EMEA DC Meeting Statement September 24, 2019

regarding Chapter 15 Petition of Thomas Cook Group plc

Issue number 2019091701

1. SUMMARY

1.1 The DC met on Monday 23 September 2019 to discuss whether a Bankruptcy Credit Event had occurred in relation to Thomas Cook Group plc (the **Reference Entity**) as a result of the filing of a petition (the **Chapter 15 Petition**) 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 16 September 2019. 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**).

1.2 The DC resolved:

(i) to treat the DC Question as separate requests in respect of (i) 2014 Transactions and (ii) Updated 2003 Transactions;[1]

(ii) that a Bankruptcy Credit Event had **not** occurred with respect to the Reference Entity in relation to 2014 Transactions;

(iii) that a Bankruptcy Credit Event had occurred with respect to the Reference Entity in relation to Updated 2003 Transactions;

(iv) that the date of the Bankruptcy Credit Event with respect to the Reference Entity in relation to Updated 2003 Transactions is 16 September 2019; and

(v) the date on which the DC Secretary first effectively received both a request to convene the Committee and Publicly Available Information that satisfies the requirements of Section 2.1(b) of the DC Rules for the Bankruptcy Credit Event with respect to the Reference Entity in relation to Updated 2003 Transactions (such date being the Credit Event Resolution Request Date) was 17 September 2019.

1.3 This statement sets out the background to the DC Question and the reasoning behind the DC's determinations. The DC notes that the facts in relation to this question are relatively unusual, in particular that the Reference Entity expressly sought to avoid the application of the stay that would typically be sought under a chapter 15 filing (either automatically in relation to foreign main proceedings, or at the discretion of the court in foreign non-main proceedings, as discussed in more detail below). The determinations in this case are therefore not necessarily indicative of how the DC would approach chapter 15 filings in general, and are based on the specific circumstances in this case.

1.4 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) (the **DC Rules**) or the 2014 Definitions or Updated 2003 Definitions, as applicable;

[1] In accordance with the DC Rules, "Updated 2003 Transaction" means a March 2009 Supplement Transaction or a July 2009 Supplement Transaction (and not a Credit Derivative Transaction incorporating the 2014 Definitions as a result of the ISDA 2014 Credit Derivatives Definitions Protocol).

(ii) the Reference Entity's proposed restructuring transaction or the Reference Entity's proposed Scheme of Arrangement have the meaning given to them in the Explanatory Statement in relation to Schemes of Arrangement under Part 26 of the Companies Act 2006 between the Reference Entity, Thomas Cook Group Treasury Limited, Thomas Cook Finance 2 plc and their respective Scheme Creditors dated 30 August 2019 (the **Explanatory Statement**);[2] and

(iii) the Chapter 15 Petition have the meanings given to them in the *Verified Petition for Recognition of Foreign Nonmain Proceedings, or in the alternative, Foreign Main Proceedings* dated September 16, 2019.

2. TRANSACTIONS TO WHICH THIS DC QUESTION IS RELEVANT

2.1 At the time of publication of this statement, two other DC Questions have been accepted in relation to the Reference Entity:

(a) whether a Bankruptcy Credit Event has occurred as result of its compulsory liquidation (issue number 2019092301); and

(b) whether a Failure to Pay Credit Event has occurred (issue number 2019091700),

in each case in relation to both 2014 Transactions and Updated 2003 Transactions.

2.2 In relation to the former, the DC has determined that a Bankruptcy Credit Event occurred in relation to the Reference Entity for both 2014 Transactions and Updated 2003 Transactions, and that the date of the Credit Event was Monday 23 September 2019.[3] The effect of these determinations is to limit the relevance of the DC Question regarding the Chapter 15 Petition (and the DC Question regarding the potential Failure to Pay) to Credit Derivative Transactions with a Scheduled Termination Date occurring prior to Monday 23 September 2019 (including, in particular, transactions that matured on Friday 20 September 2019).

3. FACTUAL BACKGROUND

3.1 The Overall Proposed Transaction

The Explanatory Statement includes a description of the Reference Entity's overall proposed transaction and the Scheme of Arrangement as at the time of the Chapter 15 Petition. The Scheme of Arrangement was an essential element to implementing the Proposed Transaction, which is described beginning at Paragraph 8.16 of the Explanatory Statement.

