EMEA DC Meeting Statement 14 August 2020

regarding Chapter 15 Petition of Matalan Finance Plc

Issue Number 2020073001 and 2020073002

1. SUMMARY

(a) The DC met on Monday 10 August 2020 to discuss whether a Bankruptcy Credit Event had occurred in relation to Matalan Finance plc (the **Reference Entity**) as a result of the filing of a petition (the **Chapter 15 Petition**) filed with the United States Bankruptcy Court for the Southern District of New York (the **US Bankruptcy Court**) under Chapter 15 of Title 11 of the United States Code (as amended, the **Bankruptcy Code**) by the foreign representative of the Reference Entity on 29 July 2020. The Chapter 15 Petition sought recognition in the United States of the Reference Entity's scheme of arrangement under the UK Companies Act 2006 (the **Scheme**).

(b) The DC resolved:

(i) that a Bankruptcy Credit Event had occurred with respect to the Reference Entity under the 2014 Definitions and the Updated 2003 Definitions;

(ii) that the date of the Bankruptcy Credit Event with respect to the Reference Entity in relation to each of the 2014 Transactions and Updated 2003 Transactions was 29 July 2020;

(iii) that the Credit Event Resolution Request Date with respect to the Reference Entity in relation to each of the 2014 Transactions and Updated 2003 Transactions was 30 July 2020; and

(iv) to dismiss the DC Question as to whether a Restructuring Credit Event has occurred with respect to the Reference Entity.

(c) This statement sets out the background to the DC Questions and the reasoning behind the DC's determinations.

(d) Capitalised terms used but not defined in this statement relating to:

(i) credit derivatives have the meanings given to them in the 2018 ISDA Credit Derivatives Determinations Committees Rules (September 28, 2018 Version, as amended on January 27, 2020 and on March 30, 2020) or the 2014 Definitions or Updated 2003 Definitions as applicable;

(ii) the Reference Entity's Scheme of Arrangement have the meaning given to them in the Explanatory Statement in relation to a Scheme of Arrangement under Part 26 of the UK Companies Act 2006 between the Reference Entity and its respective Scheme Creditors dated 24 June 2020[1] (the **Explanatory Statement**); and

(iii) the Chapter 15 Petition have the meanings given to them in the *Verified Petition of Foreign Representative for order granting (i) Recognition of Foreign Main Proceeding, (ii)*

[1] Available at Exhibit B to the Declaration of Stephen Mark Hill in support of Petition for Order Granting Recognition of Foreign Main Proceeding pursuant to 11 U.S.C. §§ 1515 and 1517 and Granting Certain Related Relief pursuant to 11 U.S.C. §§ 1519, 1520 and 1521, available at: https://reorg-research.com/pdf/2456753.pdf

Recognition of Foreign Representative, (iii) Recognition of Sanction Order and Related Scheme and (iv) Related Relief under Chapter 15 of the Bankruptcy Code dated July 29, 2020.

2. FACTUAL BACKGROUND

2.1 The Additional Liquidity Arrangements

(a) The Explanatory Statement includes a description of the overall Additional Liquidity Arrangements, the Scheme and its effect on the Second Lien Notes. The Scheme is an essential element to implementing the changes to the provisions of the Second Lien Notes which are set out in Paragraph 9 of the Explanatory Statement.

(b) The Additional Liquidity Arrangements, as set out at paragraph 5.1 of the Explanatory Statement, involve the provision to the Group of a broad additional liquidity package consisting of (i) the provision of GBP 25,000,000 of revolving credit facilities by lenders under the Coronavirus Large Business Interruption Loan Scheme, (ii) the issue of GBP 25,000,000 of additional priority notes to certain holders of the First Lien Notes, (iii) the cancellation of GBP 50,000,000 of Second Lien Notes held by John Hargreaves in exchange for GBP 50,000,000 of Shareholder PIK Notes, and (iv) amendments to the rights to payment of the cash interest coupon in respect of the Second Lien Notes.

2.2 The Scheme

(a) The Scheme seeks (i) to provide the Reference Entity with authority to enter into a supplemental indenture to the Second Lien Notes Indenture, and (ii) make certain related amendments to the Intercreditor Agreement and Global Notes.

(b) The Second Lien Amendments are described in detail in Section 10 of the Explanatory Statement. At a high level the amendments being made include:

(i) converting the interest coupon to be paid on the Second Lien Notes to PIK Interest, such that interest will be payable as PIK Interest provided that cash interest will become payable again (instead of PIK Interest) if certain liquidity tests are met;

(ii) making consequential changes to the Global Notes; and

(iii) waiving defaults, events of default or accelerations or any insolvency events, and rights of challenge or standstill.

