intended to broadly follow the process for approving a Scheme of Arrangement (approval by creditors and sanction by the court)*", and that "*while there are some differences between the new Part 26A and existing Part 26 (for example the ability to bind dissenting classes of creditors and members), the overall commonality between the two Parts is expected to enable the courts to draw on the existing body of Part 26 case law where appropriate*".[43] There is no suggestion that the addition of the threshold criteria in section 901A are intended to change the nature of the procedure; rather, they represent an additional safeguard to control the manner in which the procedure is used. This is reflected in the Practice Statement (Companies: Schemes of Arrangement under Part 26 and Part 26A of the Companies Act 2006)[44] issued by the Judiciary of England and Wales which combines the guidance applicable to both Schemes of Arrangement and Restructuring Plans. This is consistent with the fact that Part 26A of the Companies Act 2006 also does not fall within "insolvency law" as defined in section 426 of the Insolvency Act 1986.

For the reasons set out above, we consider that neither Schemes of Arrangement nor Restructuring Plans fall within the definition of a "foreign proceeding" under the Model Law. Viewed in this light, neither Schemes of Arrangement nor Restructuring Plans would be considered to fall within the almost identical definition of "*insolvency proceedings*" in the Cape Town Convention or the CTC Regulations 2015.

10.7 It is also helpful to consider an analogy with the EU Recast Insolvency Regulation:

(a) The EU Recast Insolvency Regulation has a concept of "public collective proceedings" which closely mirrors the equivalent definitions under the Model Law, the Cape Town Convention and the CTC Regulations."[45]

(b) The omission of Schemes of Arrangement and Restructuring Plans from Annex A to the EU Recast Insolvency Regulations (which sets out the proceedings within its scope) means that they do not constitute "*insolvency proceedings*" in that context.

43 Paragraphs 15-16 of the Explanatory Notes to the Corporate Insolvency and Governance Act 2020.

44 See Practice Statement (Companies: Schemes of Arrangement under Part 26 and Part 26A of the Companies Act 2006), published by the Judiciary of England and Wales and available at https://www.judiciary.uk/wp-content/uploads/2020/06/Schemes-Practice-Statement-FINAL-25-6-20-1.pdf.

45 Article 1 of the EU Recast is Regulation shall apply to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation: (a) a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed; (b) the assets and affairs of a debtor are subject to control or supervision by a court; or (c) 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 , and, where no agreement is reached, are preliminary to one of the proceedings referred to in point (a) or (b).

10.8 Finally, we have considered how these procedures are treated under UK law:

(a) Schemes of Arrangement are not classified as insolvency proceedings under any applicable UK law, nor in any associated international regulations;

(i) they are not, and have never been, considered an insolvency proceeding for the purposes of the EU Recast Insolvency Regulation – see paragraph 10.7 above;

(ii) they do not fall within "*British insolvency law*" in the Cross-Border Insolvency Regulations 2006; and

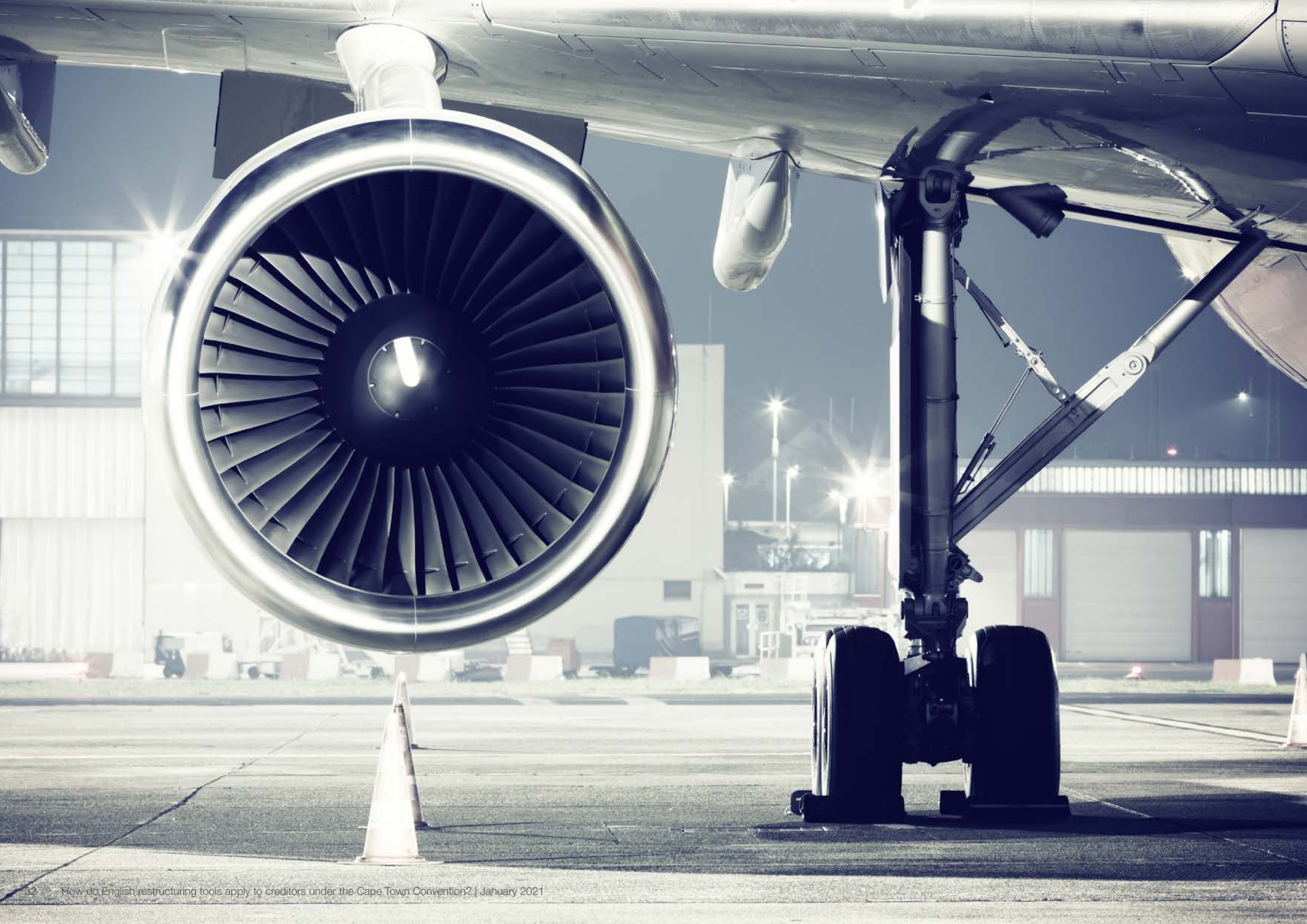
(iii) they do not fall within "*insolvency law*" as defined in section 426 of the Insolvency Act 1986.

