

C A N A D A

**PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL
LOCALITY OF MONTRÉAL**

No: 500-11-056442-193

**SUPERIOR COURT
(Commercial Division)
*Business Corporations Act***

IN THE MATTER OF THE LIQUIDATION OF:

**GROUPE DESSAU INC.
DESSAU HOLDING INC.
DESSAU CAPITAL INC.
9387-1325 QUÉBEC INC (FORMERLY LVM
INC.)
SOPRIN ADS INC.
LANDRY GAUTHIER & ASSOCIÉS INC.
FONDATEC INC.
DESSAU INC.
DESSAU ADL INC.
CONSULTANTS VFP INC.
LES CONSULTANTS RENÉ GERVAIS INC.
PLANIA INC.
GROUPE CONSTRUCTION VERREAULT
INC.
9387-5631 QUÉBEC INC.**

Applicants

-and-

KPMG INC.

Liquidator / Applicant

-and-

XL SPECIALTY INSURANCE COMPANY

-and-

**XL INSURANCE COMPANY S.E., formerly
known as XL INSURANCE COMPANY
LIMITED**

-and-

DESSAU ASSURANCE INC.

-and-

VINSTON HAMPDEN

-and-

JEFFREY GELLINEAU

-and-

JOSEPH CAVALANCIA

-and-
FRANÇOIS DIONNE
-and-
**THE MEMBERS OF LLOYD'S SYNDICATE
NUMBERS 2987, 386, 1200, 1886, and 1919**
-and-
**ALLIANZ GLOBAL RISKS US INSURANCE
COMPANY**
-and-
**EACH OF THE PARTIES IMPLICATED IN
THE INSURED CLAIMS**

Impleaded Parties

**APPLICATION FOR AN ORDER APPROVING A SETTLEMENT AGREEMENT AND
FOR CERTAIN ANCILLARY RELIEF**

(Sections 354 of the *Business Corporations Act*, S-31.1 ("**QBCA**"), paragraph 11(c) of the Liquidation Order and paragraphs 11 and 12(e) of the Claims Procedure Order)

TO ONE OF THE HONOURABLE JUDGES OF THE SUPERIOR COURT, SITTING IN
COMMERCIAL DIVISION FOR THE DISTRICT OF MONTRÉAL, THE LIQUIDATOR
RESPECTFULLY SUBMITS AS FOLLOWS:

I. INTRODUCTION

1. The Liquidator hereby seeks approval of a settlement agreement entered into with XL Insurance Company S.E., formerly known as XL Insurance Company Limited ("**XLSE**" and, together with XL Specialty, "**XL**"), the Applicants' professional liability insurer, pursuant to which:
 - a) the XL Proof of Claim (as defined below) as well as various litigation commenced by XL and by the Liquidator shall be fully and finally resolved; and
 - b) XL shall assume carriage of all outstanding Insured Claims (as defined below),

the whole in accordance with the terms of the comprehensive full and final settlement agreement (the "**Settlement Agreement**") and the draft settlement approval order ("**Settlement Approval Order**") filed herewith respectively as **Exhibit P-1** and **Exhibit P-2**.

2. The Settlement Agreement shall only become effective if the Settlement Agreement is approved by this Court and the Settlement Approval Order is granted substantially in its current form (Exhibit P-2).

3. As more fully described below and in the Second Report of the Liquidator, the Liquidator is of the view that the Settlement Agreement is fair and reasonable and that the Settlement Approval Order should be issued, namely for the following reasons:
 - a) they allow for a full and final settlement of the XL Proof of Claim as well as various other litigation that spans across multiple forums and jurisdictions;
 - b) they ensure that the parties involved in the Insured Claims (as defined below) will continue to have access and, if necessary, benefit from the Insurance Coverage (as defined below);
 - c) The individual and aggregate coverage limits under the Insurance Policies (as defined below) and Excess Policies (as defined below) (collectively the “**Insurance Coverage**”) are sufficient to deal with all the Insured Claims. The Liquidator’s detailed analysis as to the sufficiency of the Insurance Coverage is more fully set in the Second Report of the Liquidator, which is filed herewith as **Exhibit P-3**. Schedule C of the Second Report of the Liquidator shall be filed under seal as it is protected by attorney-client privilege; and
 - d) They will allow the Liquidator to bring an end to these liquidation proceedings which have been ongoing for almost three years.

II. THE LIQUIDATION PROCEEDINGS AND CLAIMS PROCESS

A. THE LIQUIDATION ORDER

4. Up until early 2015, the Applicants operated various businesses providing engineering, urban planning, geotechnical, management and construction and operations services to various sectors.
5. As more fully described in the *Demande pour (i) l’émission d’une ordonnance de liquidation, (ii) la nomination d’un liquidateur et (iii) l’approbation d’une procédure de traitement des réclamations* (the “**Application for a Liquidation Order**”), the Applicants’ were required to adopt and implement a restructuring plan for their businesses namely as a result of:
 - a) certain allegations made against the Applicants and some of their directors, officers and shareholders during the Charbonneau Commission tarnished their reputations;
 - b) Dessau Inc. and Groupe Construction Verreault Inc. were added to the list of companies ineligible to bid on and obtain public contracts;
6. It was ultimately decided that the restructuring plan would take the form of an orderly liquidation, which, in a first step required the sale of the Applicants’ various assets with a view to maximizing their realization value.

7. By October 2015, substantially all of the Applicants' assets were sold to arm's length third parties, namely to Stantec, Pomerleau Englobe Corp. and Helios.
8. The second phase of the orderly liquidation process would require the payment and/or settlement of the Applicants' outstanding liabilities.
9. In 2018 and early 2019, the Applicants reached settlements in the context of Quebec's Voluntary Reimbursement Program (Bill 26) and with the Canadian Competition Bureau.
10. Following these two settlements, the Applicants' directors and shareholders decided that the Applicants required the assistance and supervision of this Court to formalize and complete the informal liquidation that had begun in late 2014.
11. As stated in the Application for a Liquidation Order, the main reason for continuing the Applicants' liquidation under the supervision of this Court was to allow for the implementation of a claims process that would allow the Applicants to identify, settle, pay and/or make provision for any of its outstanding liabilities.
12. On May 3, 2019, this Court granted the Applicants' Application for a Liquidation Order and issued a liquidation order (the "**Liquidation Order**"), as it more fully appears from a copy of the Liquidation Order filed herewith as **Exhibit P-4**.
13. The Liquidation Order stayed the commencement of litigation against the Applicants, including errors and omissions claims that might be covered by the Insurance Policies.
14. The Liquidation Order did not, however, stay the continuation of the majority of already judicialized claims based on alleged errors and omissions, which claims were commenced prior to May 3, 2019 set out in Schedule "A" to the Liquidation Order (the "**Non-Stayed E&O Actions**"). The Non-Stayed E&O Actions were permitted to continue as litigation in the normal course and without the need to comply with the Claims Process Order or file a proof of claim prior to the Bar Date.
15. As set out in the Application for a Liquidation Order, these claims were not stayed as (i) they are complex disputes involving many defendants and warranty claims and (ii) are covered by the Applicants' insurance policies.
16. The Non-Stayed E&O Actions have continued to move forward since May 3, 2019 and are being administered and defended on behalf of the Applicants by XL in cooperation with the Liquidator.

B. THE CLAIMS PROCESS

17. Concurrently with the issuance of the Liquidation Order, this Court also issued an order (the "**Claims Process Order**") establishing a process (the "**Claims Process**") for claimants to assert claims against the Applicants as well as their

directors and officers (“**Applicants’ D&Os**”), as it more fully appears from a copy of the Claims Process Order filed herewith as **Exhibit P-5**.

