UBS's arguments and concludes that UBS has failed to carry its burden to persuade this Court that abstention is warranted. Therefore, the Court will not abstain from hearing this case under permissive abstention principles.

C. The Court Has Authority to Enter This Order, Which Is Not a Final Order

[14] There is a split in authority whether a motion to remand is itself a "core" proceeding, or whether the "proceeding" referenced in 28 U.S.C. § 157 is the underlying lawsuit subject to a remand motion. *See Residential Capital,* 488 B.R. at 571–72 (discussing split in authority). In two prior cases, without resolving the issue, this Court submitted proposed findings of fact and conclusions of law to the district court, recommending remand of a state court action. *See id.*; *Sealink Funding Ltd. v. Deutsche Bank AG (In re Residential Capital, LLC),* 489 B.R. 36, 43–44 (Bankr.S.D.N.Y.2013). In those cases, where motions to withdraw the reference were pending, this Court's decision to grant the remand motions would have removed the cases from federal court on a final basis, rendering the withdrawal of the reference motions moot. *See Residential Capital,* 488 B.R. at 572; *Residential Capital,* 489 B.R. at 43–44. This Order *denying* the Remand Motion, however, is an interlocutory order, and not a final judgment, since the case will continue in front of this Court. *See, e.g., O'Toole v. McTaggart (In re Trinsum Grp., Inc.),* 467 B.R. 734, 740 (Bankr.S.D.N.Y.2012) ("In adversary proceedings, orders dismissing fewer than all claims are considered to be interlocutory."); *see also LTV Steel Co., Inc. v. United Mine Workers of Am. (In re Chateaugay Corp.),* 922 F.2d 86, 90 (2d Cir. 1990) ("Orders in bankruptcy cases may be immediately appealed if they resolve discrete disputes within the larger case. The disposition of a discrete dispute is generally considered to be the resolution of an adversary proceeding within the bankruptcy action." (internal citations omitted)). Therefore, the Court has authority to enter this Order, and is not limited to submitting proposed findings of fact and conclusions of law to the district court. *See Trinsum Grp.,* 467 B.R. at 740 (holding that, after *Stern,* bankruptcy judges have the authority to enter interlocutory orders in non-core proceedings and in core proceedings as to which the bankruptcy court may not enter final orders or judgment consistent with Article III absent consent). This Order is still subject to discretionary review by the district court under 28 U.S.C. § 158(a)(3). *See id.* at 741.

III. CONCLUSION

For all of the foregoing reasons, the Motion is **DENIED**.

IT IS SO ORDERED.

IN RE: REDE ENERGIA S.A.,[1] Debtor in a Foreign Proceeding.

Case No. 14-10078 (SCC)

United States Bankruptcy Court, S.D. New York.

Signed August 27, 2014

Background: Foreign representatives of debtors that were the subject of reorgani-

1. The last four digits of the Debtor's Brazilian Corporate Taxpayer Registration Number are 01–49. The Debtor's executive headquarters are located at Avenida Paulista, 2439, 5th

zation case which was pending in Brazil, and which had been recognized as foreign main proceeding, requested relief in aid of plan that had been confirmed in foreign bankruptcy proceedings.

Holdings: The Bankruptcy Court, Shelley C. Chapman, J., held that:

(1) relief requested by foreign representatives, consisting of order from United States Bankruptcy Court enforcing the foreign plan confirmation order, enjoining acts in contravention of order, and requiring action necessary to carry out terms of plan, while not specifically enumerated in provision of Chapter 15 dealing with relief that may be granted upon recognition, was type of relief appropriately granted under this provision;

(2) relief was also available as additional assistance under provision of Chapter 15 allowing such assistance, consistent with principles of comity, if certain enumerated fairness factors were satisfied; and

(3) requested relief could not be denied as "manifestly contrary to United States public policy."

Relief granted.

1. Bankruptcy ⚷2341

Central tenet of Chapter 15 of the Bankruptcy Code is the importance of comity in cross-border insolvency proceedings.

2. Bankruptcy ⚷2341

Relief granted to foreign representative under provision of Chapter 15 authorizing court to provide any "additional assistance" available under the Bankruptcy Code or under "other laws of the United States" must be consistent with principles of comity, and must satisfy fairness considerations as set forth in this provision. 11 U.S.C.A. § 1507.

3. Bankruptcy ⚷2341

Chapter 15 of the Bankruptcy Code provides courts with broad, flexible rules to fashion relief that is appropriate to effectuate objectives of the Chapter in accordance with comity.

4. Bankruptcy ⚷2341

Assistance available to foreign representative upon recognition of foreign proceeding is largely discretionary and turns on subjective factors that embody principles of comity. 11 U.S.C.A. §§ 1507, 1521.

5. Bankruptcy ⚷2341

Relief granted in foreign proceeding and relief available in the United States in proceeding ancillary to foreign case under Chapter 15 of the Bankruptcy Code need not be identical.

6. Bankruptcy ⚷2341

Principle of comity, as embodied in Chapter 15 of the Bankruptcy Code, has never meant categorical deference to foreign proceedings; implicit in the concept is that deference should be withheld where appropriate to avoid violation of laws, public policies or rights of citizens of the United States.

7. Bankruptcy ⚷2341

All relief under Chapter 15, including the additional relief or assistance available following recognition of foreign proceeding, is subject to limitation that permits court to decline to take any action if such action would be "manifestly contrary" to public policy of the United States. 11 U.S.C.A. §§ 1506, 1507, 1521.

Floor, Cerqueira Cesar, City of São Paulo, State of São Paulo, Brazil. The Debtor was formerly known as Caiuá Serviços de Eletricidade S.A. and Rede Empresas de Energia Elétrica S.A.

8. Bankruptcy ⚷2341

"Public policy" exception to Chapter 15 is drafted in narrow terms to apply only when requested relief would be "manifestly contrary" to public policy of the United States and is to be applied sparingly. 11 U.S.C.A. § 1506.

9. Bankruptcy ⚷2341

Foreign judgments are generally granted comity in proceeding ancillary to foreign case under Chapter 15 of the Bankruptcy Code, as long as the proceedings in foreign court were "according to the course of a civilized jurisprudence," i.e., fair and impartial.

10. Bankruptcy ⚷2341

Relief requested by foreign representatives of debtors that were the subject of reorganization case which was pending in Brazil and which had been recognized as foreign main proceeding, consisting of order from United States Bankruptcy Court enforcing the foreign plan confirmation order, enjoining acts in contravention of order, and requiring indenture trustee to take action necessary to carry out terms of confirmed plan by executing assignment and making payments to beneficial noteholders, while not specifically enumerated in provision of Chapter 15 dealing with relief that may be granted upon recognition, was type of relief that was available prior to enactment of Chapter 15 in case ancillary to foreign proceeding, as well as type of relief routinely granted under United States bankruptcy law, and was appropriately granted under this provision; refusal to grant such relief would mean that Brazilian reorganization plan, which had already been substantially consummated, could not be fully implemented, and that distributions to noteholders would be prevented or substantially delayed, simply to allow objecting party another chance to renegotiate terms of plan with no evidence that its efforts in this regard would be successful. 11 U.S.C.A. § 1521.

11. Bankruptcy ⚷2341

Relief requested by foreign representatives of debtors that were the subject of reorganization case which was pending in Brazil and which had been recognized as foreign main proceeding, consisting of order from United States Bankruptcy Court enforcing the foreign plan confirmation order, enjoining acts in contravention of order, and requiring indenture trustee to take action necessary to carry out terms of confirmed plan by executing assignment and making payments to beneficial noteholders, was available as additional assistance under provision of Chapter 15 allowing such assistance, consistent with principles of comity, if certain enumerated fairness factors were satisfied; creditors were given access to information and a meaningful opportunity to be heard in the Brazilian bankruptcy proceeding, Brazilian law provided a comprehensive procedure for orderly and equitable distribution of debtors' assets to creditors, there was no prejudice to United States creditors in processing of claims in the Brazilian bankruptcy proceeding nor any evidence of preferential or fraudulent property distributions, and Brazilian law, while not recognizing an "absolute priority" rule identical to that applicable under United States law to prevent equity holders from retaining interest if creditors were not paid in full, provided for distribution of debtors' assets in manner "substantially in accordance with United States law." 11 U.S.C.A. § 1507.

12. Bankruptcy ⚷2341

Foreign representative generally satisfies the "just treatment" factor, as required for grant of additional assistance under provision of Chapter 15 providing for such relief, consistent with principles of comity, only if certain enumerated fairness

factors are met, upon showing that the applicable foreign law provides a comprehensive procedure for the orderly and equitable distribution of debtor's assets among all of its creditors. 11 U.S.C.A. § 1507(b)(1).

13. Bankruptcy ⚷2341

Courts hold that foreign proceeding does not satisfy the "just treatment" factor, as required for grant of additional assistance under provision of Chapter 15 providing for such relief, consistent with principles of comity, only if certain enumerated fairness factors are met, where the foreign proceeding fails to provide creditors with access to information and an opportunity to be heard in meaningful manner, or where the proceeding would not recognize creditor as claim holder. 11 U.S.C.A. § 1507(b)(1).

14. Bankruptcy ⚷2341

Foreign insolvency regime need not contain an "absolute priority" rule identical to that of United States bankruptcy law in order for distribution of proceeds of foreign debtor's property under this foreign insolvency regime to be "substantially in accordance with the Bankruptcy Code," as required for grant of additional assistance under provision of Chapter 15 providing for such relief, consistent with principles of comity, only if certain enumerated fairness factors are met. 11 U.S.C.A. § 1507(b)(4).

15. Bankruptcy ⚷2341

Relief requested by foreign representatives of debtors that were the subject of reorganization case which was pending in Brazil and which had been recognized as foreign main proceeding, consisting of order from United States Bankruptcy Court enforcing the foreign plan confirmation order, enjoining acts in contravention of order, and requiring indenture trustee to take action necessary to carry out terms of confirmed plan, could not be denied under public policy exception to Chapter 15 as "manifestly contrary to United States public policy"; neither the process by which debtors' assets were marketed, which involved competitive bidding and resulted in evolution and improvement of return to unsecured creditors, nor Brazilian court's decision to substantively consolidate debtors for plan purposes, relief that may, in appropriate circumstances, be granted in Chapter 11 cases under United States law, rendered the Brazilian proceedings manifestly contrary to United States law, and mere fact that plan was crammed down, on acceptance of single secured creditor, while equity holders retained interest in reorganized debtors and unsecured creditors received less than full payment on their claims, was insufficient to trigger application of public policy exception, especially where equity holders' interest would be vastly diluted upon confirmation, and where plan, which was accepted by 66.34% in amount and 47.7% in number of unsecured creditors, fell short only 0.3% in amount and 2.3% in number of what would have been required under the Bankruptcy Code to find that plan was accepted by unsecured class. 11 U.S.C.A. § 1506.

16. Bankruptcy ⚷2341

Bankruptcy court will not decline, on public policy grounds, to extend comity and grant additional relief to foreign representative of debtor that is the subject of bankruptcy proceedings in foreign country simply because foreign bankruptcy law is not identical to United States bankruptcy law. 11 U.S.C.A. § 1506.

17. Bankruptcy ⚷2341

Mere fact that, under reorganization plan confirmed in Brazilian bankruptcy proceedings, certain unsecured creditors, concessionaires that provided utility service to consumers in Brazil and that were barred by Brazilian law from filing for

bankruptcy relief, would receive full payment on their claims, while other unsecured creditors would receive only a 25% distribution on their claims, did not preclude grant of foreign representatives' request for post-recognition assistance in aid of plan, as allegedly being manifestly contrary to United States public policy; such disparate treatment was necessary as result of law validly adopted by Brazilian government in exercise of its regulatory powers to preclude concessionaires from filing for bankruptcy, and different treatment of groups of unsecured creditors was not uncommon under United States bankruptcy law. 11 U.S.C.A. § 1506.

18. Bankruptcy ⚷2341

Party challenging relief requested by foreign representatives of debtors that were the subject of bankruptcy proceedings in Brazil in aid of reorganization plan confirmed by Brazilian court failed to show that grant of such relief would be manifestly contrary to public policy of the United States, on theory that Brazilian law allegedly discriminated against United States creditors, where Brazilian law required that Brazilians and foreigners be treated equally before the law and required that foreign creditors receive a full and fair opportunity to participate in the Brazilian bankruptcy proceedings, and where there was only a single United States creditor that had not voted in favor of plan, and party declined to present any evidence that Brazilian bankruptcy proceedings targeted this lone dissenting creditor. 11 U.S.C.A. § 1506.

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In a Case Under Chapter 15
of the Bankruptcy Code

MEMORANDUM DECISION GRANTING PLAN ENFORCEMENT RELIEF PURSUANT TO CHAPTER 15 OF THE BANKRUPTCY CODE

SHELLEY C. CHAPMAN, UNITED STATES BANKRUPTCY JUDGE

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In this proceeding brought pursuant to chapter 15 of the Bankruptcy Code, José Carlos Santos, the Foreign Representative of Rede Energia S.A., seeks this Court's assistance, pursuant to sections 1507 and 1521, in enforcing the terms of Rede's Brazilian reorganization plan. Specifically, the Foreign Representative requests the following relief: (i) an order granting full faith and credit to (a) the Brazilian reorganization plan and (b) the Brazilian court order confirming the plan, including a continuation of the injunction of acts in the United States in contravention of the confirmation order, and (ii) an order authorizing and directing the Indenture Trustee

for Rede's 11.125 percent perpetual notes and the Depository Trust Company to take the actions necessary to carry out the terms of the Brazilian reorganization plan, including making payments to Rede's noteholders. Certain of Rede's noteholders object to the relief as being contrary to public policy of the United States and urge the Court to allow them to return to Brazil and negotiate for an improvement on the distribution they are to receive under the Brazilian reorganization plan. These noteholders allege that what the Foreign Representative describes as a proceeding that indisputably comports with fundamental principles of U.S. bankruptcy law and civilized jurisprudence is in fact a wholesale trampling of their rights that was conceived of and executed by the Brazilian government and rubberstamped by the Brazilian bankruptcy court. While there are certainly aspects of the Brazilian proceeding that differ in form and substance from what might occur in the United States, the Court nonetheless concludes, for the reasons set forth herein, that Rede's Foreign Representative is entitled to the relief requested.

FACTUAL BACKGROUND

An understanding of the structure of Rede Energia S.A. ("*Rede*" or the "*Debtor*"), the events leading to Rede's Brazilian bankruptcy proceeding (the "*Brazilian Bankruptcy Proceeding*"), and the Brazilian Bankruptcy proceeding itself, including the terms of Rede's reorganization plan and its treatment of Rede's creditors, is essential to the Court's consideration and analysis of the relief requested by José Carlos Santos, the authorized foreign representative of Rede (the "*Foreign Representative*") and the objections to such relief. The uncontroverted facts and summary of applicable Brazilian law set forth below are taken from (i) the Stipulation of Facts for Purposes of a Hearing on the Objection by the Ad Hoc Group of Rede Noteholders to Relief Related to Recognition of a Foreign Proceeding [Docket No. 26] ("*Stipulation of Facts*" or "*Fact Stip.*") and (ii) the Stipulation of Brazilian Law for Purposes of a Hearing on the Objection by the Ad Hoc Group of Rede Noteholders to Relief Related to Recognition of Foreign Proceeding [Docket No. 27] ("*Stipulation of Law*" or "*Law Stip.*").[2]

I. The Rede Group

Rede is one of the largest electric power companies in Brazil; it is the parent company of a group of operating and non-operating subsidiary entities (collectively, with Rede, the "*Rede Group*"). (Foreign Representative's Petition for Recognition of Brazilian Bankruptcy Proceeding and Motion for Order Granting Related Relief Pursuant to 11 U.S.C. § 105(a), 1507(a), 1509(b), 1515, 1517, 1520 and 1521) [Docket No. 2] (the "*Petition*" at 3.) Through its operating subsidiaries, the Rede Group distributes electricity to millions of customers throughout Brazil, including customers in the States of São Paulo, Minas Gerais, Paraná, Mato Grosso, and Tocantins. (Petition at 3.) By 2012, the Rede Group had become one of Brazil's largest electricity distributors, providing electricity to 578 municipalities in seven states in Brazil, serving approximately five million consumer units, 165 indigenous villages, and 787 rural settlements. (Fact Stip. at ¶ 1.)

Five members of the Rede Group are debtors in the Brazilian Bankruptcy Pro-

2. The Stipulation of Facts and the Stipulation of Law were admitted into evidence at the hearing on May 9, 2014.

ceeding (collectively, the "*Rede Debtors* "), consisting of:

- Rede, an intermediate holding company, holding interests in fourteen subsidiaries;
- Empresa de Eletricidade Vale Paranapanema S.A. ("*EEVP* "), a holding company that is the direct parent and controlling shareholder of Rede;
- Denerge Desenvolvimento Energético S.A. ("*Denerge* "), another holding company that is the direct parent and controlling shareholder of EEVP and the indirect parent of Rede;
- Companhia Técnica de Comercialização de Energia ("*CTCE* "), an electricity-trading subsidiary of Rede; and
- QMRA Participações S.A., a subsidiary of Rede and the former intermediate holding company parent of Centrais Elétricas Do Pará S.A. ("*CELPA* ").[3]

(Fact Stip. at ¶ 2.)

The Rede Debtors have eight electricity distribution operating subsidiaries, known as the "Rede Concessionaires," [4] that are not debtors in the Brazilian Bankruptcy Proceeding.[5] (Fact Stip. at ¶ 3.) Rede holds the equity in the Rede Concessionaires, and substantially all of the Rede Group's business activities are conducted through them. The electricity distribution activities of the Rede Concessionaires are subject to extensive regulation by the Brazilian government through various regulatory authorities, including Agência Nacional de Energia Elétrica ("*ANEEL* "). (Fact Stip. at ¶ 8.)

II. Rede Issues the Perpetual Notes

Pursuant to an indenture dated April 2, 2007 (the "*Indenture* "), Rede issued 11.125 percent notes in the aggregate principal amount of USD$400 million [6] that

3. CELPA commenced judicial reorganization proceedings under Brazilian bankruptcy law in February 2012. (Fact Stip. at ¶ 13.) On November 9, 2012, CELPA's foreign representative sought chapter 15 recognition in this Court of CELPA's Brazilian judicial reorganization proceeding as a foreign main proceeding, along with certain relief to enforce the confirmed plan of reorganization. (Fact Stip. at ¶ 15.) The plan enforcement relief sought by the foreign representative of CELPA was similar to the relief sought here and included a request that the indenture trustee and the Depository Trust Company be directed and authorized to take actions to assign the notes to the plan sponsor pursuant to CELPA's Brazilian plan of reorganization. (Fact Stip. at ¶ 15.) No party in interest challenged the chapter 15 relief sought by CELPA's foreign representative. (Fact Stip. at ¶ 16.) On December 12, 2012, this Court entered an order granting recognition and the requested plan enforcement relief. *In re Centrais Elétricas Do Pará S.A.—EM Recuperação Judicial*, Order Granting Recognition of Foreign Main Proceeding and Certain Related Relief, Case No. 12–14568(SCC) [Docket No. 19]. At the time the Court entered such order, transfer of the shares contemplated under CELPA's plan had already closed, and appeals of the order confirming CELPA's plan were pending with the Brazilian appellate courts. (Fact Stip. at ¶ 17.) As of March 17, 2014, such appeals were still pending in Brazil. (Fact Stip. at ¶ 17.)

4. The Rede Concessionaires consist of the following eight electricity distribution subsidiaries: CEMAT, CELTINS, ENERSUL, Caiuá Distribuição de Energia S.A., Empresa Elétrica Bragantina S.A., Companhia Nacional de Energia Elétrica ("*CNEE*"), Companhia Força e Luz do Oeste, and Empresa de Distribuição de Energia Vale Paranapanema S.A. (Fact Stip. at ¶ 10.)

5. Four other subsidiaries of Rede (that are not Rede Concessionaires) also are not debtors in the Brazilian Bankruptcy Proceeding. (Fact Stip. at ¶ 3.)

6. For the purposes of this decision, all amounts will be indicated in either U.S. Dollars ("*USD$* ") or Brazilian Real ("*R$* ") and have not been converted except where specified.

have no fixed final maturity date and are not subject to any mandatory redemption provisions (the "*Perpetual Notes*"). (Fact Stip. at ¶ 4.) In September 2007, Rede exercised its right under the Indenture to issue additional Perpetual Notes in the aggregate principal amount of USD$175 million. Approximately USD$496 million of the Perpetual Notes remained outstanding as of the date of the commencement of the Brazilian Bankruptcy Proceeding on November 23, 2012. (Fact Stip. at ¶ 4.)

The Perpetual Notes are general unsecured obligations of Rede and are not guaranteed by any of Rede's operating subsidiaries or other affiliates. (Fact Stip. at ¶ 5.) The notes are held in global note form (the "*Global Note*") with the Depository Trustee Company ("*DTC*"). The Bank of New York Mellon is the indenture trustee for the Perpetual Notes (the "*Indenture Trustee*"). Interest payments on the Perpetual Notes historically have been made by Rede to the Indenture Trustee in New York and have been distributed to the beneficial owners of the Perpetual Notes (the "*Noteholders*") through DTC. The Indenture and the Perpetual Notes are governed by New York law.[7] (Fact Stip. at ¶¶ 5–6.)

The members of the Ad Hoc Group of Rede Noteholders (the "*Ad Hoc Group*") in the aggregate hold approximately 37 percent of the Perpetual Notes. (Fact Stip. at ¶ 80.) The members of the Ad Hoc Group are Merrill Lynch Pierce, Fenner & Smith Incorporated ("*Merrill*"); Finanzas Y Negocios Internacional Inc.; and multiple funds managed by Moneda Asset Management. (Fact Stip. at 31 n.16.) The majority of the members of the Ad Hoc Group are based in Latin America. (Fact Stip. at ¶ 80.) Only one of its members, Merrill (which holds approximately 8.1 percent of the Perpetual Notes), is based in the United States. (Fact Stip. at ¶¶ 79–80; 5/9/14 Tr. at 23:19–24:4.)

III. Events Leading to the Brazilian Bankruptcy Proceeding

On August 29, 2012, the Brazilian government passed and published Provisional Measure No. 577 ("*MP 577*"),[8] which permitted ANEEL, among other things, to intervene and take operational control of an electricity distribution concessionaire "to ensure its proper performance and to ensure compliance with the relevant contractual, regulatory and legal standards." (Fact Stip. at ¶ 18.) MP 577 also provided that electricity distribution concessionaires are no longer permitted to commence judicial and extrajudicial restructuring proceedings under Brazilian bankruptcy law prior to termination of the concession.[9]

7. The Indenture contains a permissive jurisdiction clause that would allow, absent a court order to the contrary, any holder of the Perpetual Notes to commence an action in the United States against Rede to recover on the Perpetual Notes. (Fact Stip. at ¶ 6.)

8. MP 577 subsequently became Law 12,-767/2012, which was published on December 27, 2012. (Fact Stip. at n.6.)

9. The Legislative History of MP 577 explains that

> The electric power sector currently faces a situation of having a concessionaire under judicial intervention [*i.e.*, CELPA], on the verge of bankruptcy, making regulatory action that is within the power of the granting authority once this event occurs urgent. Moreover, to keep any other similar situation from occurring, there is an urgent need to derogate from judicial and nonjudicial reorganization of public electric power concessionaires (or permit holders), as it is understood conducting this type of reorganization by means of intervention, which the provisions of this measure seek to do, better suits the specific considerations of these public electric power concessionaires (or permit holders).

(Fact Stip. at ¶ 19 (citing Ex. F, a Correct Copy and Certified Translation of MP 577 and its official legislative history).) The Ministério

(Fact Stip. at ¶ 19.) Within two days of publication of MP 577, on August 31, 2012, ANEEL intervened and seized operational control of the Rede Concessionaries. (Fact Stip. at ¶ 22.) Pursuant to MP 577, Rede was required to provide ANEEL with a plan, over which ANEEL had unilateral approval rights, to correct the failures and infractions that led to ANEEL's intervention and which demonstrated Rede's economic and financial viability (the "*Correctional Plan* "). (Fact Stip. at ¶ 27.) In order to lift its intervention, ANEEL required that the Rede Debtors adequately capitalize the Rede Concessionaires to ensure the provision of electric service to consumers. (Fact Stip. at ¶¶ 24–27.)

The Ad Hoc Group alleges that (i) the timing of MP 577's passage; (ii) the timing of the seizure of the Rede Concessionaires by ANEEL; (iii) the treatment of FI–FGTS's claim (defined and discussed below); and (iv) the end result for creditors of the Rede Concessionaires (who were not forced to restructure claims in bankruptcy) suggest that the protection of local interests may have been involved in both the passage of MP 577 and in ANEEL's activities. The Rede Debtors dispute such allegations and believe the evidence is to the contrary. (Fact Stip at ¶ 24.)

Following ANEEL's intervention, the Rothschild Group ("*Rothschild* "), whom Rede had previously hired as its financial advisor, began marketing the shares of the Rede Group while calling for any purchaser to make a capital injection in the Rede Concessionaries and pay an additional amount that could be used to fund distributions to the creditors of the Rede Debtors. (Fact Stip. at ¶¶ 26–29.) Rothschild received two binding offers by the October 11, 2012 deadline, and Rede selected the joint bid submitted by CPFL Energia ("*CPFL* ") and Equatorial Energia ("*Equatorial,*" and together with CPFL, "*Equatorial–CPFL* ").[10] (Fact Stip. at ¶ 30.) Rede also developed a Correctional Plan that was submitted to ANEEL on October 26, 2012.[11] (Fact Stip. at ¶ 31.)

On November 22, 2012, Fundo de Investimento do Fundo de Garantia por Tempo de Serviço ("*FI–FGTS* "), an investment fund wholly-owned by an employee severance payment guarantee fund created by the Brazilian government, exercised a "put" right under its 2010 investment agreement with Rede. (Fact Stip. at ¶¶ 64–65.) Pursuant to the investment agreement, FI–FGTS held 37.1 percent of the shares of EEVP and a right to "put" such shares to Denerge [12] in return for a secured debt claim. Accordingly, by exercising its put right one day before the Rede Debtors filed for bankruptcy in Brazil, FI–FGTS obtained a secured claim against Denerge, one of the Rede Debtors, in an amount of R$712.5 million. (Fact Stip. at

de Minas e Energia ("*MME* "), the Brazilian government's primary regulator of the power industry, issued a press release on August 31, 2012, which explained that the main objective of MP 577 was to give more security to the energy supply in Brazil, and MP 577's rules regarding intervention "were inspired by the practices applicable to the financial system, another sector that deserves special attention from regulators and the [Brazilian government], for its relevance in the life of the citizen and Brazilian economy." (Reply at ¶ 20 (citing Exhibit G, a certified translation of the MME Press Release).)

10. Rothschild sent invitations to at least ten potential buyers (both foreign and domestic) and granted seven credentialed groups access to a dataroom. (Fact Stip. at ¶ 29.)

11. On November 20, 2012, ANEEL revoked the license granted to Rede's electricity trading subsidiary, CTCE, to market and trade electricity. (Fact Stip. at ¶ 32.)

12. As discussed above, Denerge is a holding company that is the direct parent and controlling shareholder of EEVP and is the indirect parent of Rede. (Fact Stip. at ¶ 2.)

¶ 66.) As further described below, the Ad Hoc Group contends that, as of the petition date, FI–FGTS remained a shareholder and should not be treated as a secured creditor entitled to vote on the Brazilian Reorganization Plan (as defined below).

On November 23, 2012, the Rede Debtors voluntarily filed petitions for judicial reorganization under Brazilian bankruptcy law.[13] None of the Rede Concessionaires filed a petition. (Fact Stip. at ¶ 33.)

IV. The Brazilian Bankruptcy Proceeding

A. Competing Plans Are Submitted

On December 19, 2012, the Second Court of Bankruptcies and Judicial Restructuring Court of the Central Civil Court of the City of São Paulo, State of São Paulo (the "*Brazilian Bankruptcy Court*") granted the Rede Debtors' request to commence reorganization proceedings. (Fact Stip. at ¶ 34.) On March 15, 2013, the Rede Debtors presented a reorganization plan to the Brazilian Bankruptcy Court based on an investment and share purchase agreement (the "*Equatorial–CPFL SPA*") executed between the Rede Debtors and Equatorial–CPFL (the "*Equatorial–CPFL Plan*"), which provided for Mr. Jorge Queiroz de Moraes Junior (the "*Controlling Shareholder*") of the Rede Group to transfer his stock in the Rede Group to Equatorial–CPFL. (Fact Stip. at ¶¶ 34–35.) The Equatorial–CPFL SPA also prohibited the Rede Debtors from marketing the company to other potential bidders until June 30, 2013, at which time the agreement could be terminated by either party.[14] (Fact Stip. at ¶ 34.) The Equatorial–CPFL Plan provided that certain creditors of the Rede Debtors, including the Noteholders, would receive their choice of either: (i) cash equal to fifteen percent of the principal amount of their claim in return for assignment of such claim to Equatorial–CPFL or (ii) reinstatement of 65 percent of the principal amount of their claim paid out over 27 years, without interest. (Fact Stip. at ¶ 35.)

On April 4, 2013, the Indenture Trustee and the Ad Hoc Group filed petitions with the Brazilian Bankruptcy Court objecting to a number of issues related to the Equatorial–CPFL Plan, including (i) the proposed substantive consolidation of the Rede Debtors for plan purposes and (ii) the voting rights of FI–FGTS under the Equatorial–CPFL Plan, based on the Ad Hoc Group's belief that FI–FGTS qualified as an insider (as more fully discussed *infra*). (Fact Stip. at ¶ 56.) Interested parties COPEL and Energisa S.A. also filed a petition with the Brazilian Bankruptcy Court challenging the exclusivity that had been granted to Equatorial–CPFL under the Equatorial–CPFL SPA and requesting access to the dataroom for purposes of forming a competing bid. (Fact Stip. at ¶ 36.)

13. Under Brazilian law, a debtor retains the right to administer its assets and affairs and may continue to run its business once a judicial reorganization has commenced. A judicial administrator is appointed by the court and is responsible for, among other things, overseeing the debtor's management of its day-to-day affairs and managing the claims verification process. (Law Stip. at ¶ 8.) On December 19, 2012, the Brazilian Court appointed Deloitte Touche Tohmatsu Consultores Ltda. (the "*Judicial Administrator*") as the independent judicial administrator for the Rede Debtors' judicial reorganization case. (Fact Stip. at ¶ 48.)

14. COPEL and Energisa had access to the dataroom from approximately December 2011 until February 2012, and again for several days prior to the October 11, 2012 bid deadline. (Fact Stip. at ¶ 36.)

On May 14, 2013, the Judicial Administrator published a preliminary official list of claims, listing FI–FGTS as holding a secured claim against Denerge.[15] (Fact Stip. at ¶ 67.) On May 27, 2013, FI–FGTS informed the Brazilian Bankruptcy Court that the put option that it held pursuant to its 2010 investment agreement had been exercised one day prior to the bankruptcy filing, and it offered the shares to the Brazilian Bankruptcy Court to dispose of them.[16] (Fact Stip. at ¶ 66.)

On May 27, 2013, the Brazilian Bankruptcy Court ruled on eleven issues, including those raised by the Ad Hoc Group on April 4, 2013, finding, among other things, that FI–FGTS was a secured creditor.[17] (Fact Stip. at ¶¶ 5 8, 71.) The Indenture Trustee then sought an expedited appeal of such order and an injunction of the solicitation of the Equatorial–CPFL Plan with the São Paulo State Court of Appeals (the "*Brazilian Court of Appeals*"). The Brazilian Court of Appeals denied the request for an injunction and the appeal remains pending. (Fact Stip. at ¶ 60.)

On May 29, 2013, COPEL and Energisa (together, "*COPEL–Energisa*") publicly announced a competing bid to purchase certain assets of the Rede Debtors (the "*COPEL–Energisa Proposal*"). (Fact Stip. at ¶ 37.) The COPEL–Engerisa Proposal provided, among other things, for the purchase of the Rede Concessionaires' stock held by Rede for approximately R$3.2 billion. (Fact Stip. at ¶ 37.) The COPEL–Energisa Proposal was not a plan of reorganization; it neither (i) provided for allowance or distribution to particular claims nor (ii) opined on the consolidation of the Rede Debtors. (Fact Stip. at ¶ 37.) Although the Ad Hoc Group supported the COPEL–Energisa Proposal, the Rede Debtors rejected it on June 5, 2013, the date of the first Rede creditors' meeting (discussed *infra*), reasoning, among other things, that (i) the proposal was not binding, as it required certain condition precedents to be met; (ii) it did not satisfy the restructuring requirements imposed by ANEEL; (iii) the estimated creditor recoveries it promised were inflated; and (iv) it would strip the Rede Debtors of their business activity and/or assets. (Fact Stip. at ¶ 38.)

On June 5, 2013, the first Rede creditors' meeting was held and an official committee of creditors was formed.[18] (Fact

15. Under Brazilian bankruptcy law, creditors have ten days to object to a claim's allowance after publication of the preliminary official list. (Fact Stip. at ¶ 68.) In general, however, creditors may separately object to a claimant's right to vote on a plan of reorganization outside of this timeframe. (Fact Stip. at ¶ 68.) The parties dispute whether the ten-day objection deadline should have applied to any objection to FI–FGTS's claim and its right to vote as a secured creditor. (Fact Stip. at ¶ 68.)

16. FI–FGTS's shares of EEVP were never returned to EEVP in connection with the exercise of FI–FGTS's put right. (Fact Stip. at ¶ 66.)

17. The Brazilian Bankruptcy Court reasoned that,

> There can be no doubt that this fund [FI–FGTS] is a creditor of the companies under reorganization; however, in the past, it had been a shareholder, but since it validly exercised a sale option prior to joining the legal reorganization proceedings, it no longer has the status of shareholder. Proof of notification of exercise of the option has been provided, which is an undisputed fact in the case files . . . Its vote was completely valid in its status as secured creditor.

(Fact Stip. at ¶ 71 (citing Exhibit P (Decision of the Brazilian Bankruptcy Court, dated May 27, 2013) at 4 (changes in original)).)

18. The official committee of creditors had the duty to obtain and inform all creditors of information regarding the Rede Debtors. (Fact Stip. at ¶ 49.) The members of the creditors' committee were (i) FI–FGTS, act-

Stip. at ¶ 49.) The meeting was discontinued prior to creditors voting on the Equatorial–CPFL Plan. (Fact Stip. at ¶ 40.) On June 12, 2013, COPEL–Energisa withdrew the COPEL–Engerisa Proposal due to lack of information necessary to confirm the proposal and tight deadlines for its confirmation. (Fact Stip. at ¶ 41.)

On July 2, 2013, one day prior to the second creditors' meeting, Energisa submitted a revised proposal and plan of reorganization that largely mirrored the structure of the Equatorial–CPFL SPA and the Equatorial–CPFL Plan (the "*Revised Energisa Proposal* "). (Fact Stip. at ¶¶ 41–43.) On July 3, 2013, the second creditors' meeting was held, but this meeting was also discontinued prior to voting on any plan of reorganization. (Fact Stip. at ¶ 44.)

B. Creditors Vote on the Brazilian Reorganization Plan

Prior to the third creditors' meeting, the Brazilian Bankruptcy Court suggested that it would not allow a vote on both the Revised Energisa Proposal and the Equatorial–CPFL Plan. (Fact Stip. at ¶ 45.) As a result, at the third creditors' meeting held on July 5, 2013, representatives of Energisa and Equatorial–CPFL presented their respective plans to creditors of the Rede Debtors, after which the Rede Debtors adjourned the meeting and requested that the creditors tell them informally which plan they preferred. (Fact Stip. at ¶ 45.) The Ad Hoc Group and the Indenture Trustee did not participate in the poll due to, among other things, their view that both plans contained inappropriate consolidation of the debtor entities. The majority of the remaining creditors who did participate indicated a preference for the Revised Energisa Proposal. (Fact Stip. at ¶ 45.) Accordingly, Equatorial–CPFL withdrew its bid, and, upon resuming the third creditors' meeting, the Rede Debtors proposed a plan embodying the Revised Energisa Proposal (the "*Brazilian Reorganization Plan* " or "*Plan* ") and the final votes of the Rede Debtors' creditors on the Plan were solicited.