(b) Restructuring Plans are likewise not classified as insolvency proceedings under any applicable UK law, nor in any associated international regulations:

(i) they are not considered an insolvency proceeding for the purposes of the EU Recast Insolvency Regulation – see paragraph 10.7 above;

(ii) they do not fall within "*British insolvency law*" in the Cross-Border Insolvency Regulations 2006; and

(iii) they do not fall within "*insolvency law*" as defined in section 426 of the Insolvency Act 1986.



11. Limb 2 – the declared intention to suspend or actual suspension of payments by the debtor where the creditor's right to institute insolvency proceedings against the debtor or to exercise remedies under the Cape Town Convention is prevented or suspended by law or State action.

11.1 The second limb of the definition of "insolvency-related event" is taken directly from the Aircraft Protocol (Article II(m)). It appears to fall into three parts, each of which must be satisfied in order to trigger the provision. These are: (1) a declared intention to suspend or actual suspension of payments by the debtor; (2) the creditors' rights to institute insolvency proceedings against the debtor or to exercise remedies under the Cape Town Convention must be prevented or suspended; and (3) this suspension or prevention must take effect by law or State action. We consider below whether Schemes of Arrangement or Restructuring Plans satisfy these conditions.

(a) When interpreting this provision, it is important to bear in mind the fact that the Aircraft Protocol specifically requires contracting states to choose which of their domestic insolvency proceedings trigger Alternative A. It would be contrary to the express provisions of Article XXX(3) of the Aircraft Protocol if the provisions of Alternative A itself were drafted so as to undermine that choice. Therefore, rather than being a catch-all provision designed to apply Alternative A to a wider set of procedures than the contracting state may have intended, this second limb of the definition should be restrictively construed.

(b) This restrictive approach towards interpreting the second limb is supported by the Official Commentary, which suggests that this second limb is only required because in some jurisdictions airlines are not eligible for insolvency proceedings at all, but can be subject to externally-imposed State action which may establish a moratorium on legal actions against them.[46]

(c) In any event, the wording of this limb indicates that it only covers procedures which involve a temporary moratorium under the national insolvency law. Examples of these moratoriums include the Netherlands (under its *surséance van betaling* or "suspension of payments" procedure) and Belgium (under its LCE Procedure, which enables the court to commence a *periode van opschorting* or "suspension period"). Schemes of Arrangement and Restructuring Plans clearly fall outside this category.

46 Paragraphs 5.14 and 5.18 of the Official Commentary on the Convention on International Interests in Mobile Equipment and the Protocol thereto on Matters specific to Aircraft Equipment – Fourth Edition (2019). Paragraph 5.18 is an illustrative example of the need for second limb namely: *"Under the laws of State X, government-controlled airlines may not be subject to insolvency proceedings. Airline 1 is a government-controlled airline. Airline 2 is an affiliate of Airline 1, which holds a 25% interest in Airline 2. The remaining 75% interest is held by private investors. On 2 January, Airline 1 declares its intent to suspend payments to all creditors. On 15 January, Airline 2 declares its intent to suspend payments to all creditors, and on 17 January State X, by presidential decree, establishes a moratorium on legal actions against Airline 2. For the purposes of Article XI of the Protocol, an insolvency-related event has occurred on 2 January with respect to Airline 1, and on 17 January with respect to Airline 2."*

(d) The concept regarding a "suspension of payments" is also included in the definition of "*reorganisation measures*" in Article 2 of the *EU Directive on the Reorganisation and Winding Up of Credit Institutions* (2001/24/EC), which include "*measures which are intended to preserve or restore the financial situation of a credit institution and which could affect third parties' pre-existing rights, including measures involving the possibility of a suspension of payments, suspension of enforcement measures or reduction of claims*". Schemes of Arrangement are not included within the definition of a reorganisation measure under the UK implementation of the Credit Institutions Directive, but instead have a bespoke procedure that only applies to them: see the Credit Institutions *(Reorganisation and Winding Up) Regulations 2004* (SI 2004/1045) at regulations 3 and 4. This supports the conclusion that a Scheme of Arrangement does not ordinarily involve a "*suspension of payments*" The same analysis applies to a Restructuring Plan.

(e) This conclusion is reinforced by returning to the Guide to the Enactment of the UNCITRAL Model Law on Cross Border Insolvency which states "*Within the parameters of the definition of a foreign proceeding, a variety of collective proceedings would be eligible for recognition, be they compulsory or voluntary, corporate or individual, winding-up or reorganisation. The definition would also include those proceedings in which the debtor retains some measure of control over its assets, albeit under court supervision (eg suspension of payments, "debtor in possession")*"[47] (emphasis added). As discussed above, we consider that Schemes of Arrangement and Restructuring Plans do not fall within the Model Law. This further supports the conclusion that Schemes of Arrangement and Restructuring Plans do not fall within this limb of the definition.

(f) In addition, proposing and sanctioning a Scheme of Arrangement or a Restructuring Plan does not prevent a creditor from instituting insolvency proceedings or exercising remedies under the Cape Town Convention. Part 26 and Part 26A of the Companies Act 2006 do not temporarily suspend the debtor's existing obligations for a limited period of time (and impose a corresponding temporary moratorium on claims to enforce them): rather, the effect of sanctioning a Scheme of Arrangement or Restructuring Plan is to contractually vary underlying agreements (which may depending on certain conditions being satisfied including a compromise of the debt itself), without restricting the creditor from taking enforcement action or seeking remedies in respect of the compromised debt.

11.2 Since Schemes of Arrangement and Restructuring Plans neither (1) involve a "suspension of payments" nor (2) prevent or suspend the creditor's rights to institute insolvency proceedings against the debtor or to exercise remedies under the Cape Town Convention, they not fall within this limb of the definition of an "insolvency-related event".

47 See paragraph 71 of the UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation available at https://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf.