18. The purpose of the Claims Process was to allow the Applicants to identify and treat all potential outstanding and unknown claims, other than those that were already judicialized, in the context of these proceedings.
19. The Claims Process Order provided, *inter alia*, that claimants were required to file their proofs of claim by no later than 5 p.m. Eastern Time on August 26, 2019 (the “**Bar Date**”), failing which any claims against the Applicants and the Applicants’ D&Os, without the authorization of the court, would be forever barred.
20. As more fully detailed in the Second Report of the Liquidator, the following is a summary of the claims received by the Liquidator prior to the Bar Date:
 - a) The Liquidator received a total of thirty-seven (37) proof of claims prior to the Bar Date, including the XL Proof of claim (as defined below);
 - b) In addition, one (1) claim for which the claimant (CIUSSS de la Capitale-Nationale) sought and obtained leave of this Court to continue its proceeding against Groupe Dessau Inc. (“**GDI**”);
21. Of these thirty-eight (38) proof of claims:
 - a) Eleven (11) claims were ultimately excluded from the Claims Process as they were either excluded or related to an excluded judicial claim in accordance with Schedule A of the Liquidator Order and Schedule F of the Claims Process Order.;
 - b) Four (4) claims were excluded from the Claims Process as they were already judicialized at the time of the issuance of the Liquidation Order but not included in the Schedule A of the Liquidation Order and Schedule F of the Claims Process Order. For greater certainty, the Liquidator hereby requests that this Court amend the Schedule A of the Liquidation Order and Schedule F of the Claims Process Order to include these additional claims, the whole as more fully appears from paragraphs 31 and 32 of the Settlement Approval Order.
 - c) One (1) claim that was excluded from the Claims Process following leave of this Court;
 - d) Eleven (11) claims which have been definitively resolved by the Liquidator in accordance with the Claims Process Order;
 - e) Ten (10) claims that have been rejected by the Liquidator in accordance with the Claims Process Order. Four (4) of such rejections have been contested by the claimants and remain unresolved. Two of such unresolved claims are Insured Claims, which shall be dealt with as follows:

- i) the claim asserted by Team Truck Centres Limited as set out in its proof of claim and in Ontario Superior Court of Justice Action No. 882/19 (collectively, the “**Team Truck Claim**”) shall be added to Schedule A of the Liquidation Order and Schedule F of the Claims Process Order and, if the court grants such relief, the Team Truck Claim shall be removed from the Claims Process and allowed to continue in the ordinary course; and
 - ii) the claim asserted by the *Ministère des Transports* shall continue to be dealt with by the Liquidator in the context of the Claims Process in accordance with paragraph 12 of the Claims Process Order and paragraph 21 of the Settlement Approval Order.
- f) The other two unresolved contested claims are not Insured Claims. They will be dealt with as follows:
- i) the claim asserted by SARL La Vigilante shall be removed from the Claims Process and transferred to the Commercial Division of the Superior Court for adjudication;
 - ii) the claim asserted by Syndicat de la Copropriété Le George V shall continue to be dealt with by the Liquidator in the context of the Claims Process;
- g) Finally, the XL Proof of Claim (as defined below) is the object of the Settlement Agreement for which approval is being sought pursuant to this Application.

III. THE INSURANCE POLICIES AND EXCESS POLICIES

- 22. XL Specialty is a corporation subsisting under the laws of the State of Delaware, in the United States of America, and which carries on business as an insurer in Canada and the United States.
- 23. At various times since approximately 2007, XLSE issued to GDI a number of Professional Liability Policies—Architects & Engineers (individually, an “**Insurance Policy**” and collectively, the “**Insurance Policies**”) each containing various terms, endorsements, and exclusions. A copy of the Insurance Policies are filed herewith *en liasse* as Exhibit P-6.
- 24. As of January 1, 2016, all rights and obligations of XLSE were transferred to XL Specialty.
- 25. Each of the Insurance Policies is a claims-made policy.
- 26. The most recent Policy, bearing policy number DPX 9445493 (the “**Final Insurance Policy**”), had a policy period from January 31, 2015 to January 31, 2020.

27. Each of the Insurance Policies issued by XL, except for the Final Insurance Policy, have an aggregate annual coverage limit of \$10,000,000. For each coverage year up until 2015, the Applicants benefit from a maximum of \$10,000,000 of insurance coverage. Under the Final Insurance Policy, the Applicants have an aggregate of \$10,000,000 of insurance coverage.
28. The reduction in the amount of the yearly coverage is explained primarily by the fact that the Applicants had ceased virtually all of their operations in 2015.
29. In addition to the Insurance Policies, the Applicants also have corresponding excess insurance policies (the “**Excess Policies**”) pursuant to which they have \$20,000,000 of additional coverage for each insured year, except for the 2015-2020 period for which the Applicants’ have an aggregate of \$20,000,000 of excess coverage. A copy of the Excess Policies are filed herewith *en liasse* as Exhibit P-7.
30. Since approximately 2008, pursuant to a Reinsurance Agreement – Non-Proportional executed on April 21 and 29, 2008 (as subsequently amended and extended) (the “**Reinsurance Agreement**”) and at the request of GDI, XL reinsured a portion of its risk under the Policies with Dessau Assurance Inc. (“**DAI**”), a Barbados subsidiary of Groupe Dessau Inc.
31. As of 12:01 a.m. on January 31, 2020 (the “**Policy Termination Date**”), the period of the Final Insurance Policy terminated, and XL ceased to provide any further insurance coverage to Dessau.
32. One of the objectives of the Claims Process Order, which established the Bar Date (August 26, 2019), was to allow the Applicants to identify all potential claims prior to the Policy Termination Date since any new claim asserted after the Policy Termination Date would not benefit from the Applicants’ insurance coverage.

IV. THE XL PROOF OF CLAIM

33. XL filed a proof of claim prior to the Bar Date (the “**XL Proof of Claim**”) seeking payment of \$20,998,430.78 against the Applicants (the “**Corporate Claim**”) and \$10,150,000 against the current and former officers of Groupe Dessau Inc. (the “**GDI D&O Claim**”), as it appears from a copy of the XL Proof of Claim filed herewith under seal as **Exhibit P-8**.
34. The XL Proof of Claim can be further subdivided into two categories.
35. The first category consists of a claim for the deductibles payable by GDI under the Insurance Policies in respect of each claim (the “**GDI Deductible Claim**”).
36. The GDI Deductible Claim referred to 71 claims known to XL up to August 15, 2019 and the XL Proof of Claim also included a contingent claim for potential future and unknown claims up to the end of the insurance coverage period of the Final Insurance Policy (January 31, 2020).