The Proposed Transaction involved Fosun Tourism Group (**Fosun**), its affiliate and the Thomas Cook group's core lending banks making a capital investment as part of a recapitalisation and separation of the Thomas Cook group. The key commercial terms were described, as at the date of the Explanatory Statement, as:

(i) the release of certain claims of the 2022 Noteholders, the 2023 Noteholders and the Cash RCF Lenders in relation to approximately £1.67bn of currently outstanding RCF and Notes debt in consideration for at least 15% of the equity and at least a £81m subordinated PIK note to be issued by the recapitalised Group pro rata to the Scheme Creditors (the **Debt-for-Equity Swap**);

(ii) providing the recapitalised group with access to new money financing facilities in the amount of £900m; and

[2] Available at: https://www.thomascookgroup.com/investors/insight_external_assest/ThomasCook-ExplanatoryStatement-August2019.pdf
[3] Available at: https://www.cdsdeterminationscommittees.org/cds/thomas-cook-group-plc-3/

(iii) reorganising the group structure, including legal, economic and financial separation of the tour operator business from the airline business and at Fosun's option, the transfer of 75% of the tour operator and 25% of the airline business to Fosun.

(b) The Explanatory Statement also provides that Scheme Creditors were to be asked to sign up to a lock-up agreement in advance of the Scheme meetings.

3.2 The English Scheme of Arrangement in respect of the Reference Entity

(a) The Scheme sought to amend certain terms of (i) the Indentures in respect of the 2022 Notes and the 2023 Notes and (ii) the RCF Agreement such that, once the final terms for the Proposed Transaction were agreed, the Thomas Cook group would have the ability to complete the Debt-for-Equity Swap. However, as per paragraph 9.5 of the Explanatory Statement, the Scheme did not itself release any principal or guarantee claims of any Scheme Creditor, nor implement the Debt-for-Equity Swap. The Debt-for-Equity Swap was to be implemented separately following the sanction of the Scheme using the amendments made by the Scheme.

(b) The Scheme Amendments are described in detail in Section 9 of the Explanatory Statement. At a high level, the amendments to be made included:

(i) lowering or changing the voting threshold (and voting mechanics) for changes to material or other terms of the Notes including, without limitation, the release of the guarantees and principal claims, amending the Notes to provide for the mandatory exchange or conversion of the Notes in whole or in part into equity and/or debt securities or other consideration;

(ii) amending certain covenants and events of default;

(iii) changing the percentage of Noteholders that is required to call an event of default under the Indentures, accelerate the Notes or rescind an acceleration or waive a default or event of default; and

(iv) changing the consent requirements and voting thresholds for certain actions and amending or waiving certain provisions under the RCF Agreement.

(c) The proposed Scheme of Arrangement is set out at Section 13 of the Explanatory Statement. Schedules 8 and 9 of the Scheme set out the form of amended Indentures for the 2022 Notes and 2023 Notes. Amongst other things, the amended Indentures were to be subject to the new Common Terms Agreement set out in Schedule 3.

(d) The Explanatory Statement states that the Thomas Cook group had significant financial creditors not covered by the proposed Schemes (finance leases, aircraft creditors, uncommitted bonding lines, hedging and cash pooling) although it is unclear whether the Reference Entity was the borrower or obligor under these arrangements.

3.3 The Chapter 15 Petition

(a) The Reference Entity's Chapter 15 Petition was filed on 16 September 2019 by its foreign representative. The Chapter 15 Petition is clear that the Reference Entity's preference was for the Scheme to be recognised as a "foreign nonmain proceeding," which would not entail the imposition of the automatic stay upon such recognition, but, if it were recognised as a "foreign main proceeding," the Reference Entity had further requested relief such that the automatic stay that would otherwise apply upon recognition were deemed waived and shall be of no force or effect. The Reference Entity also reserved its rights to withdraw the petition and seek dismissal of the Chapter 15 case in the event that the US Bankruptcy Court declined to grant either (i) recognition as a foreign

non-main proceeding; or (ii) recognition as a foreign main proceeding together with a general waiver of the automatic stay.

(b) The Chapter 15 Petition also sought, inter alia:

(i) recognition and enforcement in the United States of the Scheme Sanction Order and the Scheme (note that the Chapter 15 hearing was to be held after the Scheme had been sanctioned by the English court, assuming that the Scheme had been approved) in accordance with their terms as to the Noteholders and RCF Lenders, whether or not they had actually agreed to be bound by the Scheme or participated in the proceedings in the UK; and

(ii) an acknowledgement that nothing in the order of the US Bankruptcy Court was to constitute a finding that the Debtors are insolvent or bankrupt or provide for a moratorium on payment of any debts of the Debtors.