12. The intention of the UK Government

12.1 The previous section of this analysis focussed on the wording of the definitions in the Cape Town Convention, Aircraft Protocol and the CTC Regulations 2015. We have suggested that the language used therein supports the conclusion that Schemes of Arrangement and Restructuring Plans do not fall within the scope of the definition of an "insolvency-related event". However, to the extent that there is any ambiguity about the classification of Schemes of Arrangement and Restructuring Plans from the language in the CTC Regulations 2015, there are a number of other documents that support this conclusion. There is no doubt that the Cape Town Convention and the Aircraft Protocol aim to establish a clear and transparent regime, such that any election made about what constitutes "insolvency proceedings" or an "insolvency-related event" that triggers Alternative A should be made explicit by the domestic courts. It is, therefore, highly unsatisfactory that the UK's election in respect of Schemes of Arrangement and Restructuring Plans is not clear from the wording of the CTC Regulations 2015 themselves. However, in our view, that uncertainty can only be resolved in accordance with the usual principles of UK statutory interpretation, which may require considering certain other sources in order to ascertain what the UK government intended. It is also relevant to note that the Annotation (dated 16 June 2020) post-dates the CTC Regulations 2015, and so the UK government was plainly not aware of that line of thinking when implementing the CTC Regulations 2015. Similarly, by the time the Annotation was published, the text of the CIGA 2020, which introduced Restructuring Plans, had been through several rounds of amendments, such that it was in substantially final form, and just nine days from receiving Royal Assent. It therefore cannot be said that the UK government was aware of the reasoning in the Annotation prior to developing and enacting either piece of legislation. We therefore do not consider the substance of the Annotation in this section of our analysis, but confine our response to the Annotation to paragraph 14 below.

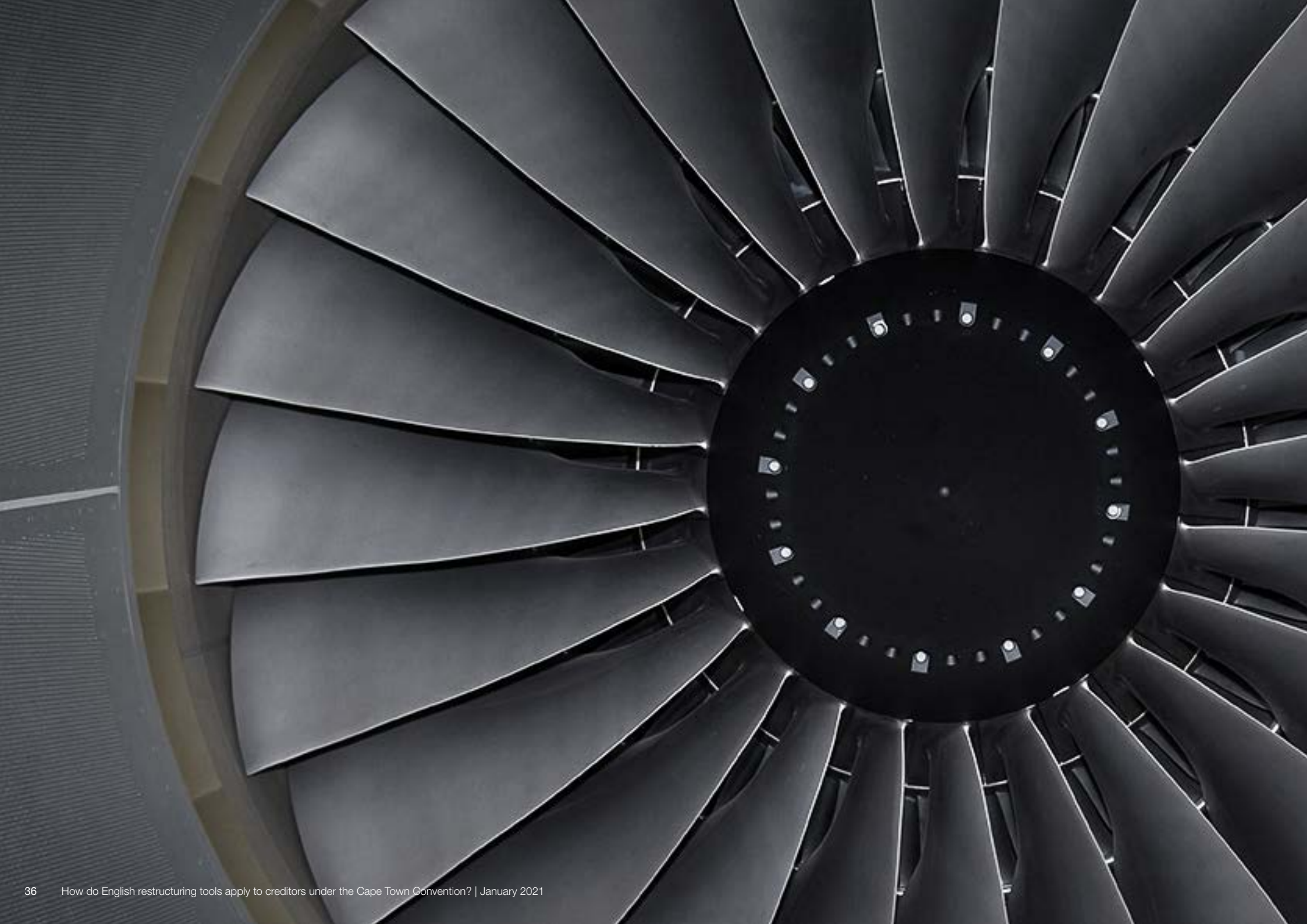
12.2 In determining which proceedings the UK government intended to trigger Regulation 37 of the CTC Regulations 2015, it is potentially relevant to consider regulation 37(12), which clarifies the interaction between specific insolvency proceedings and the CTC Regulations 2015. This is clearly not intended to be an exhaustive list, as neither voluntary nor compulsory liquidation is mentioned. However, this provision specifically refers to administration and individual voluntary arrangements, and section 12A refers to the new moratorium introduced by the CIGA 2020.[48] When originally enacted, Regulation 37(12) also made specific reference to company voluntary arrangements, but these were removed by the CIGA 2020.[49] Whereas the interaction between liquidation and the CTC Regulations 2015 requires no further explanation, there is inherent uncertainty about how Regulation 37 would interact with Schemes of Arrangement/Restructuring Plans, and if those proceedings did trigger Regulation 37. In these circumstances, it would have been consistent with the purpose of regulation 37(12) for the draftsman to clarify those matters in that section. Therefore, in our view, the fact that Schemes of Arrangement and Restructuring Plans are not mentioned in Regulation 37(12) also suggests that the UK government does not consider that they fall within the definition of an "insolvency-related event."

