

# Malaysian Airlines—English Scheme of Arrangement sanctioned (Re MAB Leasing)

This analysis was first published on Lexis®PSL on 1 March 2021 and can be found [here](#) (subscription required):

**Restructuring & Insolvency analysis:** Mr Justice Snowden has sanctioned a scheme of arrangement under Part 26 of the Companies Act 2006 between Malaysian incorporated MAB Leasing Ltd (MAB) and certain of its creditors (the Scheme Creditors) (the Scheme). MAB is part of the group of companies owned by Malaysia Aviation Group Berhad (the Group) which operates Malaysia Airlines Berhad, the national air carrier of Malaysia. The Scheme Creditors are the lessors under certain of the Group's operating leases, which were all governed by English law and contained jurisdiction clauses in favour of the English courts. All Scheme Creditors were given the same menu of options to choose from, pursuant to which MAB's obligations under the relevant operating leases would be amended. In his judgment, Mr Justice Snowden considered the ability of a foreign company to propose an English scheme, questions relating to the Cape Town Convention on International Interests in Mobile Equipment (the CTC) and associated Protocol to the CTC on matters specific to Aircraft Equipment (the Aircraft Protocol) and whether the court can sanction a scheme proposed with unanimous scheme creditor support. Written by Lois Deasey, partner and Emma Butler, counsel at Akin Gump LLP.

*Re Mab Leasing* [\[2021\] EWHC 379 \(Ch\)](#)

## What are the practical implications of this case?

The case demonstrated that the English court is willing to sanction a scheme proposed by a foreign company if the relevant conditions are met.

English law governed debt documents are capable of satisfying the requirement of 'sufficient connection' with England, and an expert opinion, together with a high level of creditor support, is strong evidence that the scheme will have international effectiveness if sanctioned. The court did not need to determine questions regarding whether the Scheme was an 'insolvency-related event' for the purposes of the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 (SI 2015/912) (the 2015 Regulations) because all Scheme Creditors had, by the time of the sanction hearing, consented to the Scheme. Snowden J did, however, indicate that had he had to decide on the relevant issues, notwithstanding support from the vast majority of scheme creditors, the court would be concerned as to whether it was right to sanction a scheme which might be thought to breach the CTC. It is also notable that certain of the Scheme Creditors reserved their position, as lessors, to argue in a future case that a scheme was an 'insolvency-related event'.

Finally, the court held that where unanimous creditor consent is received during the scheme process, this does not automatically result in the court losing jurisdiction or its discretion to sanction the scheme. Provided there is sufficient practical purpose in having the scheme, the court may still consider exercising its discretion to sanction a fully consensual scheme.

## What was the background?

The Group had been severely impacted by coronavirus (COVID-19) and the downturn in the aviation industry during 2020. The purpose of the Scheme was to restructure 52 of MAB's operating lease agreements (the Operating Lease Agreements). The Scheme Creditors, as lessors, were given a menu of options from which they could make an election, in summary to:

- continue to lease the relevant aircraft to MAB at a revised market rent (variants of this deal were also available), or
- terminate the relevant Operating Lease Agreement and take back the aircraft (receiving a one-off payment exceeding the upper end of the expected return in a liquidation of MAB)

The comparator to implementation of the Scheme was insolvent liquidation with extremely poor returns to Scheme Creditors (estimated to be as low as 0.9% and as high as 6.4%).

All but one of the Scheme Creditors had signed a lock-up agreement (LUA) prior to the Scheme meeting. The final Scheme Creditor (being the only Scheme Creditor who did not vote in favour of the Scheme) subsequently acceded to the LUA and therefore consented to the Scheme, prior to the Scheme sanction hearing. No fees or other benefits were offered to Scheme Creditors for entering into the LUA.

At the convening hearing on 20 January 2021, Mr Justice Zacaroli had ordered Scheme Creditors could form a single class to vote on the Scheme.

## What did the court decide?

### Foreign Company

The court held that sufficient connection was satisfied on the basis that the Operating Lease Agreements are governed by English law (*In re Rodenstock GmbH* [2011] Bus LR 1245 and *Re Vietnam Shipbuilding Industry Group* [2014] BCC 433).

In considering international effectiveness, the court looked to the LUA and said that the very high level of creditor support provided good evidence both of the appropriateness of the involvement of the English court and the likelihood that the Scheme will have a substantial effect abroad (*Re KCA Deutag UK Finance plc* [2020] EWHC 2977 (Ch)). In addition, the court noted that MAB had obtained a Malaysian expert opinion confirming that the Scheme would be recognised in Malaysia.

### CTC

In considering whether there was a 'blot' or defect in the Scheme that prevented the court from exercising its discretion to issue the sanction order (*Re Telewest Communications plc (No 2)* [2005] 1 BCLC 772) the court considered the impact of a failure to comply with the CTC and the Aircraft Protocol. The 2015 Regulations provide that following the onset of an 'insolvency-related event', 'No obligations of the debtor under the agreement may be modified without the consent of the creditor'. It was not disputed that the CTC applied to the operating leases subject to the Scheme.

The court noted that it could have been argued that a scheme constituted an 'insolvency related event' such that the lessees' rights could not be modified without their consent. However, no Scheme Creditor had sought to make that argument before the court. Given that all Scheme Creditors ultimately acceded to the LUA and therefore consented to the Scheme, the court did not need to resolve the issue of whether the Scheme is an 'insolvency-related event' for the purposes of the 2015 Regulations.

### Unanimous consent

The court considered whether it had jurisdiction to sanction, and should exercise discretion to sanction, a scheme with unanimous Scheme Creditor support.

Snowden J referred to his comments in *Re Virgin Atlantic Airways Ltd* [2020] EWHC 2376 (Ch) at [para 48] where he had said that, '[...] it is not normal practice to include classes in a Part 26 scheme where 100% of the relevant creditors are known to be willing to consent'.

The judge noted that this case differed from the type of case he had in mind in *Virgin Atlantic* since it was not known until very shortly before the sanction hearing, that 100% consent could be, or had been, obtained.

It was held that creditor approval at scheme meetings is a minimal jurisdictional threshold and provided there is sufficient practical purpose in having a scheme, the court should not be deprived of jurisdiction (*Re Dundee Pikco Ltd* [2020] EWHC 1059 (Ch)). Snowden J considered that, notwithstanding unanimous support for the Scheme, given the time and cost implications of abandoning the Scheme, especially in light of the pressing nature of MAB's financial difficulties, it was appropriate for him to exercise his discretion to sanction the Scheme.

### Case details

- Court: Business and Property Court of England and Wales
- Judge: Mr Justice Snowden
- Date of judgment: 23 February 2021

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