(c) The proposed Scheme of Arrangement is set out in Part 6 of the Explanatory Statement.

2.3 The Chapter 15 Petition

(a) The purpose of Chapter 15 of the Bankruptcy Code is to incorporate the UNCITRAL Model Law on Cross-Border Insolvency. Chapter 15 provides a means for a U.S. bankruptcy court to give recognition and relief in the United States to the administration of a "foreign proceeding," which is defined for this purpose as "a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation." The UNCITRAL Guide to Enactment and Interpretation for the Model Law on Cross-Border Insolvency states that the "relating to insolvency" formulation is intended to prevent arguments that compromise proceedings such as the English scheme, which arises under companies legislation rather than insolvency legislation, were not proceedings relating to insolvency.[2] Further, it is worth noting that the words "adjustment of debt" are not included in the UNCITRAL

[2] UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, pg. 41 (2014).

Model Law but were included in Chapter 15 to broaden the scope of Chapter 15 and make clear that Chapter 15 is "not limited to proceedings involving only debtors which are technically insolvent, but broadly includes all proceedings involving debtors in severe financial distress."[3]

(b) Here, the "foreign proceeding" is the Scheme and the English-court proceeding in respect thereof. English-law schemes of arrangement are routinely recognized as "foreign proceedings" for the purpose of recognition and enforcement of such schemes in the United States under Chapter 15.

(c) A Chapter 15 case is commenced when a "foreign representative" (here, a director of the Reference Entity), files a petition with a bankruptcy court seeking recognition of a "foreign proceeding" as either a "foreign main proceeding," which is a foreign proceeding that is pending where the debtor has its "center of main interests," or a "foreign nonmain proceeding," which means it is pending where the debtor has an "establishment." Among the principal differences between the two is that upon recognition a "foreign main proceeding" is entitled to various forms of relief as of right, including an imposition of the automatic stay under section 362(a) of the Bankruptcy Code to stay actions against the debtor and the debtor's property in the United States. In the case of a "foreign nonmain proceeding," such relief is subject to bankruptcy court approval and the satisfaction of the standards for discretionary relief after recognition is granted. Further, unless provisional relief is sought, no stay or moratorium is imposed by default upon the filing of the chapter 15 petition until the date of recognition of the foreign proceeding, if granted.

(d) The Reference Entity's Chapter 15 Petition was filed on 29 July 2020 by its foreign representative. The Chapter 15 Petition is clear that the Reference Entity's preference is for the Scheme to be recognised as a "foreign main proceeding," which would entail the imposition of the automatic stay upon such recognition. The DC noted that during the pendency of the recognition hearing, the Reference Entity here has also sought provisional injunctive relief to enjoin all entities from taking actions that would disrupt the Scheme process and the debtor's businesses and property in the United States.

(e) The application of section 362(a) (the "automatic stay") together with section 1520 of the Bankruptcy Code (being the Chapter 15 provision governing the effects of recognition as either a main or nonmain foreign proceeding) would lead to the imposition of the stay in the U.S. against all persons / creditors, as the Bankruptcy Code does not expressly limit the scope of such stay to the relevant creditors "affected" by the foreign proceeding (here, the holders of the Second Lien Notes under the Scheme). In practice, sometimes the Chapter 15 papers are drafted to limit expressly the scope of the stay by framing the relief as "the automatic stays in effect against Scheme Creditors" or language to that effect, such that it is not applicable to all persons / creditors. This formulation is designed to avoid any issues with the application of the relief and with the provision of proper notice to creditors generally, given that in practice it is only relevant to Scheme Creditors. In this instance, the stay has not been expressly limited, but the DC noted the proviso at Point 5(b) of the proposed recognition order, which states that the relief "shall not bar or stay any action that is permitted to be taken under the terms of the Sanction Order and/or the Scheme".[4] Whilst the intention of this proviso is not entirely clear, the DC was of the view it had been included to ensure that the stay does not inhibit steps to implement the Scheme, though it noted that it is also possible to read the proviso as limiting the effect of the stay to Scheme Creditors only.

(f) The Chapter 15 Petition also seeks recognition and enforcement in the United States of the Scheme Sanction Order and the Scheme in accordance with their terms as to the holders of the Second Lien Notes, whether or not they actually agreed to be bound by the Scheme or participated in the proceedings in the UK.

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[3] H.R.Rep. No. 109–31, 109th Cong., 1st Sess. 118 (2005).