Secured creditor FI–FGTS voted in favor of the Brazilian Reorganization Plan.[19] (Fact Stip. at ¶ 69.) Each of the members of the Ad Hoc Group voted to reject the Brazilian Reorganization Plan. (Fact Stip. at ¶ 98.) Having obtained a ruling from the Brazilian Bankruptcy Court that the Indenture Trustee would be permitted to vote, the Indenture Trustee, on behalf of all Noteholders other than the members of the Ad Hoc Group (including those Note-

ing through its attorney-in-fact, Cassio Viana de Jesus, representing itself as the sole voting secured creditor, and (ii) Moneda Deuda LatinoAmericana Fondo de Inversion ("*Moneda* "), acting through its counsel Eduardo Augusto Mattar, representing the class of unsecured creditors. (Fact Stip. at ¶ 49.) Moneda is a Chilean investment fund and the largest member, by holdings, of the Ad Hoc Group. (Fact Stip. at ¶ 49.)

19. The other secured creditor, Banco Nacional de Desenvolvimento Econômico e Social ("*BNDES*"), was not permitted to vote on the Brazilian Reorganization Plan because its subsidiary, BNDES Participações S.A. ("*BNDESPar* "), is a minority shareholder in the Rede Debtors. (Fact Stip. at ¶ 63.) Brazilian bankruptcy law prevents shareholders, affiliates, controlling and controlled companies of the debtor or entities which have a partner or shareholder with an equity interest above ten percent in the debtor's capital stock, or in the capital stock of which the debtor or any of his partners have an equity interest exceeding ten percent, from voting on account of claims against the debtor. (Law Stip. at ¶ 16.) BNDES held a claim that was allowed against Rede in the amount of R$134.5 million and was secured by, among other things, Rede's equity interests in one of the Rede Concessionaires, CNEE. (Fact Stip. at ¶ 63.)

holders who did not direct or authorize the Indenture Trustee to vote on their behalf), also voted to reject the Brazilian Reorganization Plan. (Fact Stip. at ¶ 99.) On July 15, 2013, Rede appealed to the Brazilian Court of Appeals and sought injunctive relief and reconsideration of the Brazilian Bankruptcy Court's decision allowing the Indenture Trustee to vote, but the Brazilian Court of Appeals denied this request. (Fact Stip. at ¶ 100.)

At the time of the third creditors' meeting, several objections to the treatment of claims or the right of certain creditors to vote remained pending before the Brazilian Bankruptcy Court, including the Ad Hoc Group's objection to FI–FGTS's status as a secured creditor. (Fact Stip. at ¶ 5 1.) While all creditors on the official list of creditors (the "*Creditors' List*") were permitted to attend the general meetings of creditors and to vote on the Brazilian Reorganization Plan, in many cases in which a dispute remained outstanding with respect to a creditor's right to vote, the Brazilian Bankruptcy Court ordered that the applicable creditor be permitted to cast a provisional vote. The Brazilian Bankruptcy Court then instructed the Judicial Administrator to make two calculations of voting results: one considering all such provisional votes and one disregarding such provisional votes. (Fact Stip. at ¶ 51.)

On July 26, 2013, after the final votes were solicited, the Ad Hoc Group objected to confirmation of the Brazilian Reorganization Plan, again raising an objection to consolidation of the Rede Debtors; Rede and Energisa filed replies. (Fact Stip. at ¶ 61.)

On September 9, 2013, the Brazilian Bankruptcy Court entered its decision confirming the Brazilian Reorganization Plan. (Fact Stip. at ¶ 61.) As part of this decision, the Brazilian Bankruptcy Court reversed its prior decision and held that that the Indenture Trustee could not vote on behalf of those Noteholders from whom it did not receive direction or authorization, finding that under the terms of the Indenture, the Indenture Trustee did not have the power, without the consent of each of the individual beneficial holders of Perpetual Notes, to effect any alteration to the values, charges, conditions, or maturity dates of the Perpetual Notes. (Fact Stip. at ¶ 100.) The Brazilian Bankruptcy Court determined that the Brazilian Reorganization Plan should nevertheless be confirmed because, even without the vote of the Indenture Trustee, both the secured and unsecured creditor classes had voted to accept the Brazilian Reorganization Plan. (Fact Stip. at ¶ 101.)

C. The Brazilian Reorganization Plan is Approved Via Cram–Down

On September 24, 2013, the Ad Hoc Group filed an objection to the Brazilian Bankruptcy Court's September 9, 2013 order confirming the Brazilian Reorganization Plan, arguing that (i) the vote of Denerge and EEVP-level creditors should not be permitted to control the outcome of the Rede-level assets and (ii) FI–FGTS's vote should not be counted because FI–FGTS remained a shareholder of EEVP (and thus, an insider ineligible to vote) due to the fact that, at the time the Rede Debtors filed for reorganization, FI–FGTS's exercise of its put right had not been perfected by a share transfer in the appropriate corporate books. (Fact Stip. at ¶ 70.) The Brazilian Bankruptcy Court overruled the Ad Hoc Group's objections, and the Ad Hoc Group appealed. (Fact Stip. at ¶¶ 70–73.)

On November 14, 2013, after determining that it had miscalculated the voting results, the Brazilian Bankruptcy Court entered an order clarifying its September

9, 2013 order (together, the "*Confirmation Decision*"). The November 14, 2013 order clarified that, even after disregarding the vote of the Indenture Trustee, the unsecured creditor class had narrowly missed the numerosity requirement for confirming the Brazilian Reorganization Plan;[20] therefore, the Brazilian Bankruptcy Court had confirmed the Brazilian Reorganization Plan pursuant to the cram-down provisions of Brazilian bankruptcy law.[21] (Fact Stip. at ¶¶ 101–02.)

The Rede Debtors have appealed the Confirmation Decision, arguing that the Brazilian Reorganization Plan was approved by both the secured and unsecured creditor classes by consensual means and without the need for cram-down. (Fact Stip. at ¶ 104.) Specifically, the Rede Debtors have appealed the Confirmation Decision's denial of Rede's argument that the votes of parties arguably related to Equatorial and CPFL—which together held seven votes—should be designated because such parties were related to the losing bidders, competitors of the Rede Debtors who had publicly declared that they were interested in investing in the Rede Debtors if the Brazilian Reorganization Plan was rejected. (Fact Stip. at ¶ 104.) The Ad Hoc Group also has appealed, arguing (i) that the Indenture Trustee had the right to vote on behalf of all Noteholders and (ii) that FI–FGTS did not have a right to vote as a secured creditor. (Fact Stip. at ¶ 102.) Both parties' appeals remain pending with the Brazilian Court of Appeals. (Fact Stip. at ¶¶ 61, 104.)

20. Approval of a plan under Brazilian law may be obtained in one of two ways: (1) through a "regular creditor majorities" procedure or (2) through a "cram-down" procedure. Approval of a plan through the regular creditor majorities procedure requires that the plan be approved by each class of claims. In Classes II and III, the plan must be approved by (i) more than 50 percent of the creditors present at the creditors' meeting, in number, in each class and (ii) creditors that hold more than 50 percent in amount of the allowed claims present at the creditors' meeting, in each class. All such 50 percent thresholds are calculated only over the base of creditors who, cumulatively, (a) are present at the meeting; (b) are allowed to vote; and (c) actually do so (*i.e.,* do not voluntarily abstain from voting). (Law Stip. at ¶ 17.) Here, at least four more accepting votes from unsecured creditors in Class III in the Brazilian Reorganization Plan were required for such class to accept the Plan. (Fact Stip. at ¶ 104.)

21. If the required majorities are not met for acceptance of the plan under Brazilian law, the plan may still be approved via a cram-down of the rejecting class. Approval of a plan through the cram-down procedure requires the court to approve the plan if the following cumulative requisites are met: (1) holders of a simple majority (more than 50 percent) in amount of the total allowed claims who (a) are present at the creditors' meeting, (b) are allowed to vote, and (c) actually do so, vote for approval of the plan; (2) the required majorities are met in one class of claims (if there are only two classes of claims); and (3)(a) if the required majorities are not met in Class II or in Class III, more than one-third (1/3) of the creditors that (i) are present at the creditors' meeting, (ii) are allowed to vote, and (iii) actually do so, in number, in such class, must have voted in favor of the plan and, cumulatively, creditors that hold more than one-third (1/3) in amount of the allowed claims and that (a) are present at the creditors' meeting, (b) are allowed to vote, and (c) actually do so, in such class, must have voted in favor of the plan. In addition, Brazilian bankruptcy law expressly provides that confirmation via cram-down is only possible if the plan does not entail different treatment among the creditors of the class that rejected it. The parties disagree regarding whether Brazilian law permits cram-down where the plan provides different treatment to creditors in the dissenting class under some circumstances if done for a fair and valid justification (*e.g.,* to enforce subordination rights or legislative priority). This issue has been extensively briefed by the parties and is currently on appeal in Brazil. (Law Stip. at ¶ 18.)

If the Rede Debtors are successful on appeal and the Brazilian Court of Appeals otherwise affirms the Confirmation Decision, the Brazilian Reorganization Plan may be deemed approved by both the secured and unsecured creditor classes by consensual means (without the need for cram-down under Brazilian bankruptcy law). If the Ad Hoc Group prevails in its appeal with respect to the right of the Indenture Trustee to vote, the unsecured class would reject the Brazilian Reorganization Plan by amount, notwithstanding the results with respect to numerosity. Moreover, if the Ad Hoc Group also prevails in its appeal with respect to FI–FGTS's right to vote, the Brazilian Reorganization Plan will be unable to satisfy the requirement of a consenting class for cram-down purposes. Finally, if the Ad Hoc Group prevails in its appeal with respect to consolidation, the Brazilian Reorganization Plan will be unable to satisfy any requirement for either ordinary confirmation or confirmation by cram-down under Brazilian bankruptcy law. (Fact Stip. at ¶ 104.)

V. The Terms and Provisions of the Brazilian Reorganization Plan

Under the Brazilian Reorganization Plan, Energisa will invest R$1.2 billion in the Rede Concessionaires and R$1.95 billion to pay the creditors of the Rede Debtors. The investment in the Rede Concessionaires may be derived from a variety of sources, including the sale of one or more Rede Concessionaires by Energisa, although Energisa has announced that no such sale is contemplated in the foreseeable future.

The Brazilian Reorganization Plan generally provides that certain creditors of the Rede Debtors, including the Noteholders, will have the option to receive either (i) cash equal to 25 percent of the principal amount of their claims in return for an assignment of such claims to Energisa or (ii) reinstatement of 100 percent of the principal amount of their claims paid out over 22 years, without interest. (Fact Stip. at ¶ 43.) The Brazilian Reorganization Plan also requires the Controlling Shareholder of the Rede Debtors to transfer his equity interests in the Rede Group to Energisa in consideration for the symbolic price of R$1.00, and it requires the assumption by Energisa of certain guarantees of the debts of the Rede Group that had been provided by the Controlling Shareholder of the Rede Debtors. (Fact Stip. at ¶ 43.)

A. Substantive Consolidation of the Rede Debtors

The Brazilian Reorganization Plan is premised on the consolidation of the assets and liabilities of all five Rede Debtors for voting and distribution purposes. (Fact Stip. at ¶ 55.) The Brazilian Reorganization Plan does not result in the actual corporate consolidation or merger of the Rede Debtors. (Fact Stip. at 23 n.13.) However, the Plan permits Energisa to modify the corporate structure of the Rede Group after the consummation of the transaction. (Fact Stip. at 23 n.13 (citing Ex. L (Brazilian Reorganization Plan) § 3.5).) In addition, Article 9.7.2 of the Brazilian Reorganization Plan specifies means for payment of all intercompany claims other than claims held by the Rede Concessionaires. (Fact Stip. at 23 n.13.) As described above, the Ad Hoc Group and the Indenture Trustee filed petitions with the Brazilian Bankruptcy Court objecting to, among other things, the presentation of a consolidated plan. (Fact Stip. at ¶¶ 58–61.) On May 27, 2013, the Brazilian Bankruptcy Court issued a decision finding that the consolidation of the Rede Debtors was appropriate and permitting the joint processing and consolidation of the Rede

Debtors for plan purposes. The Brazilian Bankruptcy Court found that the consolidation of the Rede Debtors was appropriate because,

> The "Rede" group, subject to reorganization, is in fact organized as a corporate group, with a common controlling company and credit inter-dependence, as loans exist between the companies that comprise the group, and cross corporate guarantees to honor obligations to third parties. Moreover, the plan is based on the joint cash flow of all the companies, in such a way to find an effective means of reorganization.[22]

On July 26, 2013, the Ad Hoc Group renewed its objection to consolidation in its objection to the confirmation of the Brazilian Reorganization Plan. (Fact Stip. at ¶ 61.) The substantive consolidation of the Rede Debtors is one of the infirmities of the Brazilian Reorganization Plan that is cited by the Ad Hoc Group as a reason to deny the relief requested by the Foreign Representative in this Court.[23]

B. Classification of Claims Generally

There were 111 claims asserted against the five Rede Debtors, totaling approximately R$3.990 billion and USD$655 million. Of those claims, 33 were asserted against multiple Rede Debtors. (Fact Stip. at ¶ 53.) Under Brazilian bankruptcy law, claims are divided into three classes: (i) labor related claims ("*Class I* "); (ii) secured claims ("*Class II* "); and (iii) unsecured claims, claims entitled to general and special privilege, and subordinated claims ("*Class III* "). (Law Stip. at ¶ 16.) No Class I claims were asserted against the Rede Debtors. Class II (secured) claims were filed by two creditors: (i) FI–FGTS, which asserted a R$712.5 million Class II secured claim against Denerge, secured by equity interests in other Rede Debtors, and (ii) BNDES, which asserted a R$135.5 million Class II secured claim against Rede. (Fact Stip. at ¶ 53.) Most of the Class III unsecured and other claims, totaling approximately R$1.89 million plus USD$655 million, were asserted against Rede. (Fact Stip. at ¶ 53.) Approximately R$775 million in claims were owed by certain Rede Debtors to other Rede Debtors, and, if netted, would result in R$500 million owing to Rede from other Rede Debtors. (Fact Stip. at ¶ 53.)

The Brazilian Reorganization Plan does not provide for treatment of the shareholders of the Rede Debtors as, under Brazilian bankruptcy law, shareholders cannot be deprived of their interests without their consent.[24] (Fact Stip. at ¶ 93.)

C. Treatment of Secured Claims

Under the Brazilian Reorganization Plan, secured claim holders were permitted to choose from three options for the treatment of their claims.[25] (Fact Stip. at

22. Fact Stip. at ¶ 58 (citing Ex. P (Decision of the Brazilian Bankruptcy Court, dated May 27, 2013) at 1–3).

23. The May 27, 2013 decision by the Brazilian Court did not address factors that, according to the Ad Hoc Group, would ordinarily be considered by a United States court considering the issue of substantive consolidation. Such factors include: disregard of corporate separateness, creditor confusion about which entity with which they were doing business, intermingling of funds, or fraud. (Fact Stip. at ¶ 59.)

24. Although the Brazilian Reorganization Plan does not extinguish the remaining equity interests held by minority shareholders, as discussed below, such remaining minority shares will be diluted upon consummation of the Brazilian Reorganization Plan. (Fact Stip. at ¶¶ 94–95.)

25. The three options consisted of:

¶¶ 74–75.) BNDES chose to assign its debt to Energisa in return for a 25 percent cash distribution paid on the closing date.[26] (Fact Stip. at ¶ 74.) FI–FGTS chose a 22–year note bearing four percent interest in exchange for committing to provide future financing to the Rede Debtors. (Fact Stip. at ¶ 76.) FI–FGTS is to provide future financing to the Rede Debtors in an amount equal to 90 percent of its claim, for a minimum period of payment of twenty years, with (i) at least a twelve-year period without the payment of principal; (ii) monthly amortization after the twelve-year period; and (iii) a maximum interest rate of seven percent per year, payable as agreed between the parties, as adjusted annually.[27] (Fact Stip. at ¶ 76.)

D. Treatment of Unsecured Claims

Although all unsecured claims are contained in one class under the Brazilian Reorganization Plan, the Plan distinguishes among three types of unsecured claims:

1. *Concessionaire Creditor Claims:* unsecured guaranty, surety, or joint claims against the Rede Debtors where the creditor's underlying principal claim is against one or more of the non-debtor Rede Concessionaires;
2. *Subsidiary Concessionaire Claims*: claims of non-debtor Rede Concessionaires; and
3. *General Unsecured Claims*: all unsecured claims (other than Concessionaire Creditor Claims and Subsidiary Concessionaire Claims), including claims by Noteholders.

(Fact Stip. at ¶ 77.) As more fully described below, under the Brazilian Reorganization Plan, Concessionaire Creditor Claims and Subsidiary Concessionaire Claims will be satisfied in full, whereas General Unsecured Claims, including claims of Noteholders, are entitled to a 25 percent recovery. The Ad Hoc Group maintains that such "disparate" treatment is a basis for denying the Plan Enforcement Relief (as defined below).

1. Treatment of Concessionaire Creditor Claims

There are eleven allowed Concessionaire Creditor Claims on the Creditors' List, totaling approximately R$421 million. (Fact Stip. at ¶ 83.) The holders of these claims, the "*Concessionaire Creditors,*"[28] were permitted to vote on the Brazilian

(A) retention of security interest and restatement [sic] of the principal amount of its debt in full to be paid over 22 years at a two percent interest rate, with a balloon principal payment in year 22;
(B) if the secured creditor chooses to commit to future financing of the reorganized companies on terms set forth in section 1.2.22 of the Plan, retention of security interest and restatement [sic] of the principal amount of its debt in full to be paid over 22 years at a four percent interest rate, with a balloon payment in year 22; and
(C) the secured creditor may assign its debt to Energisa in return for a 25 percent cash distribution paid on the closing date.
Fact Stip. at ¶ 74 (citing Ex. L (Brazilian Reorganization Plan) at Articles 6 and 8).

26. BNDESPar, a subsidiary of BNDES and the holder of 15.9 percent of the shares of Rede, held a right to sell its Rede shares to EEVP in return for a debt claim of R$390 million, which right was never exercised. (Fact Stip. at ¶ 91.) As a result, BNDESPar did not have a claim listed on the Creditors' List and will not receive a new distribution as a claimant under the Brazilian Reorganization Plan. (Fact Stip. at ¶ 91.) However, BNDESPar's claim for the exercise of the put remains a contingent liability for which Energisa may ultimately be responsible. (Fact Stip. at ¶ 92.)

27. Fact Stip. at ¶ 76 (citing Ex. L (Brazilian Reorganization Plan) at § 1.2.22).

28. A U.S.-based entity, the Inter–American Development Bank ("*IADB*") holds the ma-

Reorganization Plan because they hold guarantee or surety claims against one or more of the Rede Debtors (and therefore, the Rede Debtors are jointly and severally liable for the payment of such claims). (Fact Stip. at ¶ 83.)

While the Concessionaire Creditors were permitted to choose from the three Plan treatment options available to holders of General Unsecured Claims (discussed *infra*), if a Concessionaire Creditor agreed not to take further enforcement actions and waived all defaults, fines, and penalties against the Rede Concessionaires and the Rede Debtors, such Concessionaire Creditor (i) will receive (within 60 days of the closing date) payment in full of any portion of its obligations that have already matured pursuant to their original schedule and (ii) will have its surety, guarantee, or joint obligations replaced by Energisa on the same terms and conditions thereof. (Fact Stip. at ¶ 85.)

2. Treatment of Subsidiary Concessionaire Claims

Each of the eight Rede Concessionaires holds a Subsidiary Concessionaire Claim against the Rede Debtors, which, in the aggregate, total approximately R$504 million. (Fact Stip. at ¶ 87.) None of these parties was permitted to vote on the Brazilian Reorganization Plan, as the Rede Concessionaires are affiliates of the Rede Debtors. (Fact Stip. at ¶ 87.)

The Brazilian Reorganization Plan provides that holders of Subsidiary Concessionaire Claims will have their claims satisfied in full pursuant to the ANEEL Plan.[29] (Fact Stip. at ¶¶ 88–89.) As discussed above, Energisa has committed to invest at least R$1.2 million in the Rede Concessionaires under the ANEEL Plan; a significant portion of such amount will be used to cause the Rede Debtors to settle the Subsidiary Concessionaire Claims. (Fact Stip. at ¶ 90.)

3. Treatment of General Unsecured Claims

There are 109 General Unsecured Claims against the Rede Debtors,[30] including those of the Noteholders, totaling approximately R$3.142 billion plus approximately USD$655 million. (Fact Stip. at ¶ 78.) The Brazilian Reorganization Plan offers three plan treatment options to holders of General Unsecured Claims,[31]

jority in amount of the Concessionaire Creditor Claims, holding approximately USD$151 million against the Rede Concessionaires, CEMAT and CELTINS, which claims are guaranteed by Rede. (Fact Stip. at ¶ 84.) The remaining Concessionaire Creditors are Brazilian-based entities. (Fact Stip. at ¶ 84.)

29. To satisfy ANEEL's requirements, the Rede Debtors originally submitted their Correctional Plan to ANEEL on October 26, 2012, and such plan was subsequently revised. Among other things, this plan laid out Energisa's proposal for the assumption and reorganization of the Rede Concessionaires (as amended on October 1, 2013 and presented by the Rede Debtors and Energisa, the *"ANEEL Plan"*).

30. Except for certain holders of the Perpetual Notes and the IADB, all known holders of the General Unsecured Claims are Brazilian-based entities. (Fact Stip. at ¶ 78.) Because the Perpetual Notes are held in global note form with DTC, neither the Rede Debtors nor the Ad Hoc Group knows with certainty the identities or nationalities of the beneficial holders of the Perpetual Notes (other than the members of the Ad Hoc Group). The Ad Hoc Group purports to have been in contact with other holders of Perpetual Notes, one or more of which are also based in the U.S. The Perpetual Note claims were issued only to (i) non-U.S. persons in accordance with Regulation S of the U.S. Securities Act of 1933, as amended (the *"Securities Act"*) and (ii) qualified institutional buyers in accordance with Rule 144A of the Securities Act. (Fact Stip. at ¶ 79.)

31. The three plan treatment options available to a holder of an allowed General Unsecured Claim are:

(A) restatement [sic] of the principal amount of its debt in full to be paid over 22

and it provides that the type of consideration chosen by the majority of Noteholders (in principal amount) who indicated a preference for a type of consideration would govern the form of consideration provided to all Noteholders.[32] (Fact Stip. at ¶ 82.) After the Brazilian Reorganization Plan was approved, in response to the Rede Debtors' solicitation of Noteholders' preference, a majority in principal amount of the Noteholders (including all members of the Ad Hoc Group) chose Option C—to assign their claims to Energisa in return for a 25 percent cash distribution to be paid on the closing date. (Fact Stip. at ¶ 82.)

VI. The Foreign Representative Commences a Chapter 15 Proceeding in the United States

On January 16, 2014, the Foreign Representative filed the Petition, requesting recognition of the Brazilian Bankruptcy Proceeding as a foreign main proceeding.[33] The Petition also requested additional relief, pursuant to sections 1521 and 1507 of the Bankruptcy Code, enforcing the Brazilian Reorganization Plan in the United States, including an order (i) granting full faith and credit to (a) the Brazilian Reorganization Plan and (b) the Confirmation Decision and enjoining acts in the U.S. in contravention of the Confirmation Decision; and (ii) authorizing and directing the Indenture Trustee and DTC to take actions to carry out the terms of the Brazilian Reorganization Plan, including assigning the Global Note to Energisa and making the associated payments to the beneficial Noteholders (collectively, the "*Plan Enforcement Relief*").[34] According to the Foreign Representative, the latter is necessary because the Indenture Trustee has indicated that it will not assign the Global Note to Energisa (in accordance with the Confirmation Decision) without obtaining a directive from this Court. (Fact Stip. at ¶ 117.) In addition, the Foreign Representative has stated that, while Energisa may deposit funds with the Brazilian Bankruptcy Court for the benefit of the holders of the Perpetual Notes, Energisa is unlikely to fund the distribution directly to the Indenture Trustee without assurance of such assignment. (Fact Stip. at ¶ 117.)

The Ad Hoc Group did not object to entry of an order recognizing (i) the Brazilian Bankruptcy Proceeding as a foreign main proceeding pursuant to chapter 15 of the Bankruptcy Code and (ii) José Carlos Santos, the Petitioner, as Rede's Foreign Representative. Accordingly, the parties agreed to, and the Court approved, a stipulated order granting recognition to the Brazilian Bankruptcy Proceeding as a foreign main proceeding.[35] Then, on February 25, 2014, the Ad Hoc Group filed an objection to the requested Plan Enforce-

years at a one percent interest rate, with a balloon principal payment in year 22;
(B) if the unsecured creditor chooses to commit to future financing of the reorganized companies on terms defined in section 1.2.23 of the Plan, restatement [sic] of the principal amount of its debt in full to be paid over 22 years at a one percent interest rate, subject to annual monetary adjustment on the value of the principal balance, with a balloon payment in year 22; and
(C) the unsecured creditor may assign its claim(s) to Energisa in return for a 25 percent cash distribution paid on the closing date.

(Fact Stip. at ¶ 81 (citing Ex. L (Brazilian Reorganization Plan) at Articles 7 and 8).)

32. Fact Stip. at ¶ 81 (citing Ex. L (Brazilian Reorganization Plan) at § 7.1.4).

33. Petition at ¶ 35.

34. Petition at ¶¶ 53–68.

35. Order Granting Recognition of Foreign Main Proceeding [Docket No. 18].

ment Relief (the "*Objection*"),[36] arguing that (i) the Foreign Representative is not entitled to relief under sections 1521 or 1507 of the Bankruptcy Code and (ii) granting the Plan Enforcement Relief would be manifestly contrary to U.S. public policy and should be denied pursuant to section 1506.[37] In particular, the Ad Hoc Group argues that the Brazilian Reorganization Plan has been "fraught with infirmities," including (i) a significant extraction of value for shareholders; (ii) disparate treatment of similarly situated creditors; (iii) targeting of such disparate treatment at U.S.-based creditors; (iv) protection of local creditor interests by fiat; and (v) the use of "phantom" consolidation and a single insider vote to cram down an otherwise unconfirmable plan.[38]

On May 2, 2014, the Foreign Representative filed a reply to the Objection (the "*Reply*"),[39] arguing that the Brazilian Bankruptcy Proceeding was not administered in a manner manifestly contrary to U.S. principles and that the requested relief is proper under sections 1521 and 1507 of the Code.[40] Although both the Foreign Representative and the Ad Hoc Group were entitled to an evidentiary hearing on the propriety of the Plan Enforcement Relief, the parties instead agreed to file the Stipulation of Facts and the Stipulation of Law rather than conduct an evidentiary hearing. On May 9, 2014, the Court heard argument on whether the Plan Enforcement Relief requested by the Foreign Representative should be granted.

DISCUSSION

I. Applicable Law

[1] Chapter 15 of the Bankruptcy Code, which adopted the substance and most of the text of the United Nations Commission on International Trade Law's ("*UNCITRAL*") Model Law on Cross–Border Insolvency, provides a framework for recognizing and giving effect to foreign insolvency proceedings. *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 132 (2d Cir. 2013). A central tenet of chapter 15 is the importance of comity in cross-border insolvency proceedings. *In re Cozumel Caribe S.A. de C.V.*, 482 B.R. 96, 114–15 (Bankr. S.D.N.Y.2012). If a foreign case is recognized as a foreign main proceeding, as it was here, certain relief automatically goes into effect, pursuant to 11 U.S.C. § 1520, and, under section 1521, a bankruptcy court may grant "any appropriate relief" in order to "effectuate the purpose of this chapter [15] and to protect the assets of the debtor or the interests of the creditors." 11 U.S.C. § 1521(a). Such relief expressly includes:

> (1) staying the commencement or continuation of an individual action or proceeding concerning the debtor's assets, rights, obligations or liabilities to the extent they have not been stayed under section 1520(a);
>
> (2) staying execution against the debtor's assets to the extent it has not been stayed under section 1520(a);

36. Objection of Ad Hoc Group of Rede Noteholders to Foreign Representative's Petition for Recognition of Brazilian Bankruptcy Proceeding and Motion for Order Granting Related Relief Pursuant to 11 U.S.C. §§ 105(a), 1509(b), 1515, 1517, 1520 and 1521 [Docket No. 16].

37. Objection at 14–21.

38. Objection at 2.

39. Foreign Representative's Reply to Objection of Ad Hoc Group of Rede Noteholders to Foreign Representative's Motion for Order Granting Plan Enforcement [Docket No. 29].

40. Reply at ¶¶ 24–42; *see also* Petition at ¶¶ 57–88.

(3) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under section 1520(a);

(4) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;

(5) entrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative or another person, including an examiner, authorized by the court;

(6) extending relief granted under section 1519(a); and

(7) granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a).

11 U.S.C. § 1521(a).

There are nonetheless certain restrictions. The court may grant relief under section 1521(a) "only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected," [41] and it may subject any relief granted under section 1521 to "conditions it considers appropriate." 11 U.S.C. § 1522(b). One court has observed that the policy underlying section 1522 is that there should be "a balance between relief that may be granted to the foreign representative and the interests of the person that may be affected by such relief." *In re Int'l Banking Corp. B.S.C.,* 439 B.R. 614, 626 (Bankr.S.D.N.Y.2010) (citing GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY); *see also* H.R.Rep. No. 109–31, at 116 (2005).

[2] In addition to the types of relief enumerated in section 1521, section 1507(a) of the Bankruptcy Code provides that "[s]ubject to the specific limitations stated elsewhere in this chapter[,] the court, if recognition is granted, may provide additional assistance to a foreign representative under this title or under other laws of the United States." 11 U.S.C. § 1507(a); *see also* H.R.Rep. No. 109–31 (2005). Pursuant to section 1507, the court is authorized to grant any "additional assistance" available under the Bankruptcy Code or under "other laws of the United States," provided that such assistance is consistent with the principles of comity and satisfies the fairness considerations set forth in section 1507(b).[42] *In re Toft,* 453 B.R. 186, 190 (Bankr. S.D.N.Y.2011). As noted in *Toft,* however, the relationship between sections 1507 and 1521 "is not entirely clear." *Id.* The Fifth Circuit in *In re Vitro S.A.B. de C.V.,* 701 F.3d 1031, 1054 (5th Cir.2012), considered, as a matter of first

41. 11 U.S.C. § 1522(a).

42. Section 1507(b) of the Bankruptcy Code provides that,

In determining whether to provide additional assistance under this title or under other laws of the United States, the court shall consider whether such additional assistance, consistent with the principles of comity, will reasonably assure—

(1) just treatment of all holders of claims against or interests in the debtor's property;

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of the debtor;

(4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and

(5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

11 U.S.C. § 1507(b).

impression, whether a foreign representative may independently seek relief under either section 1521 or section 1507 and whether a court may itself determine under which provision such relief would fall. The *Vitro* court concluded that a court confronted by this situation should first consider the specific relief enumerated under section 1521(a) and (b), and, if the relief is not provided for there, the court should then consider whether the requested relief falls more generally under section 1521's grant of any appropriate relief. *Id.* at 1054. "Appropriate relief," the Fifth Circuit concluded, is "relief previously available under Chapter 15's predecessor, § 304." *Id.* "Only if a court determines that the requested relief was not formerly available under § 304," the Fifth Circuit continued, "should a court consider whether relief would be appropriate as 'additional assistance' under § 1507." *Id.* It remains to be seen whether the three-part analysis crafted by the *Vitro* court is embraced by other courts.

[3, 4] Chapter 15 thus provides courts with broad, flexible rules to fashion relief that is appropriate to effectuate the objectives of the chapter in accordance with comity. *See In re Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd.,* 389 B.R. 325, 333–34 (S.D.N.Y. 2008); *In re SPhinX, Ltd.,* 351 B.R. 103, 112 (Bankr.S.D.N.Y.2006) ("chapter 15 maintains—and in some respects enhances—the 'maximum flexibility' . . . that section 304 provided bankruptcy courts in handling ancillary cases in light of principles of international comity and respect for the laws and judgments of other nations") (citations omitted), *aff'd,* 371 B.R. 10 (S.D.N.Y.2007). While the interplay between the relief available under sections 1507 and 1521 is far from clear, it is evident that recognition assistance of the types available under those sections is "largely discretionary and turns on subjective factors that embody principles of comity." *Toft,* 453 B.R. at 190 (citing *Bear Stearns High–Grade Structured Credit Strategies Master Fund,* 389 B.R. at 333, *aff'g* 374 B.R. 122 (Bankr.S.D.N.Y.2007)).

[5, 6] Of particular significance to the case at bar is the well-established principle that the relief granted in a foreign proceeding and the relief available in the United States do not need to be identical. *In re Metcalfe & Mansfield Alt. Invs.,* 421 B.R. 685, 697 (Bankr.S.D.N.Y.2010). On the other hand, it is also clear that "[t]he principle of comity has never meant categorical deference to foreign proceedings. It is implicit in the concept that deference should be withheld where appropriate to avoid the violation of the laws, public policies, or rights of the citizens of the United States." *Bank of New York v. Treco (In re Treco),* 240 F.3d 148, 157 (2d Cir.2001); *see also Argo Fund Ltd. v. Bd. of Dirs. of Telecom Arg., S.A. (In re Bd. of Dirs. of Telecom Arg., S.A.),* 528 F.3d 162, 171–73 (2d Cir.2008); *Pravin Banker Assocs., Ltd. v. Banco Popular Del Peru,* 109 F.3d 850, 854 (2d Cir.1997); *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.,* 825 F.2d 709, 713 (2d Cir.1987); *Cunard S.S. Co. Ltd. v. Salen Reefer Servs. AB,* 773 F.2d 452, 457 (2d Cir.1985); *Toft,* 453 B.R. at 190–191.

[7] Moreover, all relief under chapter 15, including relief requested under either section 1521 or section 1507, is subject to the limits in section 1506, which permits a court to decline to take any action, including granting additional relief pursuant to section 1521 or additional assistance pursuant to section 1507 of the Bankruptcy Code, if such action would be "manifestly contrary" to the public policy of this coun-

try.[43] *Toft,* 453 B.R. at 193 (citing 11 U.S.C. § 1506).

[8, 9] However, the public policy exception is clearly drafted in narrow terms and "the few reported cases that have analyzed [section] 1506 at length recognize that it is to be applied sparingly." *Toft,* 453 B.R. at 193; *see In re Ephedra Prods. Liab. Litig.,* 349 B.R. 333, 336 (S.D.N.Y.2006) (the public policy exception embodied in section 1506 should be "narrowly interpreted, as the word 'manifestly' in international usage restricts the public policy exception to the most fundamental policies of the United States") (citing H.R.Rep. No. 109–31(I), at 109, *reprinted in* 2005 U.S.C.C.A.N. 88, 172) (grammatical changes omitted); *see also Fairfield Sentry,* 714 F.3d at 139–40; *Bd. of Dirs. of Telecom Arg. S.A.,* No. 05–17811, 2006 WL 686867, at *25 (Bankr. S.D.N.Y. Feb. 24, 2006) ("the foreign law . . . must not be repugnant to the American laws and policies") (citing *In re Brierley,* 145 B.R. 151, 166 (Bankr.S.D.N.Y. 1992)), *aff'd,* 528 F.3d 162 (2d Cir.2008); *In re Culmer,* 25 B.R. 621, 631 (Bankr. S.D.N.Y.1982); *see also In re Sino–Forest Corp.,* 501 B.R. 655, 664–665 (Bankr. S.D.N.Y.2013). Foreign judgments "are generally granted comity as long as the proceedings in the foreign court 'are according to the course of a civilized jurisprudence, *i.e.* fair and impartial.'" *Toft,* 453 B.R. at 194 (citing *In re Ephedra Prods. Liab. Litig.,* 349 B.R. at 336 (citing and quoting the seminal case on comity, *Hilton v. Guyot,* 159 U.S. 113, 205–06, 16 S.Ct. 139, 40 L.Ed. 95 (1895))); *see also Metcalfe,* 421 B.R. at 697 (the key determination required under section 1506 is whether the procedures used in the foreign jurisdiction "meet our fundamental standards of fairness").