37. XL established the first category the GDI Deductible Claim at \$8,488,431, based on an individual analysis of the claims (71) mentioned above. To complete its claim, XL took into account an additional provision of \$2,400,000 for additional potential claims up to January 31, 2020.
38. As mentioned above, one of the objectives of the Claims Process Order, which established the Bar Date (August 26, 2019), was to allow the Applicants to identify all potential claims prior to the Policy Termination Date, which would also allow the Liquidator to obtain a clear picture of GDI's potential deductible liability under the Final Insurance Policy.
39. The second category of claim was for an estimate of DAI's obligations under the Reinsurance Agreement to pay a deductible for each claim made under Insurance Policies (the "**Reinsurance Claim**"). XL claims that both GDI and its directors and officers are liable to XL for DAI's inability to fulfill its obligations under the Reinsurance Agreement.
40. The Liquidator understands that XL's representatives established the amount of the Reinsurance Claim at \$11,200,000 based on their review of the 71 claims and their professional experience, but did not provide further details. To complete the Reinsurance Claim, XL took into account an additional provision of \$1,700,000 for additional claims up to January 31, 2020.
41. The total claim for the GDI Deductible Claim was estimated at \$10,848,431 and the total claim for the Reinsurance Claim was estimated at \$12,900,000, for a total of \$23,748,431.
42. A letter of credit in the amount of \$2,750,000 that had been provided by GDI and issued by a Barbados subsidiary of Canadian Imperial Bank of Commerce to guarantee the performance of DAI's obligations under the Reinsurance Agreement was drawn by XL so that XL's net claim was established at \$20,998,431.
43. The GDI D&O Claim of \$10,150,000 is duplicative of the Reinsurance Claim, net of the \$2,750,000 letter of credit. XL alleges that the directors breached their duties and failed to adequately capitalize DAI. The GDI D&Os are fully indemnified by GDI and therefore any liability of the GDI D&Os would ultimately be a liability of GDI.
44. On November 17, 2020, the Liquidator sent a Notice of Review or Rejection of Claim in respect of the XL Proof of Claim (the "**Rejection**") and, on November 27, 2020, XL disputed the Rejection by serving the Liquidator with a Notice of Objection (the "**Objection**"), as it appears from copies of the Rejection and the Objection filed herewith respectively under seal as **Exhibit P-9** and **Exhibit P-10**.
45. The Reinsurance Claim was rejected in its entirety, while the GDI Deductible Claim was rejected in part, as more fully appears from Exhibit P-9.

46. In accordance with the Claims Process Order, XL and the Liquidator entered into settlement discussions in respect of the XL Proof of Claim.

V. THE OTHER XL LITIGATION

47. On November 4, 2020, the Liquidator, on behalf of certain of the Applicants, filed an Originating Application in these proceedings against both XL Specialty and XLSE (the “**Deductible Application**”) seeking a declaration that, under the provisions of Articles 2500 and 2503 of the *Civil Code*, all defence costs under certain insurance Policies were to be assumed by XL and therefore despite the terms of the Insurance Policies that imposed liability on GDI to pay a deductible applicable to both defence costs and indemnity payments, any defence costs that the Applicants had paid within the deductible since May, 2016 should be refunded;
48. In particular, in the Deductible Application, a refund of \$2,962,104 plus interest and costs is being sought (the “**Claimed Deductible Refund**”);
49. XL takes the position that it has no liability in the Deductible Application and that such application should be dismissed;
50. XL takes the alternative position that even if the requested declaration about the effect of the *Civil Code* provisions is made, the Claimed Deductible Refund is not a correct calculation of the liability of XL and, further, there are potential issues of prescription under Quebec law;
51. An initial hearing of the Deductible Application regarding the legal issue concerning the effect of Articles 2500 and 2503 of the *Civil Code* was scheduled to take place in the Court in August and then on October 28, 2021 but was adjourned *sine die* on consent of the parties, given the settlement discussions;
52. On June 17, 2021, XL commenced an arbitration in Ontario, Canada (the “**Arbitration**”) against DAI seeking a declaration that DAI had breached the Reinsurance Agreement and an order directing that DAI pay XL \$10,150,000 in damages relating to alleged breaches of the Reinsurance Agreement.
53. On August 13, 2021, XL commenced an action in the Supreme Court of Barbados in the High Court of Justice as Claim No. 720/2021 (the “**Barbados Action**”) against DAI’s directors and also against DAI seeking damages and other relief for oppression, unfair prejudice, unfair disregard, breach of fiduciary duty, and procuring breach of contract.
54. On October 4, 2021, DAI, through counsel, gave notice to XL of its position that, as a result of a pending petition in the High Court of Barbados under section 57 of the *Insurance Act* (Barbados) to wind-up DAI (the “**Winding-Up Proceeding**”), it takes the position that the portion of the Barbados Action against DAI is stayed.

55. The Deductible Application, the Arbitration, the Barbados Action and the Winding-Up Proceeding are hereinafter collectively referred to as the “**Other XL Litigation**”.

VI. THE SETTLEMENT AGREEMENT

56. Since the receipt of the Objection on November 27, 2020, the Liquidator and XL have held extensive discussions to find a *modus operandi* that would allow namely for the following:

- a) the settlement of the XL Proof of Claim as well the Other XL Litigation;
- b) the assumption by XL of carriage of all outstanding insured claims, including any claims filed in the Claims Process and covered under the Final Insurance Policy in a manner that would ensure that each individual claimant continues to benefit from the Insurance Coverage and does not suffer any undue prejudice as a result thereof;
- c) the payment of an indemnity by the Liquidator to XL to take into account the potential outstanding deductible liability of GDI under the Insurance Policies and any other liability that GDI and its officers may have to XL; and
- d) ultimately allow the Liquidator to bring these proceedings to an end as it would no longer have to assume any carriage of the Insured Claims (as defined below).

57. The Liquidator submits that the Settlement Agreement entered into between the parties achieves each of the above objectives in that it provides that:

- a) XL shall assume carriage of and responsibility for each of the insured claims listed in Schedule B of the Settlement Approval Order (the “**Insured Claims**”), which corresponds to the entirety of the known claims insured under the Insurance Policies that are still outstanding, the whole in accordance with the monetary limits of the Insurance Policies;
- b) XL shall pay defence costs and indemnity amounts without regard to the deductible that would otherwise apply to the Insurance Policies and XL shall not seek any further payment from GDI and/or the Liquidator in respect of any deductible under the Insurance Policies. The monetary limits of the Insurance Policies shall also not be reduced by any amount of deductible that would have otherwise been paid by GDI had the Parties not entered into the Settlement Agreement;
- c) XL will not assert coverage defences against any of the Insured Claims as currently asserted or pleaded, and XL therefore agrees to provide coverage in respect of the Insured Claims as currently asserted/pleaded in accordance with the terms and monetary limits set forth in the Insurance Policy that applies to each Insured Claim.

- d) where permitted by law in the relevant jurisdiction, XL shall take up the interest of the Liquidator and/or the Applicants in each Insured Claim and shall be substituted in its capacity as insurer as named defendant or impleaded party in any such Insured Claim;
 - e) a lump-sum payment of \$4 million shall be paid by the Liquidator to XL, namely to account for the Applicants' potential deductible in respect of the insured claims and other liability of the Applicants, which \$4 million amount shall be adjusted downward in the event that the Liquidator makes any payment on account of settlement or judgment of any Insured Claim between the time of the execution of the Settlement Agreement and the issuance of the Settlement Approval Order; and
 - f) the XL Proof of Claim and the Other XL Litigation shall be fully and finally settled between all the parties to the Settlement Agreement.
58. The extended period of time over which these discussions took place testifies to the complexity of the issues at hand and to the extensiveness of the analysis and negotiations that ultimately led to the conclusion of the Settlement Agreement. The issues that the parties had to deal with, include:
- a) the Other XL Litigation commenced in various forums across several jurisdictions;
 - b) the reconciliation by the Liquidator and XL of each of the Insured Claims and the status of the deductible limit for each such claim and for each policy period;
 - c) the analysis by the Liquidator, with the support of the Applicants' external counsel, of each of the Insured Claims for each policy year to determine whether the amount of aggregate insurance available under each of the Insurance Policies and Excess Policies is sufficient to cover the entirety of the Applicants' potential liability under each insured claim; and
 - d) the negotiation of the specific terms of the Settlement Agreement and the Settlement Approval Order.

