BEFORE THE EXTERNAL REVIEW PANEL OF THE DETERMINATIONS COMMITTEE OF ISDA

DC ISSUES: 2025100602, 2025102701, 2025102901 and 2025110501

HAS A RESTRUCTURING CREDIT EVENT OCCURRED WITH RESPECT TO ARDAGH PACKAGING FINANCE PLC IN RELATION TO Q1, Q2, Q3 OR Q4?

AMICUS **BRIEF SUBMITTED BY ISDA MEMBER IN SUPPORT OF "NO" POSITION**

REPRESENTED BY HERBERT SMITH FREEHILLS KRAMER LLP

INTRODUCTION

1. So far as relevant for present purposes, a Restructuring occurs under Section 4.7(a) of the 2014 ISDA Credit Derivative Definitions (the "**Definitions**") if one of certain events (listed in its Roman enumerated sub-sections) is "***agreed between*** *the Reference Entity . . . and a sufficient number of holders of such Obligation to bind all holders of the Obligation*" (emphasis added). An agreement between two parties necessarily demands something *bilateral*, with *mutual assent* from *both* parties. In this case, "both" parties means, on the one hand, the Reference Entity and, on the other hand, a sufficient number of a group of noteholders (whose interests may not align) to bind all of them.

2. The question here is whether the Publicly Available Information ("**PAI**") establishes that there was such an agreement between Ardagh Packaging Finance PLC (the "**Reference Entity**", "**Ardagh**", or the "**Company**"), on the one hand, and a sufficient number of noteholders to bind all of them, on the other, before 12 November, when the company amended certain indentures and effectuated the so-called mandatory transfers.[1] The

[1] As explained in the Company's September 29 press release, the Company sought the consents so that it could amend the SUN and SSN indentures to permit the mandatory transfer of all outstanding principal amounts under the applicable notes to different entities (defined as the SUN Mandatory Transfer and SSN Mandatory Transfer), resulting in the noteholders receiving new securities in consideration for those mandatory transfers. This is the apparent basis

answer is “No”. None of the preliminary actions or announcements here evidence an agreement between the parties to any Restructuring event, much less an agreement binding on *both* the Company and the noteholders. To the contrary, until the Company acted upon the noteholders’ consents the binding indentures *prohibited* the very mechanic that was used to effectuate the Restructuring event. The necessary amendment would not be — and did not become — “effective and operative” until the Settlement Date on 12 November.

3. It is for the proponents of the “Yes” position to satisfy the Panel of the facts which they say justify a finding that a Restructuring (as defined in the Definitions) occurred. Any doubt about the facts must be resolved in favour of the “No” position. The Panel will be alert to the need for an interpretation of Section 4.7(a) which provides certainty, creating a test which can be applied by reference to facts which are, in this and other cases, clearly established only by PAI. Here, the PAI does not establish that a Restructuring occurred before 12 November, still less is a Restructuring clearly established. The “Yes” position brings with it uncertainty, both in this and other cases: a woollier legal test under Section 4.7(a) would require a detailed assessment of the facts, many of which are not publicly known, by market participants and potentially a detailed and complex analysis of the effect of those facts from the perspective of insolvency and restructuring law. Such uncertainty would necessarily tend to a greater risk of disputes between market participants and, importantly, a corresponding lack of predictability for credit derivative market participants.

4. It is accepted that the Company entered into a Transaction Support Agreement (the “**TSA**”) with certain noteholders (among others). However, that document did not in and of itself

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for the assertion that there has been an agreement regarding a reduction in the amount of principal (SUNs) or postponement of maturity (SSNs) with respect to the notes in question, both potential bases for a Restructuring credit event. *See* Definitions, Section 4.7(a)(ii)-(iii).

effectuate any of the events listed in the Roman enumerated sub-sections of Section 4.7(a)—it merely contemplated that the parties would take steps toward a potential transaction. Among other things, the transaction contemplated in the TSA was subject to myriad conditions precedent and the TSA also included at Section 16.3 a "fiduciary out", enabling the Company to take actions inconsistent with the TSA if relevant legal obligations so required. Thus, as the Determinations Committee ("**DC**") recognised by a 10-1 vote, entry into the TSA did not amount to a Restructuring.

5. It is also accepted that the Company launched, and later announced the results of, its consent solicitation. Again, those solicitations did not of themselves result in any of the events listed in the Roman enumerated sub-sections of Section 4.7(a). The mere fact that, in responding to the solicitations, the noteholders had given the Company *permission* to act was not an agreement by the Company to act and thus under the plain text of Section 4.7(a) nothing had been "agreed between" the company and noteholders. The solicitations were not agreed between the Company and the noteholders, still less could the solicitations bind both the Company and *all* noteholders. As a term sheet attached to the TSA emphasised, the amendments needed to effectuate the mandatory transfer would "not come into effect until the Settlement Date," even if the requisite consents were received earlier.

6. Any finding that the TSA or the consent solicitations gave rise to a Restructuring under Section 4.7(a) should be rejected as inconsistent with the Definitions and therefore with market participants' reasonable expectations. By contrast, the "No" position is consistent with the text of the Definitions and industry understanding of Section 4.7(a). It also achieves the objectives of clarity, certainty and predictability.

7. Finally, certain of the "Yes" proponents appear to be seeking a determination that there

was a Restructuring prior to 12 November because they want to avoid a determination that will necessarily foreclose settlement of the CDS contracts based on the SUNs or the asset package (equity) into which the SUNs were exchanged, and they may argue that anything short of that would not give them the benefit of their bargain. However, as we explain in Section IV.F, the risk an obligation may be restructured into something that is not a Deliverable Obligation is inherent in (and priced into) any CDS contract, and, in any event, must yield to the goals of clarity, certainty and predictability advanced by the proponents of the "No" position.