12.3 Turning to the UK government's intentions regarding Schemes of Arrangement, we would make the following points:

(a) Before introducing the CTC Regulations 2015, the UK government undertook an extensive consultation exercise on whether or not to adopt Alternative A. It is clear from the consultation materials and government publications that the UK government did not envisage that Schemes of Arrangement would trigger the consequences of Alternative A, but that it would only affect creditors' rights in liquidation, administration and company voluntary arrangements. At no stage do any of the consultation or explanatory materials mention Schemes of Arrangement or the Companies Act 2006.

48 Section 12A was inserted by paragraph 55(4) of Schedule 3 to the CIGA 2020; see also paragraph 55(2).

49 Paragraph 55(3) of Schedule 3 to the CIGA 2020 removed the two parts of Regulation 37(12) that referred to CVAs. It is not clear what the purpose or effect of these changes was, but there is an argument that the government's intention may have been to remove CVAs from the scope of "insolvency proceedings" under the CTC Regulations 2015.



(b) For example, the Explanatory Memorandum to the CTC Regulations 2015 states that one of the major areas of concern during the consultations was "*whether the UK should require an insolvency practitioner in an administration or a voluntary arrangement either to return an aircraft or pay off defaults and agree to keep up with future repayments at the end of a specified waiting period.*"[50] There is no suggestion that Schemes of Arrangement would trigger regulation 37.

(c) This is consistent with the approach taken in the Final Impact Assessment for the CTC Regulations 2015, which states that "*Alternative A would not affect the right of a secured creditor to take possession of an aircraft on winding up or bankruptcy. However it would displace UK insolvency law on administration and on company voluntary arrangements (CVAs) for this type of asset.*"[51] Again, this does not mention Schemes of Arrangement.

(d) Given the fundamental incompatibility between regulation 37(9) and the intra-class cram down available in a scheme of arrangement, it would be highly surprising if the UK government intended to apply Alternative A to Schemes of Arrangement without expressly considering the consequences, or even identifying that they would be affected.

12.4 We consider below the UK government's intention in relation to Restructuring Plans:

(a) The first draft of the Corporate Insolvency and Governance Bill included provisions which expressly prevented a Scheme of Arrangement or a Restructuring Plan from modifying the rights of creditors with CTC Interests without their consent.[52] In particular, as originally drafted, section 901I provided that creditors with CTC Interests "*may not participate in the meeting summoned under section 901C" and that "the court may not sanction the compromise or arrangement…if it includes provision in respect of any [creditor with a CTC Interest] who has not agreed to it.*" However, these provisions were subsequently removed on the second reading of the Bill.

(b) There are a number of comments in Hansard about these amendments, including from the Secretary of State, who explained that the amended Bill "*will retain the ability for an airline to use a scheme of arrangement and a restructuring plan to affect Cape Town creditors' registered interests without the consent of every individual creditor, provided that the other safeguards of those procedures are satisfied*".[53] The CIGA 2020 was enacted in this amended form. Both the comments in Hansard and the amendments themselves are potential tools for construing the CIGA 2020. Comments in Hansard are admissible following *Pepper v Hart* [1992] 3 WLR 1032, and *Bennion on Statutory Interpretation* (6th edition) confirms that "*where an amendment is made to a Bill during its passage through Parliament, or an amendment is moved but not made, this may throw light on the meaning of the resulting Act*."[54]

(c) The treatment of Restructuring Plans elsewhere in the CIGA 2020 is also illuminating. Firstly, the new moratorium under section A1 draws a distinction between a "*compromise or arrangement*" under Part 26 or Part 26A of the Companies Act 2006 and a "*relevant insolvency procedure*", which covers proceedings under the Insolvency Act 1986. Secondly, only one provision of the Insolvency Act 1986 is said to be applicable Restructuring Plans (but not Schemes of Arrangement), namely the new section 233B (which restricts the use of *ipso facto* clauses in certain cases). The inclusion of Part 26A of the Companies Act 2006 in the operation of a single provision in the Insolvency Act 1986 is not sufficient to render it an "*insolvency proceeding*" for any broader purpose. Further (although not providing much further clarity), the Insolvency Act 1986 expressly states that nothing in section 233B affects the CTC Regulations 2015.[55]

50 See https://www.legislation.gov.uk/uksi/2015/912/memorandum/contents, paragraph 8.3.
51 See https://www.legislation.gov.uk/ukia/2015/42/pdfs/ukia_20150042_en.pdf, paragraphs 77-8.
52 See https://publications.parliament.uk/pa/bills/cbill/58-01/0128/20128.pdf
53 Hansard, 3 June 2020, volume 676, column 996.
54 Paragraph 24.13, O. Jones, F. Bennion, *Bennion on Statutory Interpretation* (6th edition), London: Butterworths (2013).
55 Paragraph 21 of Part 4 of Schedule 4ZZA of the Insolvency Act 1986 (inserted by the CIGA 2020) states that, "Nothing in section 233B affects the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 (S.I. 2015/912)."

(d) In our view, it is therefore clear that the UK government does not consider that Schemes of Arrangement or Restructuring Plans are "insolvency proceedings" or "insolvency-related events" that would fall within regulation 37 of the CTC Regulations 2015. To the extent that the wording is considered to be ambiguous, we consider that the statements in Hansard are admissible for the purpose of construing the CIGA 2020, following *Pepper v Hart* [1992] 3 WLR 1032.

(e) This is not just relevant for the construction of the CIGA 2020. An ambiguous phrase in existing legislation, such as the definitions of "insolvency proceeding" and "insolvency-related event" in the CTC Regulations 2015, can and should be interpreted with regard to Parliament's understanding of the meaning of that phrase in new legislation. This was explained in *Regina (N) v Walsall Metropolitan Borough Council* [2014] EWHC 1918 (Admin) per Leggatt J. He noted that, in accordance with the principle of parliamentary sovereignty, "*Parliament can change the meaning of an existing statutory provision*" (at [53]). This can be done in various ways:

(i) Firstly, even "*without explicitly requiring the courts to give a term in existing legislation a particular meaning, or to apply a specified rule when interpreting the term, Parliament may act in a way which treats the term as having a particular meaning and signals its approval of that meaning. A line of cases illustrates that this is a matter to which a court may properly have regard to resolve an ambiguity in the statutory language*" (paragraph 55).

(ii) Secondly, and importantly, "*[if] Parliament has proceeded on the basis that an existing law has a particular meaning at a time when, if Parliament had understood the law to have a different meaning, it is reasonable to infer that it would have acted differently, that may properly be treated as an implied directive as to how a previously ambiguous law should be interpreted*" (paragraph 59).