VII. THE SETTLEMENT APPROVAL ORDER

59. The Settlement Agreement is conditional upon the Applicants and XL obtaining the issuance of Settlement Approval Order substantially in the form filed herewith as Exhibit P-2, which would approve and give effect to the Settlement Agreement.
60. In addition to approving the Settlement Agreement and giving effect to the terms thereof, the Settlement Approval Order provides namely for the following relief:

- a) for a release, discharge and bar order in favour namely of the Applicants, the Applicants' D&Os and the Liquidator from the Insured Claims (the "**Released Parties**");
 - b) for an order limiting recovery of any person having, or claiming any entitlement or compensation relating to an Insured Claim to recovery in respect of such Insured Claim solely from the proceeds of the applicable Insurance Policies and/or Excess Policies and barring any claim against the Released Parties in respect of such Insured Claim;
 - c) for a mechanism by which the Applicants' Excess Insurers substitute XL in one or more Insured Claims upon exhaustion of the coverage under one or more of the Insurance Policies;
 - d) for a release, discharge and bar order in favour namely of the Applicants, the Applicants' D&Os, the Liquidator, the Applicants' insurers (including XL and the Excess Insurers) in respect of any claim that was not filed prior to the Bar Date (the "**Claims Barred Released Parties**").
61. The Liquidator submits that the Settlement Approval Order, which includes releases in favours of the Released Parties and the Claims Barred Released Parties, should be granted as the relief sought therein is appropriate, fair and reasonable, namely for the following reasons:
- a) it has been extensively negotiated at arm's length between XL and the Liquidator;
 - b) it will give effect to the Settlement Agreement, allowing the Liquidator to achieve the objectives set out at paragraph 56;
 - c) XL has provided significant consideration for the Settlement Agreement through a compromise of its claims against GDI and its directors and DAI and its directors and by agreeing to assume, administer, and indemnify the Insured Claims pursuant to the terms of the Insurance Policies, without any further requirement for DAI to pay any remaining deductible;
 - d) The Settlement Agreement is conditional on the issuance of the Settlement Approval Order;
 - e) The Liquidator, with the assistance of external counsel handling each of the Insured Claims, has analyzed and confirmed the sufficiency of the Insurance Coverage in respect of the Insured Claims, which analysis is more fully described in the Second Report of the Liquidator (Exhibit P-3); and
 - f) The Settlement Agreement and the releases will benefit the Applicants as well as the creditors generally given:

- i) that they allow for the resolution of the XL Proof of Claim, which is the most significant source of potential liability for the Applicants and, if ultimately determined as valid, could render the Applicants insolvent;
 - ii) that XL has accepted to assume carriage of the Insured Claims and has agreed to waive its right to any coverage defence as such Insured Claims are currently asserted and pleaded. Therefore, the claimants in each Insured Claims will benefit from the Insurance Coverage; and
 - iii) the potential future expense of having to maintain the present liquidation proceedings active until the resolution of the very last Insured Claim, which could be several years from now given the complexity of some of the Insured Claims. Without a settlement with XL, the Liquidator will have to remain actively involved in each of the Insured Claims until their final resolution.
- g) The releases are fair, reasonable and not overly-broad;
- h) The releases will directly contribute bringing closure to the present liquidation proceedings as they will allow the Liquidator and the Applicants to be relieved of any further obligation with respect to the Insured Claims. The Settlement Agreement therefore promotes an overriding public interest in resolving disputes and conserving judicial resources;
- i) The releases in favour of the Claims Barred Released Parties are fair and reasonable as they are simply the logical outcome following the extensive Claim Process conducted by the Liquidator, which already provides for a Bar Date. The releases in favour of XL and the Excess Insurers simply bring certainty to the Settlement Agreement given that the Applicants no longer benefit from the Insurance Coverage since the Policy Termination Date (January 31, 2020); and
- j) the present application has been brought on notice to each of the parties implicated in the Insured Claims and to the Excess Insurers, as it more fully appears from the Court record.
62. Finally, the Liquidator emphasizes that the individual claimants under the Insured Claims will not suffer any undue prejudice as a result of the Settlement Agreement and the Settlement Approval Order given that:
- a) XL has already been leading the administration, defense, and settlement of the Insured Claims. Extracting the Liquidator will help simplify the administrative process, particularly regarding the settlement of claims where applicable.

- b) The Insurance Coverage in respect of the Insured Claims is sufficient (as more fully detailed in the Second Report of the Liquidator and from the sworn statement filed by XL's representative; and
- c) XL has waived its right to invoke coverage defenses in respect of the Insured Claims, as currently asserted and pleaded, which means that XL will not refuse to provide coverage on the sole basis that the Insured Claims, as currently asserted and pleaded, fall outside of the scope of the coverage provided under the Insurance Policies.

VIII. CONCLUSION

- 63. In light of the foregoing, the Liquidator respectfully submits that the Settlement Approval Order should be granted as the Settlement Agreement is fair and reasonable and is in the best interest of all stakeholders in the present proceedings, including the creditors, all parties involved in the Insured Claims and other stakeholders, including the Applicants' shareholders.
- 64. The present application is well founded in fact and in law.

FOR THESE REASONS, MAY IT PLEASE THIS COURT TO:

GRANT the present *Application for an Order approving a Settlement Agreement and for certain ancillary relief*;

ISSUE an order substantially in the form of the Settlement Approval Order filed herewith as **Exhibit P-2**.

THE WHOLE without costs.

Montréal, this May 27, 2022

Gowling WLG (Canada) s.e.n.c., s.r.l. Fasken Martineau DuMoulin LLP

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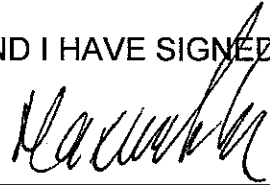
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SWORN STATEMENT

I, the undersigned, Maxime Codere, CPA, CIRP, Partner at KPMG Inc., having my professional address at 600 Boulevard de Maisonneuve West, Suite 1500, Montréal, Quebec, H3A 0A3, do solemnly declare:

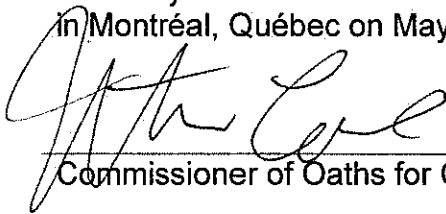
1. I am a duly authorized representative of the Liquidator, KPMG Inc., in the present case;
2. All the facts alleged in the present application are true.

AND I HAVE SIGNED :



Maxime Codere

Solemnly affirmed before me,
in Montréal, Québec on May 27, 2022



Commissioner of Oaths for Québec



(Commercial Division)
SUPERIOR COURT

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

N° : 500-11-056442-193

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LES CONSULTANTS RENÉ GERVAIS INC.
PLANIA INC.
GROUPE CONSTRUCTION VERREAULT INC.
9387-5631 QUÉBEC INC.**

Debtors

-and-

KPMG INC.

Liquidator/Petitioner

-and-

XL SPECIALTY INSURANCE COMPANY

-and-

XL INSURANCE COMPANY S.E., formerly known as XL INSURANCE COMPANY LIMITED

-and-

DESSAU ASSURANCE INC.