I. BACKGROUND

8. We respectfully refer the External Review panel to the factual background described in the primary (Advocate) briefs. We write here only to highlight certain particularly relevant PAI.

9. *8 August (TSA-Accession Update):* On August 8, the Company announced that it had "*obtained the support of over 90% of holders under each of the SSN Indentures and SUN Indentures*" to undertake certain recapitalization transactions, but not the required 75% of PIK Holders.

10. *29 September (Consent Solicitation)*: The next month, the Company announced that it had launched consent solicitations in connection with the recapitalization. The full terms and details of the consent solicitation are in a document that is not PAI. But the Company's press release made clear that the potential transaction remained subject to satisfaction or (as applicable) waiver of various conditions in addition to receiving requisite consents.[2]

11. The announcement also emphasised that the indenture amendments necessary to effect

[2] Press Release dated September 29, 2025 (noting consents were "*amongst other[]*" conditions).

future mandatory transfers were subject to conditions and contingencies and would not automatically occur upon receipt of the requisite number of consents. While certain *other* amendments to the indentures were permitted to be made earlier, the amendments necessary to effectuate the mandatory transfers (which would have the effect of reducing the amount of principal due, for the SUNs, and postponing or defering the repayment date, for the SSNs) "*w[ould] not come into effect until the Settlement Date*", i.e., as defined in an attachment to the TSA, "*the date of the satisfaction (or waiver, if applicable) of the closing conditions set forth in the Definitive Documents [as defined in the TSA] and the consummation of the Recapitalization Transaction, as further described in the Term Sheet*".[3] The prior indentures, which prohibited the mandatory transfers, would remain "in full force and effect until the Settlement Date takes place."[4]

12. <u>*27 October (Effective Time*):</u> Approximately one month later, the Company announced that the Effective Time had occurred, meaning that the 50% conditions had been satisfied and that consents given by that date could no longer be revoked. But the higher thresholds necessary to effect the amendments in respect of the mandatory transfers had not yet been met. These consents could still be revoked as required by law and as (according to the press release) described in the Consent Solicitation Statement.

13. <u>*28 October (Announcement of Results and Partial Re-Opening of Consent Solicitation)*:</u> The following day, the Company provided a further update: while it had "*obtained the consents needed to implement the Transaction in respect of the Existing SSNs and the*

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[3] TSA Exhibit A – Term Sheet, Part A – Implementation Term Sheet (the "**Implementation Term Sheet**") at 19 (defining "Settlement Date" as the Closing Date; defining "Closing Date" by reference to the TSA) & TSA, Section 1.1 (defining "Closing Date" as "*the date of the satisfaction (or waiver, if applicable) of the closing conditions set forth in the Definitive Documents and the consummation of the Recapitalization Transaction, as further described in the Term Sheet.*").

[4] Implementation Term Sheet at 16 (describing Proposed 90% Amendments for Existing SSNs and Existing SUNs).

Existing SUNs" (but not for the PIKs) it was re-opening the consent solicitation. But it did not say the Company had accepted or otherwise acted upon the consents. And it reiterated that the entry of the supplemental indentures to reduce the principal due and/or postpone the repayment date remained "*subject to the conditions described in the Consent Solicitation Statement*" and that the "***provisions relating to the SSN Mandatory Transfer and the SUN Mandatory Transfer***" would "***only becom[e] effective and operative on the Settlement Date***". (emphasis added).

14. <u>*4 November* (*Announcement of Consent Solicitation Results*)</u>: Because the Company had partially re-opened the consent solicitation, the company provided updated results—but still did not say that it had accepted those consents. Instead, it reaffirmed that the transaction remained subject to certain conditions and said only that it "*expect[ed]*" the "*completion of the Transaction to occur promptly after the satisfaction or (as applicable) waiver of all Transaction Implementation Conditions*." It also expressly declined to announce an expected Settlement Date.

15. <u>*12 November (Settlement Date)*</u>: Approximately one week later, the Company made two announcements, five hours apart. First, they announced the entry into an Amicable Agreement (a Luxembourg law out-of-court restructuring process) that documented the terms of the recapitalization and also confirmed that "*the settlement date of the Transaction is set for today*". Second, they announced the completion of the Company's comprehensive recapitalization transaction and confirmed the Settlement Date as 12 November. It was only at this point that the mandatory transfer provisions became effective (as per the 28

October Company announcement) and the mandatory transfers occurred.[5] Critically, it was only at this time that the Company assented to the requisite agreement that triggered what might be deemed a Restructuring, by binding the Company and all noteholders.

II. THE CORRECT APPROACH TO CONSTRUCTION

16. The principles that apply to the construction of contracts—and of ISDA terms in particular—are clear and should be common ground. They can therefore be shortly stated.

17. The general legal principles were summarised by the UK Supreme Court in *Wood v Capita Insurance Services Limited* [2017] AC 1173, as follows. The aim of contractual interpretation is "*to ascertain the objective meaning of the language which the parties have chosen to express their agreement*."[6] The contract must be considered as a whole, with more or less weight given to elements of the wider context depending on the nature, formality and quality of drafting of the contract.[7] Ultimately, interpretation is a unitary exercise that involves an iterative process whereby each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated.[8]

18. Further principles apply to the interpretation of ISDA terms by virtue of their actual and intended use as standard agreements by a very large number of parties and the considerable thought put into the drafting of the terms:[9]

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[5] See Press Release titled "*Ardagh Successfully Completes Comprehensive Recapitalization Transaction*" dated 12 November 2025 ("*In connection with the Transaction, the following actions have occurred on the date hereof (the "Settlement Date*")."). See also Implementation Term Sheet at 16 (describing occurrence of mandatory transfers that converted SSNs into Second Lien Notes and SUNs into equity).

