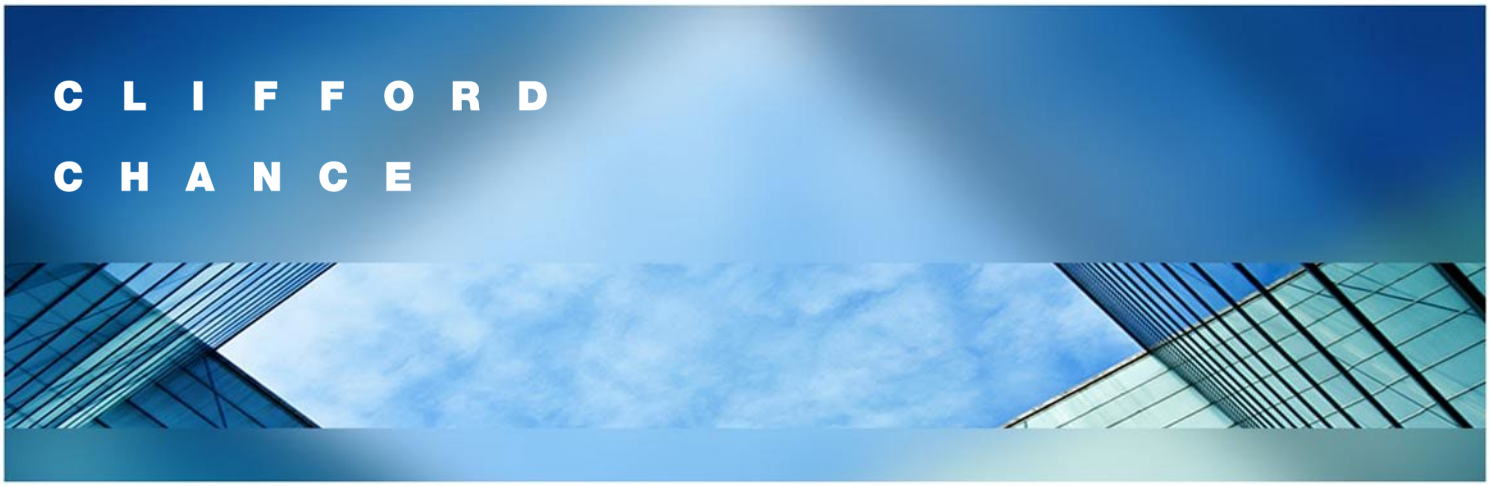

MALAYSIA AIRLINES SCHEME SANCTIONED BY THE ENGLISH COURT

On 22 February 2021 the English Court sanctioned a scheme of arrangement under Part 26 of the Companies Act proposed by MAB Leasing Limited ("**MABL**") (the "**Scheme**"). MABL is part of Malaysia Aviation Group Berhad ("**MAB**") which operates Malaysia's national flag carrier. The Scheme will restructure 52 English law governed operating leases representing over half the airline's fleet. As discussed in our previous briefing on the convening judgment, the Scheme offers the lessors a menu of options including (i) a revision of rent to reflect market rates and (ii) termination of the lease and repossession of the aircraft. Clifford Chance acted for all scheme creditors.

Key issues

- Final non-consenting scheme creditor locked-up days before the sanction hearing
- Scheme approved notwithstanding 100% approval
- Due to unanimous consent, no need for Court to decide whether schemes are "insolvency-related events" for CTC purposes
- Lessors reserved their rights on this question

FOREIGN AIRLINES CAN PROPOSE ENGLISH SCHEMES

The case demonstrates that the English scheme of arrangement remains a recognised restructuring tool in an international context, and the judgment helpfully sets out the questions the English Court will ask when considering whether to sanction an international scheme, these being:

- whether there is a sufficient connection with England; and
- whether the scheme will have international effectiveness if sanctioned.

In this case the Court was satisfied that since all the operating leases subject to the Scheme were governed by English law this established sufficient connection, and that the scheme creditors' unanimous consent together with persuasive expert evidence from a Malaysian lawyer to the effect that the Scheme is likely to be recognised in Malaysia all pointed towards its international effectiveness.

LATE UNANIMOUS CONSENT NO BAR TO SANCTION

All but one of the scheme creditors made their option election under the Scheme in advance and voted in favour of the Scheme at the scheme meeting. The one remaining creditor indicated their chosen option and consented to the Scheme during the weekend directly preceding the sanction hearing. This meant that all creditors unanimously agreed to the Scheme and therefore the restructuring could have proceeded on a purely consensual basis.

Snowden J referred to his comments in *Re Virgin Atlantic Airways Limited* [2020] EWHC 2376 (CH) at [48] around the Court's general unwillingness to convene or sanction a scheme to which all creditors lock-up in advance.

However, where abandoning the scheme process in favour of a purely consensual restructuring would entail additional delay, administrative difficulty and cost, the Court would be comfortable sanctioning the scheme notwithstanding 100% scheme creditor support. This was on the basis that creditor approval at scheme meetings is a minimal jurisdictional threshold and provided there was sufficient practical purpose in having the scheme, the Court could consider whether to exercise its discretion to sanction it.

THE CAPE TOWN CONVENTION

In this case the Court referred to the four principles from *Re Telewest Communications plc (No. 2)* [2005] BCC 36 at [20]-[22] to be applied when deciding whether to sanction a scheme:

- has there been compliance with the statutory requirements;
- was the class fairly represented and did the majority act in a bona fide manner and for proper purposes when voting at the scheme meeting;
- is the scheme one that an intelligent and honest man, acting in respect of his interests, might reasonably approve; and
- is there some “blot” (i.e. defect) in the scheme?

While acknowledging the Scheme clearly met the first three requirements, the Court observed that where a scheme failed to comply with the Cape Town Convention and associated Protocol as implemented in UK law (the "**CTC**") this might constitute a "blot" on the scheme.

Because all scheme creditors had, prior to the sanction hearing, consented to the Scheme and therefore the modification of their respective rights, there was no need for the Court to resolve the CTC questions.

For that reason the Court did not address the argument, raised by the company, that even if the Scheme were held to be an "insolvency-related event" for CTC purposes the manner in which the Scheme was structured, with each lessor being given the option to terminate the leasing of the aircraft in the alternative to an amendment to their contractual terms, was compliant with Alternative A.

The question of whether a Scheme is an "insolvency-related event" for CTC purposes is particularly topical following the decision in *gategroup Guarantee Limited* [2021] EWHC 304 (Ch) that a restructuring plan under Part 26A of the Companies Act was an "insolvency proceeding" for a different purposes (in that case the application or not of the Lugano Convention); see our briefing. However, for the reasons noted above Snowden J did not have to address this question in the context of MABL's Part 26 scheme of arrangement.

Notably, certain scheme creditors wished to reserve their rights to argue in future cases that certain schemes may be "insolvency-related events" for CTC purposes, and that they may trigger the Alternative A protections under the CTC. This will need to be decided in future English cases. It may be of note that the Malaysian courts last week in the convening judgment of the Malaysian scheme of arrangement for Air Asia X did find that its scheme of arrangement was an "insolvency-related event" for CTC purposes.

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