-and-

VINSTON HAMPDEN

-and-

JEFFREY GELLINEAU

-and-

JOSEPH CAVALANCIA

-and-

FRANÇOIS DIONNE

-and-

THE MEMBERS OF LLOYD'S SYNDICATE NUMBERS 2987, 1200, 386, 1886, and 1919

-and-

ALLIANZ GLOBAL RISKS US INSURANCE COMPANY

-and-

PARTIES ON THE SERVICE LIST

Mises en cause

AFFIDAVIT OF BRADLEY THORN

I, Bradley Thorn, residing and domiciled for the purposes hereof at 100 King Street West, Suite 3020, in the City of Toronto, in the Province of Ontario M5X 1C9, SOLEMLY AFFIRM, MAKE OATH AND SAY:

1. I am Assistant Vice-President, Claims Manager—Professional Canada, at XL Specialty Insurance Company (“**XL**”). In light of the position I hold at XL, my job responsibilities, and my direct involvement in administering and overseeing claims that have been asserted against Groupe Dessau Inc. (“**GDI**”) and the other corporations that are the subject of these liquidation proceedings (which corporations, including GDI, shall hereafter be referred to collectively as “**Dessau**”), I have knowledge of the matter to which I depose herein.

2. I swear this affidavit in support of an application by KPMG Inc. (“**KPMG**”) in its capacity as court-appointed liquidator of Dessau in these court-supervised liquidation proceedings (the “**Liquidation**”) commenced pursuant to the liquidation order of the Honourable Mr. Justice Louis Gouin of the Quebec Superior Court (Commercial Division) dated May 3, 2019 (the “**Liquidation Order**”) for an order approving the Comprehensive Full and Final Settlement Agreement dated May 27, 2022 among XL, Dessau, and others (the “**Settlement Agreement**”), which finally resolves the numerous disputes between the parties and which will provide for XL to assume responsibility for, defend, and indemnify an enumerated list of claims (“**Insured Claims**”).

3. XL is an insurance company subsisting under the laws of the State of Delaware in the United States of America. XL carries on business in Canada through a branch located at 100 King Street West., Suite 3020, Toronto, Ontario.

4. As of January 1, 2016, XL acquired and assumed all of the Canadian insurance business of XL Insurance Company S.E., which was formerly known as XL Insurance Company Limited (“**XLICL**”). XLICL had previously issued multiple Architects & Engineers Professional Liability Policies (individually, a “**Policy**”, and, collectively, the “**Policies**”) which, in essence, provided professional errors and omissions coverage to Dessau. As a result of this 2016 transaction, XL assumed all of the rights and responsibilities of XLICL and is now liable under the Policies that were previously issued by XLICL.

5. The Policies date back at least as far as 2007. In the years up to late 2014, XLICL typically issued an annual Policy. However, by early 2015, XL learned that GDI had sold

or wound down most of its active businesses and would not be carrying on an active business going forward.

6. At that time, GDI applied to XLICL for the issuance of a five-year run-off policy. XLICL ultimately issued Policy No. DPX9445493 covering the period from January 31, 2015 to January 31, 2020 (the “**Final Policy**”). The Final Policy is a “claims made” policy and had a coverage limit of \$10 million per claim, with an overall maximum limit of \$10 million for the entire policy period. The Final Policy was subject to a deductible of \$200,000 per claim. The Final Policy covered, in general terms, claims arising during the policy period based on facts that occurred between January 1, 1957 and January 31, 2015. To be clear, the Final Policy covered only new claims reported for the first time during the period of such policy based on facts that had occurred during that earlier period. To the extent that any claims had already arisen and been reported to XL prior to January 31, 2015, coverage was provided under previous Policies.

Reinsurance Agreement

7. Around 2007, GDI approached XLICL to discuss an insurance structure that would allow Dessau to effectively “self-insure” for a portion of its potential errors and omissions liability and thereby reduce the premiums that Dessau would have to pay.

8. XLICL reached an agreement with Dessau that it would agree to reinsure part of the risk under the Policies with a reinsurance company. However, unlike situations where an insurer obtains reinsurance from a well-known, international reinsurer like Swiss Re, in this case, the reinsurance would be provided by a “captive reinsurer” controlled by GDI

or one of its affiliates. In particular, Dessau incorporated an affiliate, Dessau Assurance Inc. (“**DAI**”), a Barbados corporation that was licensed as a reinsurer in Barbados. DAI then entered into a reinsurance agreement dated April 21 and 29, 2008 with XLICL (the “**Reinsurance Agreement**”) whereby DAI agreed to reinsure XLICL, and therefore fully indemnify XLICL, for an initial layer of liability (including defence costs) in excess of the deductible under each of the Policies. Although the deductibles and reinsurance amounts varied by policy year, in most cases, each Policy involved a deductible of \$200,000 (stated to be attributable to both defence costs and indemnity payments) that Dessau had to pay. Immediately above the deductible was a layer of insurance that was fully reinsured with DAI. Although the amount of reinsurance varied based on policy year, it was typically \$800,000 per claim (applicable to both defence costs and indemnity payments), subject to annual aggregate maximums in certain cases. Thus, under this arrangement (which applied in many years), Dessau effectively “self-insured” for the first \$1 million of defence costs and liability on each claim, consisting of a \$200,000 deductible that Dessau had to pay to XLICL and then reinsurance by DAI for the first \$800,000 of liability in excess of the deductible. XLICL charged specified premiums to Dessau for each policy and, out of those premiums, XLICL paid reinsurance premiums to DAI in consideration of DAI reinsuring (in most cases) the first \$800,000 of each claim in excess of the deductible.

9. The Reinsurance Agreement is governed by the laws of the Province of Ontario.

10. The liabilities of DAI under the Reinsurance Agreement were secured by a letter of credit in favour of XLICL in a specified amount representing DAI’s estimated liability for

claims. The Reinsurance Agreement specifically required such letter of credit as a condition of XLICL accepting the reinsurance arrangement.

11. The Reinsurance Agreement further provided that if during the term of the Reinsurance Agreement, XL determined that the then-current amount of the letter of credit was not adequate to fully secure DAI's liabilities under the Reinsurance Agreement, XLICL was entitled to notify DAI in writing that the amount of the letter of credit had to be increased by an amount determined by XLICL. DAI was required to implement such increase in value of the letter of credit within 15 days of receiving such notice. The amount of the letter of credit increased over time from an initial amount of \$350,000 to \$1,200,000, and, ultimately, to \$2,750,000.

Commencement of Liquidation Proceedings

12. XL first became aware of the Liquidation on May 28, 2019 (25 days after the Liquidation Order was issued) when it received an email and letter dated May 28, 2019 from Dev Coosa of the Liquidator advising that the Liquidation Order had been granted and that there would be a claims process. On May 29, 2019, XL retained Cassels Brock & Blackwell LLP as its counsel for the matter, assisted by co-counsel in Quebec. Thereafter, with the assistance of counsel, XL obtained copies of the Liquidation Order, as well as the order issued on May 3, 2019 providing for a claims process (the "**Claims Procedure Order**").

Discovery of DAI Insolvency and DAI Subsequent Breach of the Reinsurance Agreement

13. In July 2019, XL received copies of DAI's financial statements for the fiscal year ended April 30, 2019, which also included prior year financial data for the fiscal year ended April 30, 2018. These financial statements revealed to XL, for the first time, that DAI was insolvent since at least April 30, 2018 and that such insolvency persisted up to (and almost certainly beyond) the April 30, 2019 fiscal year end. In particular, the balance sheet indicated that DAI's liabilities exceeded its assets by a significant amount, leading to negative shareholders' equity of \$5,857,297 as of April 30, 2018 and negative equity of \$5,414,404 as of April 30, 2019.