[6] *Wood v Capita Insurance Services Limited* [2017] AC 1173 at [10] per Lord Hodge (Lord Neuberger, Lord Mance, Lord Clarke and Lord Sumption agreeing) **{C/11/920}**.

[7] Ibid.

[8] *Wood v Capita Insurance Services Limited* [2017] AC 1173 at [12] **{C/11/920 - 921}**, citing *Arnold v Britton* [2015] AC 1619 at [77] **{C/3/622}** and *In re Sigma Finance Corpn* [2010] 1 All ER 571 at [10] **{C/6/740 - 742}**.

[9] See e.g. *Re Lehman Brothers International (Europe)* [2023] 2 All ER (Comm) 130 at [57]-[58] per Hildyard J **{C/5/696-697}**.

a. It is "*axiomatic*" that ISDA terms should as far as possible be interpreted in a way that achieves the objectives of "***clarity, certainty and predictability***".[10]

b. The relevant background is to be taken into account, *so far as it is* common to transactions of such a varied nature and reasonably expected to be common knowledge amongst those using the ISDA standard terms. Otherwise, the particular factual background or matrix has a much more limited role to play than in an ordinary exercise of contractual construction, given the standard forms are not context-specific.[11]

c. More than in an ordinary exercise of contractual construction between parties that contracted based on a bespoke, negotiated form of words, the focus in an ISDA case is ultimately on the words used. The precise words in an ISDA document were selected after considerable thought and with the benefit of input and continuing review of users of the standard forms and of knowledge of the market.[12]

III. SECTION 4.7(A)

19. The External Reviewers will be familiar with Section 4.7(a) so we need not set it out in full. However, two points may be made as to its structure.

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[10] *Lomas v JFB Firth Rixson* [2010] EWHC 3372 (Ch) at [53] per Briggs J (emphasis added) **{C/9/890}**. See also *Lomas & Ors (Joint Administrators of Lehman Brothers International (Europe)) v Burlington Loan Management Ltd & Ors* [2016] EWHC 2417 (Ch) at [48(1)] per Hildyard J **{C/8/787}**; *Re Lehman Brothers International (Europe)* [2023] 2 All ER (Comm) 130 at [58] **{C/5/697}.**

[11] *Lomas & Ors (Joint Administrators of Lehman Brothers International (Europe)) v Burlington Loan Management Ltd & Ors* [2016] EWHC 2417 (Ch) at [48(2)] **{C/8/787}**, citing *AIB Group (UK) Ltd v Martin* [2001] UKHL 63, [2002] 1 All ER (Comm) 209, [2002] 1 WLR 94 **{C/2/588}**. See also *Re Lehman Brothers International (Europe)* [2023] 2 All ER (Comm) 130 at [58] **{C/5/697}**.

[12] *Lomas & Ors (Joint Administrators of Lehman Brothers International (Europe)) v Burlington Loan Management Ltd & Ors* [2016] EWHC 2417 (Ch) at [48(3)] **{C/8/787}**, citing *Re Lehman Brothers International (Europe)*, *Lehman Brothers International (Europe) v Lehman Brothers Finance SA* [2013] EWCA Civ 188, [2014] 2 BCLC 451 at [53] and [88] **{C/4/662-663, 669}**. *See also Re Lehman Brothers International (Europe)* [2023] 2 All ER (Comm) 130 at [58] **{C/5/697}**.

20. First, a Restructuring requires that one of five events, listed in the Roman enumerated sub-sections of Section 4.7(a) (the "**Enumerated Events**"), occurs, is agreed or is announced. These Enumerated Events are broadly defined so as to capture various mechanisms by which Obligations may be restructured, including, for example, a reduction in the rate of interest payable or a change in the ranking of priority. In the case of the Company, we are concerned with only two of the Enumerated Events. For there to have been a Restructuring in respect of the Company, it is necessary to show that either: "*(ii) a reduction in the amount of principal or premium payable at redemption (including by way of redenomination)*" or "*(iii) a postponement or other deferral of a date or dates for either (A) the payment or accrual of interest, or (B) the payment of principal or premium*" occurred, was agreed between the Relevant Entity and a sufficient number of noteholders or was decreed, in each case in a form sufficient to bind all noteholders.

21. Second, the Enumerated Events must: (a) occur in a form that binds all holders of the relevant Obligations; (b) be agreed between the Reference Entity and a sufficient number of holders of the relevant Obligations to bind all holders of those Obligations; or (c) be announced or decreed by the Reference Entity so as to bind all holders of those Obligations. That this is the correct way to parse the three limbs is confirmed by Section 4.10(a), which describes Section 4.7(a) as requiring the "occurrence of", the "agreement to", or the "announcement" of one of the Enumerated Events.

22. Each of these limbs require something which ultimately binds all holders of the relevant Obligations.

23. As between limbs (a) and (b), they are differentiated by the latter's need for an agreement between the Reference Entity and the holders. While limb (a) could in an appropriate case

be satisfied for example by a unilateral act which binds all noteholders via its occurrence, limb (b) cannot be satisfied by a unilateral act. What is required is an agreement between the Reference Entity on the one hand and a sufficient number of holders to bind all of them on the other.

24. An agreement between two parties necessarily denotes something bilateral, resulting from mutual assent.[13] It calls for something that effectively binds both the company and all the noteholders.[14] Because if Section 4.7(a) had intended only to capture something binding on, or agreed to by, *the noteholders* (and not the Company), it would have stated that it only needed to be agreed or consented to "*by*" them. And if it only needed to be agreed *by* a sufficient number of the noteholders in order to bind all of the noteholders (such as via a scheme of arrangement), limb (b) would be redundant: the agreement by the sufficient number would be an occurrence within limb (a). It would be perverse not to give some content to the words expressly used in limb (b), and which distinguish it from limb (a).