As described in detail above, the Foreign Representative has requested that the Court grant the additional Plan Enforcement Relief, which consists of the following:

> (i) an order granting full faith and credit[44] to the [Confirmation Decision] and the Brazilian Reorganization Plan, and an injunction of acts in the U.S. in contravention of that order; and (ii) an order authorizing and directing the Indenture Trustee and DTC to take the necessary actions to carry out the terms of the Brazilian Reorganization Plan, including assigning the Global Note to Energisa and making the associated payments to the beneficial Noteholders.

(Reply at ¶ 11.) For the reasons that follow, the Court finds that the requested Plan Enforcement Relief is proper under both sections 1521 and 1507 of the Bankruptcy Code and should not be denied pursuant to the public policy exception in section 1506, and it therefore grants the Plan Enforcement Relief.

II. The Plan Enforcement Relief is Proper Under Section 1521 of the Bankruptcy Code

[10] The Plan Enforcement Relief requested by the Foreign Representative is "appropriate relief" of a type not specifically enumerated in the non-exhaustive list set forth in section 1521(a), which the Foreign Representative asserts is nonetheless proper because it is the type of relief that was "available under section 304 [of the

43. Section 1506 of the Bankruptcy Code provides that "[n]othing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States." 11 U.S.C. § 1506.

44. As a technical matter, the Confirmation Decision and the Brazilian Reorganization Plan are not entitled to "full faith and credit" inasmuch as these are words taken from Article IV of the Constitution of the United States and are inapplicable to foreign judgments.

Bankruptcy Code] and is routinely granted under U.S. law." (Reply at ¶¶ 25–26 (citing *In re Vitro S.A.B. de C.V.,* 701 F.3d 1031, 1054 (5th Cir.2012)).) The Foreign Representative asserts that requests for an order (i) enforcing a foreign confirmation order, including the request for an injunction of acts in contravention of such order, and (ii) directing the Indenture Trustee and DTC to take steps to assign the Global Note and make payments to the Noteholders, are each types of requested relief that were available under section 304 of the Bankruptcy Code and are types of relief typically granted in chapter 11 plenary proceedings as well. (Reply at ¶¶ 26–27.) Accordingly, the Foreign Representative maintains, such relief is available under section 1521.

The Court agrees. The request by the Foreign Representative that the Court (i) enforce the Brazilian Reorganization Plan and the Confirmation Decision and (ii) enjoin acts in the U.S. in contravention of the Confirmation Decision is relief of a type that courts have previously granted under section 304 of the Bankruptcy Code and other applicable U.S. law. *See, e.g., Bd. of Dirs. of Telecom Arg.,* 528 F.3d at 174–76; *see also In re Petition of Garcia Avila,* 296 B.R. 95, 114–15 (Bankr.S.D.N.Y.2003); *see generally* 11 U.S.C. § 1141(d)(1)(A) (granting discharge to chapter 11 debtor upon confirmation except as otherwise provided for in the plan); 11 U.S.C. § 524(a) (describing the effect of a discharge). Similarly, the Foreign Representative's request for an instruction directing the Indenture Trustee and DTC to take the actions necessary to carry out the terms of the Brazilian Reorganization Plan, including assigning the Global Note to Energisa and making payments to beneficial Noteholders, is also relief of a type available under U.S. law. *See, e.g.,* 11 U.S.C. § 1142(b) (providing that a court "may direct ... any ... necessary party to execute or deliver or join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act ... that is necessary for the consummation of the plan"); *In re Washington Mut., Inc.,* No. 08–12229, 2012 WL 1563880 at *38 (Bankr.D.Del. Feb. 24, 2012) (directing indenture trustee to make distributions in order to effectuate plan transactions).

The Ad Hoc Group does not challenge the Foreign Representative's position that the Plan Enforcement Relief is available under section 1521 of the Bankruptcy Code. Rather, the Ad Hoc Group asserts that the Court should consider the particular facts of the case at hand and balance the equities of the requested relief against those facts. The Ad Hoc Group believes that the Foreign Representative cannot meet his burden with respect to the applicable balancing tests and factors [45] and

45. The Ad Hoc Group contends that a "very similar set of factors are to be considered when granting relief under either section 1521 or 1507." (Objection at 16.) As noted in *Sino–Forest,* "[t]he factors listed in section 1507(b)(1)-(5), to be considered in deciding whether to extend comity under section 1507, are not included in section 1521(a).... [S]ection 1522 places limitations on the relief under section 1521: relief may be granted 'only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected.'" *Sino–Forest Corp.,* 501 B.R. at 664 n.4; *see also In re Atlas Shipping A/S,* 404 B.R. 726, 740 (Bankr. S.D.N.Y.2009) (noting that the relief under section 1521(b), entrusting the distribution of all or part of the debtor's assets located in the United States to the foreign representative or another person, may be granted only if the interests of local creditors are "sufficiently protected," but making no mention that the other balancing factors listed in section 1507(b) apply to the relief available under section 1521(a)). *See infra* for a discussion of whether the Plan Enforcement Relief may be

urges that the Court exercise its discretion and deny the requested Plan Enforcement Relief. (Objection at 14–17.)

As discussed above, relief under section 1521 may be granted "only if the interests of creditors and other interested entities, including the debtor, are sufficiently protected." 11 U.S.C. § 1522(a); *Int'l Banking Corp.,* 439 B.R. at 626. Section 1522 requires the bankruptcy court to ensure the protection of both the creditor(s) and the debtor(s). The Court finds that the interests of the Rede Debtors and their creditors, including the members of the Ad Hoc Group, will be sufficiently protected by the granting of the Plan Enforcement Relief. Enforcement of the Confirmation Decision—and ordering an injunction against actions the Ad Hoc Group may pursue in the United States in contravention of such decision—will allow the Rede Debtors to reorganize and to make distributions to creditors (including to the 63 percent of Noteholders who are not members of the Ad Hoc Group and who are not contesting any aspect of the Brazilian Reorganization Plan), consistent with the Brazilian Reorganization Plan. The Brazilian Reorganization Plan contemplates, as a condition precedent to its full implementation, this Court's approval of the Plan Enforcement Relief. In fact, the Foreign Representative has represented that the Indenture Trustee will likely decline to make the assignment of the Global Note without the directive of this Court. The Court's refusal to grant the Plan Enforcement Relief would thus mean that the Brazilian Reorganization Plan, which has already been substantially consummated, could not be fully implemented and the distributions to Noteholders would be prevented or substantially delayed. Denying the relief would also mean that the Ad Hoc Group would likely return to Brazil to attempt to renegotiate and seek a higher distribution, or would commence lawsuits against the Debtor in the United States to recover further on its claims. In short, the Ad Hoc Group simply wants another chance to renegotiate the terms of the Brazilian Reorganization Plan and offers no evidence that its efforts would be successful. Moreover, the Plan Enforcement Relief does not prevent the Ad Hoc Group from continuing to assert its rights under Brazilian law in the pending appeals of the decisions of the Brazilian Bankruptcy Court. In balancing the interests of the Rede Debtors against those of the Ad Hoc Group, the Court concludes that the Plan Enforcement Relief passes muster under section 1522(a) and is relief that is proper under section 1521.

III. The Plan Enforcement Relief is Also Proper Under Section 1507 of the Bankruptcy Code

[11] As discussed above, if recognition is granted, the bankruptcy court may grant "additional assistance" to a foreign representative under chapter 15 or under other laws of the United States, pursuant to section 1507 of the Code. Section 1507(b) directs the Court to "consider whether such assistance, consistent with principles of comity, will reasonably assure" the following:

(1) just treatment of all holders of claims against or interests in the debtor's property;

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of the debtor;

granted as "additional assistance" under section 1507.

(4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and

(5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

11 U.S.C. § 1507(b)(1)-(5). These provisions embody the protections that were previously contained in section 304 of the Bankruptcy Code, "with one critical exception: the principle of comity was removed as one of the factors and elevated to the introductory paragraph." *Atlas Shipping,* 404 B.R. at 740.

Although the Court need not reach the issue,[46] the Court has also considered whether the Plan Enforcement Relief would be available as "additional assistance" under section 1507 and concludes that it is. The Court has determined that granting the Plan Enforcement Relief meets the requirements of section 1507(b) inasmuch as it reasonably assures (a) the just treatment of creditors; (b) protection of U.S. creditors against prejudice or inconvenience in the processing of their claims; (c) prevention of preferential or fraudulent transfers; and (d) distribution of proceeds substantially in accordance with the Code's priority scheme. Thus, the Plan Enforcement Relief also may be granted as "additional assistance" pursuant to section 1507.

A. Creditors Were Treated Justly in Brazil

[12, 13] Section 1507(b)(1) requires that additional relief only be granted if the just treatment of creditors is ensured. 11 U.S.C. § 1507(b)(1). The "just treatment" factor is generally satisfied upon a showing that the applicable law "provides for a comprehensive procedure for the orderly and equitable distribution of [the debtor]'s assets among all of its creditors." *Bd. of Dirs. of Telecom Arg.,* 528 F.3d at 170 (citations omitted and grammatical changes in original) (discussing the "just treatment" factor under 11 U.S.C. § 304(c)). The court in *Board of Directors of Telecom Argentina* explained that instances in which a court has held that a foreign proceeding does not satisfy this factor include where the proceeding "fails to provide creditors 'access to information and an opportunity to be heard in a meaningful manner,' which are '[f]undamental requisites of due process,' " or where the proceeding "would not recognize a creditor as a claimholder." *Id.* (citations omitted).

Here, the Foreign Representative has demonstrated that creditors were given access to information and a meaningful opportunity to be heard in the Brazilian Bankruptcy Proceeding and that Brazilian law provides for a "comprehensive procedure" for the orderly and equitable distribution of the Rede Debtors' assets to creditors. Specifically, the Brazilian Bankruptcy Proceeding provided creditors with ample opportunity to obtain information about the Rede Debtors and the terms of the various plan proposals. It also provided creditors with the right and ability to vote on a plan of reorganization, to submit proofs of claim, and to file objections to and appeals of the decisions of the Brazilian Bankruptcy Court. It is clear that the Brazilian Reorganization Plan provides for equitable distribution of the Rede Debtors' assets based on the claims that creditors submitted, once the Brazilian Reorganization Plan becomes fully im-

46. *See Atlas Shipping,* 404 B.R. at 741 (granting relief under section 1521 and concluding that it was unnecessary to determine whether "additional assistance" was available under section 1507).

plemented.[47] As such, the Court finds that the Plan Enforcement Relief meets the requirements of section 1507(b)(1) to reasonably assure the just treatment of creditors.

B. There is No Prejudice to U.S. Creditors in the Processing of Claims in Brazil

The second factor of section 1507(b) requires that U.S. creditors be protected against "prejudice and inconvenience in the processing of claims" in the foreign proceeding. 11 U.S.C. § 1507(b)(2). Straining to find a basis to fit its arguments within this factor, the Ad Hoc Group argues that U.S. creditors were prejudiced in the processing of Noteholders' votes because the Indenture Trustee had the "rug pulled out from [under] it during the voting process" and voting on an individual basis by Noteholders required the satisfaction of various procedural hurdles. (Objection at 17.) The Foreign Representative points out, however, that all Noteholders who wished to appear at the creditors' meetings and vote independently of the Indenture Trustee were permitted to do so after submitting documentation verifying their identity and holdings. (Reply at ¶ 36.) Moreover, in evaluating the propriety of the Indenture Trustee's vote, the Brazilian Bankruptcy Court recognized the right of individual Noteholders to vote. Indeed, the entire issue is a red herring inasmuch as the Ad Hoc Group admits that the vote of the Indenture Trustee was rendered irrelevant because the unsecured class voted against the Brazilian Reorganization Plan, notwithstanding the elimination of the Indenture Trustee's vote.[48] (Objection at 18.) To the extent that the Ad Hoc Group invites the Court to draw an inference that the Brazilian Bankruptcy Court acted in a prejudicial, result-oriented fashion by reversing its own determination on the Indenture Trustee's right to vote, the Court declines the invitation. Nothing in the record supports such an inference. As such, the Court finds that the second factor of section 1507(b) is satisfied.

C. There Were No Preferential or Fraudulent Property Distributions in the Brazilian Bankruptcy Proceeding

The third factor of section 1507(b) requires that the additional assistance reasonably assure the "prevention of preferential or fraudulent dispositions of property of the debtor." 11 U.S.C. § 1507(b)(3). The Ad Hoc Group argues summarily that the Brazilian Reorganization Plan would promote, rather than prevent, fraudulent dispositions of property by permitting FI–FGTS and BNDESPar to recover significant value on their claims, notwithstanding that such recovery will flow from equity

47. In arguing that creditors were not treated justly in Brazil, the Ad Hoc Group also points to the fact that the Brazilian Reorganization Plan provides different treatment to certain types of unsecured claims. For the reasons discussed at section IV.C., *infra*, the Court finds that the disparate treatment of the claims of the Rede Concessionaires and the Concessionaire Creditors under the plan was necessary in order to comply with ANEEL's requirement that the Rede Concessionaires be adequately capitalized before ANEEL would lift its intervention. As the Foreign Representative points out, had ANEEL refused to lift its intervention and instead terminated the Rede Concessionaires' concession agreements with the Brazilian government, the Rede Group would be left with only "an unprecedented and lengthy litigation claim against the Brazilian government," the recoveries of which have already been partially assigned to secure certain debts of the Rede Concessionaires. (Reply at ¶¶ 32–33.)

48. Moreover, indenture trustees are not entitled to vote on chapter 11 plans in the United States.

and/or structurally subordinated positions. (Objection at 18.) It is not at all apparent that this was the intent of this subsection of section 1507. In any event, the record is devoid of evidence indicating fraudulent dispositions of property to either FI–FGTS or BNDESPar. As the record clearly demonstrates, the Brazilian Bankruptcy Court determined that FI–FGTS is a secured creditor, even though it exercised its put right to obtain a secured claim against Denerge one day prior to the date that the Rede Debtors filed for bankruptcy. (Fact Stip. at ¶¶ 64–65.) Therefore, the distribution it receives on account of its secured claim cannot be considered fraudulent. BNDESPar, on the other hand, is a minority shareholder, owning 15.9 percent of the shares of the Rede Debtors. (Fact Stip. at ¶¶ 63, 91.) BNDESPar held a right to sell its Rede shares to EEVP in return for a debt claim of R$390 million, but it never exercised such right. As a result, BNDESPar will not receive any new distribution under the Brazilian Reorganization Plan, though it will retain its Rede shares. (Fact Stip. at ¶ 9 1.) While equity cannot be extinguished under Brazilian bankruptcy law, the record indicates that BNDESPar's Rede shares will be substantially diluted as a result of Energisa's substantial capital investment in the Rede Group as required by the ANEEL Plan. Any distribution to BNDESPar cannot be considered a fraudulent or preferential disposition of property. The Court finds, therefore, that the third factor under section 1507(b) has been satisfied.

D. The Distribution of Proceeds Under the Brazilian Reorganization Plan Was Substantially in Accordance With U.S. Law

[14] The fourth factor of section 1507(b) requires that the additional assistance provided to a foreign representative will reasonably assure the "distribution of proceeds of the debtor's property substantially in accordance with the [Bankruptcy Code]." 11 U.S.C. § 1507(b)(4). The Ad Hoc Group argues that the distribution of the Rede Debtors' property violates the Bankruptcy Code because the Brazilian Reorganization Plan runs afoul of the absolute priority rule [49] by preserving value for equity and/or structurally subordinated creditors FI–FGTS and BNDESPar, and that the Confirmation Decision wrongly approved such treatment through "cram-down," exactly when the absolute priority rule should protect creditors. (Objection at 19.)

As discussed in sections IV.B. and IV.C. below, the cram-down provisions of Brazilian bankruptcy law provide meaningful protections that are similar to the protections embodied in U.S. law and the Plan's different treatment of certain unsecured creditors has a reasonable basis and was necessary to consummate the Plan. As such, proceeds under the Brazilian Reorganization Plan are being distributed substantially in accordance with U.S. law pursuant to section 1507(b)(4).[50]

49. A foreign insolvency regime need not contain an absolute priority rule identical to that of U.S. law. *Garcia Avila,* 296 B.R. at 111; *see also Bd. of Dirs. of Telecom Arg.,* 528 F.3d at 173.

50. Moreover, both the Rede Debtors and the Ad Hoc Group have appealed the confirmation of the Brazilian Reorganization Plan, which was approved via cram-down. If, after all appeals are taken by the parties in Brazil, the cram-down requirements are not found to have been satisfied, the Brazilian Reorganization Plan will be rejected and a liquidation proceeding will be commenced.

IV. With Respect to Section 1506, the Brazilian Bankruptcy Proceeding Was Administered in a Manner Consistent With U.S. Public Policy

[15] The centerpiece of the Ad Hoc Group's objection is that the Plan Enforcement Relief would be fundamentally inconsistent with U.S. public policy, and accordingly, runs afoul of section 1506 of the Bankruptcy Code. The Ad Hoc Group specifically cites to five aspects of the Brazilian Reorganization Proceeding that it asserts violate U.S. public policy: (i) an unfair marketing process; (ii) the use of "phantom" consolidation and a single insider vote to cram down an otherwise unconfirmable plan; (iii) a significant extraction of value for shareholders which is violative of the distribution scheme under U.S. law; (iv) disparate treatment of similarly situated creditors; and (v) targeting of that disparate treatment at U.S.-based creditors, including to protect local creditor interests. (Objection at 2.)

As discussed above, the public policy exception embodied in section 1506 of the Bankruptcy Code is to be narrowly construed and applied "sparingly." *Toft,* 453 B.R. at 193 ("the few reported cases that have analyzed [section] 1506 at length recognize that it is to be applied sparingly"). The Court finds that neither the Brazilian Reorganization Plan nor the Brazilian bankruptcy law concepts which are the bases of the Confirmation Decision are manifestly contrary to U.S. public policy. Brazilian bankruptcy law meets our fundamental standards of fairness and accords with the course of civilized jurisprudence. Accordingly, the public policy exception reflected in section 1506 does not provide a basis for denial of the Plan Enforcement Relief.

A. The Marketing Process of the Rede Debtors' Assets, the Consolidation of the Rede Debtors, and the Confirmation of the Brazilian Reorganization Plan Did Not Violate Creditors' Due Process Rights and Were Not Manifestly Contrary to U.S. Public Policy

While the members of the Ad Hoc Group complain about virtually every aspect of the Brazilian Bankruptcy Proceeding from start to finish, their chief complaints center around the process by which the Brazilian Reorganization Plan was approved; *i.e.,* the manner in which the Rede Debtors' assets were marketed; the determination by the Brazilian Bankruptcy Court that the Rede Debtors' assets and liabilities could be consolidated for plan purposes; and the voting process, which they argue was procedurally unfair and violated creditors' due process rights. The Court considers these arguments in turn.

1. The Marketing Process of the Rede Debtors' Assets

The Ad Hoc Group asserts that the marketing process of the Rede Debtors' assets was flawed and favored local stakeholders and insiders. In particular, the Ad Hoc Group argues that the Rede Debtors initially chose the Equatorial–CPFL Plan without competitive bidding and then inappropriately granted the bidder exclusivity, such that Energisa was only able to submit a competing proposal after a contest at the second creditors' meeting. (Objection at 9.) The Ad Hoc Group also contends that it was improper for the Rede Debtors to refuse to accept the first Energisa proposal, alleging that it would have resulted in a materially better recovery for Noteholders and for all structurally senior creditors. (Objection at 9.) [51]

51. Specifically, the Ad Hoc Group asserts that the original proposal submitted by Energisa (that offered to purchase operating subsidiaries directly from Rede) would have caused the

The record reflects otherwise. The Rede Debtors' assets were widely marketed through a competitive bidding process. Rothschild obtained a number of binding offers, including the joint bid by CPFL and Equatorial which was initially selected by the Rede Debtors and was presented to the Brazilian Bankruptcy Court in the form of the Equatorial–CPFL Plan. (Fact Stip. at ¶¶ 28–30; 34–35.) Though the Ad Hoc Group contends that the Equatorial–CPFL SPA improperly prohibited the Rede Debtors from marketing the company to other potential bidders for some time, such a prohibition is recognized in large chapter 11 cases. *See, e.g., In re Global Crossing, Ltd.,* 295 B.R. 726, 741 n.55 (Bankr.S.D.N.Y.2003) (approving debtor's compliance with a no-shop provision in a purchase agreement that included a carve-out for communications required for the debtors to comply with their fiduciary duties). Furthermore, the record illustrates that COPEL–Energisa was eventually able to make not one, but two competing bids, the first of which the Rede Debtors evaluated but ultimately rejected for various valid reasons, including that it was inferior to the Equatorial–CPFL proposal. (Fact Stip. at ¶¶ 37–42.)

The Ad Hoc Group offers no evidence to substantiate its arguments that the Rede Debtors should not have rejected the original Energisa proposal and that it would have resulted in a better recovery for Noteholders. The bald assertion that a party should have or could have received a higher distribution, especially without supporting evidence as to how much more creditors should have or could have received, is insufficient to make a showing that the requested ancillary relief should be denied or that creditors' due process rights were violated. *See generally Bd. of Dirs. of Telecom Arg.,* 528 F.3d at 173 (creditor's argument that court should not grant comity because creditors may receive a smaller distribution in the foreign jurisdiction than they would receive in the United States was irrelevant if the other factors under former section 304(c) of the Bankruptcy Code were met, as the Bankruptcy Code "does not require that the amount of a distribution in a foreign insolvency proceeding be equal to the hypothetical amount the creditor would have received in a proceeding under U.S. law").

Moreover, when Energisa submitted its revised proposal, the Rede Debtors presented it to creditors along with the Equatorial–CPFL Plan. Rede's creditors preferred the revised Energisa proposal to the Equatorial–CPFL Plan because it raised unsecured creditor recoveries from fifteen percent (under the Equatorial–CPFL Plan) to 25 percent (under the Energisa proposal which became the Brazilian Reorganization Plan). (Fact Stip. at ¶ 43.) The marketing process of the Rede Debtors' assets and the resulting evolution and improvement of the return to unsecured creditors resemble chapter 11 processes and section 363 sales that take place routinely in U.S. bankruptcies. *See, e.g., In re Boston Generating, LLC,* 440 B.R. 302, 310–313 (Bankr.S.D.N.Y.2010) (discussing the extensive marketing and sale process of a 363 sale of a debtor, in which the debtor set a bid deadline that permitted competing bidders to submit competing bids in the form of chapter 11 plans of reorganization). Accordingly, the Court finds that the marketing process was not manifestly contrary to U.S. public policy.

purchase price to flow solely to Rede's creditors, thus maximizing creditor value. (Objection at 9.)

2. The Determination by the Brazilian Bankruptcy Court That the Rede Debtors' Assets and Liabilities Could be Consolidated for Plan Purposes

The Ad Hoc Group next argues that the Brazilian Bankruptcy Court erred, as a matter of Brazilian law, when it allowed the substantive consolidation of the Rede Debtors for plan purposes and that a United States court would not, under *Union Savings Bank v. Augie/Restivo Baking Company, Ltd. (In re Augie/Restivo Baking Company, Ltd),* 860 F.2d 515 (2d Cir. 1988), grant substantive consolidation under similar circumstances. In addition to arguing that substantive consolidation was inappropriate as a matter of law, the Ad Hoc Group contends that substantive consolidation inappropriately enabled the confirmation of an otherwise unconfirmable plan as a result of FI–FGTS's vote. (Objection at 11.)

As a threshold matter, substantive consolidation for plan purposes, in and of itself, is not manifestly contrary to U.S. public policy, and while not routinely granted, substantive consolidation of certain debtors in appropriate circumstances has been approved by courts in chapter 11 cases. *See, e.g., Augie/Restivo,* 860 F.2d at 518–21; *FDIC v. Colonial Realty Co.,* 966 F.2d 57 (2d Cir.1992) (affirming district court's decision that the bankruptcy court properly directed substantive consolidation of the bankruptcy estates over the objection of creditors); *In re Drexel Burnham Lambert Group, Inc.,* 138 B.R. 723, 764 (Bankr.S.D.N.Y.1992) (approving plan with substantive consolidation of debtors and stating that "[t]he equitable doctrine of substantive consolidation permits a Court in a bankruptcy case involving one or more related corporate entities, in appropriate circumstances, to disregard the separate identity of corporate entities, and to consolidate and pool their assets and liabilities and treat them as though held and incurred by one entity"); *In re Value City Holdings, Inc.,* No. 08–14197, 2010 WL 4916389, at *7 (Bankr.S.D.N.Y. May 17, 2010) (confirming a plan that involved substantive consolidation of the debtors).

Here, the Brazilian Bankruptcy Court made specific findings that substantive consolidation of the Rede Debtors was appropriate for plan purposes. The Brazilian Bankruptcy Court found that the Rede debtors were "organized as a corporate group, with a common controlling company and credit inter-dependence" as a result of loans that exist between the companies in the group and cross-corporate guarantees to third parties. (Fact Stip. at ¶ 58.) Though the Ad Hoc Group argues that the Brazilian Bankruptcy Court did not address factors which may "ordinarily" be considered by a United States court confronted with the issue of substantive consolidation, it is not appropriate for this Court to superimpose requirements of U.S. law on a case in Brazil or to second-guess the findings of the foreign court. *See In re Cozumel Caribe,* 508 B.R. 330, 337 (Bankr.S.D.N.Y.2014) ("To inquire into a specific foreign proceeding is not only inefficient and a waste of judicial resources, but more importantly, necessarily undermines the equitable and orderly distribution of a debtor's property by transforming a domestic court into a foreign appellate court where the creditors are always provided the proverbial 'second bite at the apple.' ") (citation omitted). Moreover, the record is clear that the Ad Hoc Group exercised its due process rights to object to the Brazilian Bankruptcy Court's decision to allow substantive consolidation of the Rede Debtors and, later, its right to appeal such decision. For the foregoing reasons, the Court finds that substantive consolidation of the Rede Debtors for plan

purposes was not manifestly contrary to U.S. public policy.

3. The Voting Process and Approval of the Plan Through Cram–Down

The next set of arguments raised by the Ad Hoc Group is that the creditors' due process rights were violated because the Brazilian Bankruptcy Court excluded the Indenture Trustee's vote on the Brazilian Reorganization Plan and that the Plan was approved through cram-down in a procedurally unfair manner. We address these arguments in turn.

The Ad Hoc Group argues that it was improper for the Brazilian Bankruptcy Court to exclude the Indenture Trustee's vote on the Brazilian Reorganization Plan, focusing on the fact that the Brazilian Bankruptcy Court first ruled that the Indenture Trustee would be permitted to vote on the Brazilian Reorganization Plan, and then "reconsidered" and reversed that ruling after the Indenture Trustee had voted against the Plan. (Objection at 10, 20.) Such action, combined with the "arbitrary" consolidation of the Rede Debtors, the Ad Hoc Group argues, operated to deprive Noteholders of a "meaningful opportunity to be heard (or at least to vote) in the Brazilian Bankruptcy Proceeding." (Objection at 20.)

Despite the inferences that the Ad Hoc Group wishes the Court to draw, there is no evidence that the Brazilian Bankruptcy Court disregarded the Indenture Trustee's vote *because* it voted against the Brazilian Reorganization Plan. Rather, there is ample evidence that the Brazilian Bankruptcy Court determined that, based on the terms of the Indenture, the Indenture Trustee did not have the power, without the consent of each of the individual beneficial holders of the Perpetual Notes, to vote on the Plan. (Fact Stip. at ¶¶ 99–102.) Notably, the Ad Hoc Group does not contend that this decision was wrong as a matter of U.S. law; it is well-accepted that indenture trustees do *not* vote on chapter 11 plans. In any event, the Ad Hoc Group admits that, although the Indenture Trustee was not permitted to vote on the Plan, its vote "proved largely irrelevant," as the unsecured class lacked the requisite votes to accept the Plan, and the Brazilian Bankruptcy Court eventually approved the Plan through cram-down procedures. (Objection at 10.)

The Ad Hoc Group next argues that the Brazilian cram-down procedures were not properly followed by the Brazilian Bankruptcy Court. Specifically, the Ad Hoc Group contends that, because the affirmative vote of the secured creditor class required for cram-down purposes was cast by FI–FGTS, which was not a secured creditor, but rather, an affiliated entity (*i.e.*, a shareholder), the requirements for cram-down were not satisfied, and the Plan was approved in a procedurally unfair manner. (Objection at 18.)

Assuming *arguendo* that this Court can review the decision of a Brazilian court on an issue of Brazilian law, and it cannot, the record is clear with respect to (i) the determination that FI–FGTS is a secured creditor and (ii) the Brazilian Bankruptcy Court's compliance with cram-down pursuant to Brazilian law. FI–FGTS held a put option to sell its shares in exchange for a secured claim against Denerge, one of the Rede Debtors, pursuant to an investment agreement signed in 2010, over two years prior to the Brazilian Bankruptcy Proceeding. (Fact Stip. at ¶ 65.) Although FI–FGTS's shares were not returned to EEVP in connection with the exercise of FI–FGTS's put right prior to the filing, FI–FGTS filed a petition with the Brazilian Bankruptcy Court showing that the put option had been exercised prior to the bankruptcy filing and offering those shares

to the Brazilian Bankruptcy Court to dispose of them. (Fact Stip. at ¶ 66.) The Judicial Administrator then made a determination that FI–FGTS had a secured claim against Denerge in the amount R$712.5 million. After the Ad Hoc Group objected to this determination, the Brazilian Bankruptcy Court ordered that the votes be counted both with and without FI–FGTS's affirmative vote, pending resolution of the dispute. (Fact Stip. at ¶ 67.) In its Confirmation Decision, the Brazilian Bankruptcy Court subsequently concluded that FI–FGTS had validly exercised its put option prior to the filing of the Brazilian Bankruptcy Proceeding and was therefore a secured creditor. (Fact Stip. at ¶ 7 1.) FI–FGTS voted to accept the Plan; its claim was the only voting claim in Class II, the secured creditor class,[52] and the Plan was confirmed via cram-down based on the acceptance of such class.[53]

The Court finds that the Brazilian Bankruptcy Court properly followed cram-down procedures and did not violate creditors' due process rights. There is no showing that the Brazilian Bankruptcy Court ignored the Ad Hoc Group's concerns; rather it counted the results of the vote both with and without FI–FGTS's vote. The court later determined that FI–FGTS had become a secured creditor prior to the time that the Rede Debtors filed for bankruptcy, and the vote of FI–FGTS enabled the Plan to be confirmed in accordance with cram-down procedures.

In any event, the Ad Hoc Group cannot plausibly assert that cram-down was a sham based on FI–FGTS' validly exercised put right, as the Ad Hoc Group voluntarily entered a capital structure that permitted FI–FGTS to obtain and exercise the put option which gave it the right to obtain a secured claim. The Ad Hoc Group had the opportunity to contest the status of FI–FGTS as a secured creditor during the pendency of the Brazilian Bankruptcy Proceeding, and it also has exercised its right to appeal the Confirmation Decision, which appeal is still pending. If the Ad Hoc Group prevails on appeal with respect to FI–FGTS's right to vote, the Brazilian Reorganization Plan will be unable to satisfy the requirement of a consenting class for cram-down purposes—but that is an issue for the Brazilian Bankruptcy Court, rather than this Court, to decide. The record here is clear that, notwithstanding its disappointment with the outcome of the Brazilian Bankruptcy Proceeding, due process has been afforded to the Ad Hoc Group;

52. Fact Stip. at ¶ 69. The Ad Hoc Group also asserts that the term ''secured creditor class'' is a ''misnomer'' because such class only consisted of *one single voting creditor,* FI–FGTS. (Objection at 11.) The Court notes that, even under U.S. bankruptcy law, it is not uncommon for certain classes of creditors, particularly a class of secured claims, to contain only one claim. The fact that the secured creditor class under the Brazilian Reorganization Plan contained only one secured claim does not establish unfairness or manipulation of the vote, as the Ad Hoc Secured Group alleges.

53. As explained in footnote 21, *supra,* approval of a plan through the cram-down procedure under Brazilian law requires the court to approve the plan if holders of a simple majority (more than 50 percent) in amount of the total allowed claims vote for approval of the plan (here, 74 percent of all creditors voted to approve the Plan); (2) the required majorities are met in one of the two classes of claims (here, the secured class); and (3)(a) if the required majorities are not met in Class II or in Class III, more than one-third (1/3) of the creditors that (i) are present at the creditors' meeting, (ii) are allowed to vote, and (iii) actually do so, in number, in such class, must have voted in favor of the plan and, cumulatively, creditors that hold more than one-third (1/3) in amount of the allowed claims and that (a) are present at the creditors' meeting, (b) are allowed to vote, and (c) actually do so, in such class, must have voted in favor of the plan.

the voting and cram-down process was not, as the Ad Hoc Group maintains, "fraught with procedural infirmities." (Objection at 10.)

B. The Distribution Scheme in the Brazilian Reorganization Plan is Not Manifestly Contrary to U.S. Public Policy

The Ad Hoc Group asserts that the Brazilian Reorganization Plan results in distributions that are manifestly contrary to priority rules in the United States. Under section 304, courts recognized that a foreign proceeding must produce results that are "substantially" in accordance with the priority rules of the Bankruptcy Code, but "the priority rules of the foreign jurisdiction need not be identical to those of the United States." *Bd. of Dirs. of Telecom Arg.,* 528 F.3d at 170 n.9 (stating that the fourth factor of former section 304(c) of the Bankruptcy Code—assurance of just treatment of creditors—"looks to whether the priority rules of the foreign jurisdiction are 'substantially in accordance' with U.S. priority rules"); *see, e.g., Garcia Avila,* 296 B.R. at 111–12 (Bankr.S.D.N.Y.2003) (in granting a preliminary injunction, overruling an objection that a foreign plan violated the absolute priority rule, noting that the provisions of Mexican insolvency law "largely mirror" section 1129(b) of the Bankruptcy Code); *In re Axona Int'l Credit & Commerce Ltd.,* 88 B.R. 597, 610 (Bankr.S.D.N.Y.1988); *In re Schimmelpenninck,* 183 F.3d 347, 365 (5th Cir.1999). In any event, the Ad Hoc Group cites no authority that an insolvency scheme is manifestly contrary to U.S. public policy because it fails to mirror U.S. insolvency law.

Despite its lack of authority, the Ad Hoc Group argues that the Brazilian Reorganization Plan violates the absolute priority rule and is therefore manifestly contrary to U.S. law because it "preserves value for equity and/or structurally subordinated creditors (FI–FGTS and BNDESPar)" and "goes so far as to potentially call for, or at least to enable, the repayment in full of one or both of such parties" at the expense of the structurally senior Noteholders. (Objection at 19.) Citing *Treco,* 240 F.3d at 159, the Ad Hoc Group argues that, in cases where foreign bankruptcy law does not provide protections similar to those found in U.S. law, the U.S. bankruptcy court has denied the ancillary relief requested.