[4] Point 5(b) of the proposed recognition order, included in Exhibit A at page 47 of the verified petition, available here: https://reorg-research.com/pdf/2456752.pdf

(g) Assuming that the US Bankruptcy Court grants the requested relief, it would have the effect of recognising and enforcing in the United States the amendments being made effective by the Scheme under the UK Companies Act 2006 under English law.

3. HAS A BANKRUPTCY CREDIT EVENT OCCURRED UNDER SECTION 4.2(d) OF THE 2014 DEFINITIONS?

(a) Limb (d) of the definition of Bankruptcy Credit Event in Section 4.2 of the 2014 Definitions provides, in pertinent part, as follows:

"*the Reference Entity… institutes or has instituted against it a proceeding seeking a judgment of insolvency or bankruptcy or any other similar relief under any bankruptcy or insolvency law or other law affecting creditors' rights…*"

(b) The Chapter 15 Petition would satisfy the requirement that the Reference Entity has instituted a proceeding seeking "relief" under "bankruptcy law" as (i) the Reference Entity has mandated a director to make the relevant petition as its foreign representative; and (ii) the filing is made pursuant to Chapter 15 of the Bankruptcy Code requesting recognition and related relief. **The DC Question therefore turns on whether the relief sought is "similar" to that of a "judgment of insolvency or bankruptcy".**

Previous DC consideration in Abengoa

(c) The EMEA DC first considered Section 4.2(d) of the 2014 Definitions in respect of Abengoa S.A. (**Abengoa**), which had filed a communication pursuant to Article 5bis of the Spanish Law 22/2003 of 9 July 2009 on insolvency (the **Spanish Insolvency Law**),[5] and this analysis informed the decision in respect of Thomas Cook.

(d) In the context of Abengoa, the EMEA DC compared the filing of the Article 5bis communication to an actual declaration of insolvency under the Spanish Insolvency Law. The DC noted that the Article 5bis process differed from an actual declaration of insolvency in a number of ways as, in summary, under the Article 5bis process:

(i) no insolvency official is appointed that can take control of managing the debtor;

(ii) no stay on payment obligations applies;

(iii) unsecured creditors are subject to a more limited restriction on enforcement against assets that are not necessary for the debtor to carry on its business; and

(iv) other additional reliefs (such as no accrual of interest on late payments) were not applicable.

(e) The EMEA DC also compared Article 5bis with French *sauvegarde* proceedings, another pre-insolvency procedure that the EMEA DC had previously found to constitute a Bankruptcy Credit Event in respect of Thomson S.A.. *Sauvegarde* proceedings entailed a markedly greater restriction on creditors' rights in the form of a freeze on debt payment, the acceleration of debt and the enforcement of security, together with specific creditor filing requirements. *Sauvegarde* proceedings are also universal in their application.

(f) Accordingly, the EMEA DC concluded that the filing of an Article 5bis communication is a limited relief and not one that is "similar" to a judgment of insolvency or bankruptcy for the purpose of Section 4.2(d) of the 2014 Definitions.

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[5] For more detail, please refer to the DC Meeting Statement available here: https://www.cdsdeterminationscommittees.org/documents/2015/12/emea-dc-decision-09122015.pdf

(g) Subsequently the EMEA DC considered the same clause in relation to Portugal Telecom International Finance B.V., Grupo Isolux Corsan Finance B.V., Astaldi SPA, and Rallye SA and in each case determined that Section 4.2(d) of the 2014 Definitions had been triggered based on the fact that a higher level of creditor relief was included in each of the relevant proceeding and set great importance on the level of creditor relief included. However it should be noted that each of these instances was a primary proceeding rather than a recognition proceeding.

Previous DC consideration in Thomas Cook

(h) As a more directly relevant example, the EMEA DC previously considered Section 4.2(d) of the 2014 Definitions in respect of Thomas Cook Group plc (Thomas Cook), which had filed a petition with the US Bankruptcy Court under chapter 15 of title 11 of the US Bankruptcy Code.[6]

(i) In the context of Thomas Cook, the EMEA DC considered the effect of the petition for a foreign nonmain proceeding. This petition was notable in that Thomas Cook did not seek the imposition of a stay (which the EMEA DC considered particularly significant in adjudging whether given relief was "similar"). In addition the EMEA DC noted that the petition did not seek to compromise directly creditors' rights independently of the scheme of arrangement, and on the basis of this and the absence of a stay, the EMEA DC determined that the relief under the petition in this instance was clearly limited and as such was not "similar" to that of a judgment of insolvency or bankruptcy.