(f) It is clear from (1) the government consultations and publications prior to the enactment of both the CTC Regulations 2015 and the CIGA 2020, (2) the amendments made before the enactment of CIGA 2020 and (3) the accompanying comments in Hansard that Parliament has acted in a way which treats Schemes of Arrangement and Restructuring Plans as outside the definition of an "*insolvency-related event*" in the CTC Regulations 2015. It is also reasonable to infer that the Government would have acted differently if it had understood that Schemes of Arrangement or Restructuring Plans would trigger the remedies in regulation 37, both in enacting the CTC Regulations 2015 themselves, and/or when introducing the CIGA 2020.

(g) Following the decision in *Walsall*, this amounts to an implied directive that the definition of "*insolvency-related event*" in the CTC Regulations 2015 should be interpreted so as to exclude procedures under Part 26 and Part 26A of the Companies Act 2006. Therefore, in our view, there can be no doubt that Parliament does not intend for Schemes of Arrangement or Restructuring Plans to trigger regulation 37 of the CTC Regulations 2015.

(h) Finally, it is important to note that this is not inconsistent with the UK's obligations under the Cape Town Convention. Article XXX(3) of the Aircraft Protocol gives each contracting state a free choice about which of its national insolvency proceedings, if any, will trigger Alternative A, and other provisions of the Aircraft Protocol and the Cape Town Convention enable contracting states to change their stance at a later date.

13. Which claims could be crammed down under a Scheme of Arrangement and a Restructuring Plan?

13.1 In light of the analysis above, we consider that the better view is that Schemes of Arrangement and Restructuring Plans are not "insolvency-related events" or, therefore, "insolvency proceedings" under the CTC Regulations 2015. This means that airlines can enter into a Scheme of Arrangement or a Restructuring Plan with creditors with CTC Interests, without needing to obtain their consent in advance. In this section we discuss how this could work in practice.

13.2 As part of establishing that it has jurisdiction to convene meetings in relation to the proposal, the court needs to be satisfied that the proposal amounts to a compromise or arrangement between the company's creditors (or members) or any class of them.

13.3 It is well established that Schemes of Arrangement (and, by parity of reasoning, Restructuring Plans) can only compromise the rights of creditors in their capacity as creditors.[56] It is therefore not possible to compromise any rights that those creditors have in a different capacity. Although the UK court has not previously considered the position of aircraft lessors, recent consideration has been given to how the rights of landlords may be compromised by a Scheme of Arrangement.[57]

(a) The rights which *can* be compromised include:

(i) secured debts;

(ii) liabilities for accrued and future rent;

(iii) damages claims against the company for breaching the terms of the lease; and

(iv) claims against third parties such as guarantors, where the release of those claims is necessary to give effect to the compromise.

(b) However, it is not possible:

(i) to compromise a lessor's accrued right to repossess its property without their consent. This is because the right of repossession relates to the lessor's proprietary interest in the property, and is therefore not a right which arises in its capacity as a creditor. Therefore, whilst a Scheme of Arrangement or Restructuring Plan can include an *option* for a lessor to waive its right of repossession, it cannot remove this right without their individual consent; or

(ii) to impose a surrender of the lease. This is because a Scheme of Arrangement or Restructuring Plan cannot impose additional obligations. If a property is surrendered, then the owner will be required to incur additional expenses, such as business rates.[58]

13.4 Although there are certain differences between a property lease and an aircraft lease, these differences do not alter the substance of this analysis. Therefore, given the current state of the law, we consider it likely that the UK court would hold that a lessor's accrued right to repossess its aircraft cannot be compromised, nor can a Scheme of Arrangement or Restructuring Plan impose an early surrender of the lease.[59]

13.5 What this means in practice is that although an aircraft lessors' right to receive payments from the company going forward could be adjusted, deferred or otherwise amended, the lessor will retain any accrued right that it has under the lease to repossess its aircraft, and will be entitled to exercise this option in any event. Depending on the market appetite for aircraft, this could provide lessors with a valuable bargaining chip in the negotiations leading up to the formulation of any Scheme of Arrangement or Restructuring Plan. In addition to this, it is also unlikely to be possible for the company to terminate the leases early.

56 *Re Lehman Brothers International Europe* [2010] BCLC 496, [65].

57 *Re Instant Cash Loans Ltd* [2019] EWHC 2795 (Ch), applying Re Debenhams Retail Ltd [2020] BCC 9.

58 *Re Instance Cash Loans Ltd* [2019] EWHC 2795 (Ch) at [10]-[11].

59 However, there is an argument that the position of aircraft lessors differs substantially from property landlords in this regard, as the early surrender of an aircraft does not require the owner to incur any obligatory charges, such as business rates. Of course, requiring the owner to take possession of its aircraft is still likely to result in some additional costs associated with upkeep of the aircraft.

13.6 In addition to these limits on what rights can be included in the proposal, there are also clear restrictions on the nature of the compromise that can be imposed on creditors without their consent. Neither Schemes of Arrangement nor Restructuring Plans permit the different treatment of creditors within the same class. The English restructuring legislation and jurisprudence has developed in order to ensure that there is adequate protection to all stakeholders, and the court takes an active role in ensuring that the proposal is procedurally and substantively fair. Crucially, in order to have any prospect of being sanctioned by the court, the company has to demonstrate that no creditors will be any worse off under the proposal than they would be in the most likely alternative if the proposal did not go ahead.

13.7 The circumstances in which a Restructuring Plan can be sanctioned differ slightly from the circumstances in which a Scheme of Arrangement can be sanctioned. However, the potential impact that each procedure can have on the rights of the creditors involved is the same.

(a) Firstly, as discussed above, in order for a Restructuring Plan to be convened and sanctioned, the court must be satisfied that it is being proposed for the purpose of addressing actual or anticipated financial difficulties.[60] There is no such restriction on the circumstances in which a Scheme of Arrangement can be proposed.

(b) Second, the approval required from creditors is different.

(i) In order for a Scheme of Arrangement to be sanctioned, it must be approved by a majority in number representing 75% in value of those present and voting in each class.[61] The court will then need to consider whether to exercise its discretion to approve the scheme.

(ii) In order for a Restructuring Plan to be sanctioned, it must be approved by creditors representing 75% in value[62] of those present and voting in at least one class.

(A) If the Restructuring Plan is approved by the statutory majority in each class, then the court simply has to consider whether to exercise its discretion to sanction the Restructuring Plan.

(B) If the Restructuring Plan is not approved by the statutory majority in one or more class (a "dissenting class"), but there is at least one "in the money class" that does approve the plan, then the court has to consider whether each dissenting class will be worse off under the Restructuring Plan than the most likely alternative if the plan is not sanctioned (the "relevant alternative").[63] If it is satisfied of this, then the court still has to consider whether to exercise its discretion to sanction the Restructuring Plan.