The Ad Hoc Group's citation to *Treco* in this context is unpersuasive. In *Treco,* liquidators of a bank incorporated in the Bahamas and undergoing bankruptcy proceedings there filed a petition under section 304(a) of the Bankruptcy Code, seeking the turnover of certain funds held by Bank of New York and other entities located in the United States. *Id.* at 151. The bankruptcy court and the district court held that turnover was appropriate under section 304(c)(4), irrespective of whether Bank of New York's claim to the funds held by it was secured. *Id.* The Second Circuit disagreed, vacated the district court's judgment, and remanded the case, holding that, to the extent that the Bahamian proceeding subordinated Bank of New York's secured claim to administrative expenses, such treatment directly conflicted with the priority rules prescribed by U.S. law and thus violated section 304(c)(4). *Id.* at 159. *Treco* did not suggest that Bahamian law was manifestly contrary to U.S. public policy, which is the issue under section 1506. It involved the rights of a secured creditor claiming a security interest in assets in the United States created under U.S. law. Chapter 15 also has special protection for this class of creditors, requiring that their interests be sufficiently protected before the collateral can be entrusted to the foreign repre-

sentative for distribution. *See* 11 U.S.C. § 1521(b).

Brazilian bankruptcy law's cram-down requirements provide protections against junior stakeholders receiving or retaining value when dissenting senior stakeholders are not paid in full; such protections are similar (but not identical) to those in the United States. Under Brazilian bankruptcy law, a plan may only be crammed down if, among other things, (i) the dissenting class approves by at least one-third in amount and at least one-third in number and (ii) all classes, in the aggregate, approve by a majority in amount. (Law Stip. at ¶ 18.) Here, 74 percent of all claims, in amount, voted in favor of the Brazilian Reorganization Plan, and, in the class of unsecured claims, 66.34 percent, in amount, and 47.7 percent, in number, voted to accept.[54] This is only 0.3 percent less in amount and 2.3 percent less in number than would be required under the Bankruptcy Code for the class to have accepted, such that the absolute priority rule would not apply. *See* 11 U.S.C. § 1126(c). The Foreign Representative argues that, with a difference this small, it is difficult to see how the Brazilian Reorganization Plan could be considered manifestly contrary to U.S. public policy. The Court finds this argument persuasive.[55]

With respect to the treatment of shareholders, although Brazilian law does not permit the cancellation of equity without the consent of shareholders, Rede equity holders do not retain meaningful value under the Plan at the expense of the Rede Debtors' unsecured creditors. The remaining minority shares will be vastly diluted upon consummation of the Brazilian Reorganization Plan. First, the Rede Debtors will make a capital call to repay Energisa approximately R$498 billion for the amount Energisa paid to the creditors of the Rede Debtors in exchange for the assignment of their approximately R$2 billion in claims, within one year of such assignment and with 12.5 percent interest. (Fact Stip. at ¶ 95.) Under the Plan, Energisa will also assume certain guarantees of the debts of the Rede Group that had been provided by the Controlling Shareholder. (Fact Stip. at ¶ 43.) In addition, pursuant to the ANEEL Plan, Energisa will invest a minimum of R$1.2 billion in the Rede Concessionaires, which Energisa anticipates accomplishing by flowing such funds through the Rede Debtors via a series of capital calls. (Fact Stip. at ¶ 95.) This significant dilution of outstanding equity under the Brazilian Reorganization Plan is consistent with the purpose of the absolute priority rule in the U.S., which is designed to prevent shareholders from retaining equity in reorganized companies without contributing new value. *See Case v. Los Angeles Lumber Prods. Co.,* 308 U.S. 106, 121–22, 60 S.Ct. 1, 84 L.Ed. 110 (1939). Moreover, approval of such treatment here also was obtained from the dissenting unsecured class according to a Brazilian procedure designed to protect creditors' rights.

[16] Therefore, although Brazilian bankruptcy law does indeed differ from U.S. law in certain respects, the Foreign Representative has successfully demonstrated that the distribution scheme in the Brazilian Reorganization Plan is not manifestly contrary to the public policy of the United States. This Court will not decline to extend comity and grant additional relief simply because Brazilian bankruptcy law is not identical to U.S. bankruptcy law. *See Ackermann v. Levine,* 788 F.2d 830,

54. Fact Stip. at 22 n.12 (citing Ex. R (chart providing voting results as calculated by the Brazilian Bankruptcy Court)).

55. *See also supra* note 49.

842 (2d Cir.1986) (" 'We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.' ") (quoting *Loucks v. Standard Oil Co. of N.Y.*, 224 N.Y. 99, 110–11, 120 N.E. 198 (1918) (Cardozo, J.)).

C. Differing Treatment of Similarly Situated Creditors by the Brazilian Reorganization Plan Was For a Valid Purpose and is Not Inconsistent With U.S. Law

[17] The Ad Hoc Group argues that the Brazilian Reorganization Plan discriminates unfairly among the Class III (Unsecured) creditors, pointing to the Plan's disparate treatment of the Class III claims: Noteholders are receiving a 25 percent recovery while other Class III creditors, the holders of Subsidiary Concessionaire Claims and Concessionaire Creditor Claims, are being paid in full or essentially left unimpaired. (Objection at 17.)[56] However, the Ad Hoc Group ignores the fact that this favorable treatment is necessary, and indeed required, under Brazilian law. Pursuant to MP 577, the Brazilian government, in a valid exercise of its regulatory powers, prohibits all concessionaires, including the Rede Concessionaires (*i.e.*, the Rede Debtors' nondebtor operating subsidiaries in which ANEEL intervened), from entering bankruptcy; therefore, the Rede Concessionaires' claims against the Rede Debtors must be paid in full[57] under the Correctional Plan approved by ANEEL before ANEEL will lift its intervention in the Rede Concessionaires.[58] (Reply at ¶ 10.) As the Foreign Representative makes clear, although certain Class III (Unsecured) members may be treated differently under the Brazilian Reorganization Plan, such disparate treatment is justified where, as here, a government regulator charged with protecting the resources in its country has required different treatment of a creditor involved in reorganization proceedings. Indeed, different treatment of groups of unsecured creditors is not uncommon under chapter 11.

The question before this Court is only whether such treatment of similarly situated claims is wholly at odds with U.S. public policy. The Court finds that it is not. *See, e.g., JPMorgan Chase Bank, N.A. v.*

56. Specifically, the Ad Hoc Group criticizes the "special" treatment of two groups of Class III Claims: (i) intercompany claims owed to non-debtor subsidiaries that are electricity distribution concessionaires (the Rede Concessionaires), which claims are being paid in full under the Plan and (ii) obligations of electricity distribution concessionaires (the Subsidiary Concessionaires) that are also joint obligations of a Rede Debtor, which obligations are required to be brought current and then assumed by Energisa under the Brazilian Reorganization Plan (*i.e.*, paid in full). *See* Objection at 6.

57. In addition to the claims of the Rede Concessionaires, under the Brazilian Reorganization Plan, the claims of the Concessionaire Creditors (*i.e.*, the creditors of the Rede Concessionaires that also hold guarantee or surety claims against one or more of the Rede Debtors) are entitled to the same treatment as all other general unsecured creditors, but, if the Concessionaire Creditors agree to waive further enforcement rights, defaults, and penalties against the Rede Concessionaires and the Rede Debtors, such creditors will have their surety or guarantee claims replaced by Energisa.

58. In order to lift its intervention in the Rede Concessionaires, ANEEL required that Energisa (or any potential investor in the Rede Debtors) address and mitigate the risks of potential defaults under the concession agreements with the Brazilian government by adequately capitalizing the Rede Concessionaires, including by settling the debts owed to the Rede Concessionaires by the Rede Debtors, curing the Rede Concessionaires' outstanding defaults, and assuming or paying down the Rede Concessionaires' outstanding debts. (Fact Stip. at ¶ 86.)

Charter Commc'ns Operating, LLC (In re Charter Commc'ns Corp.), 419 B.R. 221, 267 (Bankr.S.D.N.Y.2009) (holding that plan did not unfairly discriminate against unsecured noteholder class receiving 32.7 percent recovery while awarding general unsecured creditors a 100 percent recovery because differing treatment was justified); *In re Adelphia Commc'ns,* 368 B.R. 140, 246–47 (Bankr.S.D.N.Y.2007) (permitting differing treatment of unsecured creditors when done for a valid purpose, including to separate liquidated and unliquidated claims); *see also In re LightSquared Inc.,* 513 B.R. 56, 82–83 (Bankr.S.D.N.Y.2014).

Accordingly, the different treatment of the Class III (Unsecured) creditors under the Brazilian Reorganization Plan is not manifestly contrary to U.S. public policy, where the Rede Debtors have demonstrated that such treatment is reasonable due to ANEEL's intervention and where such treatment is necessary in order to confirm the Plan.

D. To the Extent That There is Disparate Treatment, Such Treatment is Not Targeted at U.S.-Based Creditors and There is No Evidence of Protection of Local Creditors to the Detriment of U.S.-Based Creditors

[18] Finally, the Ad Hoc Group attempts to demonstrate that U.S.-based creditors, including U.S.-based Noteholders, were the targets of prejudice or mistreatment in the Brazilian Bankruptcy Proceeding. The facts are to the contrary. As described in the Law Stipulation, the Brazilian Constitution requires that Brazilians and foreigners be treated equally before the law. (Law Stip. at ¶ 24.) In accordance with the laws of Brazil, and as provided in the Stipulation of Facts, all of the Rede Debtors' creditors, including the Ad Hoc Group and U.S.-based creditors, received a full and fair opportunity to participate in the Brazilian Bankruptcy Proceeding by, among other things, objecting to the bankruptcy filing; filing proofs of claim; filing motions concerning substantive consolidation of the Rede Debtors for plan purposes; attending creditors' meeting and having a representative appointed to the creditors' committee; voting on the Plan; and filing numerous objections, motions for clarification, appeals, and requests for stays pending appeal. There is no evidence that U.S.-based creditors failed to receive notice of the Brazilian Bankruptcy Proceeding or were prevented from participating in the Brazilian Bankruptcy Proceeding. No proof of mistreatment of U.S.-based creditors has been provided to the Court.

More importantly, however, it appears that only two of the Rede Debtors' known creditors, including known Noteholders, are located in the United States: (i) Merrill, a member of the Ad Hoc Group, which holds approximately 8.1 percent of the Perpetual Notes (worth approximately USD$40 million in face amount)[59] and (ii) the IADB, the holder of the majority in amount of the Concessionaire Creditor Claims, which is not a member of the Ad Hoc Group and which supported confirmation of the Brazilian Reorganization Plan. (Reply at ¶ 37.) In any event, the members of the Ad Hoc Group hold, in the aggregate, only 37 percent of the outstanding Perpetual Notes, and Merrill is the only Ad Hoc Group member located in the United States. (Fact Stip. at ¶ 80.) In essence, the Ad Hoc Group is complaining of mistreatment directed at U.S.-based creditors generally, but Merrill is the sole U.S. creditor that does not support the Brazilian Reorganization Plan. There is no evidence in the record that demonstrates that Merrill or any other U.S.-based credi-

59. 5/9/14 Tr. at 23:19–24:4.

tor was targeted, and the Ad Hoc Group declined the opportunity to present evidence to the Court to support this contention.

The Ad Hoc Group also argues that, in adopting MP 577, which prohibits bankruptcy filings by electricity distribution concessionaires, the Brazilian government and ANEEL attempted to ensure that "local creditors, primarily at the operating level, would be unimpaired by any restructuring process." (Objection at 8.) The Ad Hoc Group argues that MP 577 did so by "shift[ing] all the risk to a much smaller (in number) pool of financial creditors at the holding company level." (*Id.*) Creditors at the holding company level always have greater risk than creditors of the operating companies, as they have no right of payment before subsidiary debt is paid in full. Moreover, the Ad Hoc Group fails to demonstrate that the purpose of MP 577 was to protect local, operating level creditors. Rather, the Stipulation of Facts makes clear that the main objective of the Brazilian government in passing the MP 577 legislation was to give more security to the energy supply in Brazil. (Fact Stip. at ¶ 20 (discussing press release issued by the MME of Brazil).) The legislative history of MP 577 also indicates that the Brazilian government passed the measure in order to prevent public electric power concessionaires or permit holders from entering into bankruptcy, as CELPA did. (Fact Stip. at ¶ 19.) The Brazilian government's exercise of its regulatory power in this manner is not manifestly contrary to U.S. public policy. As in Brazil, electricity distribution utilities in the United States are heavily regulated by U.S. state and federal governmental regulators in order to protect the public interest. U.S. regulators routinely engage in various activities designed to regulate electricity distribution utilities, including by setting the rates such utilities charge customers, licensing market entrants, approving the utilities' financial transactions, and setting service quality standards. Accordingly, the Court finds no evidence of targeted mistreatment of U.S.-based creditors by the passage of MP 577.

The public policy exception embodied in section 1506 permits a court to decline to take any action, including granting additional relief or assistance pursuant to section 1521 and 1507 of the Bankruptcy Code, if such action would be manifestly contrary to the public policy of this country. Where, as here, the proceedings in the foreign court progressed according to the course of a civilized jurisprudence and where the procedures followed in the foreign jurisdiction meet our fundamental standards of fairness, there is no violation of public policy.

CONCLUSION

Based on the foregoing, the Plan Enforcement Relief is granted. The parties are directed to submit an order granting the Plan Enforcement Relief in accordance with this Decision.

IN RE: LONGVIEW POWER,

In the Matter of VITRO S.A.B. DE C.V., Debtor.

Ad Hoc Group of Vitro Noteholders, Appellant,

v.

Vitro S.A.B. de C.V., Appellee.

In the Matter of Vitro S.A.B. de CV, Debtor.

Vitro S.A.B. de C.V., Appellant,

v.

Ad Hoc Group of Vitro Noteholders; Wilmington Trust, National Association, solely in its capacity as indenture trustee; U.S. Bank National Association, Appellees.

In the Matter of Vitro S.A.B. de C.V., Debtor.

Fintech Investments, Limited, Appellant,

v.

Ad Hoc Group of Vitro Noteholders; Wilmington Trust, National Association, solely in its capacity as indenture trustee; U.S. Bank National Association, Appellees.

Nos. 12–10542, 12–10689 and 12–10750.

United States Court of Appeals, Fifth Circuit.

Nov. 28, 2012.

Decision Abridged and Pages Renumbered from Official Reporter

Background: Mexican holding company filed Chapter 15 petition for recognition of its Mexican bankruptcy proceeding as foreign main proceeding. Ad hoc group of noteholders objected to petition. The United States Bankruptcy Court for the Northern District of Texas, Harlin DeWayne Hale, J., granted petition, and noteholders appealed. The District Court, A. Joe Fish, Senior District Judge, 470 B.R. 408, affirmed, and noteholders appealed. In separate proceeding, foreign representatives moved for post-recognition relief in nature of enforcement of judgment entered by Mexican court, which not only modified debts owed by foreign debtor, but novated and extinguished guarantees of foreign debtor's indebtedness by its nondebtor subsidiaries. The Bankruptcy Court, Harlin DeWayne Hale, J., 473 B.R. 117, denied motion, and foreign representatives ap-

pealed directly to the Court of Appeals, where appeal was consolidated with prior appeal by noteholders.

Holdings: The Court of Appeals, King, Circuit Judge, held that:

(1) individuals were not disqualified from serving as "foreign representatives" of company that was the subject of Mexican reorganization proceeding merely because they were designated as representatives by company's board of directors, and not officially appointed by Mexican court;

(2) as matter of apparent first impression, court had to consider availability of post-recognition relief first under provision of Chapter 15 authorizing "any appropriate relief," before employing provision authorizing "additional assistance";

(3) unavailability of non-debtor releases in reorganization cases under United States bankruptcy law did not neces- sarily mean that foreign representa- tives of debtor that was reorganizing under Mexican law could not obtain enforcement of such releases; but

(4) bankruptcy court did not abuse its discretion in denying enforcement motion.

Affirmed.

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Appeals from the United States Bankruptcy Court for the Northern District of Texas.

Before KING, SMITH and BARKSDALE, Circuit Judges.

KING, Circuit Judge:

Consolidated before us are three cases relating to the Mexican reorganization proceeding of Vitro S.A.B. de C.V., a corporation organized under the laws of Mexico. The Ad Hoc Group of Vitro Noteholders, a group of creditors holding a substantial amount of Vitro's debt, appeal from the district court's decision affirming the bankruptcy court's recognition of the Mexican reorganization proceeding and Vitro's appointed foreign representatives under Chapter 15 of the Bankruptcy Code. Vitro and one of its largest third-party creditors, Fintech Investments, Ltd., each appeals directly to this court the bankruptcy court's decision denying enforcement of the Mexican reorganization plan because the plan would extinguish the obligations of non-debtor guarantors. For the following reasons, we affirm the district court's judgment recognizing the Mexican reorganization proceeding and the appointment of the foreign representatives. We also affirm the bankruptcy court's order denying enforcement of the Mexican reorganization plan.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Vitro S.A.B. de C.V. and the 2008 Financial Crisis

Vitro S.A.B. de C.V. ("Vitro") is a holding company that, together with its subsidiaries, constitutes the largest glass manufacturer in Mexico. Originally incor-

porated in 1909, Vitro operates manufacturing facilities in seven countries, as well as distribution centers throughout the Americas and Europe, and exports its products to more than 50 countries worldwide. Vitro employs approximately 17,000 workers, the majority of whom work in Mexico. Between February 2003 and February 2007, Vitro borrowed a total of approximately $1.216 billion, predominately from United States investors. Vitro's indebtedness is evidenced by three series of unsecured notes. The first series was issued on October 22, 2003 and consisted of $225 million aggregate principal amount of 11.75% notes due 2013; the second and third series were issued on February 1, 2007, and consisted of $300 million of 8.625% notes due 2012 and $700 million of 9.125% notes due 2017 (collectively the "Old Notes").

Payment in full of the Old Notes was guaranteed by substantially all of Vitro's subsidiaries (the "Guarantors"). The guaranties provide that the obligations of the Guarantors will not be released, discharged, or otherwise affected by any settlement or release as a result of any insolvency, reorganization, or bankruptcy proceeding affecting Vitro. The guaranties further provide that they are to be governed and construed under New York law and include the Guarantors' consent to litigate any disputes in New York state courts. The guaranties state that "any rights and privileges that [Guarantors] might otherwise have under the laws of Mexico shall not be applicable to th[e] Guarant[ies]."

In the latter half of 2008, Vitro's fortunes took a turn for the worse when the global financial crisis significantly reduced demand for its products. Vitro's operating income declined by 36.8% from 2007 to 2008, and an additional 22.3% from 2008 to 2009. In February of 2009, Vitro announced its intention to restructure its debt and stopped making scheduled interest payments on the Old Notes.

B. Vitro Restructures Its Obligations

After Vitro stopped making payments on the Old Notes, it entered into a series of transactions restructuring its debt obligations. On December 15, 2009, Vitro entered into a sale leaseback transaction with Fintech Investments Ltd. ("Fintech"), one of its largest third-party creditors, holding approximately $600 million in claims (including $400 million in Old Notes). Under the terms of this agreement, Fintech paid $75 million in exchange for the creation, in its favor, of a Mexican trust composed of real estate contributed by Vitro's subsidiaries. This real estate was then leased to one of Vitro's subsidiaries to continue normal operations. The agreement also gave Fintech the right to acquire 24% of Vitro's outstanding capital or shares of a subholding company owned by Vitro in exchange for transferring Fintech's interest in the trust back to Vitro or its subsidiaries.

Partly as a result of these transactions, Vitro generated a large quantity of intercompany debt. Previously, certain of Vitro's operating subsidiaries directly and indirectly owed Vitro an aggregate of approximately $1.2 billion in intercompany debt. As a result of a series of financial transactions in December of 2009, that debt was wiped out and, in a reversal of roles, Vitro's subsidiaries became creditors to which Vitro owed an aggregate of approximately $1.5 billion in intercompany debt. Despite requests by holders of Old Notes, Vitro did not disclose these transactions. In August of 2010, Fintech purchased claims by five banks holding claims against Vitro and its subsidiaries and extended the maturity of various promissory notes issued by Vitro's subsidiaries. Pur-

suant to a "Lock-up Agreement" completed between Fintech and Vitro, Fintech also agreed not to transfer any debt it held in Vitro unless such transfer was in line with the terms of that agreement.

Only in October of 2010, approximately 300 days after completing the transactions with its subsidiaries, did Vitro disclose the existence of the subsidiary creditors. This took the transactions outside Mexico's 270–day "suspicion period," during which such transactions would be subject to addi- tional scrutiny before a business enters bankruptcy.

C. Vitro Commences a *Concurso* Proceeding in Mexican Court

Between August 2009 and July 2010, Vitro engaged in negotiations with its creditors and submitted three proposals for reorganization. Each was rejected by creditors. After the last proposal, the Ad Hoc Group of Vitro Noteholders (the "Noteholders"), a group of creditors holding approximately 60% of the Old Notes, issued a press release "strongly recommend[ing]" that all holders of the Old Notes deny consent to any reorganization plan that the Noteholders had not approved. On November 1, 2010, Vitro disclosed its intention to commence a voluntary reorganization proceeding in Mexico, together with a pre-packaged plan of reorganization. On December 13, 2010, Vitro initiated in a Mexican court a *concurso* proceeding under the Mexican Business Reorganization Act, or *Ley de Concursos Mercantiles* ("LCM").[1]

The Mexican court initially rejected Vitro's filing on January 7, 2011, because Vitro could not reach the 40% creditor approval threshold necessary to file a *concurso* petition without relying on intercompany claims held by its subsidiaries. On April 8, 2011, that decision was overruled on appeal and Vitro was then declared to be in bankruptcy, or *concurso mercantil.* Pursuant to Mexican law, Javier Luis Navarro Velasco was appointed as *conciliador.*[2]

The *conciliador* was tasked with filing an initial list of recognized claims and mediating the creation of a reorganization plan. The *conciliador* did so, and on August 5, 2011, filed a proposed final list of recognized creditors, which included those subsidiaries holding intercompany debt. The *conciliador* then negotiated terms of a reorganization plan between Vitro and the recognized creditors to submit to the Mexican court for approval. Throughout this process, the parties were apparently in frequent contact with the Mexican court on an ex parte basis.

1. Terms of the *Concurso* Plan

On December 5, 2011 the *conciliador* submitted to the Mexican court a proposed restructuring plan (the "*Concurso* plan" or "Plan") substantially identical to the one Vitro had originally proposed. Under the

1. A *concurso* proceeding is the Mexican equivalent of a voluntary judicial reorganization proceeding under United States law.

2. A *conciliador* is an individual appointed by the *Instituto Federal de Especialistas de Con- cursos Mercantiles*—the Federal Institute of Specialists of Insolvency Procedures—to serve as a quasi-judicial officer with certain responsibilities in a *concurso* proceeding, including filing an initial list of recognized claims, mediating a plan, and, if necessary to protect the debtor's estate, managing the debtor's business. A *conciliador's* pay is based on the number of recognized claims in a *concurso* proceeding, a fact the Noteholders argue encouraged him to recognize intercompany claims. The Noteholders also point out that, in this case, the *conciliador's* law firm provided legal services to Vitro since 2001, and that the *conciliador* retained, as his financial advisor, a firm that also acted as Vitro's internal auditor.

terms of the Plan, the Old Notes would be extinguished and the obligations owed by the Guarantors would be discharged. Specifically, the Plan provides that:

> [O]nce this Agreement is approved by the Court TTT this Agreement TTT will substitute, pay, replace and terminate the above obligations, instruments, securities, agreements and warranties in which were agreed upon Approved Credits and, therefore TTT will terminate personal guarantees granted a third and/or direct and indirect subsidiaries [sic] of Vitro with regards to the obligations, instruments, securities and agreements that gave rise to the Approved Credits.

The Plan further provides that Vitro would issue new notes payable in 2019 (the "New 2019 Notes"), with a total principal amount of $814,650,000. The New 2019 Notes would be issued to Vitro's third-party creditors (not including those subsidiaries holding intercompany debt, who would forgo their *pro rata* share of the Plan's consideration and instead receive other promissory notes). The New 2019 Notes would bear a fixed annual interest rate of 8.0%, but would "not have TTT payments of principal during the first 4 (years) years [sic] TTT and from the fifth year of operation and until the seventh year TTT will have repayments or payments of [a] total principal amount of $23,960,000.00 USD TTT payable semiannu- ally on June 30 and December 31 of each year and the remaining balance upon due date." The New 2019 Notes would also "be unconditionally and supportively guar- anteed for each of the Guarantors." Pay- ment under the New 2019 Notes would go into a third-party payment trust, which would deliver payment to those creditors who had consented to the Plan. A second trust would be created to pay non-consenting creditors upon their written agreement to the terms of the Plan. In addition to the New 2019 Notes, Vitro would also provide to the holders of the Old Notes $95,840,000 aggregate principal amount of new mandatory convertible debt obligations ("MCDs") due in 2015 with an interest rate of 12%, convertible into 20% equity in Vitro if not paid at full maturity. Finally, the Plan also provided cash consideration of approximately $50 per $1000 of principal of Old Notes.

2. The *Concurso* Plan is Approved

Under Mexican law, approval of a reorganization plan requires votes by creditors holding at least 50% in aggregate principal amount of unsecured debt. As distinguished from United States law, Mexico does not divide unsecured creditors into interest-aligned classes, but instead counts the votes of all unsecured creditors, including insiders, as a single class. As a result, although creditors holding 74.67% in aggregate principal amount of recognized claims voted in favor of the plan, over 50% of all voting claims were held by Vitro's subsidiaries in the form of intercompany debt. The 50% approval threshold could not have been met without the subsidiaries' votes. After the initial approval, the LCM provides a period during which objecting creditors can veto the plan. A veto requires agreement by recognized creditors holding a minimum of 50% in aggregate principal amount of debt or by recognized creditors numbering at least 50% of all unsecured creditors. As only 26 of the 886 recognized creditors sought to veto the *Concurso* plan, and as those creditors held less than 50% of the aggregate recognized debt, the veto failed.[3]

The Mexican court approved the *Concurso* plan on February 3, 2012. On February 23, 2012, the Plan went into effect,

3. Of the creditors resisting veto of the Plan, approximately 360 were Vitro employees to each of whom Vitro had issued a note in the amount of $1,000 prior to the Plan's filing.

and Vitro issued New 2019 Notes and MCDs and paid restructuring cash into two third-party payment trusts, one for consenting creditors and the other for non-consenting creditors. The *Concurso* plan approval order has been appealed, and such appeal has been accepted by, and is currently pending in, the Mexican judicial appellate system; no stay of effectiveness of the *Concurso* plan was entered.[4]

D. Objecting Creditors Resist Enforcement

While objecting to the *concurso* proceeding in Mexico, creditors dissatisfied with Vitro's reorganization efforts attempted to collect on the Old Notes and guaranties in a variety of ways. By April 2010, Vitro had received acceleration notices for all the Old Notes. On November 17, 2010, involuntary Chapter 11 petitions were filed against fifteen Guarantors domiciled in the United States.[5] Various holders of Old Notes also commenced two substantially identical lawsuits in New York state court against Vitro and 49 Guarantors, resulting in orders of attachment with respect to any property located in New York.

Parallel to the *concurso* proceeding, in August 2011, Wilmington Trust, National Association ("Wilmington"), the indenture trustee for the Old Notes due in 2012 and 2017, filed suit in New York state court against various of the Guarantors, seeking a declaratory judgment confirming the Guarantors' obligations under the related indentures. The state court granted partial summary judgment in Wilmington's favor on December 5, 2011. The court held that New York law applied to the dispute and that under the unambiguous terms of the relevant Old Notes, "any non-consensual release, discharge or modification of the obligations of the Guarantors TTT is prohibited." *Wilmington Trust v. Vitro Automotriz, S.A. De C.V.,* 33 Misc.3d 1231, 943 N.Y.S.2d 795 (table), 2011 WL 6141025, at *6 (N.Y.Sup.Ct. Dec. 5, 2011). The court went on to find, however, that "whether such prohibitive provisions may be modified or eliminated by applicable Mexican laws is not at issue here." *Id.* at *5.[6] A separate suit brought by U.S. Bank National Association ("U.S. Bank"), the indenture trustee for the Old Notes due in 2013, achieved the same outcome.

E. Vitro Commences a Chapter 15 Proceeding in the United States

On October 29, 2010, Vitro's Board of Directors appointed Alejandro Sanchez–Mujica to act as Vitro's foreign representa-

4. Letters submitted to this court demonstrate that substantially all of the issues relating to enforcement of the Plan before us are also being appealed in Mexican courts.

5. This matter proceeded to trial on March 31, 2011. As a result of this proceeding, four of Vitro's subsidiaries requested permission to sell substantially all their assets. Vitro's sub- sidiaries continued resisting the Noteholders' efforts and, initially, received favorable judg- ments that they were generally paying their debts as they became due or that no demand for payment had been made at the time the involuntary proceedings were commenced. That decision was appealed and, on August 28, 2012, the United States District Court for the Northern District of Texas held that the bankruptcy court erred in its findings and vacated that court's order.

6. Wilmington and other creditors then sought a temporary restraining order directing the Guarantors to withdraw their consent to the *Concurso* plan. The state court granted the TRO, but that order was stayed by the bankruptcy court on the basis that the TRO interfered with Vitro's rights in a lockup agreement between it and its subsidiaries, and the *concurso* proceeding. That order was separately appealed and is before another panel of this court, Case No. 11–11239.

Objecting creditors also took further legal action to resist Vitro's reorganization efforts, including involuntary *concurso* proceedings in Mexico.

tive. On April 14, 2011, Sanchez-Mujica commenced a Chapter 15 proceeding in United States bankruptcy court by filing a petition for recognition of the Mexican *concurso* proceeding.[7] The petition was originally filed in the United States Bankruptcy Court for the Southern District of New York, but, on May 13, 2011, by motion of objecting creditors, venue was transferred to the United States Bankruptcy Court for the Northern District of Texas. Because Sanchez-Mujica could not leave Mexico—a result of certain travel restrictions imposed by the Mexican court because of his role in Vitro's restructuring—Vitro filed a supplemental petition to recognize Javier Arechavaleta-Santos, another appointee of Vitro's Board of Directors, as "co-foreign representative."[8] The bankruptcy court, over objections, held that the Mexican reorganization proceeding was a "foreign main proceeding" and approved the petition confirming Sanchez-Mujica and Arechavaleta-Santos as foreign representatives pursuant to 11 U.S.C. § 1515 and § 1517.[9] The United States District Court for the Northern District of Texas affirmed the bankruptcy court's order. *In re Vitro, S.A.B. de C.V.*, 470 B.R. 408 (N.D.Tex.2012) (*Vitro I*). That decision has been appealed, Case No. 12-10542, and is one of the cases consolidated in this appeal.

On March 2, 2012, Vitro's foreign representatives filed a motion in bankruptcy court entitled "Motion of Foreign Representatives of Vitro S.A.B. de C.V. for an Order Pursuant to 11 U.S.C. §§ 105(a), 1507 and 1521 to (I) Enforce the Mexican Plan of Reorganization of Vitro S.A.B. de C.V., (II) Grant a Permanent Injunction, and (III) Grant Related Relief" (the "Enforcement Motion"). The Noteholders, Wilmington, and U.S. Bank (collectively, the "Objecting Creditors") objected, and the matter proceeded to trial on June 4, 2012. Following a four-day trial, in which hundreds of exhibits were presented and several witnesses testified, the bankruptcy court denied the Enforcement Motion. *In re Vitro, S.A.B. de C.V.*, 473 B.R. 117 (Bankr.N.D.Tex.2012) (*Vitro II*). As part of that ruling, the court also denied Vitro's motion to enjoin the Objecting Creditors from initiating litigation against the Guarantors.[10] To permit Vitro time to appeal, the bankruptcy court did, however, extend a previously issued temporary restraining order. Vitro and Fintech have appealed the bankruptcy court's decision, which has been certified for direct appeal, and Case Nos. 12-10689 (Vitro's appeal) and 12-10750 (Fintech's appeal) were subsequently consolidated with the other case before us.[11] Vitro subsequently sought, and was

7. This filing actually constituted Vitro's second filing of a petition for recognition under Chapter 15. Vitro first filed such a petition on December 14, 2010, but, by agreement of the parties, withdrew that petition after the Mexican court initially denied Vitro's entry into *concurso mercantil*.

8. The travel restrictions on Sanchez-Mujica were later lifted, permitting him to travel to the United States and testify at trial.

9. A "foreign main proceeding" is "a foreign proceeding pending in the country where the debtor has the center of its main interests," 11 U.S.C. § 1502(4), and is to be distinguished from a foreign nonmain proceeding, which is "a foreign proceeding TTT pending in a country where the debtor has an establishment," *id.* § 1502(5). Depending on whether a proceeding is a foreign main or a foreign nonmain, certain Chapter 15 relief will be automatic or discretionary. *See In re Ran*, 607 F.3d 1017, 1026 (5th Cir.2010).

10. Previously, on June 24, 2011, the bankruptcy court had issued a preliminary injunction in Vitro's favor to protect its assets, but denied such relief as to the guarantors.

11. Although brought under separate case numbers, the only substantive difference between the cases is that Vitro is the appellant

granted on June 28, 2012, an order by this court staying the expiration of the bankruptcy court's temporary restraining order.

II. CHAPTER 15

The dispute before us arises under Chapter 15 of the Bankruptcy Code and broadly involves two issues: recognition of the foreign representatives and enforcement of the *Concurso* plan. As to the first, on April 14, 2011, Sanchez–Mujica and Arechavaleta–Santos, as co-foreign representatives, filed a petition seeking recognition of the *concurso* proceeding under Chapter 15. The Noteholders objected that Sanchez–Mujica and Arechavaleta–Santos were not properly appointed as foreign representatives because they were not appointed by the Mexican court and because Vitro did not have the powers of a debtor in possession. The bankruptcy court granted recognition of the *concurso* proceeding as a foreign main proceeding under 11 U.S.C. § 1517. On appeal, the district court affirmed, holding that it was sufficient that Sanchez–Mujica and Arechavaleta–Santos were authorized as co-foreign representatives in the context of a foreign bankruptcy proceeding and that Vitro retained sufficient control over its business to be a debtor in possession. The Noteholders appeal, raising substantially the same arguments before us that they raised in the lower courts.

Because recognition of a proceeding under Chapter 15 is a precondition for the more substantive relief Vitro seeks in the Enforcement Motion, we will resolve the recognition issue first. We hold that the bankruptcy court and the district court correctly interpreted Chapter 15 as not requiring official court appointment. We further find that the term "foreign representatives" was intended to include debtors in possession, including those that may not meet Chapter 11's definition of debtors in possession, and that Vitro retained enough authority over its affairs to be a debtor in possession and could thus appoint Sanchez–Mujica and Arechavaleta–Santos as foreign representatives. Accordingly, we affirm the district court's ruling affirming the bankruptcy court's order.

We then address the Enforcement Motion. On March 2, 2012, Vitro's co-foreign representatives filed a motion seeking "to 1) give full force and effect in the United States to the *Concurso* Approval Order, 2)

in Case No. 12–10689, while Fintech is the appellant in Case No. 12–10750.

grant a permanent injunction prohibiting certain actions in the United States against Vitro SAB, as well as its non-debtor subsidiaries, and 3) grant certain related relief." *Vitro II*, 473 B.R. at 120–21 (quotation marks omitted). The bankruptcy court denied relief under 11 U.S.C. §§ 1507, 1521, and 1506 because approval of the Plan would extinguish claims held by the Objecting Creditors against the subsidiaries. *Id.* at 131. Vitro and Fintech appeal this decision solely on the issue of whether the bankruptcy court erred as a matter of law in refusing to enforce the *Concurso* plan because the Plan novated guaranty obligations of non-debtor parties. While the relief available under Chapter 15 may, in exceptional circumstances, include enforcing a foreign court's order extinguishing the obligations of non-debtor guarantors, Vitro has failed to demonstrate that comparable circumstances were present here. Because Vitro has not done so, we affirm the bankruptcy court's decision denying the Enforcement Motion.