Application to the Scheme

(j) In relation to the Scheme itself, the DC was of the view that its filing alone would not constitute a Bankruptcy Credit Event under limb (d) of the definition. It would be anomalous if it did, given the more natural fit of UK schemes of arrangement under limb (c) of the Bankruptcy definition, as it would result in a very early trigger, in fact before either the creditors or the court approved any aspects of it.

Application to the Chapter 15 Petition

(k) The DC noted that there were good arguments on both sides as to whether a Bankruptcy Credit Event had occurred under the 2014 Definitions:

(i) In favour of it not constituting a Credit Event was the stated intention of the Chapter 15 Petition. The Chapter 15 Petition is ancillary to the main Scheme and the primary relief being sought is recognition and enforcement of the English Scheme in the United States. It does not seek to impose any additional compromise of the terms of the Reference Entity's debt beyond that proposed by the Scheme, and its focus is on extending the territory in which the outcome of the Scheme is enforceable. The additional relief is included for the purposes of ensuring that the outcome of the Scheme is effective and enforceable even if it does as a matter of fact go further than the Scheme itself. On this basis, it could be argued that the Chapter 15 Petition would not constitute a Bankruptcy Credit Event under Section 4.2(d) of the 2014 Definitions, where the Scheme alone would not constitute a Bankruptcy Credit Event under English law. If this analysis is correct, it is hard to envisage a situation where a Chapter 15 Petition would ever trigger Section 4.2(d) of the 2014 Definitions.

(ii) On the other hand, the Chapter 15 Petition is a proceeding seeking relief under the Bankruptcy Code, filed with a United States Bankruptcy Court, and part of a broader proposed transaction to effect a restructuring of the Reference Entity, the effect of which will be to reduce the Reference Entity's debt obligations to certain classes of creditors, some of whom may or may not consent. In this context, the words "similar relief" could be given a broader meaning. Rather than looking at the immediate effect of the impairment of creditors' rights of action (or

[6] For more detail, please refer to the DC Meeting Statement available here: https://www.cdsdeterminationscommittees.org/documents/2019/09/thomas-cook-dc-emea-statement-2019091701.pdf/

lack thereof), the focus would be on the ultimate effect of the proceeding, which is to amend creditors' rights in a way that gives relief (in the sense of help or assistance) to the Reference Entity to implement the overall additional financing arrangements. The Chapter 15 Petition involves relief in the form of a court order that has the effect of an injunction to make the Scheme enforceable in the US. This is not unlike the order of a US bankruptcy court that would confirm (i.e., approve) a Chapter 11 plan of "reorganization" that includes compromises of creditors' rights. Taking a broader view of the overall restructuring proposal, the US Bankruptcy Court could give bankruptcy relief that has the effect of enabling the conversion of interest payments into PIK interest or which has the effect of reducing the hurdles to the debtor doing so. In particular, Chapter 11 of the Bankruptcy Code provides for "reorganization" and enabling a debtor to restructure its debt obligations and to approve creditor compromises (including by permitting a debtor to vary the contractual terms of such debt without changing the economic terms by reducing the principal or interest rate or postponing the maturity date or changing the ranking of the debt). In this sense, one could argue that the relief requested here to give effect to and enforce the Scheme in the United States is similar to relief provided in a plenary case even if it is not a request for a judgment of insolvency or bankruptcy. If this analysis is correct, in most cases a Chapter 15 Petition would result in the determination of a Credit Event under Section 4.2(d) of the 2014 Definitions, irrespective of whether there was any automatic stay or other additional relief.

(l) The DC also considered the analysis applied in Thomas Cook, which fell in between the positions described in paragraphs (k)(i) and (k)(ii) above. The analysis was as follows (extracted from the Thomas Cook statement[7]):

"*On balance, based on the approach taken in Abengoa, the DC was of the view that the Chapter 15 Petition did not constitute a Bankruptcy Credit Event under Section 4.2(d) of the 2014 Definitions. This was the better view because it did not seek the imposition of a stay (which the DC considered particularly significant in adjudging whether given relief was "similar") and nor did it seek to directly compromise creditors' rights independently of the Scheme (e.g. by directly converting the debt into equity). The relief sought by the Reference Entity under the Chapter 15 Petition was clearly limited, and as such was not "similar" to that of a judgment of insolvency or bankruptcy.*

Further, the Chapter 15 Petition did not add any specific relief over and above that provided by the Scheme of Arrangement; it merely sought to extend the territory in which the outcome of the Scheme was enforceable. The only relevant difference is therefore that the Scheme of Arrangement was not being effected under a bankruptcy or insolvency law. Limb (d) of the Bankruptcy definition in the 2014 Definitions expressly looks at the nature of the relief, rather than the type of law under which it is provided (in contrast to the Updated 2003 Definitions, discussed below). Generally, it would seem anomalous that recognition proceedings of an event that does not constitute a Credit Event would themselves constitute a Credit Event, unless there were some additional consequence affecting creditors' rights (for example if the recognition proceedings introduced a stay on enforcement). In the absence of anything beyond territorial recognition of changes to rights that are happening in another jurisdiction, the DC was of the view that the only relevant difference between the Scheme of Arrangement and the Chapter 15 Petition was that the latter takes place under a bankruptcy or insolvency law."