25. The need for an agreement which binds all of the holders in respect of an Enumerated Event is again confirmed by Section 4.10(a) and its words "*agreement to*". It is not enough that there be something "*agreed between*" the Company and a sufficient number of the holders which as a matter of law falls short of an agreement. What is needed is an agreement in the legal sense: a meeting of minds between the relevant parties which has the effect of creating or altering legal relations between them. This is consistent with the common legal understanding of the term "*agreement*". For example, "*agreement*" is defined:

[13] "Between" in The Oxford University Press, Oxford English Dictionary (OED Online, updated March 2025) (excerpt), n.III (noting "between" can be used "*[w]ith reference to things acting conjointly or participating in action*") **{E/3/1001}**.

[14] The phrase "*sufficient number of holders of such Obligation to bind all holders of the Obligation*" does not mean that the Company need not be bound—it merely describes the number of holders required to form an agreement that is sufficient to bind all the noteholders.

a. in *Black's Law Dictionary* as a "*mutual understanding between two or more persons about their relative rights and duties regarding past or future performances; a manifestation of mutual assent by two or more persons*";[15] and

b. in *Osborn's Concise Law Dictionary* as "*[a]n agreement is an act in the law whereby two or more persons declare their consent as to any act or thing to be done or forborne by some or one of those persons for the benefit of the others or other of them*".[16]

26. In addition, an agreement which, while created, has not yet taken effect as a result of unsatisfied conditions precedent is incapable of being an agreement which binds all holders in respect of an Enumerated Event. The obligations under such an agreement are suspended; they do not bind anyone until the condition is satisfied.[17] As one commentator has observed in respect of Section 4.7(a), "*[i]f there are conditions that govern the effective date when all holders would be bound by an event, these conditions would also be pertinent to the determination of the restructuring date as, in some cases, the date of a resolution, or the date of a decree, may not be applicable*."[18]

27. The agreement must also be of a form that, if agreed between a sufficient number of holders of the Obligations, is capable of binding all of them. It is obvious that the agreement must in fact bind at least the sufficient number in respect of an Enumerated Event relating to the Obligations they hold; if the sufficient number are not so bound, it follows that all holders

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[15] Bryan A Garner (ed), *Black's Law Dictionary* (12th edn, Thomson Reuters 2024), definition of "*Agreement*", n1 **{E/1/986}**.

[16] Mick Woodley, *Osborn's Concise Law Dictionary* (12th edn, Sweet & Maxwell 2013), definition of "*Agreement*" **{E/2/990}**.

[17] See, e.g., *Smallman v Smallman* [1972] Fam. 25 **{C/10/905-913}**.

[18] Indra Rajaratnam, *Credit Default Swaps: The Vanilla Essence* (Risk Books 2022) **{D/4/980}**.

are not bound. This is also consistent with (i) the interpretation set out in the leading treatises and commentaries, which recognise both that the agreement must be binding and that it must be binding in a form that binds all noteholders,[19] as well as (ii) the prior resolutions of the DC and the legislative framework of the Definitions (see section IV, subsections E. and F respectively below).

28. It is not suggested in this case that either limbs (a) or (c) were satisfied. The "Yes" position must necessarily rise—and, here, fall—on the existence (or, here, lack) of an agreement between the Company and sufficient holders of the Obligations to bind all holders of the Obligations at hand.

29. Nevertheless, limbs (a) and (c) are instructive. Both refer to readily identifiable triggers, in a form that binds all noteholders. It would be incongruous to adopt a construction of limb (b) that allowed anything less than a legal agreement binding on a sufficient number of noteholders and capable of binding all of them to satisfy the express words "agreed between". Put simply, the parties either have an agreement to bind all to the Enumerated Event or not. Any alternative would lead to endless disputes about what types of informal, but not yet effective, "agreements" are sufficient to trigger a Restructuring—precisely the type of open-ended and ambiguous inquiry the drafters sought to avoid (see further below).

[19] See Simon Firth, *Derivatives Law and Practice* (Sweet & Maxwell, latest release September 2025) § 17.089, fn 8 (Section 4.7(a) requires an agreement that is "*legally enforceable: a non-binding agreement in principle would not be sufficient*.") **{D/5/984 - 985}**; Anna Gelpern and Mitu Gulati, '*CDS Zombies*' (2012) 13(3) European Business Organization Law Review 347 at 368 (noting that under the similar 2003 Definitions, "*a Restructuring Credit Event would be deemed to occur if one of the following three categories of bad things befell the underlying obligations, and did so in a form 'binding on all' holders of such obligations*") **{D/1/949}**; Indra Rajaratnam, *Credit Default Swaps: The Vanilla Essence* (Risk Books 2022) ("*Regardless of the form of implementation, it is pertinent that the relevant agreement, decree or announcement must bind all holders of an Obligation in order for a restructuring to occur*.") **{D/4/979}**; Edmund Parker, *Credit Derivatives: Understanding and Working with the 2014 ISDA Credit Derivatives Definitions* (Globe Law and Business 2017) at 346 ("*Section 4.7 provides that a Restructuring Credit Event occurs when any one of a list of specified events binding all of the holders occurs to an aggregate amount of the Reference Entity's Obligations at least equal to the Default Requirement*.") **{D/3/975}**.

Adopting a "Yes" position would therefore eschew the clarity, certainty and predictability that the proper interpretation of ISDA terms should achieve.

30. For each of these reasons, a finding of "No" is required to achieve the objects of clarity, certainty and predictability for all users of these standard terms.[20]

IV. ANALYSIS

A. The TSA Did Not Constitute A Relevant Agreement

31. Prior to November 12, there was no agreement "between the Reference Entity . . . and a sufficient number of holders of such Obligation to bind all holders of the Obligation."

