EMEA DC Meeting Statement October 4, 2019

regarding Failure to Pay Credit Event in relation to Thomas Cook Group plc

Issue number 2019091700

1. SUMMARY

1.1 The DC met on Friday 27 September 2019 to discuss whether a Failure to Pay Credit Event had occurred in relation to Thomas Cook Group plc (the **Reference Entity**).

1.2 The DC resolved:

(i) that a Failure to Pay Credit Event has occurred with respect to Thomas Cook Group Plc;

(ii) that the date of the Failure to Pay Credit Event was 19 September 2019, provided that for any 2014 Transactions and Updated 2003 Transactions with a Scheduled Termination Date of 16 September 2019, 17 September 2019 or 18 September 2019, the date of the Failure to Pay Credit Event was the date of such Scheduled Termination Date;

(iii) that 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 Failure to Pay Credit Event (i.e. the Credit Event Resolution Request Date) was, in relation to 2014 Transactions and Updated 2003 Transactions, 20 September 2019; and

(iv) to hold an Auction to settle 2014 Transactions and Updated 2003 Transactions with respect to which a Credit Event Resolution has occurred.

1.3 This statement sets out the background to the DC Question and the reasoning behind the DC's determinations. The DC considered whether the filing of the Reference Entity's Chapter 15 Petition (as defined below) constituted an Event of Default in relation to the 2022 Notes (as defined below) under the Indenture (as defined below).[1] If so, this will have caused the automatic acceleration of the 2022 Notes, and there was no Eligible Information to suggest that any such Event of Default was waived. In addition, Bloomberg showed the full principal amount of the 2022 Notes as outstanding.

1.4 The question of whether an Event of Default had occurred in relation to the 2022 Notes hinged on the interpretation of the Indenture. The DC noted that the relevant provision of the Indenture was ambiguous and that there were good arguments in favour of each of the two possible interpretations. As the Indenture was governed by New York law, the DC sought New York law legal advice and a number of the DC members also consulted with their US colleagues. On balance, the DC favoured the interpretation that an Event of Default had occurred and, accordingly, a Failure to Pay Credit Event had occurred in relation to the Reference Entity.

1.5 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] The DC focused on the 2022 Notes, as the relevant provisions of the 2022 Notes and 2023 Notes were the same and the Reference Entity is the issuer of the 2022 Notes. The Reference Entity is the guarantor of the 2023 Notes so determining whether a Failure to Pay Credit Event had occurred as a result of non-payment under the 2023 Notes would have required additional analysis as to whether or not the 2023 Notes benefit from a Qualifying Guarantee.

(ii) the Reference Entity's proposed restructuring transaction or Scheme 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 meaning given to them in the *Verified Petition for Recognition of Foreign Nonmain Proceedings or, in the Alternative, Foreign Main Proceedings, Supplementing "Voluntary Petition" Docket No. 1, and Motion for Related Relief Pursuant to Sections 105(A), 1507(A), 1509(B)(2)-(3), 1521(A), 1521(C), and 1525(A) of the Bankruptcy Code Giving Full Force and Effect to UK Schemes of Arrangement*, which was filed contemporaneously with the Chapter 15 Petition (the **Verified Petition**).

2. TRANSACTIONS TO WHICH THIS DC QUESTION IS RELEVANT

2.1 The DC has already made Credit Event Resolutions in relation to the Reference Entity in respect of (i) Updated 2003 Transactions with a Scheduled Termination Date on or after 16 September 2019, and (ii) 2014 Transactions with a Scheduled Termination Date on or after 23 September 2019.

2.2 The Event of Default in the 2022 Notes for failure to pay principal does not contain a grace period. Therefore, a deemed Grace Period will apply under Section 1.46 of the 2014 Definitions and Section 1.12 of the Updated 2003 Definitions, provided that such Grace Period shall expire no later than the Scheduled Termination Date of the relevant Credit Derivative Transaction. As the Chapter 15 Petition was filed on 16 September 2019, the deemed Grace Period would have ended on 19 September 2019. The date of the Failure to Pay Credit Event in relation to this question would therefore be 19 September 2019 (assuming that the relevant Scheduled Termination Date had not occurred between 16 September 2019 and 19 September 2019; if it did, the date of the Credit Event would be the Scheduled Termination Date).