14. In addition, as of the summer of 2019, XL became particularly concerned about the aggregate value of claims that had been asserted against Dessau, especially claims filed under the Final Policy. This worsened claims experience indicated to XL that the estimated liability of DAI pursuant to the Reinsurance Agreement was significantly greater than the existing value of the letter of credit (i.e., \$2,750,000). Accordingly, on August 8, 2019, XL served a notice on DAI requiring that the amount of the letter of credit posted as security for DAI's reinsurance obligations be increased to \$12,900,000 from \$2,750,000.

15. Because an existing \$2,750,000 letter of credit remained in effect, DAI was only required to implement an increase of \$10,150,000 in the value of the letter of credit. The request for the increase in the amount of the letter of credit was based on XL's assessment of the profile of the claims asserted under the Policies (i.e., not just the Final Policy, but also claims under the earlier Policies). Since, by this point, DAI was apparently

insolvent, it was important to XL that DAI's liabilities under the Reinsurance Agreement be fully secured.

16. DAI failed to undertake any increase in the value of the letter of credit by the August 23, 2019 deadline and, in fact, failed to respond to XL's notice at all. At no time did DAI ever increase the value of the letter of credit above \$2,750,000.

17. In November 2020, XL fully drew upon the letter of credit and received proceeds of \$2,750,000. XL used such funds to reduce the substantial defence costs and indemnity payments that XL had incurred within the reinsurance layer up to that time, but other substantial reinsurance liabilities remained even after the draw on the letter of credit.

XL Proof of Claim

18. In light of the claims process involving Dessau which had been initiated by the Claims Procedure Order, and given the failure of DAI to increase the amount of the letter of credit when notice was given, XL recognized over the summer of 2019 that it needed to take steps to assert its claims and thereby protect its rights.

19. Accordingly, XL filed a proof of claim with the Liquidator by email on August 22, 2019, and by hand-delivery to the offices of the Liquidator on August 23, 2019. The Proof of Claim asserted a variety of claims against GDI and/or its officers and directors in the aggregate amount of \$20,998,430.78.

20. The first claim that XL asserted was against GDI for the deductible under the Policies. XL asserted a deductible claim for \$10,848,430.78, consisting of \$8,448,430.78 for claims under the Policies that had been reported to XL up to the date of the Proof of

Claim, together with \$2,400,000 in estimated deductible that would be incurred for new claims filed under the Final Policy prior to its expiry on January 31, 2020.

21. In addition, XL asserted a claim against both GDI and its officers and directors in relation to the failure of GDI to cause DAI to post an increased letter of credit to secure its obligations under the Reinsurance Agreement.

22. As far as XL is aware, DAI is and has always been under the direct ownership and control of GDI or one of its affiliates. For example, GDI and DAI had, at relevant times, some overlap of directors (i.e., common directors). In the proof of claim, XL asserted an oppression claim under the *Business Corporations Act* (Quebec) against GDI and its officers and directors based on an allegation that those parties conducted the affairs of GDI's affiliate, DAI, in an oppressive manner as set out in section 450 of such Act. The alleged acts of oppression include preferring the interests of GDI over those of DAI, including the conscious decision by GDI and its officers and directors to allow DAI to become insolvent and then withhold the funding that DAI required to meet its obligations under the Reinsurance Agreement. XL sought damages of \$10,150,000, being the estimated amount of DAI's then-unsecured liability under the Reinsurance Agreement.

Disallowance of Proof of Claim and Objection by XL

23. On November 17, 2020, the Liquidator issued to XL a Notice of Review or Rejection of Claim in respect of XL's proof of claim (the "**Rejection**"). In the Rejection, the Liquidator fully disallowed XL's \$10,150,000 claim for oppression against GDI and its officers and directors relating to the affairs of GDI. In the Rejection, the Liquidator also

questioned XL whether the deductible claim for \$10,848,430.78 remained accurate, and it urged XL to consider amending its claim.

24. On November 27, 2020, XL filed with the Liquidator a Notice of Objection (the “**Objection**”) to dispute the Rejection. First, XL fully appealed the disallowance of the \$10,150,000 claim against GDI and its officers and directors. Second, XL agreed to amend its claim against GDI relating to the deductible, by reducing such claim from \$10,848,430.78 to \$5,500,000. XL’s amendment of its deductible claim resulted from a reassessment of such amount, taking into account the fact that, by the fall of 2020, the Final Policy had expired and no claimant had any right to assert a new claim. In addition, XL was able to reassess the claims profile to take into account developments that had occurred since the time of the filing of the Proof of Claim, including the settlement of certain claims and the failure of other claims to develop in a negative direction.

25. Since the time that XL filed the Objection, no adjudication of the validity of the proof of claim has occurred and therefore XL’s proof of claim (as amended on November 27, 2020) remains outstanding.

Quebec Deductible Proceeding

26. On November 4, 2020, the Liquidator (on behalf of Dessau) commenced an originating application in the Quebec Superior Court (Commercial Division) for the District of Montreal (Court File No. 500-11-056442-193) (the “**Deductible Application**”). In the Deductible Application, the Liquidator sought an order directing XL to reimburse \$2,962,104 on account of defence costs that Dessau had allegedly paid in respect of

claims under the Policies. The Liquidator asserted that, although the clear wording of the Policies makes the deductible applicable to both defence costs and indemnity payments, such term of the Policies was overridden by Article 2503 of the *Civil Code of Quebec* (CCQ), which provides as follows:

“2503. The insurer is bound to take up the interest of any person entitled to the benefit of the insurance and assume his defence in any action brought against him.

Legal costs and expenses resulting from actions against the insured, including those of the defence, and interest on the proceeds of the insurance are borne by the insurer over and above the proceeds of the insurance.”

27. The Liquidator further took the position that Article 2503 of the CCQ was a matter of public order and could not be modified by contract, including the terms of the Policies.

28. Accordingly, the Liquidator’s legal position was that only indemnity payments could legitimately be part of the deductible and thus XL had to pay defence costs from the first dollar.

29. XL denied any liability to the Liquidator in the Deductible Application and, further, there are issues of prescription under Quebec law. XL disagreed with the Liquidator’s assertions concerning how Article 2503 CCQ should be interpreted. Further, XL asserted that, even if it was ultimately found liable to refund defence costs, the actual amount of defence costs paid by Dessau, which fell within the deductible, was far less than \$2,962,104.

30. In addition, XL informed the Liquidator that if defence costs within the deductible did not have to be paid by Dessau, indemnity payments that were previously incurred in the layer immediately above the deductible (i.e., indemnity amounts paid by XL) would then become part of the deductible, thereby reducing or eliminating any net refund. For example, if a claim was settled for an indemnity payment of \$500,000, Dessau would be liable for the full \$200,000 deductible which, at the end of the day, would be allocated solely to indemnity payments even if defence costs did not form part of the deductible.

Arbitration and Litigation Against DAI

31. XL concluded that DAI's failure to provide the increased letter of credit when requested in August 2019 was a breach of the Reinsurance Agreement. XL also believed that the directors of DAI had failed to fulfil their duties under the Barbados *Companies Act* (the "**BCA**"), including by committing oppression under the BCA (which is directly based upon the *Canada Business Corporations Act*). The Reinsurance Agreement required all disputes arising under such agreement to be settled by arbitration, based on the laws of Ontario, in an arbitration proceeding in Ontario. Therefore, on June 17, 2021, XL served on DAI a Notice of Arbitration and associated claim seeking damages of \$10,150,000 arising out of DAI's breach of the Reinsurance Agreement, namely the failure to increase the value of the letter of credit ("**Ontario Arbitration**").