32. It is accepted that the TSA is a legally binding agreement. However, it did not trigger a Restructuring because: (1) it did not bind any of the noteholders in respect of an Enumerated Event, but instead required the signatories (after the TSA became binding and effective in accordance with its Section 2) to work together towards an agreement in respect of an Enumerated Event (see sections 3 to 6); and (2) it was not an agreement in a form which, if agreed to by a certain number of noteholders, could be capable then automatically of binding all noteholders.

33. There was no certainty as a result of the TSA that an Enumerated Event would occur, or that the relevant parties would agree to an Enumerated Event or that an Enumerated Event would be agreed. It was entirely possible, even after entry by the Company into the TSA, for nothing satisfying the definition of a Restructuring in the Definitions or even satisfying the ordinary meaning of the word "restructuring" then to follow. Among other things, as the DC observed, the TSA contained termination rights and the "*implementation of the*

[20] *Lomas v JFB Firth Rixson* [2010] EWHC 3372 (Ch) at [53] per Briggs J (emphasis added) **{C/9/890}**. See also *Lomas & Ors (Joint Administrators of Lehman Brothers International (Europe)) v Burlington Loan Management Ltd & Ors* [2016] EWHC 2417 (Ch) at [48(1)] per Hildyard J **{C/8/787}**; *Re Lehman Brothers International (Europe)* [2023] 2 All ER (Comm) 130 at [58] **{C/5/697}**.

recapitalization [was] also contingent on satisfying the conditions precedent that are contained in the TSA and any further conditions precedent that may be included in the long form transaction documents." It also included a fairly customary "fiduciary out", essentially providing that even if all "external" conditions precedent to the consummation of the Transaction have been met, Ardagh could still terminate the TSA—without breaching it—on the basis that proceeding with the Transaction "*would be inconsistent with the exercise of its fiduciary duties.*"[21] Irrespective of how this determination might arise, there was no firm limitation on when Ardagh could exercise it, so until the Transaction became effective, Ardagh was in essence not bound by it.

34. Not surprisingly, a supermajority of the DC (in a 10-1 vote) therefore determined that:

> "*one of the events listed in Section 4.7(a) had not occurred in a form that binds all holders of such Obligation, **been agreed between the Reference Entity or a Governmental Authority and a sufficient number of holders of such Obligation to bind all holders of the Obligation** or been announced (or otherwise decreed) by the Reference Entity or a Governmental Authority in a form that binds all holders of such Obligation*." (emphasis added).

35. The market does not expect to make payments based on whether something might occur at some point in the future that could, in ordinary language, be called a "restructuring". That is not a risk that credit default swaps ("**CDS**") are intended to protect against, or that the market understands them to protect against.

[21] See TSA, Section 16.3 (Company Party Termination Events).

B. The Receipt of the Consent Solicitations Did Not Constitute a Requisite Agreement Because It Merely Granted the Company *Permission* to Act

36. Neither the solicitation of consents, nor the noteholders' responses, do anything to move the needle. In responding to the solicitations, noteholders merely granted the company *permission* to pursue an amendment in relation to an Enumerated Event. But giving the Company permission to act is not an agreement by the Company to act, and thus under the plain text of Section 4.7(a), nothing had been "agreed between" the Company and the noteholders prior to the Company acting upon those consents by amending the indentures and effecting the reduction of principal and postponement of the repayment date.

37. The "Yes" position should be rejected for an additional reason as well. Until the Company acts upon or accepts the consents they are of no independent legal significance and do not operate to bind the Company or all noteholders—which, as above, is also required for a Restructuring under Section 4.7(a). According to the last publicly available versions of the Company's relevant indentures, and as is typical in an indenture governed by New York law, only the issuers, trustee, and guarantor may generally amend the indenture.[22] The noteholders' consents are (for certain amendments) necessary, but not *sufficient*. They cannot alone amend the indenture in a form that would bind all other holders or the Company. As with any consent solicitation, the Company could decide no longer to entertain the transaction contemplated—thus, precluding formation of the agreement.[23]

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[22] See, e.g., Indenture among Ardagh Packaging Finance plc and Ardagh Holdings USA Inc. (as issuers) and Ardagh Group S.A. (as parent guarantor) in respect of 5.250% senior notes due 2027 at Section 9.02 **{A/1/99-101}**.

[23] The fact that the noteholders might have had a breach of contract cause of action against the Company *under the TSA* for failure to consummate the transaction is entirely irrelevant to this analysis, because the DC has already determined that the TSA was not an agreement triggering a Restructuring credit event. And while the TSA had a specific performance provision, a court would not necessarily be required to enforce it. Because specific performance invokes the court's equitable powers, such provisions are only a factor to consider in exercising their discretion. *See*

Indeed, it is typical for consent solicitation statements to note that the company retains the right (where certain conditions are not met) to revoke or withdraw the consent solicitation at any time before the settlement date[24]—and it is reasonable to infer that the Ardagh consent solicitation material included such provisions.[25] The 29 September press release in fact goes even further by stating that Ardagh and its affiliated issuers "*may, in their discretion, . . . terminate any one or more of the Consent Solicitations at any time, in whole or in part.*"

38. The fact that certain press releases stated that the new, amended indentures "*will be entered into and will become effective and operative*" does not suggest otherwise. It was merely a statement of *current intention* on the part of the Company that was always qualified by both explicit and implicit conditions. For example, the 28 October press release made clear that the indentures would become effective "*subject to the conditions described in the Consent Solicitation Statement*", with the "***provisions relating to the SSN Mandatory Transfer and the SUN Mandatory Transfer only becoming effective and operative on the Settlement Date***" (emphasis added). And, as below, there was no guarantee the Settlement Date would ever occur, which means there was also no guarantee the Company would ever

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Dan B Dobbs, *Law of Remedies: Damages, Equity, Restitution* (2nd edn, West Publishing 1993) § 12.9(5) (Courts are "*generally opposed to the parties' power to contract freely for or against specific performance,*" and so "*the court may consider the contract provision in favor of specific performance, not as binding, but as an important influence in the exercise of discretion*.") **{D/2/972}**. See also *301 East 60th St. LLC v. Competitive Solutions LLC*, 217 A.D.3d 79, 85 (N.Y. App. Div. 2023) (court need not enforce specific performance provision if it would produce "inequitable result") **{C/1/582}**.