(m) Whilst the DC was not obliged to follow the same approach as it took on Thomas Cook, it seemed clear that on Thomas Cook the DC was taking an interim approach between paragraphs (k)(i) and (k)(ii) above, which focused on additional relief granted beyond the recognition of the scheme itself. Therefore the DC considered that the determination in this case turned on whether the additional relief was sufficient so as to be described as "similar" to a bankruptcy or insolvency proceeding.

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[7] Available here: https://www.cdsdeterminationscommittees.org/documents/2019/09/thomas-cook-dc-emea-statement-2019091701.pdf/

(n) Note that a Bankruptcy Credit Event occurs under Section 4.2(c) of the 2014 Definitions where a scheme or composition, which would include an English scheme of arrangement, is made "with or for the benefit of its creditors generally". Section 4.2(d) by contrast simply refers to "similar relief". The wording used in Section 4.2(d) is more general, and does not require that all creditors or creditors generally be affected by the relief. As such, the DC considered that a restricted scope of the stay would not defeat a determination of "similar relief".

(o) The imposition of the stay was a key differentiator in previous considerations. In the context of both Thomas Cook and Abengoa, where there was no stay, or a minimal stay, on the rights of creditors, the DC took the view that a Bankruptcy Credit Event had not occurred. In this instance, however, the DC noted that the stay was more than minimal.

(p) Whilst it may seem anomalous that recognition proceedings of an event that does not constitute a Credit Event would themselves constitute a Credit Event, the additional consequence affecting creditors' rights, consisting of the provisional relief, the imposition of the automatic stay upon recognition, and further orders of the US court to enforce and give effect to the Scheme in the United States, combined with the effect of the Scheme itself, would seem to constitute "similar relief" to a judgment under bankruptcy or insolvency law.

Conclusion

(q) Based on (i) the approach taken in Thomas Cook, and (ii) the additional effect of the provisional relief against the holders of the Second Lien Notes, the automatic stay (upon recognition) in connection with the foreign main proceeding, the DC was of the view that the Chapter 15 Petition would constitute a Bankruptcy Credit Event under Section 4.2(d) of the 2014 Definitions. On balance, the DC thought this was the better view because it goes beyond the application of the Scheme and seeks provisional relief during the pendency of the Chapter 15 Petition and introduces the imposition of the stay by operation of law upon recognition and the enforcement of the Scheme through the further orders of the US court. It is therefore "similar relief" to that of a judgment of insolvency or bankruptcy.

4. HAS A BANKRUPTCY CREDIT EVENT OCCURRED UNDER SECTION 4.2(d) OF THE UPDATED 2003 DEFINITIONS?

(a) The wording in the Updated 2003 Definitions differs as the word "similar" appears later in the clause:

"*the Reference Entity… institutes or has instituted against it a proceeding seeking a judgment of insolvency or bankruptcy or any other ~~similar~~ relief under any bankruptcy or insolvency law or other similar law affecting creditors' rights…*"

(b) As with the 2014 Definitions, the Chapter 15 Petition would satisfy the requirement for the Reference Entity to institute a proceeding seeking a judgment under any bankruptcy law. However, following the interpretation adopted by the DC in respect of Abengoa, the relief simply needed to be "any other relief" (emphasis added) without the requirement that it is "similar relief" to seeking a judgment of insolvency or bankruptcy.

(c) As the Reference Entity was seeking relief under Chapter 15 of the Bankruptcy Code by requesting that the US Bankruptcy Court recognises and gives effect to the English Scheme, and on the basis of the approach taken in Thomas Cook and Abengoa, the DC was of the view that the Chapter 15 Petition itself constituted a Bankruptcy Credit Event under Section 4.2(d) of the Updated 2003 Definitions.

5. DISMISSAL OF THE QUESTION AS TO WHETHER A RESTRUCTURING CREDIT EVENT HAS OCCURRED

On the basis of its determination that a Bankruptcy Credit Event had occurred in respect of 2014 Transactions and Updated 2003 Transactions, the DC considered that it was unnecessary to consider whether a Restructuring Credit Event had also occurred. The DC therefore dismissed the question.