A. Chapter 15 of the United States Bankruptcy Code

This case concerns a foreign bankruptcy proceeding for which recognition and enforcement are sought under Chapter 15 of the United States Bankruptcy Code. Chapter 15 was enacted in 2005 to implement the Model Law on Cross-Border Insolvency ("Model Law") formulated by the United Nations Commission on International Trade Law ("UNCITRAL"), and replaced former 11 U.S.C. § 304.[12] *See In re Ran*, 607 F.3d at 1020; *In re Iida*, 377 B.R. 243, 256 (B.A.P. 9th Cir.2007).[13] It was intended "to provide effective mechanisms for dealing with cases of cross-border insolvency," 11 U.S.C. § 1501(a), as well as to be "the exclusive door to ancillary assistance to foreign proceedings," thus "concentrat[ing] control of these questions in one court." H.R.Rep. No. 109–31, pt. 1, at 110 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 178. It was also intended to increase legal certainty, promote fairness and efficiency, protect and maximize value, and facilitate the rescue of financially troubled businesses. 11 U.S.C. § 1501(a).

[5–7] Central to Chapter 15 is comity. Comity is the "recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other per-

12. As Professor Jay Lawrence Westbrook has previously explained, the Model Law, along with the European Union Insolvency Regulation ("EU Regulation"), and the American Law Institute's Principles of Cooperation in Transnational Insolvency Cases Among Members of the North American Free Trade Agreement ("ALI Principles"), was a response to international trade and "the growth of multi- national enterprise," as well as "the increased incidence of multinational financial failure." Jay Lawrence Westbrook, *Multinational Enterprises in General Default: Chapter 15, the ALI Principles, and the EU Insolvency Regulation*, 76 Am. Bankr. L.J. 1, 1–2 (2002). Of the three, the EU Regulation "served as the source of some of the key concepts adopted in both the Model Law and the ALI Principles." *Id.* at 2. The ALI Principles, by contrast, were the last to be approved, and thus "in some important respects represent the next generation of reform." *Id.*

13. While § 304 has been replaced by Chapter 15, caselaw applying that section remains relevant to evaluating requests for relief. *See In re Atlas Shipping A/S*, 404 B.R. 726, 738 (Bankr.S.D.N.Y.2009); Leif M. Clark & Karen Goldstein, *Sacred Cows: How to Care for Secured Creditors' Rights in Cross-Border Bankruptcies*, 46 Tex. Int'l L.J. 513, 524 (2011) ("Not surprisingly, the case law under former § 304 is still relevant to the interpretation of Chapter 15, especially as it concerns the remedies available to a foreign representative once recognition has been granted.").

sons who are under the protections of its laws." *Hilton v. Guyot,* 159 U.S. 113, 164, 16 S.Ct. 139, 40 L.Ed. 95 (1895). "It is not a rule of law, but one of practice, convenience, and expediency." *Overseas Inns S.A. P.A. v. United States,* 911 F.2d 1146, 1148 (5th Cir.1990) (quotation marks and citation omitted). Within the context of Chapter 15, however, it is raised to a principal objective. Section 1501(a) begins by listing, as one of Chapter 15's goals, the furtherance of cooperation between domestic and foreign courts in cross-border insolvency cases. Section 1508 goes on to provide that Chapter 15's provisions shall be interpreted by considering "its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions." 11 U.S.C. § 1508. Comity considerations are explicitly included in the introduction to § 1507, and § 1509(b)(3) further provides that our courts "shall grant comity or cooperation to the foreign representative" of a foreign proceeding.

Such a foreign representative must first petition a United States bankruptcy court for recognition of a foreign proceeding. 11 U.S.C. §§ 1504, 1515. Chapter 15 defines such a foreign proceeding as:

> [A] collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

11 U.S.C. § 101(23).

Only after a United States court recognizes a proceeding can "the foreign representative TTT apply directly to a court in the United States for appropriate relief in that court." 11 U.S.C. § 1509(b)(2); *see also United States v. J.A. Jones Constr. Grp., LLC,* 333 B.R. 637, 638 (E.D.N.Y. 2005).

[8] Chapter 15 provides for a broad range of relief. This includes the ability to sue and be sued in United States courts, to apply directly to a United States court for relief, to commence a non-Chapter 15 case, and to intervene in any United States case to which the debtor is a party. *In re Condor Ins. Ltd.,* 601 F.3d 319, 324 (5th Cir.2010). Section 1520 also provides for certain automatic relief upon recognition of a foreign main proceeding, like the one here, including an automatic stay and the power to prevent transfers of the debtor's property. A bankruptcy court is also empowered under § 1521(a) to "grant any appropriate relief" necessary to "effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors." Finally, § 1507(a) gives a court authority to provide "additional assistance," subject to certain restrictions imposed by Chapter 15 and § 1507(b).

[9, 10] In considering whether to grant relief, it is not necessary that the result achieved in the foreign bankruptcy proceeding be identical to that which would be had in the United States. It is sufficient if the result is "comparable." *In re Schimmelpenninck,* 183 F.3d at 364; *Overseas Inns,* 911 F.2d at 1149; *see also In re Sivec SRL,* 476 B.R. 310, 324 (Bankr. E.D.Okla.2012) ("The fact that priority rules and treatment of claims may not be identical is insufficient to deny a request for comity."); *In re Qimonda AG,* 462 B.R. 165, 184 n. 17 (Bankr.E.D.Va.2011); *In re Petition of Garcia Avila,* 296 B.R. 95, 112 (Bankr.S.D.N.Y.2003). "[T]he foreign laws need not be identical to their counterparts under the laws of the United States; they merely must not be repugnant to our laws and policies." *In re Schimmelpenninck,* 183 F.3d at 365.

[11] But as discussed, whether any relief under Chapter 15 will be granted is a separate question from whether a foreign proceeding will be recognized by a United States bankruptcy court. The consolidated cases before us arise from decisions addressing each of these issues. We first turn to whether Vitro's co-foreign representatives were properly recognized.

Discussion
Omitted

Accordingly, we conclude that Vitro had the powers of a debtor in possession for purposes of § 101(24) and affirm the district court's decision affirming the bankruptcy court's order that Sanchez–Mujica and Arechavaleta–Santos are properly appointed foreign representatives under Chapter 15.

B. Enforcement of the Plan

1. Vitro's Request for Relief

In the Enforcement Motion, Vitro sought broad relief pursuant to 11 U.S.C. §§ 105(a), 1507, and 1521. Specifically, Vitro sought an order giving full force and effect in the United States to the Mexican court's order approving the *Concurso* plan. Vitro further sought a permanent injunction prohibiting certain actions in the United States against itself and its non-debtor subsidiaries, specifically:

> [A] permanent injunction enjoining all persons from initiating or continuing any suit, action, extra-judicial proceeding or other proceeding (including [already commenced actions in New York state court]) or any enforcement or collection process (including pursuant to any judgment, notices of attachment or [levies, restraining notices, or similar documentation]) in any jurisdiction within the United States or its territories TTT against Vitro SAB and/or the Old Guarantors TTT or their Property TTT except as permitted under the *Concurso* Plan or the *Concurso* Approval Order.

If Vitro were to succeed in obtaining all the relief that it requested, actions, executions, attachments, or other collection or enforcement processes currently pending against Vitro or its subsidiaries would be "permanently stayed, suspended, discharged, and dismissed." Judgments already rendered against it or its subsidiaries would be declared "null and void and of no further force or effect." Moreover, any entity having withheld payment to Vitro or its subsidiaries as a result of Vitro's default would immediately remit such payments to the applicable party. Finally, Vitro and its subsidiaries would be released from all liabilities with respect to any claims discharged under the *Concurso* plan. Of course, the bankruptcy court could grant some, but not all, of the relief requested.

The bankruptcy court held that the *Concurso* plan "which extinguishes the guarantee claims of the Objecting Creditors that were given under an indenture issued in the United States against non-debtor entities that are subsidiaries of Vitro, should not be accorded comity to the extent it provides for the extinguishment of the non-debtor guarantees of the indentures." *Vitro II,* 473 B.R. at 132. The bankruptcy court specifically denied enforcement under §§ 1507, 1521, and 1506. It denied relief under § 1507 because the Mexican court's approval order did "not provide for the distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by Title 11 [of the Bankruptcy Code]." *Id.* "The *Concurso* plan provides drastically different treatment in that the noteholders receive a fraction of the amounts owed under the indentures from Vitro SAB and their rights against the other obligors are cut off." *Id.* Relief under § 1521 was inap-

propriate because the Mexican court's approval order "neither sufficiently protects the interests of creditors in the United States, nor does it provide an appropriate balance between the interests of creditors and Vitro SAB and its non-debtor subsidiaries." *Id.* Finally, the relief sought would not be allowed under Chapter 15 because "the protection of third party claims in a bankruptcy case is a fundamental policy of the United States" and "the *Concurso* plan does not recognize and protect such rights." *Id.*

The circumstances under which the Plan was approved and the treatment creditors received raise many questions that are not before us about whether such a plan could be enforced under Chapter 15. The bankruptcy court explicitly dealt with some of these questions, while flagging others for our consideration without itself reaching them. Thus, for example, the bankruptcy court considered whether, as alleged by the Objecting Creditors, the Mexican judicial system and the *concurso* proceeding were corrupt, and should not be granted comity for this reason. Addressing the Objecting Creditors' expert—Dr. Stephen D. Morris—who testified to a series of "suspicious circumstances" and "red flags" in the *concurso* proceeding, the bankruptcy court held that, although the witness was knowledgeable and qualified to speak on corruption in Mexico generally, his analysis of what impact such corruption had on this proceeding was unpersuasive. The bankruptcy court therefore concluded that it "ha[d] not seen evidence that the Mexican Proceeding [was] the product of corruption, or that the LCM itself is a corrupt process," and rejected the Objecting Creditors' argument. *Id.* at 130. The bankruptcy court reached a similar conclusion as to whether, as argued by the Objecting Creditors, enforcement would have an adverse impact on credit markets. The court ultimately concluded that, while testimony by Dr. Elaine Buckberg, a former economist at the International Monetary Fund, was credible, her testimony did not quantify the negative effects of enforcing the Plan, and thus the court could not conclude that enforcement would adversely affect credit markets. *Id.* The bankruptcy court also considered, but rejected, the argument that relief should not be granted because the Mexican proceeding was "unfair." *Id.* at 130–31. The bankruptcy court observed that although there had been ex parte meetings, such meetings were had by both sides and were, in fact, common in Mexico. *Id.* at 131. Responding to the Objecting Creditors' allegations that they were not permitted to raise certain arguments in the Mexican court and that the *conciliador* was biased, the bankruptcy court held that such arguments were better left for the Mexican court system.[22] *Id.*

The bankruptcy court did not reach two other arguments it described as "[p]ossibl[y] [m]eritorious [o]bjections." *Id.* at 132. These were that insiders were allowed to vote in favor of the Plan, and that the *Concurso* plan violates the absolute priority rule. Other arguments the bankruptcy court did not explicitly address, but which might be subsumed under its other holdings, are that the *Concurso* plan imposed a kind of "death trap" provision that precluded non-consenting creditors from recovering anything. Another such argument is that Mexico's single-class voting made no distinctions between creditors with adverse interests. Finally, a third

22. The Objecting Creditors' briefs reiterate many of the factual allegations they made in the bankruptcy court, without addressing the bankruptcy court's holdings on those allegations. Because we affirm the bankruptcy court's ultimate holding denying enforcement to the Plan, we do not address those allegations further.

such argument challenges the propriety of Vitro's orchestrating a balance transfer of several billion dollars between itself and its subsidiaries, turning those subsidiaries into creditors, prior to entering into the *concurso* proceeding and failing promptly to disclose the existence of these newly minted insider creditors.

We need not concern ourselves with the vast majority of these issues, as Vitro and Fintech have framed their appeal in terms of only one:

> Whether the Bankruptcy Court erred as a matter of law when, after it concluded that the *Concurso* Approval Order was the product of a process that was not corrupt or unfair to the Appellees, it refused to enforce the *Concurso* Approval Order solely because the *Concurso* plan novated guarantee obligations of non-debtor parties and replaced them with new obligations of substantially the same parties?

The issue Vitro and Fintech identify underpins the bankruptcy court's entire opinion. As that court summarized, "the *Concurso* plan approved in this instance TTT extinguishes the guarantee claims of the Objecting Creditors that were given under an indenture issued in the United States against non-debtor entities that are subsidiaries of Vitro TTTT Such order manifestly contravenes the public policy of the United States and is also precluded from enforcement under §§ 1507, 1521 and 1522 of the Bankruptcy Code," and would not be accorded comity. *Id.* at 133.

2. Chapter 15's Framework for Granting Relief

[18, 19] As already discussed, "[a] central tenet of Chapter 15 is the importance of comity in cross-border insolvency proceedings." *In re Cozumel Caribe, S.A. de C.V.,* 482 B.R. 96 (Bankr.S.D.N.Y.2012). "The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call the comity of nations." *Hilton,* 159 U.S. at 164, 16 S.Ct. 139. In applying the principles of comity, we "take[ ] into account the interests of the United States, the interests of the foreign state or states involved, and the mutual interests of the family of nations in just and efficiently functioning rules of international law." *In re Artimm, S.r.L.,* 335 B.R. 149, 161 (Bankr.C.D.Cal.2005). Accordingly, Chapter 15 provides courts with broad, flexible rules to fashion relief appropriate for effectuating its objectives in accordance with comity. *See In re Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd.,* 389 B.R. 325, 333–34 (S.D.N.Y.2008); *In re SPhinX, Ltd.,* 351 B.R. 103, 112 (Bankr.S.D.N.Y. 2006) ("[C]hapter 15 maintains—and in some respects enhances—the 'maximum flexibility,' that section 304 provided bankruptcy courts TTT in light of principles of international comity and respect for the laws and judgments of other nations." (citation omitted)).

[20] Given Chapter 15's heavy emphasis on comity, it is not necessary, nor to be expected, that the relief requested by a foreign representative be identical to, or available under, United States law. *In re Metcalfe & Mansfield Alternative Investments,* 421 B.R. 685, 697 (Bankr.S.D.N.Y. 2010) ("The relief granted in the foreign proceeding and the relief available in a U.S. proceeding need not be identical."); *see also Artimm,* 335 B.R. at 160 n. 11. We have previously cautioned that the mere fact that a foreign representative requests relief that would be available under the law of the foreign proceeding, but not in the United States, is not grounds for deny-

ing comity. *See In re Condor,* 601 F.3d at 327.

Nevertheless, Chapter 15 does impose certain requirements and considerations that act as a brake or limitation on comity, and preclude granting the relief requested by a foreign representative. In this case, the bankruptcy court rested on three of Chapter 15's sections, §§ 1521, 1507, and 1506, each of which it found precluded the relief Vitro sought. *Vitro II,* 473 B.R. at 133. Vitro's appeal predominantly rests on finding relief under § 1507 and, only in the alternative, under § 1521. Vitro argues that it would be inappropriate to deny its request for comity under § 1507, simply because the relief might not meet the requirements of § 1521. The Objecting Creditors, in turn, argue extensively that the relief Vitro requests, to the extent it is available at all, must fall under § 1521(a)(1) and (b), and that the bankruptcy court was correct to deny enforcement because of the limitations imposed by § 1522.

Thus, while comity should be an important factor in determining whether relief will be granted, we are compelled by the bankruptcy court's decision and the parties' arguments to get into the weeds of Chapter 15 to determine whether a foreign representative may independently seek relief under either § 1521 or § 1507, and whether a court may itself determine under which of Chapter 15's provision such relief would fall. Both appear to be questions of first impression.

[21] We conclude that a court confronted by this situation should first consider the specific relief enumerated under § 1521(a) and (b). If the relief is not explicitly provided for there, a court should then consider whether the requested relief falls more generally under § 1521's grant of any appropriate relief. We understand "appropriate relief" to be relief previously available under Chapter 15's predecessor, § 304. Only if a court determines that the requested relief was not formerly available under § 304 should a court consider whether relief would be appropriate as "additional assistance" under § 1507.[23]

We start by acknowledging that "[t]he relationship between § 1507 and § 1521 is not entirely clear." *In re Toft,* 453 B.R. at 190; *see also In re Atlas Shipping A/S,* 404 B.R. at 741.[24] This leaves litigants uncertain as to which provision they should rely on for relief. Indeed, Vitro itself acknowledges that its decision to seek relief under § 1507 and, only in the alternative, § 1521 was motivated, in part, by the fact that every other foreign representative requesting enforcement of a *concurso* plan under Chapter 15 has cited both § 1507 and § 1521.

23. Although this approach—first considering relief under § 1521(a) and (b) and then proceeding to § 1507—has not been explicitly mandated in this circuit, this three-step approach, as we explain below, finds support in the statutory language and in Congress's express intent in crafting § 1507.

24. *See generally* Alesia Ranney–Marinelli, *Overview of Chapter 15 Ancillary and Other Cross–Border Cases,* 82 Am. Bankr. L.J. 269, 317 (2008) ("What is not clear is whether a foreign representative can pick and choose which section to proceed under in order to take advantage of different standards for affording relief or burdens of proof."); George W. Shuster, Jr., *The Trust Indenture Act and International Debt Restructurings,* 14 Am. Bankr. Inst. L.Rev. 431, 455 ("Because it is unclear where section 1521 ends and where section 1507 begins, it is also unclear which of these paths the court will follow—whether it will consider entry of an order enforcing a foreign discharge as 'appropriate relief' under section 1521 or as 'additional assistance' under section 1507.").

Section 1521(a) empowers a court to "grant any appropriate relief" at the request of the foreign representative when necessary to "effectuate the purpose of [Chapter 15] and to protect the assets of the debtor or the interests of the creditors." 11 U.S.C. § 1521(a). In addition, § 1521 lists a series of non-exclusive forms of relief. These include:

> (1) staying the commencement or continuation of an individual action or proceeding concerning the debtor's assets, rights, obligations or liabilities to the extent they have not been stayed under section 1520(a);
>
> (2) staying execution against the debtor's assets to the extent it has not been stayed under section 1520(a);
>
> (3) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under section 1520(a);
>
> (4) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
>
> (5) entrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative or another person, including an examiner, authorized by the court;
>
> (6) extending relief granted under section 1519(a); and
>
> (7) granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a).

11 U.S.C. § 1521(a).

Additionally, under § 1521(b), "the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in the United States to the foreign representative TTT provided that the court is satisfied that the interests of creditors in the United States are sufficiently protected." Section 1522 provides an important limiting factor: relief under § 1521 may be granted "only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected," and a court may impose appropriate conditions on relief. 11 U.S.C. § 1522(a)-(b).

Unlike § 1521's "any appropriate relief" language, § 1507 gives courts the authority to provide "additional assistance." Section 1507 "was added to the Bankruptcy Code because Congress recognized that Chapter 15 may not anticipate all of the types of relief that a foreign representative may require and which would otherwise be available to such foreign representative." 8 Collier on Bankruptcy ¶ 1507.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2012) (Collier).[25] A court determining whether to provide additional assistance under § 1507 considers the factors listed under subsection (b),[26] which provides that:

> (b) In determining whether to provide additional assistance under this title or under other laws of the United States, the court shall consider whether such additional assistance, consistent with principles of comity, will reasonably assure

25. The Model Law's analog to § 1507 "was designed to insure access to relief that might be available under law other than the insolvency law." 8 Collier, *supra,* ¶ 1507.01.

26. These factors are identical to those formerly found under § 304(c), with the exception that comity has been elevated from a factor to the introductory text.

1) just treatment of all holders of claims against or interests in the debtor's property;
2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
3) prevention of preferential or fraudulent dispositions of property of the debtor;
4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and
5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

11 U.S.C. § 1507(b).[27]

We are thus faced with two statutory provisions that each provide expansive relief, but under different standards. To clarify our resolution of requests for relief under Chapter 15 we adopt the following framework for analyzing such requests.

First, because § 1521 lists specific forms of relief, a court should initially consider whether the relief requested falls under one of these explicit provisions. *In re Read,* 692 F.3d 1185, 1191 (11th Cir.2012) (specific terms prevail over the general (quoting *D. Ginsberg & Sons, Inc. v. Popkin,* 285 U.S. 204, 208, 52 S.Ct. 322, 76 L.Ed. 704 (1932))); *see also* 1 Collier, *supra,* ¶ 13.07[2]; Ranney–Marinelli, *Overview, supra,* at 317 (arguable that foreign representatives should be bound by those provisions specifically providing the relief sought). Other courts have held that, where the requested relief is explicitly provided for under § 1521, it is unnecessary to consider § 1507. *In re Atlas Shipping A/S,* 404 B.R. at 740 ("Whatever the outer bounds of discretionary relief chapter 15 allows, this case does not push the boundaries. The relief sought by the foreign representative is expressly provided for in §§ 1521(a)(5) and 1521(b). The Court need not venture into the area of 'additional assistance,' 'consistent with principles of comity' under § 1507."); *In re Int'l Banking Corp. B.S.C.,* 439 B.R. 614, 626 n. 10 (Bankr.S.D.N.Y.2010).

Second, if § 1521(a)(1)-(7) and (b) does not list the requested relief, a court should decide whether it can be considered "appropriate relief" under § 1521(a). This, in turn, requires consideration of whether such relief has previously been provided under § 304. *See In re Condor,* 601 F.3d at 329 (observing that avoidance actions under foreign law were permitted under § 304 and reading § 1521(a)(7) to permit such relief). This latter consideration aligns with Congress's intent that § 1521 was not intended to "expand or reduce the

27. Because of § 1521's broad reach, § 1507's scope is uncertain. *See* Lesley Salafia, *Cross–Border Insolvency Law in the United States and Its Application to Multinational Corporate Groups,* 21 Conn. J. Int'l L. 297, 322 (2006) (section 1507 "might not have been necessary," given expansive relief available under other parts of Chapter 15); 8 Collier, *supra,* ¶ 1507.01 ("In light of this display of [§ 1521's] weaponry, it is not clear what section 1507 adds to the arsenal."). Scholarly commentary has speculated that § 1507 was merely intended to incorporate § 304's jurisprudence. 8 Collier, *supra,* ¶ 1507.01. Further muddying § 1507's role is that, although § 304(c)'s factors are included under § 1507, a court may nevertheless consider those factors under § 1521. "It would be anomalous to suggest that in determining whether creditor interests are sufficiently protected for purposes of TTT [§] 1521, a court could not consider evidence of procedural or substantive prejudice to non-domestic creditors in the foreign proceeding or a significant deviation between the distribution scheme in the foreign proceeding and the distribution scheme prescribed by the Code." Paul L. Lee, *Ancillary Proceedings under Section 304 and Proposed Chapter 15 of the Bankruptcy Code,* 76 Am. Bankr. L.J. 115, 193 (2002).

scope of relief" previously available under other provisions, including § 304. H.R.Rep. No. 109–31, pt. 1, at 116. A court should also consider whether the requested relief would otherwise be available in the United States. *Cf. Artimm,* 335 B.R. at 160 n. 11 (section 1507 authorizes relief beyond that provided for in Bankruptcy Code or United States law).

[22, 23] Third, only if the requested relief appears to go beyond the relief previously available under § 304 or currently provided for under United States law, *Artimm,* 335 B.R. at 160 n. 11, should a court consider § 1507. *See* H.R.Rep. No. 109–31, pt. 1, at 109 ("Subsection (2) [of § 1507] makes the authority for additional relief (*beyond that permitted under section*[ ] TTT *1521,* below) subject to the conditions for relief heretofore specified in United States law under section 304 TTTT" (emphasis added)). This approach recognizes that relief under § 1507 "is in nature more extraordinary" than that provided under § 1521, as a result of which "the test for granting that relief is more rigorous." Leif M. Clark, *Chapter 15 Bankruptcy Strategies: Leading Bankruptcy Experts on Understanding the Filing Process and Achieving Successful Outcomes in Cross–Border Insolvency Cases—Advice for Handling Cross–Border Bankruptcy Cases Effectively* (Aspatore Sept. 2012), *available at* 2012 WL 3279175, at *10. It also acknowledges that, while § 1507's broad grant of assistance is intended to be a "catch-all," it cannot be used to circumvent restrictions present in other parts of Chapter 15, nor to provide relief otherwise available under other provisions. *In re Int'l Banking Corp. B.S.C.,* 439 B.R. at 626 n. 10; 1 Collier, *supra,* ¶ 13.07[2] n. 34 (section 1507 should not be used "to eviscerate limitations placed within chapter 15 itself").

We believe this framework provides foreign representatives with the clearest path by which to seek Chapter 15 relief. *See* Clark, *supra,* at *10 (advising attorneys to consult § 1507 if the relief under § 1521 is insufficiently broad). This framework also conforms to Congress's intent that courts should not deny Chapter 15 relief for failure to meet the requirements of § 1507, which, in any case, "is not to be the basis for denying or limiting relief otherwise available under this chapter." H.R.Rep. No. 109–31, pt. 1, at 109; *see also* Ranney–Marinelli, *Overview, supra,* at 316 n. 267. Under this framework, courts will also "not construe the range of relief under § 1507 to be bound by the same limitations that apply in § 1521," with the exception of those limitations specifically provided for. Clark & Goldstein, *Sacred Cows, supra,* at 529.

At the same time, this approach means that, by first considering § 1521 relief—which we deem co-extensive with that previously available under § 304—courts begin their analysis in familiar territory. Ranney–Marinelli, *Overview, supra,* at 317 n. 274 (noting that, compared to other sections, § 1507's standard of proof is unclear). This prevents all-encompassing applications of § 1507 and avoids prematurely expanding the reach of Chapter 15 beyond current international insolvency law. H.R. Rep. No. 109–31, pt. 1, at 109 (purpose of § 1507 is "to permit the further development of international cooperation begun under section 304"); Clark & Goldstein, *Sacred Cows, supra,* at 529 (whether a "court [would] ever dare to employ § 1507 as a substitute for (or worse, an end-around of) § 1521" is an open question).

3. Availability of Relief under § 1521 and § 1507

Applying our analytic framework to Vitro's request for relief, the bankruptcy

court did not err in denying relief. Sections 1521(a)(1)-(7) and (b) do not provide for discharging obligations held by non-debtor guarantors. Section 1521(a)'s general grant of "any appropriate relief" also does not provide the necessary relief because our precedent has interpreted the Bankruptcy Code to foreclose such a release, and because when such relief has been granted, it has been granted under § 1507, not § 1521. Even if the relief sought were theoretically available under § 1521, the facts of this case run afoul of the limitations in § 1522. Finally, although we believe the relief requested may theoretically be available under § 1507 generally, Vitro has not demonstrated circumstances comparable to those that would make possible such a release in the United States, as contemplated by § 1507(b)(4).

(a) Step 1: Section 1521's enumerated provisions

[24] The bankruptcy court denied relief under § 1521(b) and § 1522(a), observing that "[o]ne could argue that Vitro SAB, as a holding company, is trying to achieve, through its *Concurso* plan, an entrustment of the distribution of the assets of its non-debtor U.S. subsidiaries without sufficiently protecting the Objecting Creditors." *Vitro II*, 473 B.R. at 132. Vitro concedes that § 1507, on which it primarily relies, does not explicitly provide for a "discharge" of non-debtors, and thus injunctive relief is a necessary by-product of granting enforcement, but Vitro argues that this fact alone does not mean that it must satisfy the requirements of § 1522.[28] The Objecting Creditors respond that the relief Vitro seeks is addressed by § 1521(a)(1) and (b), and thus Vitro is bound by the limitations in § 1521 and § 1522 that any relief must ensure that the interests of creditors and other interested parties are sufficiently protected.

Contrary to the Objecting Creditors' assertion and the bankruptcy court's finding, the requested relief is not available under any of § 1521's specific provisions because none of the types of relief enumerated under § 1521(a) or § 1521(b) matches the type of relief Vitro seeks. The closest provision is § 1521(a)(1), which provides for "staying the commencement or continuation of an individual action or proceeding *concerning* the debtor's assets, rights, obligations or liabilities." 11 U.S.C. § 1521(a)(1) (emphasis added).[29] But Vitro is not merely seeking a stay. Rather, Vitro seeks to permanently enjoin actions brought against its subsidiaries and, moreover, to discharge obligations and liabilities owed by those subsidiaries. We reject the bankruptcy court's suggestion to treat the assets of Vitro's subsidiaries as Vitro's

28. Vitro also argues that § 1521 only applies during the pendency of a foreign insolvency proceeding, and not after the foreign court approves a reorganization plan, and Vitro cites in support *In re Daewoo Logistics Corp.*, 461 B.R. 175, 179–80 (Bankr.S.D.N.Y.2011). That case only states that "relief may be available after close of the foreign proceeding under section 1507." *Id.* at 180. It does not create a categorical rule and § 1521 does not include such a limitation.

29. Scholarly commentary has suggested that § 1521(a)(1)'s use of the word "concerns" "indicates that a stay of actions against someone other than the debtor or the debtor's assets is a possibility," including "a stay of litigation against a third party with indemnification rights against the debtor, or with shared liability TTT on the theory that the litigation so stayed *concerns* the debtor's rights, obligations or liabilities." 1 Collier, *supra*, ¶ 13.07[2] & n. 37 (emphasis in original). However, the situation in this case is different. The worry is not that Vitro will be harmed by creditors collecting from the subsidiaries who will in turn come looking for Vitro. Instead, Vitro's subsidiaries are guarantors, and thus it was Vitro's defaulting on its obligations which now endangers the subsidiaries by triggering the guaranties.

"assets" for this purpose. *In re Guyana Dev. Corp.,* 168 B.R. 892, 905 (Bankr. S.D.Tex.1994) ("As a general rule, property of the estate includes the debtor's stock in a subsidiary but not the assets of the subsidiary."). As the Objecting Creditors repeatedly remind us, most of Vitro's subsidiaries have not gone into bankruptcy. Vitro's subsidiaries are also its creditors. Thus, there is no basis to conclude that § 1521(a)(1) adequately responds to the type of relief Vitro seeks.[30]

For substantially the same reason, we reject the bankruptcy court's suggestion that § 1521(b) applies. Section 1521(b) provides that "the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in the United States to the foreign representative TTT provided that the court is satisfied that the interests of creditors in the United States are sufficiently protected." Because the subsidiaries' assets are not Vitro's, § 1521(b) does not apply.[31]

(b) Step 2: Section 1521(a)'s grant of "any appropriate relief"

[25] Having determined that none of the enumerated forms of relief listed under § 1521 provides the range of relief Vitro seeks, we proceed to consider whether the relief sought fits into the court's more general power to grant "any appropriate relief." We conclude that the requested relief falls outside § 1521(a)'s grant of authority for two reasons.

First, the relief Vitro seeks, a non-consensual, non-debtor release through a bankruptcy proceeding, is generally not available under United States law. Indeed, this court has explicitly prohibited such relief. *In re Pac. Lumber Co.,* 584 F.3d 229, 251–52 (5th Cir.2009) (discharge of debtor's debt does not affect liability of other entities on such debt and denying non-debtor release and permanent injunction); *In re Zale Corp.,* 62 F.3d 746, 760 (5th Cir.1995) ("Section 524 prohibits the discharge of debts of nondebtors."). Because our law prohibits the requested discharge, a request for such relief more properly falls under § 1507, which was included to address such circumstances.

Second, our conclusion is bolstered by the fact that in the one case where a foreign proceeding's non-debtor discharge

30. We are aware that under the older § 304(b)(1) a bankruptcy court could "enjoin actions against the debtor with regard to property *involved in* such foreign proceeding" and that "against the debtor" has been understood to include non-debtors "when failure to enjoin the action would jeopardize the success of the bankruptcy process or cause irreparable harm to the debtor's estate and its creditors." *In re Schimmelpenninck,* 183 F.3d at 362 (internal quotation marks and citation omitted). However, under 11 U.S.C. § 362(a)(1), which includes the same "against the debtor" language as § 304(b), stays against non-debtors were reserved for "very limited situations." *Matter of S.I. Acquisition, Inc.,* 817 F.2d 1142, 1147 (5th Cir.1987). Moreover, unlike in a case such as *In re Schimmelpenninck,* we are not dealing with creditors attempting to recover on a debt under an alter ego and single business enterprise theory. 183 F.3d at 363. Instead, the Objecting Creditors are trying to recover from the subsidiaries under guaranties that were triggered only as a result of Vitro's default. Vitro is not seeking a temporary injunction, but a permanent discharge of the Guarantors' obligations. Vitro itself points out that injunctive relief is only incidental to the broader relief it seeks.

31. We also note that the Enforcement Motion does not seek relief under § 1521(b). Instead, the Enforcement Motion refers to § 1521(a)(1), (a)(2), (a)(5), and (a)(7). Neither Vitro's nor Fintech's brief argues how these other provisions would apply and they actually appear to present reasons for why the requested relief might not be available under § 1521.

was approved by a United States court, it was under § 1507, not § 1521. In *Metcalfe,* the court recognized that "a third-party non-debtor release 'is proper only in rare cases.' " 421 B.R. 685, 694 (Bankr. S.D.N.Y.2010) (quoting *In re Metromedia Fiber Network, Inc.,* 416 F.3d 136, 141 (2d Cir.2005)). The court nevertheless found that approval was not precluded under § 1507. *Id.* at 697.[32]

[26] Finally, we note that the bankruptcy court's decision was proper under § 1522, which requires that the relief contemplated under § 1521 balance the interests of the creditors and debtors. *See In re Tri–Cont'l Exch. Ltd.,* 349 B.R. at 637 (analysis of § 1522 "emphasize[s] the need to tailor relief and conditions so as to balance the relief granted to the foreign representative and the interests of those affected by such relief, without unduly favoring one group of creditors over another"). Because the bankruptcy court also found that the *Concurso* plan did not provide for an appropriate balance among the interests of Vitro, its creditors, and the Guarantors under § 1521 and § 1522, we observe that even were we to agree that the requested relief is provided for under § 1521, the bankruptcy court did not abuse its discretion in denying it. Because the reasons for which the bankruptcy court denied relief under § 1521 are largely identical, however, we jointly address those reasons under our discussion of § 1507. We proceed to consider whether, as Vitro and Fintech argue, the relief was available under § 1507, and whether the bankruptcy court properly denied it.

(c) Step Three: Section 1507's "additional assistance"

The bankruptcy court denied relief under § 1507 because the Plan "does not provide for the distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by Title 11," contrary to § 1507(b)(4). *Vitro II,* 473 B.R. at 132.

> Under a Chapter 11 plan, the noteholders would receive their distribution from the debtor and would be free to pursue their other obligors, in this case the non-debtor guarantors. The *Concurso* plan provides drastically different treatment in that the noteholders receive a fraction of the amounts owed under the indentures from Vitro SAB and their rights against the other obligors are cut off.

Id.

Vitro challenges the bankruptcy court's holding predominantly on the ground that it accorded insufficient weight to comity. The Objecting Creditors point to disparities between the *Concurso* plan and a similar proceeding in United States bankruptcy court. They also assert that the Mexican court's disregard for a relevant decision in New York state court precludes extending comity to its decision.