2.3 On this basis, this DC Question is of particular relevance to triggering 2014 Transactions with a Scheduled Termination Date occurring on or after 16 September 2019 but before 23 September 2019. As 20 September 2019 was a roll date, this principally means 2014 Transactions that matured on 20 September 2019. As (i) the DC decided that a Failure to Pay Credit Event has occurred with respect to the Reference Entity and (ii) the Credit Event Resolution Request Date (20 September 2019) for this DC Question pre-dates the Credit Event Resolution Request Date in respect of the Bankruptcy Credit Event relating to the compulsory liquidation of the Reference Entity, this DC Question will also be of relevance to determining the Event Determination Date for 2014 Transactions more broadly.

3. FACTUAL BACKGROUND

3.1 On 16 September 2019, the foreign representative of the Reference Entity filed 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 (**Chapter 15**) of title 11 of the United States Code (as amended, the **Bankruptcy Code**). 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**). Reference is made to *EMEA DC Meeting Statement September 24, 2019 regarding Chapter 15 Petition of Thomas Cook Group plc* (issue number 2019091701)[3] for a more detailed description of the Chapter 15 Petition and the Scheme. Subsequent to the filing of the Chapter 15 Petition and the Scheme, the Reference Entity became the subject of compulsory liquidation.

[2] Available as at 4 October 2019 at: https://www.thomascookgroup.com/investors/insight_external_assest/ThomasCook-ExplanatoryStatement-August2019.pdf

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

3.2 The Reference Entity is the issuer of €750,000,000 6.25% Senior Notes due 2022 (the **2022 Notes**) pursuant to an indenture dated 8 December 2016 (the **Indenture**).

3.3 The Explanatory Statement includes the Indenture in mark-up such that the unamended terms can be determined.

3.4 Section 13.07 of the Indenture provides that the Indenture, as well as the Notes issued under the Indenture, will be governed by and construed in accordance with New York law.

3.5 Section 6.01(a)(7) of the Indenture provides that an "Event of Default" includes the occurrence of the following:

> *(7) the Issuer or any of its Restricted Subsidiaries that is a Significant Subsidiary or any group of its Restricted Subsidiaries that, taken together, would constitute a Significant Subsidiary pursuant to or within the meaning of Bankruptcy Law:*
>
> *(A) **commences a voluntary case under any applicable Bankruptcy Law or any other case to be adjudicated bankrupt or insolvency**,[4] or files for or has been granted a moratorium on payment of its debts, or files for bankruptcy or is declared bankrupt;*
>
> *[…]*

(emphasis added).

3.6 The Indenture defines "*Bankruptcy Law*" to mean "*the U.K. Insolvency Act 1986, as amended (together with the rules and regulations made pursuant thereto), Title 11 of the U.S. Code or the laws of any other jurisdiction or any political subdivision thereof relating to bankruptcy, insolvency, receivership, winding up, liquidation reorganization or relief of debtors*."

4. DID THE FILING OF THE CHAPTER 15 PETITION TRIGGER AN EVENT OF DEFAULT UNDER THE INDENTURE?

4.1 Key question of interpretation

(a) Under the relevant language from Section 6.01(a)(7)(A) of the Indenture, an Event of Default occurs when the Reference Entity "***commences a voluntary case under any applicable Bankruptcy Law or any other case to be adjudicated bankrupt or insolvency*** . . . ." The DC noted that there were two ways to interpret this wording.

(b) On a literal reading of Section 6.01(a)(7)(A), the Reference Entity had commenced "*a voluntary case under any applicable Bankruptcy Law*" with the filing of the Chapter 15 Petition because:

(i) The Chapter 15 Petition was filed by the Chief Executive Officer of the Reference Entity, acting as the foreign representative of the Reference Entity pursuant to orders of the Chancery Division (Business and Property Court) of the High Court of Justice of England and Wales.

(ii) Chapter 15 is part of the Bankruptcy Code, which is "*Title 11 of the U.S. Code*" as used in the definition of "*Bankruptcy Law*."