[24] See, e.g., Inn of the Mountain Gods Resort & Casino Confidential Offering Memorandum and Consent Solicitation Statement in respect of "Offer to Exchange its 9.25% New Senior 1st-Out Notes due 2020 and Solicitation of Consents for proposed amendments to the related indenture (CUSIP No. 45771V AG8) and Offer to Exchange its 9.25% Senior Notes due 2020 (CUSIP Nos. 45771V AC7, 45771V AD5)" dated 18 November 2020 ("*Subject to the requirements of applicable law, the terms hereof and the terms of the Support Agreement, the Company reserves the right, in its sole discretion, to . . . terminate, withdraw, amend or extend the Exchange Offers or the Consent Solicitation at any time and for any reason, including if any of the conditions described [therein] are not satisfied*.") **{A/2/149}**.

[25] In addition, even after the Effective Time, noteholder consents could still be revoked consistent with the Consent Solicitation Statement and as required by law. *See* the 4 November press release.

accept and act on the consents, as required to bring about the agreement.

39. For all these reasons, the "No" position should also prevail even if the External Review panel determines that Section 4.7(a) requires only (notwithstanding its express words) that there be an agreement *by* certain noteholders that is binding on all of them (without necessarily being agreed by or binding on the Company). Until the Settlement Date, when the Company accepted the consents, *all* noteholders simply were not bound, as required by the Definitions. To the contrary, until that date the effective indenture in fact *prohibited* the Enumerated Events which could give rise to a determination that a Restructuring had occurred.

C. The Company's Own Statements Confirm That No Agreement Existed Prior To 12 November—And That The Transaction Remained Subject to Conditions That Precluded The Formation of an Agreement

40. The Company's own statements confirm that no Restructuring occurred until 12 November because no agreement binding on all holders in respect of an Enumerated Event existed before then, for the reasons given above.

41. Here (and as set out above in Section I), the Company repeatedly emphasised in its press releases that the mandatory transfers—a precursor to the Enumerated Event (i.e., the mandatory transfer effecting the principal reduction (via equitization) of the SUNs and the postponement of the maturity (via exchange) of the SUNs)—were subject to conditions and would not become "effective and operative" until the Settlement Date. (And, conversely, the mandatory transfers were barred by the indentures until such date.) By tying the acceptance of the consents to the Settlement Date, the requisite amendments—and therefore, the formation of the *agreement*—were in effect subject to:

a. The negotiation, drafting, execution and delivery of the Definitive Documents, which included, among things, the equitization documents, the exchange documents, the new money documents, the tax structuring paper, the implementation steps plan, government and regulatory filings, the consent solicitation documents, supplemental indentures, the scheme documents (if required), the SPA, the TSA itself (including third-party consents), and "*other definitive documentation as is necessary to or desirable to consummate the Recapitalization Transaction [as defined the TSA]*";[26]

b. The satisfaction (or waiver, if applicable) of the various closing conditions that may be set forth in each of the Definitive Documents, nearly all of which are not PAI;[27] and

c. The consummation and settlement of the Recapitalization Transaction (which ultimately included the Amicable Agreement as well, suggesting that the earlier documentation that may have been entered into in the lead-up to the completion of the recapitalization transaction was not itself sufficient to effectuate it).

42. Finally, even if the PAI did not affirmatively establish the *absence* of agreement (and it does), there is, at a minimum, nothing to *support* that an agreement had occurred prior to 12 November, and thus the proponents of the "Yes" position cannot meet the standard of proof necessary to establish the existence of a Restructuring event.[28]

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[26] See TSA, Section 1.1 (defining "Definitive Documents"); Section 3 ("Definitive Documents") and Section 17.1(i) ("Conditions Precedent").

[27] See TSA, Section 17.1(i) ("Conditions Precedent").

[28] That the burden is for evidence to show the existence of the Credit Event is implicit in the Definition and Determinations Committees Rules. They require that a Convened DC make an affirmative determination that a Credit Event has occurred by a Supermajority. *See* Rule 3.1(c)(ii) (A "*Convened DC may Resolve, with respect to an Affected Reference Entity, by a Supermajority . . . whether a Credit Event of the type referenced in the relevant DC Question*

D. A "No" Finding Is Consistent With Drafters' Intent to Create An Easily Administrable, Bright-Line Standard

43. As a prior External Review panel stated, "*the ISDA Master and the transactional confirmations and the terms incorporated by them . . . will include language that is general to accommodate the variety of fact patterns to which such language will apply*."[29] Thus, "*the business purpose sought to be achieved by the drafters of the ISDA standard documentation is relevant*" in order to ascertain the meaning of its Definitions.[30]

44. In that regard, a "No" finding here would best effectuate the drafters' intent. One goal of the ISDA Master was "*mitigating the risk of fact-specific disputes and the attendant risk of protracted litigation*".[31] And, as relevant here, the Definitions intended to create a bright-line, easy-to-administer standard for determining the existence of a Restructuring.[32] As above, that is evident from the text of Section 4.7(a): it defines a Restructuring by reference to easily identifiable events (the occurrence of, the agreement to, or announcement of certain actions). Requiring an agreement between issuers and holders based on objective indicia of mutual assent is consistent with that purpose. Permitting the triggering of a Restructuring based upon less readily identifiable arrangements is not.