We conclude that § 1507 theoretically provides for the relief Vitro seeks because it was intended to provide relief not otherwise available under United States law. But the devil is in the details, and in this case, the bankruptcy court correctly determined that relief was precluded by § 1507(b)(4). Under that provision, the bankruptcy court had to consider whether the relief requested was comparable to that available under the Bankruptcy Code. We conclude below that, although a non-consensual, non-debtor discharge would not be available in this circuit, it could be available in other circuits. We also hold

32. While we agree with the bankruptcy court that *Metcalfe* is ultimately distinguishable, *Vitro II,* 473 B.R. at 131, we nevertheless find it instructive in determining which part of Chapter 15 would provide the requested relief.

that because Vitro has failed to show the presence of the kind of comparable ex- traordinary circumstances that would make enforcement of such a plan possible in the United States, the bankruptcy court did not abuse its discretion in denying relief.

i. Availability of non-consensual, non- debtor discharges under § 1507

Discussion Omitted

[27] The decisions of these courts demonstrate disagreement among the circuits as to when, if ever, a non-debtor discharge is appropriate. We conclude that, although our court has firmly pronounced its opposition to such releases, relief is not thereby precluded under § 1507, which was intended to provide relief not otherwise available under the Bankruptcy Code or United States law. *See Artimm,* 335 B.R. at 160 n. 11.

ii. Appropriateness of non-consensual, non-debtor discharges under § 1507

[28] Having determined that the relief Vitro seeks is theoretically available under § 1507, we turn to whether the bankruptcy court abused its discretion in determining that such relief was not appropriate in this case. The bankruptcy court held a four-day trial, involving hundreds of exhibits and testimony by witnesses from both sides. It concluded that the requested relief did not substantially conform to the order of distribution under Title 11 because the *Concurso* plan provided creditors with a substantially reduced recovery, while cutting off their ability to pursue relief against the Guarantors.

Vitro contends that the bankruptcy court incorrectly denied enforcement because the *Concurso* plan did not provide creditors with exactly what they would

have received under Chapter 11.[33] Vitro further challenges the applicability of § 1507(b)(4) because the bankruptcy court based its decision on the discharge of non-debtors' obligations, and not the distribution of Vitro's property. Finally, Vitro argues that whatever concerns this case implicates, the bankruptcy court erred in concluding that they outweighed the interests of comity.[34],[35]

The Objecting Creditors respond that the evidence presented at trial demonstrated that, under the *Concurso* plan, they would recover only around 40% of the Old Notes' value, while Vitro's shareholders would retain equity interests worth $500 million.[36] They also point to various

33. Vitro also argues that the bankruptcy court erred in treating § 1507(b)'s subsections as prongs of a test, as opposed to mere considerations, and did not consider the totality of the circumstances. Although it is not necessary for a plan to meet all § 1507(b) factors, *see In re Bd. of Dirs. of Telecom Arg. S.A.,* 528 F.3d 162, 169 n. 7 (2d Cir.2008) (noting that "Chapter 15 dispenses with the explicit requirement that courts consider the five factors listed in § 304(c) [now § 1507(b)] as part of an application for recognition of foreign insolvency proceedings"), failure to meet any one of these can suffice to deny enforcement, *see In re Treco,* 240 F.3d at 158–61 (denying enforcement because of violation of § 304(c)(4) (now § 1507(b)(4))).

34. Fintech also argues that failure to enforce the Plan would encourage investors to resort to litigation, instead of negotiating compromises with a debtor in bankruptcy. Given our very limited holding on the facts of this case we find this to be a slight risk. Even were it otherwise, we are bound to apply the statutory provisions of Chapter 15 faithfully irrespective of whether the effect will be to spur further litigation.

35. The parties dispute whether we need to consider the traditional factors of comity. In *International Transactions, Ltd.* we enumerated five requirements that would make a foreign court's judgment on a matter conclusive in federal court. 347 F.3d at 594. Section 1507 explicitly incorporates comity, however, and thus, given our reasoning above, we assume that comity would be granted were the Plan to also reasonably address the concerns enumerated in § 1507(b)(1)-(4). *See In re Treco,* 240 F.3d at 158 (observing that § 304(c) (now § 1507(b)) supplants federal common law analysis).

36. The Objecting Creditors' briefs largely omit any discussion of how the distributions under the *Concurso* plan, including the New 2019 Notes, the MCDs, and the cash consideration, resulted in this amount. The Objecting Creditors' witness, Dan Gropper, a managing director of one of the Noteholders, testified as a fact witness on this issue. Gropper was uncertain of what worth, for example, the MCDs, which convert into 20% equity in Vitro upon Vitro's default, would have, given the questionable value of equity in a defaulting company. The bankruptcy court made no specific factual findings in his regard, and thus we are left with the court's more general observation that creditors would, under the Plan, receive a fraction of what they would have received under the Old Notes.

The Objecting Creditors also make much of testimony by their expert witness, Dr. Joseph W. Doherty, that there was only a 10,000 to 1 chance that Vitro would have received a distribution in United States bankruptcy court like that resulting from the *concurso* proceeding. But this calculation was not based on any case-by-case comparison between Vitro and other bankruptcies. Instead, it was based on a sample of cases drawn from an incomplete database of bankruptcy proceedings, which, at the time, contained 108 relevant cases, of which 37 involved any distributions of equity. Doherty himself admitted that the database was still in the process of being compiled and presently contained only cases with information easily available on the Public Access to Court Electronic Records database ("PACER"). Statistical evidence of this variety is, to say the least, of limited value when considering the complexities of bankruptcy proceedings of this scale. The bankruptcy court acknowledged that Doherty testified as to "[t]he wide variance in return to creditors from what would be expected in a Chapter 11 plan," but only found that testimony "credible," without making any specific factual findings, and only made his credibility finding within the scope of arguments the court did not reach.

parts of the Plan that do not conform with Chapter 11. These include that guarantor obligations cannot be discharged over the objections of creditors, creditors would not have been grouped for voting purposes into a single class together with parties having adverse interests, and insider votes would not count towards the Plan's approval. The Objecting Creditors further argue that comity does not weigh in favor of enforcement of this plan because the Mexican court, which approved it, ignored a ruling by a New York state court holding that the indentures expressly prohibited modification of the Guarantors' obligations.

We conclude that the evidence Vitro presented at trial does not support the presence of circumstances comparable to those necessary for effectuating the release of non-debtor guarantors in those of our sister circuits that allow such a release. *See In re Schimmelpenninck,* 183 F.3d at 364.

We begin our analysis, as we must, by considering comity. 11 U.S.C. § 1507 (court may grant "additional assistance TTT consistent with principles of comity"). In revising Chapter 15's predecessor, § 304, Congress elevated comity from a factor under § 304(c) to the introductory text of § 1507 "to make it clear that it is the central concept to be addressed." H.R.Rep. No. 109–31, pt. 1, at 109. Vitro is thus correct to focus its argument on comity, and we agree with Vitro that comity is the rule under Chapter 15, not the exception. It is thus necessary to first address the Objecting Creditors' most direct challenge to that principle, namely that the Mexican court failed to extend comity to the decision of a New York state court on issues central to this case. *See United States ex rel. Saroop v. Garcia,* 109 F.3d 165, 170 (3d Cir.1997) (reciprocity is condition for honoring foreign country's judicial decrees); *Remington Rand Corp.–Del. v. Bus. Sys. Inc.,* 830 F.2d 1260, 1273 (3d Cir.1987) (describing comity as a "two-way street").[37]

The New York state court addressed a declaratory judgment action brought by Wilmington, which sought a confirmation of Vitro's obligations under the indentures. *Wilmington Trust,* 2011 WL 6141025, at *1. The state court carefully parsed the issues before it and determined that "any declaratory relief in this court can only be in the context of determining the rights and obligation of the parties under the Indentures." *Id.* at *5. The court next determined that the indentures were governed by New York law and that "pursuant to the relevant provisions of the Indentures TTT any non-consensual TTT release, discharge or modification of the Guarantors' obligations is prohibited." *Id.* The court was clear, however, that its authority went no further. "Whether such rights and obligations can or cannot be novated, substituted, released or modified under the Mexican bankruptcy law is an issue for the Mexican Court." *Id.* To remove all doubt, the court explicitly stated that "granting a declaratory judgment in favor of [the Objecting Creditors], to the extent stated herein, will not interfere with the Mexican Court proceeding, which is the proper jurisdiction to determine the issues that may arise in connection with the approval of the Concurso Plan, pursuant to applicable Mexican law." *Id.* The court concluded by stating that "whether any Concurso Plan that is ultimately approved by the Mexican Court may be enforced in the United States is an issue for the feder-

37. We found the discussion on this issue in the amicus curiae brief filed by the United Mexican States of assistance.

al courts, including the Bankruptcy Court." *Id.*

The Mexican court was presented with the opportunity to consider the New York decision and its impact on the *concurso* proceeding. Although the Mexican court does not appear to have provided specific reasons, we infer from its decision that it did not find that the indentures precluded Mexican law from novating the obligations contained therein. Because the New York court explicitly set aside this issue for the Mexican court, reciprocity was not offended by the Mexican court's subsequent decision of that very issue. We thus do not view this as a ground for denying comity. Our decision comports with the approach adopted by the court in *Metcalfe,* which, while recognizing that a third-party non-debtor release might be inappropriate under United States law, left it to the Canadian courts to determine whether they had the jurisdiction to grant such relief. 421 B.R. at697–700.

We next consider whether the bankruptcy court erred in basing its decision on § 1507(b)(4).[38] Section 1507(b)(4) provides that a court should consider whether to grant additional assistance to a foreign representative by considering the "distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title." Vitro asserts that the bankruptcy court's opinion was based on the distribution of non-debtor's property, that of Vitro's subsidiaries, and thus § 1507(b)(4) is inapplicable. But the focus of § 1507(b)(4) is on the plan of distribution, and Vitro ignores that the Plan it seeks to enforce premises distribution of its assets on the discharge of obligations owed by non-debtors who are also Vitro's creditors. The respective amounts that Vitro pays under the Plan to the Objecting Creditors and to its subsidiaries are inescapably dependent on the discharge of the non-debtor Guarantors. That the detriment of this distribution falls on the Objecting Creditors, whose rights are extinguished in exchange for their distribution under the Plan, in no way subtracts from the fact that the release affects how the proceeds of Vitro's property are distributed.

We turn finally to whether the evidence Vitro has presented in favor of comity and enforcement so outweighed the bankruptcy court's concerns under § 1507(b)(4) that it was an abuse of discretion for the bankruptcy court to deny relief. Vitro's primary witness was its foreign representative, Sanchez-Mujica. He testified that the *conciliador* persuaded Vitro to offer more favorable terms to third-party creditors in the *Concurso* plan. These included a 5% increase—from 15% to 20%—of the equity available on default under the MCDs, and that consent payments, previously made to only some of the creditors, be extended to all consenting creditors. But this hardly shows that the result of the *concurso* proceeding is in line with what would be available under Chapter 11, much less that this case features the unique circumstances that would warrant a general release of the non-debtor subsidiaries. Sanchez-Mujica also testified that over 74% of recognized creditors approved the plan. But this ignores that recognized creditors holding over 50% of all unsecured debt who voted in favor of the Plan were Vitro subsidiaries.

Vitro's second witness, Luis Mejan—an expert in Mexican bankruptcy law—was

38. Because the bankruptcy court did not discuss whether § 1507(b)(1)-(3) weighed in favor of, or against, granting relief, and because we find that relief was properly denied on other grounds, we do not reach the Objecting Creditors' argument that the *Concurso* plan violated § 1507(b)'s other subsections.

cross-examined at trial, and his expert report and expert rebuttal were introduced in lieu of direct examination. Mejan's expert report provides a comprehensive breakdown of the LCM and how it operates in the *concurso* context. This merely establishes, however, that the LCM is a process comparable to that of the United States, a fact which no party seriously disputes. The bankruptcy court also had to consider whether the results yielded under the LCM, on the facts of this case, were comparable to the result likely in the United States. *See In re Treco,* 240 F.3d at 159 ("A court must consider the effect of the difference in the law on the creditor in light of the particular facts presented."); *In re Sivec SRL,* 476 B.R. at 324 ("The fact that priority rules and treatment of claims may not be identical is insufficient to deny a request for comity. What this Court must consider is the effect of that difference on the creditor in light of the existing facts."). Mejan's expert report extensively describes Mexican law, but does not explain how the results achieved in this case would compare to those in a United States bankruptcy proceeding. When asked if he had considered "whether other plans that had been approved or enforced in the United States were comparable to Vitro in terms of what happened in the Mexican proceedings," Mejan conceded that he "did not conduct a specific search in order to make [that] comparison."[39] This failure is especially troubling given Vitro's request for relief which, under United States law, would not be available in this circuit, and would only be available under the narrowest of circumstances in some of our sister circuits.[40]

In summary, although extensive testimony was taken before the bankruptcy court that the LCM's legal framework is substantially in accordance with our own, this does not end the analysis of whether to grant comity. *See In re Treco,* 240 F.3d at 158–61 (bankruptcy court abused its discretion by affording comity to Bahamian bankruptcy proceeding without considering effects on creditor's claim). The bankruptcy court correctly observed that we have "largely foreclosed non-consensual non-debtor releases and permanent injunctions outside of the context of mass tort claims being channeled toward a specific pool of assets." *Vitro II,* 473 B.R. at 131. There appears little dispute that, under United States law, non-debtor releases, while possible in other circuits, are only appropriate in extraordinary circumstances. To that end, Vitro was required to show that something comparable to such circumstances was present here. The mere fact that the *concurso* proceeding complied with the relevant provisions of the LCM is not, in itself, sufficient.

39. Mejan's rebuttal report also seeks to undermine the Objecting Creditors' claim that there is a debate in the Mexican legal community as to whether insiders are allowed to vote. Regardless of whether such a debate exists, or whether the LCM permits it or not, it is surely the case that in the United States insider voters cannot themselves push through a plan where there is a class of dissenting creditors. *See CIBC Bank & Trust Co. (Cayman) Ltd. v. Banco Cent. do Brasil,* 886 F.Supp. 1105, 1114 (S.D.N.Y.1995) (citing 11 U.S.C. § 1129(a)(10)) (Bankruptcy Code "prevents 'insiders' from voting on whether a reorganization plan will be accepted by a class of impaired creditors"). As we have explained previously, the Bankruptcy Code requires that at least one impaired class of creditors approve a plan, where the class is made up of claims that are substantially similar or share the impaired creditors' interests. *In re Save Our Springs (S.O.S.) Alliance, Inc.,* 632 F.3d 168, 174 (5th Cir.2011).

40. Vitro also called as a rebuttal witness Claudio Del Valle, Vitro's chief financial and restructuring officer. That witness testified as to the amount of default interest recognized in the *concurso* proceeding.

Were it otherwise, we would be treating the extraordinary relief available under § 1507 with the casual indifference we have already rejected in the context of recognition determinations under Chapter 15. *See In re Ran,* 607 F.3d at 1021 (recognition determination is not a "rubber stamp exercise"). We would also be disregarding the considerations and safeguards Congress included in § 1507(b).

To that end, we observe that many of the factors that might sway us in favor of granting comity and reversing the bankruptcy court to that end are absent here. Vitro has not shown that there existed truly unusual circumstances necessitating the release. To the contrary, the evidence shows that equity retained substantial value. The creditors also did not receive a distribution close to what they were originally owed. Moreover, the affected creditors did not consent to the Plan, but were grouped together into a class with insider voters who only existed by virtue of Vitro reshuffling its financial obligations between it and its subsidiaries. It is also not the case that the majority of the impacted group of creditors, consisting predominantly of the Objecting Creditors, voted in favor of the Plan. Nor were non-consenting creditors given an alternative to recover what they were owed in full.[41]

Vitro cannot rely on the fact that a substantial majority of unsecured creditors voted in favor of the Plan. Vitro's majority depends on votes by insiders. To allow it to use this as a ground to support enforcement would amount to letting one discrepancy between our law and that of Mexico (approval of a reorganization plan by insider votes over the objections of creditors) make up for another (the discharge of non-debtor guarantors). *Cf. CIBC Bank & Trust Co. (Cayman) Ltd.,* 886 F.Supp. at 1114.[42]

Vitro argues that there would be financial chaos as a result of the Plan not being enforced. We are aware of the adverse consequences that may ensue from the decision not to enforce the Plan. But Vitro's reasoning seeks to justify a prior bad decision on the basis that not enforcing it now would lead to further negative consequences.[43] Worse, the harm from those consequences would predominantly affect Vitro, the party responsible for bringing about this state of affairs in the first place. Vitro cannot propose a plan that fails to substantially comply with our order of distribution and then defend such a plan by

41. Vitro stresses that the Objecting Creditors are sophisticated parties, and that many noteholders did not purchase notes until after Vitro had defaulted, the implication being that creditors knew what they were getting into. As a preliminary matter, it appears to us that all the parties involved are "sophisticated." We also do not understand why an investor's background should excuse a plan's failure to substantially adhere to our law's order of distribution.

We similarly reject the argument that because the Objecting Creditors participated in the *concurso* proceeding they are now estopped from resisting Vitro's Chapter 15 action. Chapter 15's protections address a separate set of concerns beyond what may have been litigated in a foreign proceeding.

42. For the same reasons we conclude that, even if § 1521 did provide the broad relief Vitro seeks, enforcement of this Plan would be precluded under § 1522 for failing to provide an adequate "balance between relief that may be granted to the foreign representative and the interests of the persons that may be affected by such relief." *In re Int'l Banking Corp. B.S.C.,* 439 B.R. at 626 (quoting Model Law Guide, *supra,* ¶ 161); *see also In re Sivec SRL,* 476 B.R. at 323.

43. Sanchez–Mujica's declaration only states that "Vitro's business, as well as those who have an interest in seeing Vitro's business succeed, such as its customers and creditors, will continue to suffer immense harm" if the Plan is not enforced.

arguing that it would suffer were it not enforced. Vitro's two-wrongs-make-a-right reasoning is unpersuasive.

Those cases Vitro points to in which a similar discharge of non-debtor obligations was allowed are inapposite. The closest factual analog to this case is the bankruptcy court's decision in *Metcalfe.* As here, the central issue in *Metcalfe* was "[t]he enforceability of the non-debtor release and injunction on private civil actions in the United States" contained in a Canadian court order approving a restructuring plan. 421 B.R. at 687–88 n. 1. Recognizing that "a third-party non-debtor release 'is proper only in rare cases,' " *id.* at 694 (quoting *Metromedia,* 416 F.3d at 141), the court nevertheless found that approval was not precluded under § 1507, *id.* at 697. The only explanation the court provided was that the non-debtor release and injunction provisions "treat[ed] all claimants in the Canadian Proceedings similarly" and that "[n]o objections ha[d] been lodged that inclusion of these provisions adversely affects any claimant's treatment against any of the debtors' property." *Id.* The bankruptcy court distinguished *Metcalfe* because, in that case, "there was near unanimous approval of the plan by the creditors, who were not insiders of the debtor TTTT the plan was negotiated between the parties and there appears not to have been a timely objection TTTT [and] the release was not complete like the one in the present case." *Vitro II,* 473 B.R. at 131.

We agree that *Metcalfe* is distinguishable. The fact that the Plan approved here was the result of votes by insiders holding intercompany debt means that, although under *Metcalfe* non-debtor releases may be enforced in the United States under Chapter 15, the facts of this case exceed the scope of that decision. We further observe that in that case the Canadian court's decision to approve the non-debtor release "reflect[ed] similar sensitivity to the circumstances justifying approving such provisions," a sensitivity we find absent in the Mexican court's approval of the Plan. 421 B.R. at 698. The Canadian court's decision was also the result of "near-cataclysmic turmoil in the Canadian commercial paper market following the onset of the global financial crisis." *Id.* at 700. As already discussed, Vitro's evidence on this point largely emphasizes the turmoil only Vitro would be exposed to.

Vitro also relies on our decision in *Republic Supply Co. v. Shoaf,* 815 F.2d 1046 (5th Cir.1987). In that case, "we address[ed] the question whether [the] bankruptcy court's confirmation order which, beyond the statutory grant of the [Bankruptcy] Code, expressly released a third-party guarantor, [was] to be given *res judicata* effect." *Id.* at 1047. We held that once a reorganization plan passed the appeal stage it could not be challenged even though it violated the Bankruptcy Code's prohibition on such discharges. *Id.* at 1050. Aside from the fact that *Republic Supply Co.* was a case about the effects of res judicata and has been distinguished for not addressing the legality of non-debtor releases, *see In re Pacific Lumber Co.,* 584 F.3d at 252 n. 27, we have also emphasized the "limited nature" of that decision, *In re Applewood Chair Co.,* 203 F.3d 914, 918 (5th Cir.2000). For example, *Republic Supply Co.* involved a reorganization plan in which a third-party guarantor and creditor were specifically discharged. 815 F.2d at 1051–54. We have distinguished other cases for including general, as opposed to specific, releases. *Applewood Chair,* 203 F.3d at 919. As a result, *Republic Supply Co.* provides no guidance where, as here, we are confronted not by a specific release, but by a general release of all the non-

debtor subsidiaries. *See id.*[44],[45]

On the basis of the foregoing analysis, we hold that Vitro has not met its burden of showing that the relief requested under the Plan—a non-consensual discharge of non-debtor guarantors—is substantially in accordance with the circumstances that would warrant such relief in the United States. In so holding, we stress the deferential standard under which we review the bankruptcy court's determination. It is not our role to determine whether the above-summarized evidence would lead us to the same conclusion. Our only task is to determine whether the bankruptcy court's decision was reasonable. *See Friends for Am. Free Enter. Ass'n v. Wal–Mart Stores, Inc.,* 284 F.3d 575, 578 (5th Cir.2002) (" 'Generally, an abuse of discretion only occurs where no reasonable person could take the view adopted by the trial court.' " (quoting *Dawson v. United States,* 68 F.3d 886, 896 (5th Cir.1995))); *Bear Stearns,* 389 B.R. at 333 (relief under § 1521 and § 1507 is largely discretionary). Having reviewed the record and relevant caselaw, we conclude that the bankruptcy court's decision was reasonable.

4. Section 1506's Bar to Relief

The bankruptcy court concluded that "the protection of third party claims in a bankruptcy case is a fundamental policy of the United States" and held that even if Chapter 15 relief were appropriate, it would be barred under § 1506 because "the *Concurso* plan does not recognize and protect such rights." *Vitro II,* 473 B.R. at 132.

[29–32] Section 1506 provides that "[n]othing in [Chapter 15] prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States." 11 U.S.C. § 1506. The narrow public policy exception contained in § 1506 "is intended to be invoked only under exceptional circumstances concerning matters of fundamental importance for the United States." *In re Ran,* 607 F.3d at 1021. "The key determination required by this Court is whether the procedures used in [the foreign proceeding] meet our fundamental standards of fairness." *Metcalfe,* 421 B.R. at 697. A court need not engage in an "independent determination about the propriety of individual acts of a foreign court." *Id.* Furthermore, even the absence of certain procedural or constitutional rights will not itself be a bar under § 1506. *See In re Ephedra Prods. Liab. Litig.,* 349 B.R. 333, 336 (S.D.N.Y.2006) ("Federal courts have enforced against U.S. citizens foreign judgments rendered by foreign courts for whom the very idea of a jury trial is foreign.").

As already discussed, this court holds that the Bankruptcy Code precludes non-consensual, non-debtor releases. *In re Pac. Lumber Co.,* 584 F.3d at 252. Nevertheless, not all our sister circuits agree, and we recognize that the relief potentially available under § 1507 was intended to be expansive. At the same time, § 1506 was intended to be read narrowly, a fact that does not sit well with the bankruptcy court's broad description of the fundamen-

44. Presumably, Vitro is arguing that the Mexican court's decision is the prior action and, thus, the bankruptcy court and this court are required to recognize that foreign court's holding and confer it res judicata effect. Such reasoning conflates the difference between a foreign ruling and the bankruptcy court's decision to grant relief pursuant to Chapter 15, and is rejected.

45. The other cases Vitro and Fintech cite in support appear to have involved consensual agreements between the parties and are thus inapposite.

tal policy at stake as "the protection of third party claims in a bankruptcy case." *Vitro II,* 473 B.R. at 132. Because we conclude that relief is not warranted under § 1507, however, and would also not be available under § 1521, we do not reach whether the *Concurso* plan would be manifestly contrary to a fundamental public policy of the United States.[46]

III. CONCLUSION

For the aforementioned reasons, we AFFIRM in all respects the judgment of the district court affirming the order of the bankruptcy court in No. 12–10542, and we AFFIRM the order of the bankruptcy court in Nos. 12–10689 and 12–10750. The temporary restraining order originally entered by the bankruptcy court, the expiration of which was stayed by this court, is VACATED, effective December 14, 2012. Each party shall bear its own costs.

46. For the same reason, we do not reach the Objecting Creditors' arguments that the Plan violates a fundamental public policy for infringing on the absolute priority rule, the Contract Clause of the United States Constitution, U.S. Const. art. I, § 10, cl. 1, the Trust Indenture Act of 1939, 15 U.S.C. §§ 77aaa, *et seq.,* or the interests of the United States in protecting creditors from so called "bad faith schemes."

Neutral Citation Number: [2018] EWCA Civ 2802

Case No: A2/2018/0084

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (Ch D)
THE HONOURABLE MR JUSTICE HILDYARD
[2018] EWHC 59 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/12/2018

Before:

LORD JUSTICE LEWISON
LORD JUSTICE HENDERSON
and
LORD JUSTICE BAKER

- -

IN THE MATTER OF THE OJSC INTERNATIONAL BANK OF AZERBAIJAN
AND IN THE MATTER OF THE CROSS-BORDER INSOLVENCY REGULATIONS 2006

Between:

GUNEL BAKHSHIYEVA
(IN HER CAPACITY AS THE FOREIGN REPRESENTATIVE OF THE OJSC INTERNATIONAL BANK OF AZERBAIJAN) — **Appellant**

- and –

(1) SBERBANK OF RUSSIA
(2) FRANKLIN GLOBAL TRUST – FRANKLIN EMERGING MARKET DEBT OPPORTUNITIES FUND
(3) FRANKLIN EMERGING MARKET DEBT OPPORTUNITIES FUND PLC
(4) FRANKLIN TEMPLETON FRONTIER EMERGING MARKETS DEBT FUND
(5) FRANKLIN TEMPLETON EMERGING MARKET DEBT OPPORTUNITIES (MASTER) FUND, LTD
(6) FRANKLIN TEMPLETON SERIES II FUNDS
(7) FRANKLIN EMERGING MARKET DEBT INSTITUTIONAL FUND — **Respondents**

- -

Mr Daniel Bayfield QC and Mr Ryan Perkins (instructed by **White & Case LLP**) for the **Appellant**
Mr Mark Howard QC and Fred Hobson (instructed by **Fried, Frank, Harris, Shriver & Jacobson (London) LLP**) for the **1st Respondent**
Mr Gabriel Moss QC and Mr Richard Fisher (instructed by **Dechert LLP)** for the **2nd to 7th Respondents**

Hearing dates: 24 and 25 October 2018

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Approved Judgment

Lord Justice Henderson:

Introduction

1. This appeal raises important questions about the proper scope of the powers conferred on the English court by the Cross-Border Insolvency Regulations 2006, SI 2006 No 1030, (the "CBIR") to order a stay of proceedings in this jurisdiction in support of a foreign insolvency proceeding.

2. The CBIR were made in order to implement and give the force of law in Great Britain to "the UNCITRAL Model Law", that is to say the Model Law on cross-border insolvency as adopted by the United Nations Commission on International Trade Law on 30 May 1997, "with certain modifications to adapt it for application in Great Britain": see regulations 1 and 2(1). The Model Law, with those modifications, is set out in Schedule 1 to the CBIR. References in this judgment to articles of the Model Law are (unless otherwise stated) to the version of it set out in the schedule.

3. By virtue of regulation 3(1), British insolvency law (as defined in article 2) is to apply with such modifications as the context requires for the purpose of giving effect to the CBIR, while regulation 3(2) provides that in the case of any conflict with British insolvency law, the CBIR shall prevail. The relevant definition of British insolvency law incorporates, in relation to England and Wales, the provisions of the Insolvency Act 1986, or any extension or application thereof by or under any other enactment.

4. The scope of application of the Model Law is laid down by article 1, which states that it applies where:

> "(a) assistance is sought in Great Britain by a foreign court for a foreign representative in connection with a foreign proceeding."

It also applies in the converse situation, immaterial for present purposes, where assistance is sought in a foreign State in connection with a proceeding under British insolvency law, and in certain other specified circumstances. "Foreign proceeding" is widely defined in article 2(i) to mean:

> "a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation."

A "foreign representative", by virtue of article 2(j), means:

> "a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding."

5. Article 9, headed "Right of direct access", entitles a foreign representative "to apply directly to a court in Great Britain". Such an application may be made for recognition of the foreign proceeding in which the foreign representative has been appointed: see article 15, which specifies the formalities which have to be complied with on such an application. Article 17 then provides for the mandatory recognition of a foreign proceeding if the necessary conditions are satisfied. By virtue of article 17, the foreign proceeding must be recognised as "a foreign main proceeding" if it is taking place in the State where the debtor has the centre of its main interests (or "COMI"), or as "a foreign non-main proceeding" if the debtor has an establishment in the foreign State.

6. Article 20 then provides for certain *automatic* effects of recognition of a foreign *main* proceeding:

> "(1) Upon recognition of a foreign proceeding that is a foreign main proceeding, subject to paragraph 2 of this article –
>
> (a) commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
>
> (b) execution against the debtor's assets is stayed; and
>
> (c) the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended."

In the case of a corporate debtor, the stay and suspension are to be the same in scope and effect as if the debtor had been made the subject of a winding-up order under the Insolvency Act 1986, but paragraph (6) also enables the court, either on application or of its own motion, to modify such stay and suspension, or any part of it, "on such terms and conditions as the court thinks fit." In practice, this means that where the foreign proceeding is not a winding-up or akin to a liquidation, but is a process such as an administration or reconstruction from which it is hoped that the company will emerge as a going concern, the English court is likely to adapt the automatic stay under article 20(1) so that it more closely resembles the moratorium which applies when a company goes into administration under Schedule B1 to the Insolvency Act 1986.

7. Article 21 then provides for relief that *may* be granted upon recognition of a foreign proceeding, whether *main or non-main*. Since this is the central provision upon which the present case turns, I will set out the relevant parts of article 21, together with the supplementary provisions in article 22 for the "[p]rotection of creditors and other interested persons":

> "**Article 21. Relief that may be granted upon recognition of a foreign proceeding**
>
> (1) Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including –

> > (a) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1(a) of article 20;
> >
> > (b) staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1(b) of article 20;
> >
> > (c) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1(c) of article 20;
> >
> > …
> >
> > (g) granting any additional relief that may be available to a British insolvency officeholder under the law of Great Britain, including any relief provided under paragraph 43 of Schedule B1 to the Insolvency Act 1986.
>
> (2) Upon recognition of a foreign proceeding whether main or non-main, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in Great Britain to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in Great Britain are adequately protected.
>
> …
>
> **Article 22. Protection of creditors and other interested persons**
>
> (1) In granting or denying relief under article 19 or 21, or in modifying or terminating relief under paragraph 3 of this article or paragraph 6 of article 20, the court must be satisfied that the interests of the creditors… and other interested persons, including if appropriate the debtor, are adequately protected.
>
> (2) The court may subject relief granted under article 19 or 21 to conditions it considers appropriate, including the provision by the foreign representative of security or caution for the proper performance of his functions.
>
> (3) The court may, at the request of the foreign representative or a person affected by relief granted under article 19 or 21, or of its own motion, modify or terminate such relief."

8. In the light of these provisions of the CBIR, I can now formulate the question which arises in this case with more precision. The relevant circumstances may be summarised in this way:

a) the foreign proceeding is not a liquidation, but a voluntary restructuring entered into between the company and its creditors, with the aim of enabling the company to survive as a going concern;

b) the restructuring plan provides for all the company's existing debts of a specified class to be discharged in full and replaced with various entitlements;

c) under the relevant foreign law (which is the law of the company's place of incorporation and COMI), the restructuring plan becomes binding on all the creditors of the relevant class once it has been approved by a specified majority of them and confirmed by the foreign court;

d) the plan is duly approved by the requisite majority and confirmed by the foreign court;

e) the relevant class of creditors includes some whose claims against the company are governed by English law ("the English creditors"), who do not participate in the restructuring or otherwise submit to the jurisdiction of the foreign court;

f) under English law as it now stands, binding on all courts below the Supreme Court, the claims of the English creditors are not discharged or otherwise affected by the foreign restructuring; and

g) the foreign representative successfully applies to the English court for recognition of the foreign proceeding as a foreign main proceeding, and obtains a suitably modified version of the automatic stay under article 20 which will continue in force until the restructuring has been fully implemented, but will lapse or be liable to termination thereafter.

In those circumstances, does the English court have the power (and, if so, should it exercise the power), on application by the foreign representative under article 21(1)(a) and/or 21(1)(g) of the CBIR, to direct that the claims of the English creditors should continue to be stayed indefinitely, even after the restructuring has come to an end and the company has resumed operation as a going concern?

9. The purpose of the application, as is candidly conceded, is to prevent the English creditors from relying on their rights under English law to seek to enforce their claims against the company's assets in England and Wales, or in any other jurisdiction which does not recognise the discharge of their debts under the foreign law. Thus, although a stay is normally a procedural remedy, of limited duration, the purpose of seeking it in the present case is to achieve what is in effect a substantive remedy, barring the English creditors from relying on their English law rights and thereby, so it is said, obtaining an unfair advantage over the other creditors of the specified class whose original debts have been replaced by the entitlements provided for by the plan. The justification advanced for inviting the English court to act in this way is that to do so would promote the principle of modified universalism in cross-border insolvencies which not only forms part of English common law but also underpins the UNCITRAL Model Law.

10. The applicant in the present case is the foreign representative of the OJSC International Bank of Azerbaijan ("IBA"), which fell into financial difficulties, obliging it to enter into a restructuring proceeding under Azeri law. The plan which IBA put forward to restructure its debts was approved by a large majority at a meeting of creditors in Azerbaijan on 18 July 2017, and was approved by the local court on 17 August 2017. As a matter of Azeri law, the plan is now binding on all affected creditors, including those who did not vote and those who voted against the plan. In this respect, the situation is similar to that brought about by a domestic scheme of arrangement under Part 26 of the Companies Act 2006 once it has been sanctioned by the court.

11. On 24 May 2017, the foreign representative applied to the Business and Property Courts of England and Wales for an order recognising the restructuring proceeding as a foreign main proceeding under the CBIR, and at a hearing on 6 June 2017 Barling J made the order sought. The order included a suitably modified version of the automatic stay under article 20.

12. The respondents are English creditors in the sense in which I have used that term – i.e. their claims against IBA are governed by English law. The first respondent, Sberbank of Russia ("Sberbank"), is the sole lender under a US $20m term facility agreement dated 15 July 2016 ("the Sberbank Facility"). The other respondents (together "Franklin Templeton") are beneficial owners (through Citibank as trustee) of some of the US $500m 5.62% notes issued by IBA under a trust deed dated 11 June 2014 and due to mature in 2019 ("the 2019 Notes"). The respondents did not vote at or participate in any way in the meeting in Azerbaijan to approve the restructuring plan, and it is accepted by the foreign representative for the purpose of these proceedings that they have not acquiesced in the plan or its application to them, nor have they submitted to the jurisdiction of the Azeri court.

13. By a further application issued on 15 November 2017, the foreign representative sought an order against Sberbank continuing the moratorium imposed by the recognition order of 6 June 2017 "until further order… so that no legal process in relation to the Designated Financial Indebtedness may be instituted or continued against the Bank or its property except with the permission of the court". An order was also sought that the moratorium should not be lifted so as to permit Sberbank to enforce its loan facility agreement against IBA. In her affidavit in support of the application, the foreign representative made it clear that similar relief was also sought against Citibank as trustee of the 2019 Notes. This application was then countered by cross-applications from Sberbank and Franklin Templeton asking for the existing moratorium granted by Barling J to be lifted so as to permit the institution and prosecution of proceedings against IBA to enforce their English claims.