13.8 As will be clear from the paragraphs above, the most likely alternative to the proposal is an important touchstone for determining how creditors' rights may be compromised. In traditional scheme jurisprudence this was referred to as the 'comparator' to the scheme, and Part 26A of the Companies Act 2006 defines the same concept as the 'relevant alternative' in section 901G. It is customary to instruct financial advisors to provide a report on the likely outcomes for creditors under the relevant alternative, so that these can be compared with the likely outcomes for creditors under the Scheme of Arrangement or a Restructuring Plan. The purpose of this evidence is to enable creditors to form a view on whether or not they consider the proposal to be in their interests, and to satisfy the court that the proposal is fair.

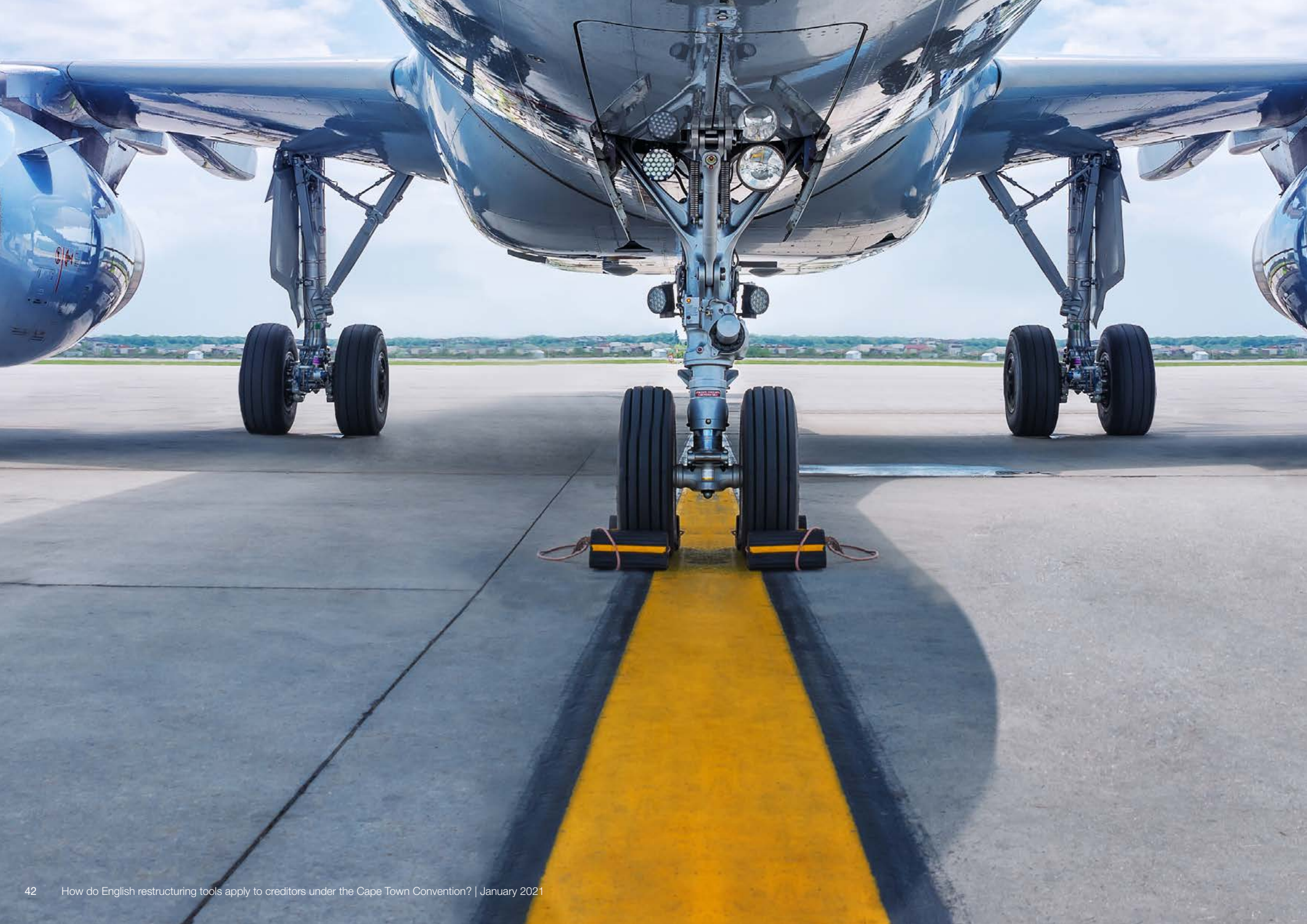
13.9 Therefore, although creditors with CTC interests would not have the protections of the specific regime in regulation 37 of the CTC Regulations 2015, they would be protected by the existing limitations on what kind of compromise can be sanctioned under Part 26 and Part 26A of the Companies Act 2006.

60 Section 901A of the Companies Act 2006.

61 Section 899(1) of the Companies Act 2006

62 There is no numerosity requirement in section 901F(1) of the Companies Act 2006.

63 Section 901G of the Companies Act 2006.



14. Response to the annotation to the official commentary dated 16 June 2020

14.1 Very shortly before the CIGA 2020 received Royal Assent (25 June 2020), an annotation to the Official Commentary was published on 16 June 2020 (the "**Annotation**").[64] At the outset, it is important to emphasise that, unlike the Official Commentary, which was authorised by the 2001 Diplomatic Conference together with the Cape Town Convention itself, the Annotation was produced by a research body called the Cape Town Convention Academic Project[65] and has no official standing.[66] As a result, while we consider that the court will likely hear arguments based on the Annotation given the standing of its authors (including Professor Louise Gullifer), we would assume that the Annotation would be accorded the same weight as an academic article ie the annotation is not in any respect authoritative or binding on the court. As noted in paragraph 12.1 above, the Annotation was published several years after the CTC Regulations 2015 were enacted, and was published online just nine days before the CIGA 2020 received Royal Assent when the text was already in final form. Therefore, the UK government was not aware of the reasoning in the Annotation prior to enacting either piece of legislation. This is particularly so given that, as we explain below, the Annotation sets out an entirely novel test for determining what constitutes a 'reorganisation arrangement' that is not based in any previous authority.