(iii) Under Section 1502(1) of the Bankruptcy Code, the Reference Entity would be the "debtor" under the Chapter 15 Petition and the "entity that is the subject of a foreign proceeding."

[4] This may be a typographical error and "insolvency" is intended to be "insolvent."

(c) The DC viewed the key question as being whether this alone was sufficient to trigger an Event of Default under the Indenture, or whether the relevant other language in the clause, "*or any other case to be adjudicated bankrupt or insolvency*," further required that such voluntary case under applicable Bankruptcy Law must be a case in which the debtor seeks an adjudication of bankruptcy or insolvency. The key question of interpretation was therefore whether the phrase "*to be adjudicated bankrupt or insolvency*" should be read as modifying the phrase "*a voluntary case under any applicable Bankruptcy Law*", or should only be read as modifying the phrase "*or any other case*". The DC considered the two alternative constructions.

4.2 **Construction arguments presented and deliberated**

(a) First, one could read the phrase "*to be adjudicated bankrupt or insolvency*" as modifying all of the words preceding it in the clause, including "*a voluntary case under any applicable Bankruptcy Law*," as opposed to only the words "*or any other case*." Under this reading, the "*Bankruptcy Law*" limb of Section 6.01(a)(7)(A) would look not just to the commencement of a "*voluntary case under any applicable Bankruptcy Law*," but to the commencement of a "*voluntary case under any applicable Bankruptcy Law . . . to be adjudicated bankrupt or insolvency*."

Additionally, the DC also considered policy arguments that construing the Chapter 15 Petition as an Event of Default without regard to the relief being sought could present an outcome that may not have been the intention of the drafting parties, especially in the context of the restructuring contemplated at the time the Chapter 15 Petition was filed. Moreover, if the Scheme did not itself constitute an Event of Default, it would be anomalous for the Chapter 15 Petition, which was ancillary to the Scheme and intended mainly to aid the enforcement thereof, to independently constitute an Event of Default.

(b) However, following New York law advice received and deliberation of the arguments presented, the DC noted a number of factors that would lead it to conclude that the words "*to be adjudicated bankrupt or insolvency*" should only be read as modifying "*any other case*":

(i) When faced with these construction disputes, New York courts often apply the "rule of the last antecedent," under which a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows. While this rule is not absolute, the favoured reading of the clause would limit the modifier to "*or any other case*".

(ii) If the phrase "*any other case to be adjudicated bankrupt or insolvency*" stands alone, it might inform the interpretation of what kind of proceeding is included in "*a voluntary case under any applicable Bankruptcy Law*." Put another way, it could be implied that such a proceeding would inherently be one that seeks an adjudication of bankruptcy or insolvency. Such reading may, however, be contrary to normal contract interpretation principles insofar as it adds a further requirement to what is otherwise a straightforward definition of "*Bankruptcy Law*" that simply cites the Bankruptcy Code (and a provision which, in turn, simply looks to whether a voluntary case has been filed under such "*Bankruptcy Law*").

(iii) If "*to be adjudicated bankrupt or insolvency*" modifies both "*a voluntary case under any applicable Bankruptcy Law*" and "*any other case*," the former would not strictly be necessary because the latter would already capture any case seeking an adjudication of bankruptcy or insolvency whether or not such case arises under a "*Bankruptcy Law*."

4.3 **Conclusion**

On balance, having sought New York law advice and following presentation of the above arguments, the DC was of the view that the more natural construction of Section 6.01(a)(7)(A) did not require a "*voluntary case under any applicable Bankruptcy Law*" to also seek an adjudication of bankruptcy or

insolvency and that the additional language in the provision was provided as a catch-all rather than as a further modification of the "*Bankruptcy Law*" limb. On this basis, the DC considered that the Chapter 15 Petition alone would constitute an Event of Default under Section 6.01(a)(7)(A) and, accordingly, the 2022 Notes had automatically accelerated and a Failure to Pay Credit Event had occurred following a deemed Grace Period on 19 September 2019 (assuming that the relevant Scheduled Termination Date had not occurred between 16 September 2019 and 19 September 2019; if it did, the date of the Credit Event would be the Scheduled Termination Date).