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has occurred."). The burden is also embedded in the definition of PAI, which is defined to mean "*information that **reasonably confirms** any of the facts relevant to the determination*" of the Credit Event. Definitions, Section 1.35 (emphasis added).

[29] Decision and Analysis of the External Review Panel of the U.S. Determinations Committee DC Issue 2018101502 (Sears) at 3 **{B/1/544}**.

[30] Ibid.

[31] *Lomas & Ors (Joint Administrators of Lehman Brothers International (Europe)) v Burlington Loan Management Ltd & Ors* [2016] EWHC 2417 (Ch) at [48(5)] **{C/8/788},** citing the expert evidence of one of the principal draftsmen of the 1992 ISDA Master Agreement (Jeffrey Golden KC) in *Lehman Brothers Holdings Inc v Intel Corp* (16 September 2015, unreported)) in the United States Bankruptcy Court for the Southern District of New York **{C/7/752-778}**. See also *Re Lehman Brothers International (Europe)* [2023] 2 All ER (Comm) 130 at [58] **{C/5/697}**.

[32] See e.g. Anna Gelpern and Mitu Gulati, '*CDS Zombies*' (2012) 13(3) European Business Organization Law Review 347 at 368 (describing the creation of the 2003 Definitions) **{D/1/949}**.

45. A "Yes" finding would in effect reject a bright-line rule in favor of a vague and open-ended inquiry. This would open the door in future resolutions to endless debate about what types of informal "agreements" are sufficient and which are not, creating uncertainty and a lack of predictability in the market. It could also lead to situations in which a Restructuring is triggered based on a hypothetical, potential transaction that may never materialize because the company later elects to take a different course of action—completely subverting market participants' legitimate expectations regarding the types of risk the product is intended to protect against.

E. Past DC Precedents Confirm That A Restructuring Credit Event Does Not Occur Until The Consents Have Been Accepted And/Or The Amendment Is Effective, At the Earliest

46. Prior resolutions of the DC confirm that the industry understands Section 4.7(a) consistent with the interpretation backed by the "No" position: a Restructuring credit event does not occur until the amendment is effective or there is an agreement to amend which is binding on all holders, at the earliest—in other words, the point at which there is an agreement between the company and the requisite number of holders, such that both the company and all the holders are effectively bound.

47. For example:

a. In *Norske Skogindustrier ASA* (Issue No. 2016041401), the DC declared a Restructuring the day the exchange offered settled (April 12), months after the solicitation launched—and a day *after* the solicitations were approved and a resolution was passed inserting into the indenture the mechanic that permitted the transaction.[33]

Notably, the Norske exchange offer announcement stated as follows:[34]

> *"In order for the 2017 Notes Extraordinary Resolution to be adopted at the 2017 Notes Meeting, the requirements described under "Exchange Offers and Consent Solicitations—The Consent Solicitations—Procedures Relating to Meetings of Holders" in the exchange offer and consent solicitation memorandum must be satisfied.* ***The 2017 Notes Proposal will be effective and operative*** *when the Extraordinary Resolution is adopted and* ***once the Settlement Date occurs****. The Settlement Date occurring is a condition precedent to the 2017 Notes Proposal being legally effective and operative." (emphasis added)*

The DC gave full effect to Norske's announcement and noted in its DC Statement that "*in its announcement dated 18 March 2016, the Reference Entity [i.e. Norske] stated that: 'The [restructuring event] will be* ***effective and operative*** *when the Extraordinary Resolution is adopted* ***and once the Settlement Date occurs***'" (emphasis added), holding as a result that the Credit Event occurred on the date on which the relevant restructuring settled.[35] Substantially similar language was used in Ardagh's disclosures, and so, applying the same logic here, the Restructuring did not occur until November 12, the Settlement Date.

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33 Meeting Statement of the Internal Review Panel of the EMEA Determinations Committee with respect to Norske Skogindustrier ASA **{B/2/549}**.

34 Announcement by Norske Skogindustrier ASA titled "*Norske Skogindustrier Asa Announces Extension Of And Amendments To Exchange Offer And Consent Solicitation For The Eur 218,106,000 7.00% Senior Notes Due 2017*" **{A/3/516}**.

35 Meeting Statement of the Internal Review Panel of the EMEA Determinations Committee with respect to Norske Skogindustrier ASA **{B/2/549}**.

b. Similarly, in _Scandinavian Airlines System Denmark – Norway – Sweden_ ("**SAS**"), the DC declared that a Restructuring event occurred on the day SAS announced successful implementation of its recapitalization plan (October 23, 2020)—more than seven weeks after the company announced (on September 2, 2020) that the noteholders had approved the conversion of claims as part of SAS' recapitalization plan.[36] Here, again, the Restructuring occurred *after* the noteholders had provided their approval—not immediately upon it.

c. In _Novo Banco S.A._ (Issue No. 2017100401), the DC declared a Restructuring the day the company announced that it had *accepted* valid tenders and it had together with the trustee actually executed amendments to certain indentures,[37] *acting* upon resolutions that had been passed.

d. And, finally, in _Republic of Ecuador_ (Issue No. 2020042001), the DC declared a Restructuring event as of April 17, the day consents were received *and accepted*—once again highlighting the necessity of an *agreement* between the issuers and holders.[38]

This determination also provides a powerful rebuttal to a potential argument from

[36] Event PAI (Issue Number 2020102701) (referring to "*Press release 2 September 2020 – Noteholders have approved the conversions of claims as part of SAS' recapitalization plan*"); Credit Derivatives Determinations Committees webpage Credit Event – Scandinavian Airlines System Denmark-Norway-Sweden **{B/3/553}**; Decision of the Internal Review Panel of the EMEA Determinations Committee DC Issue 2020102701 (Scandinavian Airlines System Denmark – Norway – Sweden) dated 28 October 2020 **{B/4/554-555}**.