14.2 The Annotation begins by stating that "*the question of whether a reorganisation arrangement is covered by Article 30 of the Convention and Article XI of the Aircraft Protocol is to be determined by the definition of 'insolvency proceedings' in Article 1(l) of the Convention, not by national law.*" This statement would appear to go without saying. There is no doubt that the question of whether a particular procedure is capable of falling within Article 30 of the Cape Town Convention and Article XI of the Aircraft Protocol is to be determined by the definition in the Cape Town Convention itself. However, as discussed above, Article XXX(3) gives contracting states the option to "declare that it will apply the entirety of Alternative A…. and, if so, shall specify the types of insolvency proceeding, if any, to which it will apply Alternative A."

14.3 It therefore follows that, in order for a particular procedure to trigger Alternative A:

(a) the procedure must fall within the definition of "*insolvency proceedings*" or an "*insolvency-related event*" under the Cape Town Convention and the Aircraft Protocol; and

(b) the contracting state must have made a declaration that Alternative A applies to that procedure.

14.4 As also discussed above, there is no requirement that a contracting state must apply Alternative A to all of its domestic "insolvency proceedings" – in fact, the Aircraft Protocol gives contracting states an explicit power to select which procedures will or will not trigger Alternative A.

64 https://ctcap.org/wp-content/uploads/2020/06/CTCAP-%E2%80%93-annotation-1-to-OC-4th-Ed-%E2%80%93-reorganisation-arrangements.pdf

65 The Cape Town Convention Academic Project is a joint undertaking of UNIDROIT and the University of Cambridge and the Aviation Working Group is a founding sponsor of the project. As noted on their website (see https://ctcap.org/repository/professor-sir-roy-goodes-official-commentaries/annotations-to-professor-sir-roy-goodes-official-commentaries/), the annotations do not necessarily represent the formal position of UNIDROIT.

66 The website for the Cape Town Academic Project makes this point at https://ctcap.org/repository/professor-sir-roy-goodes-official-commentaries/annotations-to-professor-sir-roy-goodes-official-commentaries/: *"The facility for the Cape Town Convention Academic Project to issue Annotations has been endorsed by Professor Sir Roy Goode in a personal, and not in any official, capacity. The Annotations have no official standing and do not constitute part of the Official Commentary, which is the only publication authorised by the 2001 Diplomatic Conference. It deals with questions not addressed or not fully addressed in the Official Commentary. It seeks to provide a neutral and informed analysis for the benefit of those involved with the above-noted convention ('Convention') and protocol ('Protocol')."*

14.5 The remainder of the Annotation proposes a test to determine whether 'reorganisation arrangements' are 'insolvency proceedings' under the Cape Town Convention as under:

"Arrangements fall within the definition of 'insolvency proceedings' in the Cape Town Convention where they are (a) formulated in an insolvency context, or by reason of actual or anticipated financial difficulties of the debtor company, and (b) collective in that they are concluded on behalf of creditors generally or such classes of creditor as collectively represent a substantial part of the indebtedness. For purposes of the definition of 'insolvency-related event':

(a) *where (a) and (b) above are satisfied, a reorganisation arrangement, in which a court acts to facilitate a statutory process, and where the court's approval is required for its implementation, constitutes 'insolvency proceedings' where the 'assets and affairs of the debtor are subject to control or supervision by a court for purposes of reorganisation', and*

(b) *whether or not a moratorium on enforcement applies during a reorganisation arrangement is not relevant."*

14.6 The proposal of this test is very surprising as the Cape Town Academic Project's self-expressed role is to contribute towards "*addressing questions that the Official Commentary does not, or does not fully address.*"[67] Given that the Official Commentary already offers extensive commentary on the scope of the definition of "insolvency proceedings" and "insolvency-related event", it is not clear to us why there was any room or need for a different test to determine whether so-called "reorganisation arrangements" are "insolvency proceedings".

14.7 Engaging on the merits of the test proposed by the Annotation:

(a) The suggestion in limb (a) that procedures could be regarded as an "insolvency proceeding" even where they are not formulated in an insolvency context, but are instead "*by reason of actual or anticipated financial difficulties*" constitutes a radical departure from both the Official Commentary and other lines of case law.

(i) The only other context in which this wording has been used is in Condition A in section 901A of the Companies Act 2006, setting out one of the threshold conditions for proposing a restructuring plan. There is therefore currently no case law guidance on the scope of this provision. However, it appears that the UK government made Condition A deliberately broad in order to enable both solvent and insolvent companies to propose restructuring plans.[68]

(ii) This is significant because, as discussed above, the Official Commentary itself states that the "*reorganisation…of a solvent company falls outside the scope of Article XI*" (paragraph 3.118(4).

(iii) Similarly, in order to qualify as a "foreign proceeding" under the almost identical definition in the Model Law, a company must either be insolvent or in "severe financial distress", which imposes a higher threshold, and excludes solvent companies.

It is also not clear how this would operate in respect of a proceedings, including Schemes of Arrangement, which can be proposed either "*by reason of actual or anticipated financial difficulties*", or for other reasons, wholly unconnected to financial difficulties. If this test was adopted, such procedures would need to be assessed on a case by case basis. This would plainly undermine the certainty and uniformity of approach that the Cape Town Convention and the Aircraft Protocol seek to impose.

67 See paragraph 5 of section titled Annotations available at https://ctcap.org/repository/professor-sir-roy-goodes-official-commentaries/annotations-to-professor-sir-roy-goodes-official-commentaries/.

68 See for example page 27 of the *Corporate Insolvency framework: proposed major reforms* (Number CBP8291, 5 December 2019) which states that, *"The Government proposes the introduction of a new standalone restructuring procedure that may be proposed by solvent or insolvent companies (subject to certain exclusions)."*

(b) The suggestion in limb (b) that proceedings can be "collective" if they are either conducted on behalf of classes of creditors that "*collectively represent a substantial part of the indebtedness*" is consistent with the approach taken in the UNCITRAL Model Law and the EU Recast Insolvency Regulation: see paragraphs 10.6 and 10.7 above.