14. All three applications came on for hearing before Hildyard J as a matter of considerable urgency, on 14 and 15 December 2017. The urgency was occasioned by the fact that, as matters then stood, the Azeri restructuring proceeding was set to expire on 30 January 2018, with no possibility of further extension. The judge heard submissions from Daniel Bayfield QC leading Ryan Perkins for the applicant, from Barry Isaacs QC leading Alexander Riddiford for Sberbank, and from Gabriel Moss QC leading Richard Fisher for Franklin Templeton. On 21 December 2017, the judge announced that he would dismiss the application for a stay, and gave a brief indication of his reasons for so concluding. His detailed reasons were contained in the reserved

judgment which he handed down on 18 January 2018: [2018] EWHC 59 (Ch), [2018] Bus LR 1270.

15. Although produced under considerable time pressure, the judgment (which runs to 170 paragraphs) contains a full and thoughtful discussion of the arguments presented to the judge in what he described, at [23], as "exemplary skeleton arguments and oral submissions". By this date, however, it had become clear that the immediate urgency had gone, because the Azerbaijan Parliament had approved an amendment to the Law on Banks which would enable the Azeri court to order further extensions of the restructuring proceeding, with no limit on the number or duration of such extensions. Accordingly, orders have now been made by the Azeri court prolonging the restructuring pending the outcome of IBA's appeal to this court, which is brought with permission granted by the judge.

16. We have had the benefit of submissions from the same team of counsel who appeared below, except that Mark Howard QC and Fred Hobson have replaced Mr Isaacs QC and Mr Riddiford as counsel for Sberbank. Like the judge, I would wish to pay tribute to the excellent quality of the written and oral submissions which we have received from all parties.

The facts

17. There is little which needs to be added to the outline of the factual and procedural history which I have already given.

18. The judge received undisputed expert evidence from an expert on Azeri banking and insolvency law, Mr Anar Karimov. As Mr Karimov explained, the basic function of a voluntary restructuring of the present type is to give the relevant bank a breathing space to propose a plan of reorganisation in respect of its debts. It is a "rescue" or "turnaround" process, designed to enable the bank to continue trading while the plan is implemented, the object being to reorganise its liabilities so that it can survive as a going concern. While the restructuring is in progress, the bank will continue to carry on business subject to the supervision of the Azerbaijan Financial Market Supervisory Authority ("the AFMSA") and the Azeri court. As preliminary step, the bank must promulgate an indicative restructuring proposal, which must be approved by the AFMSA. There is a statutory mechanism which permits amendment of the proposal following consultation with creditors, and the proposal must also be extensively advertised. Once the terms of the restructuring plan have been finalised, the affected creditors will attend a meeting to vote on the final form of the plan. If it is approved by the prescribed majority (effectively two-thirds of the relevant creditors by value) and confirmed by the Azeri court, it will then be binding on all affected creditors.

19. In other words, as the judge said at [29], "the process facilitates rehabilitation and the resumption of trading rather than the collection of assets and their fair distribution followed by dissolution."

20. The plan in the present case provided for the restructuring of IBA's "Designated Financial Indebtedness" amounting to approximately $3.34 billion. Both the Sberbank Facility and the 2019 Notes constituted Designated Financial Indebtedness for the purposes of the plan, which provided for the Designated Financial Indebtedness to be discharged in its entirety and exchanged for various "entitlements". Those

entitlements consisted mainly of new debt securities, some of which were sovereign bonds issued by the Government of Azerbaijan and some of which were corporate bonds issued by IBA itself. The plan received overwhelming creditor support, being approved at the creditors' meeting held on 18 July 2017 by 99.7% of those voting at the meeting (in person or by proxy), who held, in aggregate, 93.9% (by value) of the total Designated Financial Indebtedness. Accordingly, the requisite two-thirds majority was achieved by a large margin.

21. Following the approval of the plan, a number of creditors who had voted against it, or who did not vote at all, decided to consent to it and surrender their existing claims. As matters now stand, the only creditors which could seek to enforce their claims contrary to the terms of the plan are (a) Sberbank, in right and respect of the Sberbank Facility, and (b) Citibank, in its capacity as trustee for Franklin Templeton of the 2019 Notes. Holders of about $154.7m of the 2019 Notes either voted against the plan or did not vote, and have not subsequently surrendered their Notes. Approximately $58m of those Notes are beneficially owned by the second to seventh respondents, and most of the remainder are also owned by entities connected to Franklin Templeton Investment Management Limited. They have asked not to be joined as respondents because they prefer to remain anonymous.

22. The dissentient creditors represent only a very small proportion (about 5%) of the total Designated Financial Indebtedness, and it is important to note that the foreign representative does not contend that the plan will fail to achieve its primary objective if the claims of the English creditors do not continue to be stayed. The plan became effective under Azeri law on 1 September 2017, following its approval by the Azeri court at the confirmation hearing on 17 August 2017. As I have already explained, the consequence of the Azeri court order is that the plan is binding on all the creditors in respect of the Designated Financial Indebtedness, whether or not they participated in the creditors' meeting and whether or not they voted for or against the plan.

The rule in *Antony Gibbs*

23. It is common ground that this court is bound, as was the judge, by a rule of English private international law which is often referred to as "the *Gibbs* rule" or "the rule in *Antony Gibbs*". The rule takes its name from the decision of this court (Lord Esher MR, sitting with Lindley and Lopes LJJ) in Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux (1890) LR 25 QBD 399. The defendant was a French company which entered into contracts with the plaintiffs, who were merchants carrying on business in London, for the purchase of consignments of copper, to be delivered and paid for in England. The contracts were subject to the rules and regulations of the London Metal Exchange. After the contracts were made, but before the due dates for delivery of much of the copper, the defendant went into liquidation in France, and refused to accept delivery of the copper. In its defence to an action brought by the plaintiffs for non-acceptance of the goods, the defendant argued that the French liquidation operated as a discharge from liability on the contracts under French law. This argument was rejected by the trial judge, Stephen J, who gave judgment for the plaintiffs for the loss sustained on resale in respect of all the copper, including that of which delivery was not due until after the liquidation.

24. The defendant's appeal was then rejected by this court, which also held that there was no basis upon which the judge ought to have stayed the proceedings, whether before

or upon giving judgment. The first step in the reasoning of Lord Esher MR was that the contracts were governed by English law, because they were made in England and due to be performed in England. Accordingly, English law would govern the discharge of the contract, in whatever country the action was brought. Conversely, had the governing law of the contract been a foreign law, the English court would recognise a discharge from liability upon bankruptcy in accordance with that law: see his judgment at 405-406.

25. Lord Esher continued (ibid):

> "It is now, however, suggested that, where by the law of the country in which the defendants are domiciled the defendants would, under the circumstances which have arisen, be discharged from liability under a contract, although the contract was not made nor to be performed in such country, it ought to be held that they are discharged in this country. It seems to me obvious that such a proposition is not in accordance with the principle which I have stated. The law invoked is not a law of the country to which the contract belongs, or one by which the contracting parties can be taken to have agreed to be bound; it is the law of another country by which they have not agreed to be bound.
>
> …
>
> Therefore, if it were true that in any of the modes suggested the defendants were by the law of France discharged from liability, I should say that such law did not bind the plaintiffs, and that they were nevertheless entitled, according to English law, to maintain their action upon an English contract."

26. In relation to the question of a stay, Lord Esher said at 409 that he could "see no ground in law on which any such stay ought to be granted." The other two members of the court took the same view, at 410 and 411 respectively.

27. For a modern statement of the *Gibbs* rule, the judge referred at [45] to Fletcher, The Law of Insolvency, fifth edition (2017), at para 30-061:

> "According to English law, a foreign liquidation – or other species of insolvency procedure whose purpose is to bring about the extinction or cancellation of a debtor's obligations – is considered to effect the discharge only of such a company's liabilities as are properly governed by the law of the country in which the liquidation takes place or, alternatively, of such as are governed by some other foreign law under which the liquidation is accorded the same effect. Consequently, whatever may be the purported effect of the liquidation according to the law of the country in which it has been conducted, the position at English law is that a debt owed to or by a dissolved company

> is not considered to be extinguished unless that is the effect according to the law which, in the eyes of English private international law, constitutes the proper law of the debt in question."

28. As the judge went on to note at [46], there is an exception to the rule if the relevant creditor submits to the foreign insolvency proceeding. In that situation, the creditor is taken to have accepted that his contractual rights will be governed by the law of the foreign insolvency proceeding. But the application before the judge proceeded on the basis, as it does before us, that this exception is not engaged.

29. The *Gibbs* rule has been criticised by many academics and commentators, including Professor Fletcher, on the basis that it is an outdated relic from an era when international cooperation in insolvency matters was in its infancy, and a parochial outlook tended to prevail. I do not propose to discuss those criticisms in any detail, since it is agreed that we are bound by the rule, although the appellant reserves the right to challenge it in the Supreme Court if the case proceeds that far. For similar reasons, I will not review the subsequent cases in which the rule has been applied by courts at all levels in England and Wales, usually without adverse comment. Most of the significant cases are noted by the judge at [54], to which should be added the recent decision of the Supreme Court in Goldman Sachs International v Novo Banco SA [2018] UKSC 34, [2018] 1 WLR 3683, where Lord Sumption JSC (with whom the other members of the court agreed) said at [12]:

> "The rescue of failing financial institutions commonly involves measures affecting the rights of their creditors and other third parties. Depending on the law under which the rescue is being carried out, these measures may include the suspension of payments, the writing down of liabilities, moratoria on their enforcement, and transfers of assets and liabilities to other institutions. At common law measures of this kind taken under a foreign law have only limited effect on contractual liabilities governed by English law. This is because the discharge or modification of a contractual liability is treated in English law as being governed only by its proper law, so that measures taken under another law, such as that of a contracting party's domicile, are normally disregarded: *Adams v National Bank of Greece SA* [1961] AC 255."

30. I would, however, observe that the charge of parochialism seems to me rather unfair, given the acceptance by this court in Gibbs that questions of discharge of a contractual liability are governed by the proper law of the contract, whether or not that law is English law. In the present case, as in Gibbs itself, the relevant contracts were governed by English law; but if they had been governed by Azeri law, the English court would have recognised the effect of the restructuring.

31. The real criticisms which may be levelled against the *Gibbs* rule, I would venture to suggest, are twofold. First, the rule may be thought increasingly anachronistic in a world where the principle of modified universalism has been the inspiration for much

cross-border cooperation in insolvency matters, including the UNCITRAL Model Law, and has also been recognised as forming part of the common law: see Singularis Holdings Limited v Pricewaterhouse Coopers [2014] UKPC 36, [2015] AC 1675, at [19] per Lord Sumption. In particular, there may now be a strong case for saying that, in the absence of a stipulation to the contrary, contracting parties should generally be taken to envisage that, upon the supervening insolvency of one party, a single law closely associated with that party should govern the rights of its creditors, wherever in the world its assets happen to be situated, and regardless of the proper law of the contract. Secondly, the rule may be thought to sit rather uneasily with established principles of English law which expect foreign courts to recognise English insolvency judgments or orders, for example when a scheme of arrangement under Part 26 of the Companies Act 2006 is approved by the court. It is only fair to add, however, that this second objection was decisively rejected by Lord Collins of Mapesbury in Rubin v Eurofinance SA [2012] UKSC 46, [2013] 1 AC 236, ("Rubin") at [126].

The UNCITRAL Model Law: principles of construction

32. There is no dispute about the principles which should guide us in construing the Model Law.

33. Regulation 2(2) of the CBIR provides that:

> "Without prejudice to any practice of the courts as to the matters which may be considered apart from this paragraph, the following documents may be considered in ascertaining the meaning or effect of any provision of the UNCITRAL Model Law as set out in Schedule 1 to these Regulations –
>
> (a) the UNCITRAL Model Law;
>
> (b) any documents of the United Nations Commission on International Trade Law and its working group relating to the preparation of the UNCITRAL Model Law; and
>
> (c) the Guide to Enactment of the UNCITRAL Model Law… made in May 1997."

34. We were not directly referred to any of the "travaux préparatoires" apart from the Guide to Enactment ("the Guide"). At the beginning of the Guide, the purpose of the Model Law was described in these terms:

> "1. The UNCITRAL Model Law on Cross-Border Insolvency, adopted in 1997, is designed to assist States to equip their insolvency laws with a modern, harmonised and fair framework to address more effectively instances of cross-border proceedings concerning debtors experiencing severe financial distress or insolvency. Those instances include cases where the debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place. In principle, the proceeding pending in the debtor's centre of main interests is

> expected to have principal responsibility for managing the insolvency of the debtor regardless of the number of States in which the debtor has assets and creditors, subject to appropriate coordination procedures to accommodate local needs.
>
> …
>
> 3. The Model Law respects the differences among national procedural laws and does not attempt a substantive unification of insolvency law. Rather, it provides a framework for cooperation between jurisdictions, offering solutions that help in several modest but significant ways and facilitate and promote a uniform approach to cross-border insolvency. Those solutions include the following:
>
> (a) Providing the person administering a foreign insolvency proceeding ("foreign representative") with access to the courts of the enacting State, thereby permitting the foreign representative to seek a temporary "breathing space", and allowing the courts in the enacting State to determine what coordination among the jurisdictions or other relief is warranted for optimal disposition of the insolvency;
>
> …"

35. The important point that the Model Law "does not attempt a substantive unification of insolvency law" is reinforced by paragraph 21 of the Guide, which describes its scope as "limited to some procedural aspects of cross-border insolvency cases", and says that "the Model Law is intended to operate as an integral part of the existing insolvency law in the enacting State". It also deserves emphasis that the Model Law does not depend in any way on reciprocity. Once a State has decided to adopt the Model Law, the local version of it adopted by that State will apply to all cross-border insolvencies which fall within its scope, whether or not the foreign representative comes from another enacting State. Thus, at the present time, the Model Law has been adopted and given effect in Great Britain and some 40 other countries, but not in Azerbaijan. In this respect, there is a significant contrast both with the EC Insolvency Regulation (Council Regulation (EC) 1346/2000 on Insolvency Proceedings), which applies to insolvency proceedings within the EU, and with international conventions on the recognition and enforcement of judgments, which as Lord Collins said in Rubin at [128] typically depend on a degree of reciprocity.

36. Under the heading "Relief", the Guide says:

> "35. A basic principle of the Model Law is that the relief considered necessary for the orderly and fair conduct of a cross-border insolvency should be available to assist foreign proceedings, whether on an interim basis or as a result of recognition. Accordingly, the Model Law specifies the relief that is available in both of those instances. As such, it neither necessarily imports the consequences of the foreign law into the insolvency system of the enacting State nor applies to the

> foreign proceeding the relief that would be available under the law of the enacting State…
>
> …
>
> 37. Key elements of the relief accorded upon recognition of a foreign "main" proceeding include a stay of actions of individual creditors against the debtor or a stay of enforcement proceedings concerning the assets of the debtor, and a suspension of the debtor's right to transfer or encumber its assets (article 20, paragraph 1). Such stay and suspension are "mandatory" (or "automatic") in the sense that either they flow automatically from the recognition of a foreign main proceeding or, in the States where a court order is needed for the stay or suspension, the court is bound to issue the appropriate order. The stay of actions or of enforcement proceedings is necessary to provide "breathing space" until appropriate measures are taken for reorganisation or liquidation of the assets of the debtor… The mandatory moratorium triggered by the recognition of the foreign main proceedings provides a rapid "freeze" essential to prevent fraud and to protect the legitimate interests of the parties involved until the court has an opportunity to notify all concerned and to assess the situation."

37. In the commentary on article 21, the Guide notes at paragraph 189 that the grant of post-recognition relief under that article is discretionary, and that the types of relief listed in article 21(1) "are typical of the relief most frequently granted in insolvency proceedings". However, "the list is not exhaustive and the court is not restricted unnecessarily in its ability to grant any type of relief that is available under the law of the enacting State and needed in the circumstances of the case." Paragraph 191 adds that "[i]t is in the nature of discretionary relief that the court may tailor it to the case at hand."

38. Apart from the Guide, we were also referred to the explanatory memorandum to the CBIR, which was prepared by the Department of Trade and Industry and laid before Parliament. Under the heading "Description", paragraph 2.1 recorded that a project to produce a model law on cross-border insolvency was initiated by UNCITRAL, and two international colloquiums were held in the early 1990's "to discuss whether that body should facilitate the development of a legal instrument providing a framework, which would encompass judicial cooperation, court access for foreign insolvency administrators and recognition of foreign insolvency proceedings." A working group was then established in 1995, whose work led to the adoption by UNCITRAL of a model law in 1997 "designed to assist States to equip their insolvency laws with a modern, harmonised and fair framework to address more effectively instances of cross-border insolvency."

39. Under the heading "Policy background", the memorandum began with an introduction from which I will quote the following extracts:

"7.1… The UNCITRAL Model Law on cross-border insolvency is that body's attempt to promote modern and fair legislation for cases where the insolvent debtor has assets in more than one State. The Model Law is, however, designed to respect the differences amongst national procedural laws and does not attempt a substantive unification of insolvency laws.

7.2 The British Government has a commitment to the promotion of a rescue culture and supports the Model Law as an appropriate legislative tool to support this objective on the wider international stage. In addition, implementation of the Model Law will be beneficial in serving the cause of fairness towards creditors who may be located anywhere in the world. We hope that it may also provide an example to other countries of our readiness to engage in a genuine process of co-operation in international insolvency matters and that our actions will encourage other countries to implement the Model Law. In this way, insolvency officeholders in Great Britain should be able to enjoy, progressively, the same benefits abroad as their international counterparts, and be able to reduce administrative costs incurred in recovering assets from overseas. As a result funds available for distribution to creditors, wherever they are located, should increase.

7.3. Limitations on cooperation and coordination between different national jurisdictions can be the result of lack of a legislative framework or from uncertainty regarding the scope of the existing legislative authority, for pursuing cooperation with foreign courts… The Model Law fills the gap found in many national laws by expressly empowering courts to extend cooperation in the areas covered by the Model Law.

7.4. In May 2002, the European Union adopted its own Regulation on insolvency proceedings. There is a significant element of overlap between the UNCITRAL Model Law and the EC Insolvency Regulation and although the latter governs only the coordination of insolvency proceedings within the European Union, its underlying principles and approaches have been extremely influential in the international community. However the Regulation does not deal with cross-border insolvency matters extending beyond member States of the European Union. Thus, the Model Law will provide a complementary regime of considerable practical value that will be capable of addressing instances of cross-border insolvency and cooperation outside the European Union. This will place Great Britain, by virtue of the operation of s426 of the Insolvency Act 1986, in the unique position of having a suite of statutory procedures available in cross-border insolvency cases, as well as the flexibility of common law."

40. Paragraph 7.19 of the memorandum noted that the language of the Model Law is similar to that used in international treaties and conventions, and "will almost certainly… be interpreted purposively. Accordingly the UNCITRAL Guide to Enactment will be a useful tool in interpreting the text."

41. Finally, it is relevant to note article 8 of the Model Law itself, headed "Interpretation", which states that:

> "In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith."

42. As counsel for Sberbank correctly point out in their written submissions, the Model Law deliberately does not incorporate a choice of law framework, nor is it predicated on reciprocity. That this was a deliberate choice is apparent from the reports of the working group discussed by Morgan J in Fibria Celulose S/A v Pan Ocean Co Limited [2014] EWHC 2124 (Ch), [2014] Bus LR 1041, ("Pan Ocean") at [82] to [87]. As appears from that discussion, an initial draft of what is now article 21(1)(g) included a power for the recognising court to apply the law of the foreign proceeding, but this was thought to be unrealistic and the wording was accordingly not included in the final version. Morgan J commented at [87]:

> "My reaction to the discussions of the working group is that it seems improbable that the working group, having deleted (from what is now article 21(1)(g)) a power for the recognising court to apply the law of the foreign proceeding, intended to bring back in such a power under the general wording which refers to "any appropriate relief"."

I respectfully agree, while noting that the submission of IBA (to which I will now turn) do not seek to go that far.

IBA's submissions

43. At an early stage of his oral argument, Mr Bayfield submitted that the principle of modified universalism does not entail the application of a single insolvency law to a cross-border insolvency. That would be a characteristic of what one might call full or unmodified universalism (see Rubin at [16]), but in the modified form which forms part of the English common law, and which underpins the UNCITRAL Model Law, it only requires, as Lord Hoffmann put it in In re HIH Casualty and General Insurance Ltd [2008] UKHL 21, [2008] 1 WLR 852, ("HIH") at [30]:

> "that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution."

See too Rubin at [17] to [20], where Lord Collins pointed out that a similar approach is adopted by the United States courts.

44. This submission is undoubtedly true as far as it goes, and it is well recognised that "at common law the court has power to recognise and grant assistance to foreign insolvency proceedings" as Lord Collins went on to explain in Rubin at [29] to [33]. Nevertheless, it is also important to note the qualifications expressed by Lord Sumption, speaking for the Privy Council, in Singularis at [19], where he said:

> "In the Board's opinion, the principle of modified universalism is part of the common law, but it is necessary to bear in mind, first, that it is subject to local law and local public policy and, secondly, that the court can only ever act within the limits of its own statutory and common law powers. What are those limits? In the absence of a relevant statutory power, they must depend on the common law, including any proper development of the common law."

45. Next, Mr Bayfield submitted that, as an international instrument, the Model Law "should be construed on broad principles of general acceptation", and its "interpretation should not be rigidly controlled by domestic precedents of antecedent date": see Stag Line v Foscolo Mango & Co Limited [1932] AC 328 ("Stag Line") at 350, per Lord Macmillan, and the observations to similar effect of Lord Wilberforce in James Buchanan & Co Limited v Babco Forwarding & Shipping (UK) Limited [1978] AC 141 at 152. Again, I would readily accept that such an approach to the interpretation of the Model Law is appropriate. Indeed, it chimes with the principles of construction applicable to the Model Law which I have already discussed, including in particular paragraph 7.19 of the explanatory memorandum to the CIBR.

46. Mr Bayfield then submitted that, if the foreign proceeding in the present case were a liquidation instead of a reconstruction, the English creditors would have been unable to enforce their claims in England. The reasons he advanced for reaching this conclusion are:

a) the Azeri liquidation would have been recognised as a foreign main proceeding under the CIBR, with the consequence that upon recognition an automatic stay would have come into effect under article 20(1), and would have remained in place throughout the liquidation until IBA was dissolved;

b) the foreign representative would have been able to apply for any assets situated in England to be remitted to the Azeri liquidation under articles 21(1)(e) and 21(2), which would enable the assets to be distributed in accordance with Azeri law;

c) before granting remission, the court would have to be satisfied that the interests of the creditors in Great Britain were adequately protected, but there is no reason to doubt that this requirement would be satisfied, because Mr Karimov's unchallenged evidence is that Azeri law treats foreign and local creditors equally, and has all the procedural safeguards that the English court would expect; and

d) it follows that all monetary claims against IBA, including claims governed by English law, would have to be proved in the Azeri liquidation, and could not instead be enforced against IBA's assets in England.

I should add that neither article 21(2), nor article 21(1)(e) which is in similar terms, uses the language of "remission", but rather says that the court may "entrust" the distribution, administration or realisation of the debtor's assets located in Great Britain to the foreign representative. I would accept, however, that this language is wide enough to include the remission of assets located in Great Britain, or their proceeds of sale, to a foreign liquidator in an appropriate case, especially as such a power exists at common law: see Rubin at [31] and [34].

47. Against this background, counsel for IBA in their written submissions pose what they call the critical question: namely, "whether the CBIR requires a foreign reorganisation to be treated less favourably (from the perspective of the company and its general body of creditors) than a foreign liquidation." They submit that this would be a surprising result, because the CBIR were expressly enacted to promote the "rescue culture" (see the explanatory memorandum at paragraph 7.2). Accordingly, just as article 21(1)(e) empowers the court to remit assets to a foreign liquidation, so as to prevent creditors from enforcing their claims against assets in England, so too article 21(1)(a) enables the court to stay the enforcement of claims subject to a foreign restructuring, so as to achieve the same objective. They go on to submit that the judge's reasoning is flawed because "he failed to explain why foreign reorganisations should be treated less favourably that foreign liquidations."

48. On the question whether there is jurisdiction to make such an order under article 21(1)(a) and (b), IBA submits that the language of those provisions is clearly wide enough to confer the necessary power on the court. The wording of article 21(1)(a) must be intended to go further than the automatic stay under article 20(1)(a), because it authorises the stay of proceedings "to the extent that they have not been stayed" under the latter provision. So too, the power to grant a stay of execution under article 21(1)(b) only applies "to the extent it has not been stayed under paragraph 1(b) of article 20". Furthermore, the need to give article 21 a wide construction was endorsed by Lord Collins in Rubin at [143], where he said:

> "Articles 21, 25 and 27 are concerned with procedural matters. No doubt they should be given a purposive interpretation and should be widely construed in the light of the objects of the Model Law…"

49. Counsel for IBA then go on to deal with four alleged jurisdictional bars which are said to limit the apparently broad scope of article 21(1)(a) and (b):

a) there is no jurisdiction to grant relief inconsistent with *Gibbs*;

b) there is no jurisdiction to grant relief against persons who are not bound by the reconstruction plan;

c) there is no jurisdiction to interfere with substantive rights; and

d) there is no jurisdiction to grant relief continuing beyond termination of the plan.

(a) No jurisdiction to grant relief inconsistent with Gibbs

50. IBA submits that this objection misunderstands the proper approach to construction of the CBIR. The existence of jurisdiction under these paragraphs of article 21 is essentially a question of statutory construction. Precisely because the CBIR give effect to an international instrument, which has been implemented in a large number of jurisdictions, the common law is irrelevant to its interpretation. This is reinforced by article 8, which requires regard to be had to the international origin of the Model Law and to the need to promote uniformity in its application. It is therefore wrong in principle to ask whether the CBIR were intended to abrogate the *Gibbs* rule. That rule is a classic example of a "domestic precedent of antecedent date", which in accordance with Stag Line should be ignored when construing an international instrument.

(b) No jurisdiction to grant relief against persons not bound by the reconstruction

51. According to IBA, this objection again takes matters nowhere. At common law, the English creditors can rely on the rule in *Antony Gibbs* to argue that they are not bound by the reconstruction plan, because they have not submitted to the jurisdiction of the Azeri court. But the present case is not concerned with the common law, and the relevant question is whether the English creditors' claims are capable of being stayed under the CBIR. As a matter of construction, it is clear that they are. There is no relevant restriction on the types of "obligations" or "liabilities" which can be stayed under article 21(1)(a); nor is there any suggestion in the CBIR or the Model Law (or in any of the *travaux préparatoires*) that the governing law of a liability is relevant to determining whether it can be stayed. As a matter of Azeri law, the plan is binding on all creditors who hold Designated Financial Indebtedness, including the English creditors, all of whom were entitled to vote at the creditors' meeting. There is nothing voluntary about the automatic stay under article 20(1), and there is equally no reason why a stay under article 21 should not be imposed contrary to the wishes of the English creditors.

(c) No jurisdiction to interfere with substantive rights

52. It is accepted (as I have already said) that the relief sought by IBA is intended to prevent the English creditors from exercising their contractual rights against IBA indefinitely. However, there is nothing in the CBIR which precludes the court from granting such relief. On the contrary, there are many forms of relief under the Model Law which prevent or interfere with the exercise of substantive rights, including rights governed by English Law. The most obvious example of this is the court's power to remit English assets belonging to the debtor in a foreign liquidation under articles 21(1)(e) and 21(2): see above. Where the court makes such an order, it operates to prevent creditors, including those whose claims are governed by English law, from enforcing their claims in England. The stay sought in the present case is simply the equivalent, in the context of a foreign reorganisation, of an order for remission in the context of a foreign liquidation. Further, although the judge drew a distinction between foreign liquidation proceedings and foreign reorganisation proceedings, there is no relevant difference between (a) remitting a company's assets

to a foreign liquidation so as to prevent a creditor from taking enforcement action in England, and (b) staying the enforcement of the creditor's claim in England so as to achieve the same result. Both forms of relief prevent the exercise of substantive contractual rights, and both are permitted under the Model Law.

53. Other examples of relief under the Model Law which prevent or interfere with the exercise of substantive contractual rights include:

a) the power under article 21(1)(c) to grant an order "suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor";

b) the power under article 23 for the foreign representative to bring avoidance proceedings under various sections of the Insolvency Act 1986, including section 238 (transactions at an undervalue), section 239 (unlawful preferences) and section 423 (transactions in fraud of creditors); and

c) the power under article 21(1)(g) to grant "any additional relief that may be available to a British insolvency officeholder under the law of Great Britain". Thus, for example, in Re Atlas Bulk Shipping AS [2011] EWHC 878 (Ch), [2012] Bus LR 1124, Norris J made an order under this paragraph restraining the respondent from relying on a contractual right of set-off governed by English law.

54. In reaching the contrary conclusion, the judge sought to derive support from the decision of the Supreme Court in Rubin and the decision of Morgan J in Pan Ocean, but neither case justifies the reliance which the judge placed upon it.

55. In Rubin, the receivers of a trust established under English law, with trustees resident in England, to carry on a sales promotions scheme in the USA and Canada, filed for protection under Chapter 11 of the US Bankruptcy Code, having obtained authority to do so from the English court. The Chapter 11 proceeding was recognised in England as a foreign main proceeding under the CBIR, on the application of the receivers who had been appointed as "foreign representatives" of the debtor trust by the US Bankruptcy Court. The receivers then commenced "adversary proceedings" under the US bankruptcy legislation against various defendants, with the object of clawing back funds for distribution in the bankruptcy. The defendants were not present in New York when the proceedings were begun, nor did they submit to the jurisdiction of the New York court. As a result, default and summary judgments were entered against them in New York. The receivers, as foreign representatives, then sought to enforce the judgments in England.

56. The main question considered by the Supreme Court was whether the New York judgments could be enforced at common law, by application of the principles developed by Lord Hoffmann in HIH and Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings PLC ("Cambridge Gas") [2006] UKPC 26, [2007] 1 AC 508. Reversing the decision of this court, the Supreme Court held by a majority that the judgments could not be enforced in England at common law, and that the reasoning of Lord Hoffmann in Cambridge Gas should not be followed. For present purposes, nothing turns directly on that part of the Supreme Court's judgment. However, the receivers also argued in the alternative that the judgments should be enforced under article 21 of the CBIR. This argument was in

turn rejected by the Supreme Court, for the reasons given by Lord Collins at [141] to [144]. After pointing out that the CBIR and the Model Law "say nothing about the enforcement of foreign judgments against third parties", Lord Collins said at [143]:

> "It would be surprising if the Model Law was intended to deal with judgments in insolvency matters by implication. Articles 21, 25 and 27 are concerned with procedural matters. No doubt they should be given a purposive interpretation and should be widely construed in the light of the objects of the Model Law, but there is nothing to suggest that they apply to the recognition and enforcement of foreign judgments against third parties."

57. IBA submits, and I would agree, that this paragraph contains the ratio of the Supreme Court's decision on the receivers' alternative argument. It must therefore be accepted that the court does not have jurisdiction under article 21 to recognise or enforce a foreign judgment against a third party. But, says IBA, that proposition has no bearing on the present case, where the foreign representative is not seeking to recognise or enforce any judgment of the Azeri court, but merely seeks to extend the existing moratorium (to the extent that it applies to IBA's Designated Financial Indebtedness) beyond the termination of the restructuring proceeding. Furthermore, although the Model Law contains no specific provision relating to the recognition of foreign judgments against a third party, there are specific provisions in article 21 which empower the court to grant the relief sought.

58. In Pan Ocean, the point in issue is helpfully summarised as follows by IBA:

> "a Korean company was party to a long-term contract of affreightment governed by English law with the respondent (Fibria). The company entered into an insolvency proceeding under Korean law, which was recognised as a foreign main proceeding in England under the Model Law. Under Korean insolvency law, a contractual term which purports to empower one of the parties to terminate the contract in the event of the other party's insolvency (an "*ipso facto* clause") is unenforceable. In those circumstances, the foreign representative sought an order under Article 21(1) of the Model Law preventing Fibria from serving a notice of termination under the contract. It was argued that Article 21(1) empowered the English Court to apply the Korean prohibition against *ipso facto* clauses."

59. The application was dismissed by Morgan J. He began by rejecting the foreign representative's argument that the court could "stay" Fibria's right to serve a termination notice under article 21(1)(a) of the Model Law, on the ground that a termination notice is not an "action" or "proceeding" within the meaning of that provision: see the judgment at [63] to [76]. No challenge is made by IBA to that part of the decision, which it accepts as being "plainly correct". In the alternative, the

foreign representative argued that the court had a general discretion to apply the law of the foreign proceeding as "appropriate relief" under article 21(1), but this argument was also rejected. Morgan J held that the court did not have jurisdiction under article 21(1) to grant "relief which would not be available to the court when dealing with a domestic insolvency": see [108]. Since *ipso facto* clauses are valid and enforceable under English law, the relief sought went beyond that which the court was able to grant in a domestic insolvency, and the court therefore lacked jurisdiction to grant it.

60. I have already referred to some of the reasoning which led Morgan J to this conclusion: see [42] above. I will also quote what he said at [80], in the context of his preliminary consideration of possible literal readings of article 21:

> "The administrator's argument that the scope of "any appropriate relief" is not cut down by the terms of sub-paragraphs (a) to (g) which are matters "included" in the appropriate relief but not exhaustive of the appropriate relief does reflect the ordinary meaning of the language of article 21. None the less, I consider it somewhat surprising that sub-paragraph (g) is expressed in the way which it is if it had really been intended that the phrase "any appropriate relief" permitted the recognising court to grant relief which it would not be able to grant in an insolvency conducted in accordance with the laws of the recognising court. A power for the recognising court to grant relief in that way would be a very significant power. It is odd to think that such a power was intended without there being any specific reference to the recognising court's ability to apply the law of a foreign state, or even to do something which no system of law anywhere would allow. This is particularly so in view of the terms of sub-paragraph (g) which deliberately limit relief under that sub-paragraph to relief which would be available to a British insolvency office holder under the law of Great Britain."

61. IBA submits that Pan Ocean presents no obstacle to its application in the present case, because the grant of a stay falls squarely within the language of article 21(1)(a) and (b), and is plainly "appropriate relief" in all the circumstances. If it were necessary to go further, and establish that the relief sought by IBA would be available to the court when dealing with a domestic English insolvency, that test is satisfied because the relief is substantially equivalent to a permanent anti-suit injunction in support of a creditors' voluntary arrangement or scheme of arrangement, those being the nearest domestic equivalents to the Azeri restructuring proceeding. IBA goes on to submit that, in any event, Morgan J was wrong to conclude that the relief available under article 21(1) is confined to relief which would be available in the context of a domestic insolvency. The words "any appropriate relief" mean what they say, and should not be glossed. If it were always necessary, as a matter of jurisdiction, to establish that the relief sought under article 21(1) is of a kind that would be available in an English insolvency, then the whole of article 21(1) apart from paragraph (g) would be redundant.

62. In oral argument, Mr Bayfield submitted that we should not be deterred by the relatively brief comments made by Lord Collins in Rubin about the scope and purpose of article 21. Lord Collins expressly recognised that article 21 should be "widely construed in the light of the objects of the Model Law", and at [28] he had referred to a passage in the Guide emphasising "that the Model Law enables enacting states to make available to foreign insolvency proceedings the type of relief which would be available in the case of a domestic insolvency". The grant of a stay or moratorium is of the same broad "type" as the relief available in a domestic insolvency, and although of a largely procedural nature, there is no reason why it should not be deployed so as to achieve a substantive result which fully accords with the principle of modified universalism.