[37] Announcement by Novo Banco S.A. titled "*Novo Banco S.A. announces Tender Offers and Proposals*" **{A/4/524-537}**; Credit Derivatives Determinations Committees webpage Credit Event – Novo Banco S.A**. {B/5/566}**; Decision of the Internal Review Panel of the EMEA (Europe) Determinations Committee DC Issue 2017100401 (Novo Banco S.A.) dated 5 October 2017 **{B/6/568-569}**.

[38] Announcement by The Republic of Ecuador titled "*The Republic of Ecuador Announces Successful Results of its Consent Solicitations*" dated 17 April 2020 **{A/5/538}**; Credit Derivatives Determinations Committees webpage Credit Event – Republic of Ecuador **{B/7/570-572}**; Decision of the Internal Review Panel of the Americas Determinations Committee Issue 2020042001 (Republic of Ecuador) **{B/8/573-576}**.

the "Yes" proponents. They may argue that the "No" position threatens to render superfluous the relevant language in Section 4.7(a) because an agreement would never happen until the transaction occurs—making meaningless the possibility of a Restructuring based on agreement. Not so, as Republic of Ecuador demonstrates. There, the DC recognized that the parties had an agreement once the consents were *accepted*, even though the amended indentures would not be operative until the Republic of Ecuador paid holders whose consents were validly delivered and accepted. While payment was a condition to the *implementation* of the agreement, it did not prevent the *formation* of the agreement. That contrasts with the circumstances here, where the company never actually *accepted* the consents—mutually assenting to an agreement—prior to the Settlement Date, and so there *were* (unlike in Republic of Ecuador) conditions and contingencies to *formation*.

F. A "Yes" Finding Would Subvert Market Expectations Regarding Deliverable Obligations

48. In standard corporate CDS, cash settlement payments made by CDS protection sellers to their protection buyer counterparties are typically based on the difference between par and the final (recovery) price of "Deliverable Obligations", i.e. certain qualifying obligations of the Reference Entity that can be used in settlement of a CDS contract. Settlement payments will thus depend on the availability and value of a Reference Entity's Deliverable Obligations.

49. It appears that the multiple requests for a Credit Event determination prior to 12 November are motivated by a desire to influence, and subvert market expectations about, what will comprise the Deliverable Obligations. Specifically, certain of the "Yes" proponents are

attempting to avoid a consequence of the Restructuring having occurred on 12 November: that the CDS settlement cannot be based on the SUNs or the asset package (equity) into which the SUNs were exchanged.[39]

50. But it is well understood by market participants that: (i) settlement occurs only on certain Deliverable Obligations; *and* (ii) a credit may undergo a restructuring which results in the elimination of all Deliverable Obligations for a Reference Entity. The Definitions make clear, and the market accepts, that this is an uncovered risk. The Definitions state that a Credit Derivative Transaction will not be "*considered frustrated, or otherwise void or voidable (whether for mistake or otherwise) solely because . . . Obligations, Deliverable Obligations or the Reference Obligations do not exist on, or cease to exist on or following, the Trade Date.*"[40] For example, the phenomenon of "orphaning" is well known and may happen when a credit's relevant obligations are converted into equity (as here) and there are no other Deliverable Obligations for an entity available—potentially resulting in no payout on a CDS. Because the market accepts that the unavailability of a Deliverable Obligation, including by orphaning, is uncovered, that, and other similar risks, are priced into CDS.[41]

51. A key change between the 2003 and 2014 Definitions was the introduction of "asset-package delivery" provisions that address situations in which a Deliverable Obligation is restructured into a non-Deliverable Obligation by allowing settlement to occur taking into

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[39] To be clear, this does not mean that the "Yes" proponents are correct that the SUNs (or the equity into which they were exchanged) would properly be Deliverable Obligations if the Restructuring is determined to have occurred earlier. But that is outside the scope of the questions presented to the External Review.

[40] Definitions, Section 11.3(b).

[41] See also Indra Rajaratnam, *Credit Default Swaps: The Vanilla Essence* (Risk Books 2022) ("*Market perception of orphaning risk has a significant influence over the CDS spread levels on a reference entity, as the risk of orphaning often leads to the tightening of CDS spreads*.") **{D/4/983}**.

account the assets received by a holder in the restructuring.[42] However, the asset-package delivery provisions apply only to sovereign and financial institution credits. Corporate CDS were deliberately excluded from this regime. This is because, among other things, it would "*magnif[y]*" the risk of moral hazard, as in the corporate context a holder may have the ability to "*influence a reference entity's restructuring decision and take advantage of settlement through asset package delivery*."[43]

52. Accordingly, it is part of the deliberate design of the Definitions and consistent with (non-opportunistic) market participants' expectations that a Restructuring (as defined in Section 4.7(a)) may prevent the delivery of the pre-restructured obligations or the assets that were received on account thereof. There is no need to strain the definition of Restructuring, nor strain to make findings of fact, to avoid that consequence. Doing so would be inconsistent with the facts. It would also lead to distortion in the CDS market, given market participants' understanding, based on the clear language in the Definitions, that there is a risk that an obligation becomes non-deliverable at settlement due to equitization.

CONCLUSION

53. For the foregoing reasons, this External Review panel should adopt the "No" position.

54. Adopting a "Yes" position here would be inconsistent with the objectives of clarity, certainty and predictability in the interpretation and application of Section 4.7(a). It should be rejected.

Herbert Smith Freehills Kramer LLP

2 December 2025

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[42] See Definitions, Sections 8.8 and 8.9.

[43] Indra Rajaratnam, *Credit Default Swaps: The Vanilla Essence* (Risk Books 2022) **{D/4/981-982}**.