(c) Assuming that the US Bankruptcy Court had granted the requested relief, it would have had the effect of recognising and enforcing in the United States the amendments that were to be made effective by the Scheme under the UK Companies Act 2006 under English law.

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

(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 its CEO 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 in relation to the 2014 Definitions 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 previously 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**).[4]

(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;

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

(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 (and, subsequently, in Rallye). *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.

Previous consideration in Tembec

(g) Since the Determinations Committees were formed in 2009, the Determinations Committees have not had to consider whether a chapter 15 filing in connection with an English scheme of arrangement would constitute a Bankruptcy Credit Event. However, in 2008, Tembec Industries Inc. (**Tembec**) filed petitions under chapter 15 seeking the recognition of certain Canadian proceedings as "foreign main proceedings." On the basis of industry consensus that a Bankruptcy Credit Event had occurred, ISDA published a Protocol to enable parties to settle credit derivative transactions based on the 2003 ISDA Credit Derivatives Definitions.[5] However, Tembec did not seek to waive the effect of the automatic stay upon recognition as a foreign main proceeding and such stay was therefore imposed, which implicates one of the factors for "similar relief" considered in Abengoa. Furthermore, the "Bankruptcy" definition differs in the 2003 Definitions (see below). Therefore, the DC did not consider Tembec to be of direct relevance to the DC Question in respect of the 2014 Definitions.

Application to the Scheme

(h) 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, on the basis that it does not involve the features highlighted in paragraph 4(d) above. It would also 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 had approved any aspects of it.

Application to the Chapter 15 Petition

(i) 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, the Chapter 15 Petition was ancillary to the main Scheme and the primary relief being sought was recognition and enforcement of the English Scheme in the United States. Neither the Scheme nor the Chapter 15 Petition sought the imposition of a stay (after giving effect to the proposed waiver of the stay where the Scheme is a foreign main proceeding) on creditors' rights, and the Chapter 15 Petition did not seek to impose any additional compromise of the terms of the Reference Entity's debt beyond that proposed by the Scheme. On the basis of the approach set out above in relation

[5] See https://www.isda.org/traditional-protocol/2008-tembec-cds-protocol/

to Abengoa, the Chapter 15 Petition therefore did not itself appear to be seeking relief "similar" to a judgment of insolvency or bankruptcy with respect to the Reference Entity.

(ii) On the other hand, Abengoa involved a pre-insolvency proceeding. In contrast, the Chapter 15 Petition was a proceeding seeking relief under the Bankruptcy Code and part of a broader proposed transaction to effect a restructuring of the Reference Entity, the effect of which was to be a reduction in the Reference Entity's debt obligations to certain classes of creditors, some of whom may or may not have consented. 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 lack thereof), the focus would be on the ultimate effect of the proceeding, which was 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 Proposed Transaction. While the Chapter 15 Petition did not involve the imposition of a stay, assuming the requested waiver were granted/permitted, it nonetheless involved relief in the form of a court order that was to have 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 approve a chapter 11 plan of reorganisation that includes compromises of creditors' rights. In such a way, the Chapter 15 Petition could be said to be relief "similar" to a judgment of insolvency or bankruptcy.

Conclusion

(j) 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.

(k) 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.

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

(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 EMEA DC in respect of Abengoa, the relief simply needs 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 Abengoa, the DC was of the view that the Chapter 15 Petition itself constitutes a Bankruptcy Credit Event under Section 4.2(d) of the Updated 2003 Definitions.

(d) The DC did not think the filing for the Scheme on its own would constitute a Credit Event under this definition, because it is made under the UK Companies Act 2006, which is not a bankruptcy or insolvency law. The view that the Chapter 15 Petition does constitute a Credit Event under the Updated 2003 Definitions, whereas the Scheme that it recognises does not, therefore turns on the fact that one is under a bankruptcy or insolvency law and one is not; essentially, the question under the Updated 2003 Definitions focuses on the nature of the law under which the relief is provided, rather than the nature of the relief itself requested. (As an aside, the DC noted that this was the motivation for the change to limb (d) of the Bankruptcy Credit Event definition at the time of drafting the 2014 Definitions.) Again, while there were arguments for and against this, the DC considered this the better view.