32. Pursuant to the arbitration clause of the Reinsurance Agreement, XL appointed Bill Jonas, a Canadian insurance company executive, as its nominee for the arbitral panel.

33. Article XV.B of the Reinsurance Agreement required DAI to respond to the Notice of Arbitration within 30 days. DAI failed to respond to the Notice of Arbitration within that period or any time subsequently. As such, XL takes the position that it is entitled to a default arbitral judgment against DAI. However, in light of the discussions that subsequently ensued between the Liquidator and XL (described further below), XL has not yet obtained a default arbitral judgment.

34. Since the directors of DAI were not parties to the Reinsurance Agreement and were thus not bound by the arbitration provisions contained therein, on August 13, 2021, XL brought a separate action in the Supreme Court of Barbados (High Court of Justice) against the directors of DAI (Vinston Hampden, Jeffrey Gellineau, Joseph Cavalancia, and François Dionne) seeking a declaration of oppression and an order against the directors for compensation (the “**Barbados Action**”). The wrongful acts alleged include not only the failure to ensure that DAI was properly funded to be able to increase the letter of credit, but also breach of fiduciary duty. DAI was named as a party to the action, largely to ensure that it would also be bound by any findings made against the directors.

35. The claim in the Barbados Action was served on DAI and its directors. In the Barbados Action, Jeffrey Gellineau delivered his Statement of Defence on September 3, 2021. In that defence, Gellineau admitted that he learned in April 2017 that DAI was insolvent and that the manager of DAI in Barbados had asked the parent company of DAI (which I presume to be GDI) to provide funds to DAI to allow it to fulfill its obligations under the Reinsurance Agreement. Finally, Gellineau admitted that he owed a duty to DAI to ensure that it was able to meet its obligations under the Reinsurance Agreement. In the

defence, Gellineau states that he resigned as a director of DAI as of May 3, 2019 and therefore could not have any liability for any failure by DAI to increase the amount of the letter of credit in August 2019.

36. On October 4, 2021, DAI, through counsel, gave notice to XL of its position that, as a result of a pending petition in the High Court of Barbados under section 57 of the Insurance Act (Barbados) to wind-up DAI, it takes the position that the portion of the Barbados Action against DAI is stayed.

37. At present, the Barbados Action remains at the pleadings stage and a number of interlocutory motions were heard in Barbados in the fall of 2021, but the parties have not moved such litigation forward in light of the settlement discussions that took place, and which ultimately led to the Settlement Agreement.

Settlement Agreement

38. Prior to mid-2021, the Liquidator informed XL that it wanted to find a way to bring the Liquidation to a conclusion, including to allow creditors' claims to be addressed in a prompt manner and to find a way to resolve the numerous claims and actions that XL had with GDI, DAI, and their officers and directors. If such resolution was not reached, the litigation, arbitration, and the proof of claim would all have to be adjudicated in multiple, separate proceedings over a number of years, in Barbados, Quebec, and Ontario.

39. The disputes have all been hard fought. XL's overall aggregate claim against the various companies, officers, and directors is now approximately \$15.6 million, consisting of \$10,150,000 relating to the Reinsurance Agreement and \$5,500,000 relating to the

deductible for which Dessau is liable. On the other side, the Liquidator has asserted a claim against XL for approximately \$3 million in the Deductible Application.

Negotiation of Settlement Agreement

40. By July 2021, settlement negotiations between XL and the Liquidator were well underway. Both sides wanted to obtain certainty of results but without unduly compromising their respective positions. Even prior to the liquidation, XL had substantial experience with managing, defending, and (in many cases) settling claims, to the benefit of both XL and Dessau. Accordingly, XL worked to negotiate a settlement that would allow it to assume carriage and responsibility of a defined list of claims, conditional upon receiving an adequate amount of money to resolve its various claims against Dessau, DAI, and their respective officers and directors.

41. XL ultimately determined that it was prepared to accept an all-inclusive lump sum payment of \$4 million from the Liquidator as compensation for all of its claims. The Liquidator agreed, in turn, to abandon the Deductible Application.

42. In consideration of the \$4 million, XL agreed that it would defend, and provide coverage in respect of a specifically-enumerated list of claims, subject to the terms of the applicable Policy.

43. The claims that XL will assume are asserted primarily under the Final Policy (the term of which expired on January 31, 2020), but also under two previous Policies.

44. As of March 23, 2022, here is the following information about the actual (cash basis) paid loss incurred by XL under the Policies, along with information about XL policy limits and the number of claims currently active:

Policy Period	Amount of XL Coverage	Number of Active Claims as of May 27, 2022	Paid Loss as of March 23, 2022
2007 – 2008	\$10,000,000	0	\$268,855
2008 – 2009	\$10,000,000	0	\$4,821,861
2009 – 2010	\$10,000,000	0	\$1,117,531
2010 – 2011	\$10,000,000	0	\$196,492
2011 – 2012	\$10,000,000	0	\$5,802,954
2012 - 2013	\$10,000,000	1	\$926,162
2013 – 2015	\$10,000,000	5	\$2,625,166
2015 - 2020	\$10,000,000	22	\$2,637,356

45. The paid loss figures noted above are amounts paid by XL that are not part of the deductible applicable to the Policies, which deductible is a liability of Dessau. To be clear, these are amounts that XL paid over and above the deductible.

46. During the negotiation of the Settlement Agreement, the Liquidator informed XL that Dessau holds excess professional liability coverage in excess of the limits of the Policies, which provide primary coverage. The Liquidator subsequently informed XL that this excess coverage was issued by Lloyd's Syndicate nos. 2987, 1200, 386, 1886, and 1919 and Allianz Global Risks US Insurance Company (the "**Excess Insurers**"). In the

event that coverage under any of the Policies is exhausted, the Settlement Agreement provides that responsibility for such claims is transferred to the Excess Insurers.

47. The Settlement Agreement provides for a series of releases to be provided, both between the parties and pursuant to court order. Specifically,

- (a) Dessau, DAI, and their respective officers and directors of the first part and XL of the second part will execute and deliver to each other a full and final mutual release covering all actual and potential claims and disputes;
- (b) XL shall only be responsible for defending and providing indemnification in respect of a defined list of known claims (defined above as “**Insured Claims**”), which list is appended as Schedule “B” to the Settlement Agreement;
- (c) The Settlement Agreement is conditional on the Court issuing an approval order substantially in the form of Schedule “A” to the Settlement Agreement (the “**Approval Order**”), which provides for
 - (i) XL liability only for the Insured Claims;
 - (ii) A release from liability in favour of XL and others in respect of all claims other than Insured Claims; and
 - (iii) A mechanism for XL to assume responsibility for the Insured Claims and to transfer carriage of relevant claim(s) to the Excess Insurers if coverage under the relevant Policy should be exhausted.

48. Prior to entering into the Settlement Agreement, XL considered whether it was prepared to give up its potential for much greater recovery from GDI, DAI, and their officers and directors and instead accept the proposed \$4 million payment. Although \$4 million will not come close to indemnifying XL for its losses, XL felt that there was a benefit in obtaining certainty, avoiding further protracted litigation, and ensuring that no further claims (other than the Insured Claims) can be asserted under the Policies. The Settlement Agreement will instead allow XL to obtain a certain amount of compensation, following which it can focus on defending the Insured Claims and provide indemnification under the terms of the Policies.

49. Should the form of Approval Order not be issued or should XL be otherwise deprived of the benefits that it bargained for, it would consider exercising its right to terminate the Settlement Agreement.