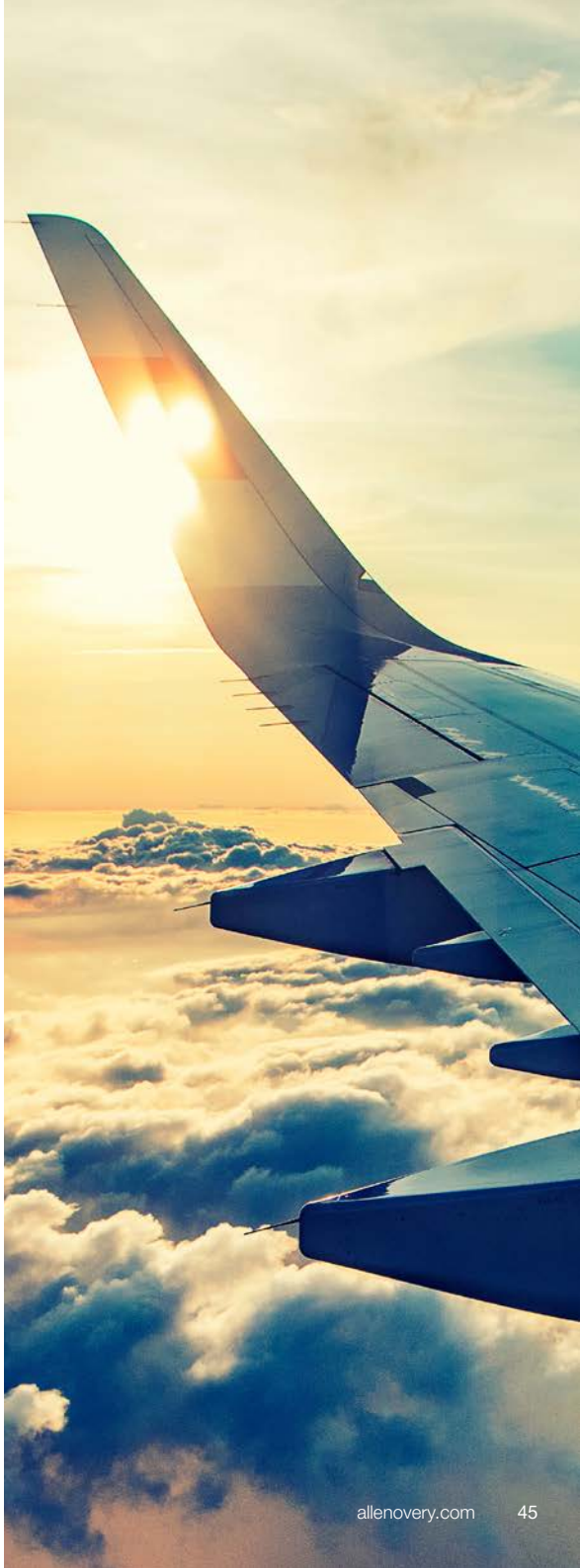
(c) The Annotation appears to suggest that the control and supervision requirement should be met where "a *court acts to facilitate a statutory process, and where the court's approval is required for its implementation.*" This test is likewise not supported by any authority, and appears to impose a lower threshold than paragraph 3.114 of the Official Commentary, which suggests that the debtors' "*assets and affairs*" must be "*under the overall control of creditors or a supervisor and the court*", rather than this requirement being satisfied by any court involvement at all.

14.8 If the analysis in the Annotation is adopted, then both Schemes of Arrangement and Restructuring Plans are capable of being "insolvency proceedings" under the Cape Town Convention and the Aircraft Protocol, albeit that there would need to be fact-sensitive determination for all Schemes of Arrangement. For the reasons set out above, we consider that this would be a surprisingly result, and the uncertainty that would be introduced is both undesirable and contrary to the purpose of the Cape Town Convention which as set out in Article 5(1), notes that regard has to be had to, among other factors, uniformity and predictability in its application.

14.9 In the recent case regarding *Virgin Australia*, the Australian Court of Appeal held that, "*In our view, it is tolerably clear that the Convention and the Protocol were not intended to operate in a way that would result in such a reworking of generally accepted principles of insolvency law.*"[69] Given that the test proposed by the Annotation is novel, not derived from any authority and constitutes a departure from the principles in other international insolvency statutes, such as the UNCITRAL Model Law and the EU Recast Insolvency Regulation, adopting it would appear to infringe this finding. However, until national courts are required to consider whether to adopt or depart from the Annotation, this issue remains open for debate.

14.10 In any event, even if the analysis in the Annotation is adopted by national courts, this does not change our substantive conclusions above regarding the CTC Regulations 2015. The UK government has made it clear that it does not consider that either Part 26 or Part 26A of the Companies Act 2006 trigger regulation 37 of the CTC Regulations 2015. Since the question of which of the UK's national insolvency proceedings trigger Alternative A are solely a matter for the UK government, this is sufficient to determine the matter.

69 *VB Leaseco Pty Ltd (administrators appointed) v Wells Fargo Trust Company, National Association (trustee)* [2020] FCAFC 168, paragraph 105



15. Conclusion

15.1 For the reasons set out above, in our view, neither Schemes of Arrangement nor Restructuring Plans fall within the definition of an "insolvency-related event" for the purpose of the Cape Town Convention and Aircraft Protocol or the CTC Regulations 2015. This conclusion is: (i) premised on the basic rules of treaty interpretation set out in the Vienna Convention ie "A treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose"; (ii) supported by the guidance in the Official Commentary; (iii) compatible with the freedom of choice offered to contracting states under the Cape Town Convention and the Aircraft Protocol to select which national insolvency proceedings trigger Alternative A; and (iv) consistent with the purpose of the Cape Town Convention.

15.2 Accordingly, we consider that airlines and other relevant companies can use a Scheme of Arrangement or a Restructuring Plan to restructure their debts, including by altering the obligations of the company towards creditors with CTC Interests without needing to obtain the unanimous consent of those creditors in advance. Importantly, any such Scheme of Arrangement or Restructuring Plan will only be sanctioned by an English court if the court is satisfied that the proposals comply with the established tests of fairness which include that all of the classes of creditors will do the same or better than they would do in the most likely alternative to the proposal. It is also pertinent to note in this regard that, for the reasons set out above, unless the English courts deviate from established precedent, proprietary rights of creditors (eg rights to terminate leases) cannot be affected by a Scheme of Arrangement or a Restructuring Plan.

15.3 We consider that Schemes of Arrangement and Restructuring Plans are powerful tools for restructuring the debts of both UK and foreign airlines (where there is sufficient connection with the UK) in circumstances where those airlines are solvent, and have a viable business model, but are struggling with liquidity issues as a result of the Covid-19 pandemic. It is likely to be in the interests of all stakeholders, including those with CTC Interests, if such airlines can restructure their debts within the framework of restructuring processes that are designed to protect the interests of creditors, rather than those airlines being forced into an insolvency process due to the lack of suitable restructuring tools. If the Scheme of Arrangement or Restructuring Plan were to constitute an "insolvency-related event" for CTC purposes, this would have a devastating effect on the use of such tools to restructure debts, potentially resulting in more insolvency proceedings. For the reasons given in this article we do not consider that this is the correct interpretation of the Cape Town Convention, Aircraft Protocol and/or the CTC Regulations 2015.

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