50. XL's consent to enter into the Settlement Agreement is based on the certainty that it provides as to the extent of XL's ongoing obligations under the Policies which will be limited to the Insured Claims. The Settlement Agreement provides certainty to both XL and Dessau on the number, identity, and dollar value of the claims that XL will take over and assume from Dessau. If any claims other than the Insured Claims could be asserted against XL, then there would be very little to no consideration for XL in the Settlement Agreement. Because of this, the release in favour of XL is essential to the Settlement Agreement.

51. XL's participation in Dessau's Liquidation through the Settlement Agreement is substantial, tangible, and is a realistic contribution to the success of the Liquidation. It ensures that the parties involved in the Insured Claims will continue to have access to and, if necessary, benefit from, the insurance coverage under the Policies.

52. The Liquidation will be maximized and expedited by the Settlement Agreement because it provides Dessau with finality on the extent of its liability under the potential claims against it.

53. XL believes that the Settlement Agreement will benefit Dessau and its stakeholders since it will facilitate the Liquidation and the distribution of its assets.

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Conclusion

54. XL supports the Settlement Agreement. It represents the result of a lengthy, detailed, hard-fought negotiation process involving the Liquidator, XL, GDI, and their respective counsel. Should the court not grant approval, the Settlement Agreement will terminate and the pre-existing proceedings between the parties will need to unfold over the next few years until they are finally resolved. XL does not want that to happen.

All the facts alleged in the present sworn statement are true and to my personal knowledge.

Solemnly affirmed before me, by
technological means, in Montréal, on May
27, 2022.

AND I HAVE SIGNED:

Lucie Brunet #86,084

Commissioner for oaths for Québec



Bradley Thorn

BRADLEY THORN

NOTICE OF PRESENTATION

TO :

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**Each of the parties implicated in the
Insured Claims**

1. PRESENTATION OF THE PROCEEDING

TAKE NOTICE that the present *Application for the approval and homologation of a settlement agreement and for certain ancillary relief* will be adjudicated by the Honourable Marie-Anne Paquette, J.S.C. sitting in commercial division for the district of Montréal, in Room 16.04 of the Montréal Courthouse on **June 13, 2022**, at **9:00 a.m.** or so soon thereafter as counsel may be heard.

The information to connect to the hearing is the following:

[Rejoindre la réunion Microsoft Teams](#)

[+1 581-319-2194](#) Canada, Quebec (Numéro payant)

[\(833\) 450-1741](#) Canada (Numéro gratuit)

ID de conférence : 516 211 860#

[Numéros locaux](#) | [Réinitialiser le code confidentiel](#) | [En savoir plus sur Teams](#) | [Options de réunion](#)

Rejoindre à l'aide d'un dispositif de vidéoconférence

teams@teams.justice.gouv.qc.ca ID de la conférence VTC : 1149478699

[Autres instructions relatives à la numérotation VTC](#)

2. HOW TO JOIN THE VIRTUAL HEARING

The coordinates for joining virtual hearing are the following:

- a) **With Teams Tool:** by clicking on the following link:

[Rejoindre la réunion Microsoft Teams](#)

You need at that time to inscribe your name and click on "Joining now". In order to facilitate the progress and the identification of the participants, we are inviting you to inscribe your name by this manner:

The lawyers: Mtre First name, Last Name (name of the represented party)

The syndics: First name, Last Name (syndic's name)

The superintendent: First name, Last name (superintendent's name)

The parties non-represented by lawyers: First name, Last name (precise: Plaintiff, Defendant, Petitioner, Respondent, Creditor, Opponent or other)

For people who are assisting to a public hearing: the mention may be limited to entering: (public)

- b) **By telephone:**

Canada, Québec (paid number): + 1 581-319-2194

Canada (toll-free number): (833) 450-1741

Conference ID: 516 211 860#

- c) **By videoconference:** teams@teams.justice.gouv.qc.ca

Conference VTC ID: 1149478699

- d) **in person**, if and only if you do not have access to one of the above-mentioned technological means. You may then go to room 16.04 of the Montreal Courthouse, located at: 1 Notre-Dame St. East, Montréal, Québec

3. DEFAULT OF PARTICIPATING TO THE VIRTUAL ROLL CALL

TAKE NOTICE that if you wish to contest the proceeding you need to advise by written the instigator of the proceeding at the indicated coordinates in this Notice of Presentation at least 48 hours before the presentation date and participate to the virtual roll call. Failing that, a judgment could be rendered during the presentation of the proceeding, without any further notice or delay.

4. OBLIGATIONS

4.1 The Collaboration

TAKE NOTICE that you have the obligation to cooperate with the other party, in particular by informing each other, at all relevant times, of all facts and elements susceptible of promote a loyal debate and making sure you preserve the relevant evidence (*Civil Code of Procedure*, Art. 20).

4.2 Preventing and Resolving Disputes Method

TAKE NOTICE that you must, before going to the Tribunal, considerate the recourse of all preventing and resolving disputes methods which are, among others, negotiation, mediation or arbitration, for which the parties appeal a third-party assistance (*Civil Code of Procedure*, Art. 2).

PLEASE GOVERN YOURSELVES ACCORDINGLY.

Montréal, this May 27th, 2022

Gowling WLG (Canada) s.enr.c.l., s.r.l.

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C A N A D A

**PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL
LOCALITY OF MONTRÉAL**

No: 500-11-056442-193

**SUPERIOR COURT
(Commercial Division)
*Business Corporations Act***

**IN THE MATTER OF THE LIQUIDATION
OF:**

**GROUPE DESSAU INC.
DESSAU HOLDING INC.
DESSAU CAPITAL INC.
9387-1325 QUÉBEC INC (FORMERLY LVM
INC.)
SOPRIN ADS INC.
LANDRY GAUTHIER & ASSOCIÉS INC.
FONDATEC INC.
DESSAU INC.
DESSAU ADL INC.
CONSULTANTS VFP INC.
LES CONSULTANTS RENÉ GERVAIS INC.
PLANIA INC.
GROUPE CONSTRUCTION VERREAULT
INC.
9387-5631 QUÉBEC INC.**

Applicants

-and-

KPMG INC.

Liquidator / Applicant
Liquidator/Petitioner

-and-

XL SPECIALTY INSURANCE COMPANY

-and-

**XL INSURANCE COMPANY S.E., formerly
known as XL INSURANCE COMPANY
LIMITED**

-and-

DESSAU ASSURANCE INC.

-and-

VINSTON HAMPDEN

-and-

JEFFREY GELLINEAU

-and-

JOSEPH CAVALANCIA

-and-

FRANÇOIS DIONNE
-and-
THE MEMBERS OF LLOYD'S SYNDICATE
NUMBERS 2987, 386, 1886, and 1919
-and-
ALLIANZ GLOBAL RISKS US INSURANCE
COMPANY
-and-
PARTIES ON THE SERVICE LIST
Impleaded Parties

LIST OF EXHIBITS

- EXHIBIT P-1:** Settlement Agreement
- EXHIBIT P-2:** Settlement Approval Order
- EXHIBIT P-3:** Second Report of the Liquidator
- EXHIBIT P-4:** Liquidation Order
- EXHIBIT P-5:** Claims Process Order
- EXHIBIT P-6:** Copy of the Insurance Policies, *en liasse*
- EXHIBIT P-7:** Copy of the Excess Policies, *en liasse*
- EXHIBIT P-8:** Copy of the XL Proof of Claim (**under seal**)
- EXHIBIT P-9:** Copy of the Rejection of Claim in respect of the XL Proof of Claim (**under seal**)
- EXHIBIT P-10:** Copy of the Notice of Objection (**under seal**)

Montréal, this May 27, 2022

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