(d) No jurisdiction to grant relief continuing beyond termination

63. The judge did not reach any final decision on the question whether, as a matter of jurisdiction, it is open to the court to grant relief which would continue beyond the termination of the foreign proceeding, although he expressed sympathy for the argument advanced by Mr Moss on behalf of Franklin Templeton that such a limitation is implicit in the scheme of the CBIR. As the judge said, at [154]:

> "If the administration type proceeding terminates with a rescue based on a plan of reorganisation, then there seems to me to be, at least in general terms, sound sense in the proposition that the CBIR relief (i) cannot last beyond the duration of the foreign proceeding being assisted and (ii) cannot or should not affect creditors who are not bound by the plan which the foreign proceeding has enabled. I also consider it to be a useful test of the nature of the relief sought, and its proper characterisation as substantive or procedural in nature, whether it is to extend in time beyond the pendency of the foreign proceeding."

Franklin Templeton renew the contention in this court by means of a respondent's notice.

64. IBA's position in relation to the contention may be summarised as follows:

a) There is nothing in the CBIR, the Model Law or the Guide which expressly confines the grant of relief under article 21 to the duration of the foreign proceeding itself. On the contrary, where the foreign proceeding terminates, article 18 merely requires the foreign representative to inform the court of any "substantial change in the status of the recognised foreign proceeding or the status of the foreign representative's appointment". The court can then decide what steps should be taken to modify or terminate the effects of recognition: see the Guide at paragraph 168.

b) Upon termination of the foreign proceeding, there is admittedly no longer any "foreign representative" who has standing to apply for relief under the CBIR: see Sanko Holdings Co Limited v Glencore Limited [2015] EWHC 1031 (Ch) at [38] to [50]. However, it does not follow from this that the court lacks jurisdiction to grant relief continuing beyond the date of termination. Provided the application is made and determined before the date of

termination, there is no reason why the relief granted should not continue beyond that date.

c) Although the automatic stay under article 20(1) may well be a temporary measure designed to provide breathing space, the relief available under the Model Law does not end there, and the courts of the enacting State must then determine what coordination among the jurisdictions or other relief is best calculated to achieve the optimal disposition of the insolvency. Such relief may include, where appropriate, the grant of an indefinite stay under article 21.

d) Where a stay extends beyond the duration of the foreign proceeding, it is possible that a creditor might apply to lift the stay. Since the foreign representative would no longer be in office, the debtor company (here IBA) would have standing to oppose the application; and, in any event, the court would only lift the stay if it was appropriate to do so, even if the application were unopposed.

e) Various provisions in schedule 2 to the CBIR deal with procedural matters and envisage that the foreign representative will be a respondent to the relevant application, but these provisions do not form part of the Model Law itself and cannot be used as an aid to its interpretation. Their purpose is merely to bring the Model Law within the framework of English civil procedure.

Discretion

65. On the assumption that the court has jurisdiction to grant the relief sought, IBA submits that the court should exercise its discretion to do so. Since, however, the question only arises if IBA succeeds on the issue of jurisdiction, I will not at this stage set out IBA's detailed submissions on it.

The submissions of Sberbank

66. Mr Howard opened his oral submissions on behalf of Sberbank by emphasising that the Azeri restructuring proceedings are now for all practical purposes at an end. The plan has been approved by the Azeri court, its provisions have been implemented, and IBA has been restored to financial health and is now trading. Against that background, he submits, the substantive nature of IBA's application for an indefinite stay is readily apparent. By the use of a procedural device, IBA hopes to achieve the result that Sberbank's English law rights are abrogated and effectively transformed into rights under Azeri law. This would be an abuse of article 21, which was designed with the limited object of enabling modest assistance of a procedural nature to be given in the case of a foreign restructuring. The limited nature of the article's scope is reinforced by the complete absence of any provision which might enable creditors' rights to be subjected to the law applicable to the foreign proceedings.

67. Building on those opening points, Mr Howard submits that, as a substantive rule of English private international law, the rule in *Gibbs* applies, Sberbank's rights under the Sberbank Facility remain unaffected by their discharge under Azeri law, and it would be wrong in principle to use the procedural mechanisms of the CBIR so as to effect a substantive discharge of those rights. In order for Sberbank's English law rights to be affected, it would be necessary either for *Gibbs* to be overruled (which

should be done, if at all, by Parliament) or for a "gateway" to variation of those rights to be found under existing English law, for example in an English liquidation, administration or scheme of arrangement. In a case of the present type, the appropriate remedy for a foreign office holder to adopt would be to apply for a parallel scheme of arrangement in this jurisdiction; but, for whatever reason, the foreign representative has chosen not to go down that route.

68. As an example of this conventional way of proceeding, Mr Howard referred us to the decision of Lawrence Collins J (as he then was) in In re Drax Holdings Limited [2003] EWHC 2743 (Ch), [2004] 1 WLR 1049. The scheme of arrangement in that case related to funding liabilities incurred on the acquisition of the Drax power station in Yorkshire, carried out by a series of transactions involving a group of subsidiaries of a Delaware corporation. The relevant contractual obligations were governed by English law, but the claimant companies were incorporated in the Cayman Islands and Jersey respectively. As Lawrence Collins J noted, at [30]:

> "In the case of a creditors' scheme, an important aspect of the international effectiveness of a scheme involving the alteration of contractual rights may be that it should be made, not only by the court in the country of incorporation, but also (as here) by the courts of the country whose law governs the contractual obligations. Otherwise dissentient creditors may disregard the scheme and enforce their claims against assets (including security for the debt) in countries outside the country of incorporation."

69. Lawrence Collins J added, at [34]:

> "Of fundamental significance in the present case is the fact that simultaneous orders would be made (if the schemes are sanctioned) in the courts of the place of incorporation, Cayman Islands and Jersey. The English schemes will make those schemes effective by binding the creditors who are subject to the English jurisdiction. I was also informed (although I was not given details) that Drax Holdings will, for a similar purpose, apply for injunctions under the United States Bankruptcy Law (11 United States Code section 304) granting relief, in aid of the schemes of arrangement in England, the Cayman Islands and Jersey, with the object of preventing United States creditors from taking action to frustrate the schemes."

70. Given the existence of this recognised procedure for binding English creditors to a foreign scheme of arrangement, it would be wholly wrong, submits Mr Howard, to seek to achieve the same result indirectly under the CBIR, thus circumventing the substantive and procedural conditions which have to be satisfied before an English scheme of arrangement can be sanctioned by the court.

71. More generally, Sberbank submits that an indefinite stay is no longer required for the purposes of the Azeri reconstruction plan, which has run its course. The "breathing space" envisaged by the Model Law has served its purpose, and all the creditors who participated in the plan have received their entitlements. As I have already pointed out, there is no suggestion that the success of the plan is jeopardised by the non-participation of the dissentient English creditors, and the entitlements of those who participated were calculated on the assumption that all the holders of Designated Financial Indebtedness would be treated alike. If the English creditors choose not to participate in the scheme, and are instead able to enforce their debt claims under English law, the other creditors have no legitimate grounds for complaint. They have received everything to which they were entitled under Azeri law.

72. As to the construction of the Model Law, Sberbank submits that its provisions should be interpreted widely and purposively, so far as procedural matters are concerned, but narrowly, in relation to substantive matters. While it may be difficult in some cases to draw the line between procedural and substantive matters, there is no such difficulty in the present case. Indeed, IBA now concedes that the indefinite moratorium which it seeks would have a substantive effect. In support of this approach to the construction of the Model Law, Sberbank relies on the Guide and other admissible aids to construction to which I have already referred, the guidance by Lord Collins given in Rubin, and the discussion by Morgan J of the *travaux préparatoires* in Pan Ocean. It is notable, says Mr Howard, that there is nothing in the *travaux* specific to article 21, which one would have expected if its provisions were intended to have substantive effects and to go beyond the provision of supplementary procedural assistance.

73. As an instructive example of how the Model Law operates in practice, Mr Howard took us to an appellate decision in the Federal Court of Australia on which Mr Bayfield also places reliance for IBA, Akers v Deputy Commissioner of Taxation [2014] FCAFC 57 ("Akers"). The foreign main proceeding in that case was the liquidation in the Cayman Islands of a Cayman-registered company, Saad. The appellants were the joint foreign representatives of the Cayman liquidators, and upon recognition of the liquidation in Australia under the Australian version of the Model Law, they asked the court to order remission of Saad's remaining funds in Australia to the Cayman Islands. This was opposed by the Deputy Commissioner of Taxation, on the basis that Saad was liable to Australian tax and penalties for which the Commissioner would have been unable to prove in the Cayman liquidation, because under Cayman law that would amount to enforcement of a foreign revenue law. This objection was upheld by the federal court, both at first instance and on appeal, but it should be noted that the Commissioner's claims to pursue relief against the company within Australia "were limited to recovery of an amount of money up to, but no more than, a sum that would be received by the DCT on a *pari passu* basis if he or she were entitled to prove the taxation debts as an unsecured creditor in the foreign main proceeding": see the judgment of Allsop CJ at [26]. In other words, the effect of the order was to place the Commissioner in the same position as the other creditors, but freed from the rule against enforcement of foreign revenue debts which still formed part of Cayman law, but not the law of Australia.

74. For present purposes, submits Mr Howard, the main interest of Akers lies in the explanation given by Allsop CJ of how the Model Law works: see in particular paragraphs [58], [68] to [69], [98] and [115] to [143]. These passages are too long to

quote in full, but one of the matters upon which the court placed repeated emphasis was the need to provide proper protection for the interests of local creditors under articles 21(2) and 22(1) of the Model Law. I will also quote Allsop CJ's conclusion at [120]:

> "Whilst the Model Law reflects universalism, there is nothing in the Model Law or the UNCITRAL Working Papers prior to its formulation, or in the CBI Act, which would justify the stripping of rights of a local creditor by reason of recognition. The universalism that underpins the Model Law and CBI Act is one for the benefit of all creditors, and the protection of local creditors is expressly recognised. It is not inappropriate to call it "modified universalism" for what such an appellation is worth."

75. Sberbank goes on to submit that, where the Model Law does potentially have a substantive effect on creditors' rights, this is made explicit. Apart from articles 21(1)(e) and 21(2), which (as I have explained) make express provision for the remission of assets located in Great Britain to the foreign representative for distribution under the relevant foreign proceeding, provided that the interests of creditors in Great Britain are adequately protected, Mr Howard also referred to article 13(3), where Parliament made express provision relating to claims by a foreign tax or social security authority, thereby reversing the common law rule in Government of India v Taylor [1955] AC 491. By contrast, the effect of granting the indefinite stay sought by IBA would be to force the English creditors to accept the terms of the Azeri reorganisation and the effective abrogation of their English law rights, despite the absence of any express provision to that effect in the Model Law. There is simply no equivalent to the clear and unambiguous provisions which permit the remission of assets to a foreign liquidator in a case like Akers.

76. Sberbank also made submissions on the issue of discretion, but as I have already noted this issue only arises if IBA succeeds on jurisdiction. In this context, Mr Howard reiterated that the Azeri reconstruction plan had been drawn up on the footing that all the relevant creditors would participate, and the terms on offer were not "discounted" to reflect the probable non-participation of the English creditors. The plan was therefore premised on all the creditors being offered the same treatment. None of the other creditors' entitlements are affected if the English creditors succeed in obtaining a better outcome through enforcement of their English law rights. Mr Howard likened any resentment which the other creditors might feel in those circumstances to that of a passenger on an aeroplane who discovers that the person sitting next to him paid less for their ticket. It is undeniably irritating, but the passenger who paid more cannot claim to have been deprived of anything, or of having been treated unfairly.

The submissions of Franklin Templeton

77. Franklin Templeton adopted the written and oral submissions of Sberbank in their entirety. Near the start of his oral argument, Mr Moss emphasised the contrast between the Model Law, which contains no choice of law provisions, and the EU

Regulation on Insolvency Proceedings, which both in its original form (available to those who drafted the Model Law) and in the recast version which has applied since 2015 contains a general choice of law provision (subject to specific exceptions), and also provides expressly for the recognition and enforceability with no further formalities of judgments of the courts of the Member State in which the debtor's COMI is situated, including compositions and schemes of arrangements: see articles 19 and 32 of the recast Regulation (EU) 2015/848 of 20 May 2015. Against that background, submits Mr Moss, it is very significant that the framers of the Model Law did not adopt similar provisions.

78. In so far as this omission may be thought to leave a gap in the Model Law, Mr Moss points out that UNCITRAL is currently working on a further model law about the recognition and enforcement of insolvency-related judgments ("the Insolvency Judgments Model Law"). Indeed, matters have progressed to the stage where the Insolvency Judgments Model Law was adopted by a decision of UNCITRAL on 2 July 2018, and it will now be disseminated to governments and other interested bodies with a recommendation that all States give favourable consideration to its implementation. The accompanying Guide to Enactment includes in its non-exhaustive list of the types of judgment that might be considered insolvency-related judgments, at paragraph 59(e):

> "A judgment (i) confirming or varying a plan of reorganisation or liquidation, (ii) granting a discharge of the debtor or of a debt, or (iii) approving a voluntary or out-of-court restructuring agreement."

79. It is provisions of this kind, submits Mr Moss, which if implemented in the United Kingdom would provide the appropriate machinery to deal with the present type of case. As matters stand, however, there is a confusion at the heart of IBA's case between two different aspects of international insolvency restructurings. One aspect is the stay or moratorium that debtors seek in order to obtain a breathing space while they formulate a restructuring; the other is the question of how the debtor can bind dissenting parties to the proposed restructuring. Only the former aspect falls within the scope of the existing Model Law. The latter issue depends on jurisdiction over the dissenting creditors and/or the law which governs their debts. In many cases, of which this is one, it may not be possible to enforce the compromise against all creditors, but the reorganisation may nevertheless be worthwhile and save a viable business. If it is desired to go further, and bind foreign creditors who would not otherwise be bound, the long-standing practice in international restructurings of the present type has been to apply for parallel schemes of arrangement in other jurisdictions. IBA's failure to follow this course "should not be cured", as counsel for Franklin Templeton put it in their written submissions, "by granting unprecedented and unjustifiable relief under the CBIR".

80. In this connection, Mr Moss also submits that there are fundamental differences between liquidations (and equivalent procedures) on the one hand, and company reorganisations (in a broad sense) on the other hand. When a company goes into liquidation, the governing principle is that the pre-existing rights of the creditors should be enforced collectively. As Lord Hoffmann said in Cambridge Gas at [15], "bankruptcy, whether personal or corporate, is a collective proceeding to enforce rights and not to establish them". By contrast, the purpose of a corporate

reorganisation will generally be to change the substance of the creditors' existing rights, with a view to the company emerging from the reconstruction as a going concern. It is therefore not surprising if these two very different types of proceeding are treated differently under the Model Law. Moreover, even in the case of a foreign liquidation, it is by no means clear that the English court would remit assets to a foreign liquidator if to do so would be unfair to creditors whose rights are governed by English law: compare In re Bank of Credit and Commerce International SA (No.10) [1997] Ch 213, discussed by Lord Hoffmann, and regarded by him as correctly decided on its facts, in HIH at [15] to [17].

81. The remainder of Mr Moss's oral submissions were principally directed to the temporal issue, that is to say the question whether (as Franklin Templeton put it in their respondent's notice) it is possible as a matter of jurisdiction to grant relief under article 21 which extends in duration beyond the termination of the foreign proceedings. The arguments relied on by Mr Moss in the court below in support of this proposition were summarised by the judge at [149] (1) to (7) and [150], which I will not repeat. In summary, the main points which Mr Moss emphasised before us were as follows:

a) Numerous provisions of the Model Law, including in particular articles 1, 2, 9-12 and 15-31, are all drafted on the assumption that the relevant foreign proceeding is still in existence and there is a validly appointed foreign representative still in office.

b) The notion of "appropriate relief" in article 21(1) must be confined to relief which is available under domestic law (see in particular the Guide at [189]), and as a matter of English law it would not be possible for a stay or moratorium to continue beyond the termination of a liquidation or administration.

c) Regardless of the position under domestic law, the temporal limitation is anyway inherent in the scope of relief potentially available under article 21, and the judge was right to conclude as he did at [154], quoted at [63] above.

d) Support by way of analogy for what is basically a proposition of common sense may be found in Re Kingscroft Insurance Co Limited [1994] BCC 343, where Harman J held that an order for the production of books and documents and for private examination obtained by provisional liquidators under section 236 of the Insolvency Act 1986 was spent once the winding-up petition had been dismissed and the provisional liquidators ceased to hold office: see his judgment at 346-347. As Harman J said at 347, "when there is no office, there cannot be a purpose of assisting the holder of that non-existent office."

e) Further support may also be found in the recent decision of Rares J, sitting in the Federal Court of Australia, in Board of Directors of Rizzo-Bottiglieri-De Carlini Armatori SpA v Rizzo-Bottiglieri-De Carlini Armatori SpA [2018] FCA 153 ("Rizzo"). That case had a complex procedural background, summarised by Rares J at [3] to [11]. For present purposes, it is enough to say that an Italian form of reconstruction proceedings (known as a *concordato preventivo*) had been superseded in Italy by a liquidation ordered by the Italian court, and one issue which then arose was whether, and if so when, orders

which the Australian court had previously made in support of the *concordato* should be terminated and replaced with interim relief in support of the liquidation. The judge dealt with these matters at [26] to [34], concluding that the purpose of the earlier orders had come to an end when the Italian court dismissed the *concordato*, with the result that those orders should be vacated or set aside with effect from that date. As the judge put it, at [33]:

> "As a matter of principle, orders made under the Model Law should also cease to operate once the reason for having originally granted a stay and any other orders under the Model Law to recognise, aid or facilitate the conduct of the foreign proceeding also has ceased to exist. There is then no need to protect the debtor's assets here under the Model Law, because the foreign proceeding (in aid of which the local stay, recognition and any other orders were made) has ceased to exist, or otherwise no longer provides a justification to prevent creditors from exercising their rights in Australia against the debtor or the debtor's assets."

82. In the present case, submits Mr Moss, the Azeri reconstruction has for all practical purposes come to an end, and it is only being kept alive artificially for the purposes of this appeal. In substance, it terminated on 30 January 2018, and it would be wrong in principle for this court to grant any relief extending beyond that date.

The jurisdiction issue: discussion and conclusions

83. The first question to consider, in my judgment, is in what sense it may be said that the English court lacks jurisdiction to grant the indefinite stay requested by the foreign representative. As Pickford LJ usefully clarified in Guaranty Trust Company of New York v Hannay & Company [1915] 2 KB 536 at 563:

> "The word "jurisdiction" and the expression "the Court has no jurisdiction" are used in two different senses which I think often leads to confusion. The first and, in my opinion, the only really correct sense of the expression that the Court has no jurisdiction is that it has no power to deal with and decide the dispute as to the subject-matter before it, no matter in what form or by whom it is raised. But there is another sense in which it is often used, i.e., that although the court has power to decide the question it will not according to its settled practice do so except in a certain way and under certain circumstances."

84. It is clear, to my mind, that the present case does not involve an issue of jurisdiction in the former, or what one might call the "strict", sense. The application was made by a foreign representative of a foreign proceeding, duly recognised as such in this jurisdiction under the CBIR. Furthermore, the foreign proceeding was still in progress both when the application was made and when it was determined by the High Court.

As Mr Bayfield made clear, the application is made under article 21(1)(a) and (b), which expressly empower the court, "where it is necessary to protect… the interests of the creditors", to "grant any appropriate relief" at the request of the foreign representative, including a stay of the commencement or continuation of individual actions or proceedings concerning the debtor's assets, rights, obligations or liabilities, or a stay of execution against the debtor's assets to the extent that there has not already been an automatic stay under article 20(1)(a) and (b). As a matter of jurisdiction in the strict sense, the application seems to me to fall squarely within the clear wording of article 21. In particular, I would reject a submission made by Mr Moss that the only purpose of article 21(1)(a) and (b) is to enable the court, upon reorganisation of a foreign *non-main* proceeding, to grant equivalent relief to that automatically conferred by the corresponding paragraphs of article 20(1) in the case of a foreign *main* proceeding. That is no doubt an important function of article 21(1)(a) and (b), but I can see no warrant in the wide language of the paragraphs for confining their scope so narrowly.

85. Accordingly, the real issue in the present case, as I see it, is one of jurisdiction in Pickford LJ's second sense, that is to say whether as a matter of settled practice the court should not exercise its power to grant a stay under those paragraphs, going beyond the automatic stay under article 20, where to do so:

    a) would in substance prevent the English creditors from enforcing their English law rights in accordance with the *Gibbs* rule; and/or

    b) would prolong the stay after the Azeri reconstruction has come to an end.

Despite Mr Bayfield's skilful and well-sustained submissions, I would answer both those questions in favour of the respondents. I must now explain my reasons for reaching that conclusion.

(a) Is it appropriate to grant an indefinite stay so as to defeat the rights of the English creditors?

86. An English court could only properly grant the stay sought by IBA, which is avowedly intended to prevent the English creditors from enforcing their English law rights indefinitely, if it were satisfied of two things. First, the stay would have to be *necessary* to protect the interests of IBA's creditors. Secondly, the stay would have to be an *appropriate* way of achieving such protection. In my view, neither of those conditions is satisfied.

87. As to the interests of IBA's creditors, viewed collectively, the relevant class which needs to be considered is the creditors whose debts formed part of IBA's Designated Financial Indebtedness. But they have now obtained everything to which they were entitled under the Azeri reconstruction plan, unless they deliberately chose not to participate in it. There is no evidence to suggest that the benefits on offer under the plan were discounted to reflect the probable non-participation of the English creditors, and the plan was duly approved by the Azeri court. IBA is now trading again, and the reconstruction is at an end. There is no further protection which the creditors need in order for the foreign proceeding to achieve its purpose. The highest that Mr Bayfield was able to put it was to argue that the creditors who participated in the plan could conceivably be prejudiced if the ability of IBA to repay its new corporate bonds,

which formed part of the new entitlements provided under the plan, were jeopardised in the future by successful enforcement by the English creditors of their stayed claims. There is no evidence, however, to suggest that this possibility is of more than theoretical significance; and, even if there were, I would regard it as far too indirect and imponderable a consideration to satisfy the test of necessity in article 21(1).

88. It is also material in this context that IBA could in principle have promoted a parallel scheme of arrangement in this jurisdiction, but chose not to do so. Mr Bayfield says that this objection misses the point, because one of the objects of the Model Law is to avoid duplication of proceedings with all the additional expense and inconvenience which they entail. I acknowledge the force of that argument, and would accept that the Model Law is designed to increase cooperation and reduce the need for separate proceedings in relation to matters falling within its scope. But that goes only some of the way towards answering the question whether protection of the interests of IBA's creditors really requires an indefinite stay of the English creditors' claims, when the alternative of a separate English scheme of arrangement was always available. One may surmise that IBA's real reasons for not promulgating a separate English scheme of arrangement probably had more to do with the need which would then have arisen to treat the English creditors as a separate class, and to offer them terms which they would be prepared to accept. That is another way of saying that the English creditors' strongest bargaining position would have been their English law rights, protected by the *Gibbs* rule; and this brings one back to the question whether anything in the Model Law, properly construed, should be permitted to override those rights. If not, it seems to me that it could seldom, if ever, be appropriate to grant relief under the Model Law which would have the substantive effect of doing just that.

89. Here, the starting point must in my opinion be the clear recognition in the Guide that the scope of the Model Law is "limited to some procedural aspects of cross-border insolvency" and that it "does not attempt a substantive unification of insolvency law". I would accept the respondents' submissions that the absence of any choice of law provisions in the Model Law is highly significant in this context, as is the absence of any requirement of reciprocity and the contrast which may be drawn with other international instruments such as the EU Insolvency Regulation or conventions for the mutual recognition of judgments. Furthermore, if the power to grant a stay under article 21 had been intended to override the substantive rights of creditors under the proper law governing their debts, one would expect this to have been made explicit, or at the very least to have been the subject of discussion and a positive recommendation at the preparatory stage. In the absence of any such material, I can find no warrant for treating the relevant article 21 powers as other than procedural in nature, with the main object of providing a temporary "breathing space" of the kind envisaged in the Guide.

90. Strong support for this approach may also be found in the existing case law. The decision of the Supreme Court in Rubin is particularly instructive, in my view, because the court there firmly rejected the approach taken by this court (of which I was a member) which sought to build on the principles stated with typical brilliance by Lord Hoffmann in HIH and Cambridge Gas so as to develop the common law on recognition of foreign judgments in line with the principle of modified universalism in insolvency proceedings. In essence, as it seems to me, IBA is trying to achieve a similar sort of result in the present case, by asking us to sideline or circumvent the

established common law rights of the English creditors by an appeal to the principle of modified universalism.

91. In any event, whatever the force of that comparison may be, Rubin is also directly in point, and binding on us, because, having declined to extend the common law, the Supreme Court went on to reject the receivers' alternative argument based on the CBIR and the Model Law. It was in this connection that Lord Collins expressly said, at [143], that article 21 is "concerned with procedural matters", and although it should be given a purposive interpretation and widely construed, there is nothing to suggest that it applies to the recognition and enforcement of foreign judgments against third parties: see [56] above. In a similar way, I can find nothing in article 21 to suggest that the procedural power to grant a stay could properly be used to circumvent the *Gibbs* rule.

92. Nor, in my view, does IBA gain any assistance from the Australian case of Akers. The issue was a very different one, concerning the terms on which it would be appropriate for the Australian court to order the remission of assets to a foreign liquidator, in circumstances where the Commissioner of Taxation would be unable to prove in the foreign liquidation because of the rule in Government of India v Taylor, but was subject to no such disqualification in Australia. The solution adopted was, in effect, to put the Commissioner on the same footing as the other creditors, but freed from the disability which would have prevented him from recovering anything in the foreign liquidation. Thus, the decision fully respected the domestic rights of the Commissioner as an Australian creditor, and far from circumventing them, the whole purpose of the order was to protect these rights, although not to the extent of affording him a preference over the other creditors. The fundamental principle of *pari passu* distribution on a liquidation was thus also protected. Nothing in Akers appears to me to be inconsistent with the position of the respondents in the present case. The difference is that the substantive rights which they are asking the court to respect gives them a potential advantage over the other creditors, but since the Model Law is essentially procedural in nature, it would in my view be wrong to use it to deprive the English creditors of that substantive advantage.

93. I also agree with Mr Moss's submission that there is an important distinction to be drawn between a liquidation and schemes of reconstruction. In a liquidation, the substantive rights of creditors are generally unaffected, and the primary focus is on achieving a fair distribution of the company's assets between all the creditors, normally on a *pari passu* basis. Save in exceptional cases, the liquidation will end with the dissolution of the company. In a reconstruction, on the other hand, the object is usually that the company will continue as a going concern, and the terms will typically involve significant changes to the creditors' substantive rights. This distinction was in my view rightly recognised by the judge, albeit in his discussion of discretion, at [158(3)], where he expressed his agreement with Morgan J in Pan Ocean at [112], helpfully adapting that paragraph to the present case as follows:

> "In some cases, it can be argued that anyone who does business with a foreign company which might thereafter enter a process of insolvency, governed by the law of its country of registration, should expect that the insolvency will be governed by that law. Indeed, statements to that effect have been made in [Atlas Bulk] para 26 and AWB (Geneva) SA v North America

> Steamships Limited [2007] 1 CLC 749, para 31. However, in the present case, the parties had deliberately chosen English law as the law of the contract. Whereas the parties might have expected that an [Azeri] court would apply [Azeri] insolvency law to the insolvency of the company, they might have been very surprised to find that an English court would [in effect] apply [Azeri] insolvency law to the substantive rights of the parties under a contract which they had agreed should be governed by English law."

94. More generally, I also agree with the main thrust of the conclusion reached by the judge at [146] after his careful consideration of essentially the same arguments as have been addressed to us:

> "In conclusion, in my judgment, the *Pan Ocean* case, following *Rubin*, and consistently with the *Antony Gibbs* case, affirms that the Model Law and the CBIR do not empower the English court, in purported appliance of English law, to vary or discharge substantive rights conferred under English law by the expedient of procedural relief which as a practical matter has the same effect, and has been fashioned with the intention, of conforming the rights of English creditors with the rights which they would have under the relevant foreign law."

95. The judge went on to say, at [147], that he would regard this conclusion "as a jurisdictional bar in the strict sense", but that it would in any event amount to a jurisdictional fetter in the wider sense explained in the Guaranty Trust case, with the result "that any such power could never appropriately be exercised so as to achieve the application of foreign law to the discharge or variation of an English law right." While I agree with the judge's conclusion at [146] in its application to the facts of the present case, however, I think that in [147] he went rather further than is either necessary or appropriate for resolution of the present case. In the first place, as I have already explained, I do not regard the issue as one of jurisdiction in the strict sense. Secondly, viewing the matter as one of jurisdiction in the wider or "soft" sense, I feel a lawyer's instinctive reluctance to use the word "never". I think there could be circumstances where, to a limited extent, it might be appropriate to exercise powers under the Model Law so as to achieve the discharge or variation of an English law right in a way that is tantamount to the application of a foreign law, for example when exercising the powers to remit assets to a foreign liquidator: compare HIH at [18] to [21]. In the context of the present case, however, I am satisfied that it would be wrong in principle to use the powers in article 21(1)(a) and (b), or any other provisions of the Model Law as incorporated in the CBIR, so as to circumvent the English law rights of the English creditors under the *Gibbs* rule.

(b) Can a stay properly be granted beyond the end of the Azeri reconstruction plan?

96. Since the conclusion which I have already reached is sufficient to dispose of the appeal, I will deal with this alternative ground more shortly.

97. In my view the arguments advanced by Mr Moss provide a compelling case for concluding that relief under the Model Law should not be granted so as to continue

beyond the date of termination of the relevant foreign proceeding. Such a limitation would be consistent with the procedural and supportive role of the Model Law. Once the foreign proceeding has terminated, there will no longer be a foreign representative who can apply to the English court for assistance, nor will there be a foreign proceeding for which such assistance could be sought. Consistently with this, article 18 requires the foreign representative to inform the court promptly of any substantial change in the status of the recognised foreign proceeding, or the status of the foreign representative's own appointment. This duty can only be performed while the foreign proceeding is still in existence, and the foreign representative is still in office. The strong implication is that, once the foreign proceeding has come to an end, and the foreign representative no longer holds office, there is no scope for further orders in support of the foreign proceeding to be made, and any relief previously granted under the Model Law should terminate.

98. Against that background, it would in my judgment be anomalous if a stay granted before the termination of the foreign proceeding were permitted to remain in force indefinitely. Furthermore, in the absence of a foreign representative, it would no longer be possible for IBA to institute proceedings under the Model Law in which the continuing validity or function of the stay could be tested. I do not think it is a sufficient answer to this point to say that the debtor company could always oppose an application to lift or vary the stay. No doubt that is true, in the sense that an English court would presumably allow submissions to be made on the company's behalf upon any such application; but that does not meet the objection that, had the Model Law ever contemplated the continuance of relief after the end of the relevant foreign proceeding, it would surely have addressed the question explicitly and provided appropriate machinery for that purpose.

99. There is little in the way of existing authority on this issue, but I agree with Mr Moss that the decision in Rizzo accords with common sense, and provides a helpful illustration of some of the practical problems likely to arise if relief continues beyond the duration of the relevant foreign proceeding, even if some of the reasoning of Rares J may arguably be open to criticism. On this last point, Mr Bayfield submitted that the decision of Allsop CJ in Yakushiji v Daiichi Chuo Kisen Kaisha (No. 2) [2016] FCA 1277 was in places difficult to follow, even though Rares J had found that the latter case "cogently explained" why recognition can be terminated, if the grounds on which it was granted "have ceased to exist": see Rizzo at [32]. Mr Moss was, I think, disposed to accept that there may be some difficulties with the reasoning of the court in Yakushiji, but he submitted that this did not deprive the decision in Rizzo of its value. I respectfully agree, while emphasising that I express no views on either the decision or the reasoning in Yakushiji.

100. Mr Bayfield also pointed out that a rather different approach has been adopted in the United States, where the courts have on occasion shown themselves willing to grant relief which is capable of continuing after the end of the foreign proceeding. In this regard, he referred us to In re Ho Seok Lee [2006] 348 B.R. 799 and In re Daewoo Logistics Corporation [2011] 461 B.R. 175. I do not consider it necessary to explore this point any further, however, because the background to the incorporation of the Model Law in the United States differs significantly from that in Great Britain or Australia, as Morgan J explained in Pan Ocean at [94] to [104] and [106] to [107]. It need not therefore occasion any surprise if the approach taken by US courts to the

interpretation and application of the Model Law is not always the same as that adopted in Great Britain or Australia.

101. If my analysis is right thus far, the only remaining question is whether it makes any difference that the Azeri reconstruction has been prolonged after its original termination date on 30 January 2018 by the change in the law enacted by the Azeri legislature and the orders made under it prolonging the life of the foreign proceeding pending the outcome of the present litigation. In my view, for the purposes of construing the Model Law and its temporal scope, the position cannot be altered by a legislative change made with specific reference (as I understand it) to the present proceedings. As a matter of substance, the original purpose of the Azeri reconstruction had been achieved before the termination date in January 2018, and IBA is now trading normally. The reconstruction plan is being kept alive artificially, but as an insolvency proceeding it has served its purpose and run its course.

Conclusion on the jurisdictional issue

102. For all these reasons, therefore, I am satisfied that the jurisdiction issue should be decided in the respondents' favour, as it was by the judge, provided that "jurisdiction" in this context is understood in the wider or "soft" sense.

Discretion

103. In view of the conclusions I have reached, the question of discretion does not arise and I prefer to say nothing about it. I will merely note that by the end of the hearing it had become common ground that, had we been in favour of IBA on the jurisdiction issue, it would then have been necessary for this court to exercise its discretion afresh, because the judge, although he discussed the issue at some length, ultimately left the question open.

Disposal

104. I would dismiss the appeal.

Baker LJ:

105. I agree

Lewison LJ:

106. I also agree.

Neutral Citation Number: [2010] EWCA Civ 137

A3/2009/1565 & 1643
CAO No. 13091

IN THE COURT OF APPEAL
(Civil Division)
ON APEAL FROM THE HIGH COURT OF JUSTICE CHANCERY DIVISION
(COMPANIES COURT)

IN THE MATTER OF STANFORD INTERNATIONAL BANK LTD

AND

IN THE MATTER OF THE *CROSS BORDER INSOLVENCY REGULATIONS 2006*

BETWEEN:

RALPH STEVEN JANVEY
(AS RECEIVER OF STANFORD INTERNATIONAL BANK LTD)

Appellant

-and-

PETER NICHOLAS WASTELL AND NIGEL JOHN HAMILTON-SMITH
(AS LIQUIDATORS OF STANFORD INTERNATIONAL
BANK, LTD)

Respondents

AND

BETWEEN:

THE SERIOUS FRAUD OFFICE

Appellant

-and-

PETER NICHOLAS WASTELL AND NIGEL JOHN HAMILTON-SMITH
(AS LIQUIDATORS OF STANFORD INTERNATIONAL
BANK, LTD)

Respondents

APPROVED JUDGMENT

IN THE COURT OF APPEAL
(Criminal Division)

IN THE MATTER OF THE *PROCEEDS OF CRIME ACT 2002 (EXTERNAL REQUESTS AND*

ORDERS) ORDER 2005

STANFORD INTERNATIONAL BANK (SIB) BY ITS LIQUIDATORS

Appellant

-and-

THE DIRECTOR OF THE SERIOUS FRAUD OFFICE

Respondent

-and-

ROBERT ALLEN STANDFORD
JAMES DAVIS
LAURA PENDERGEST-HOLT

Other affected parties

MR W TROWER QC & MR D BAYFIELD (instructed by CMS Cameron McKenna) for the **Antiguan Liquidators on the Civil Appeal**
MR R KOVALEVSKY QC & MR D BAYFIELD (instructed by CMS Cameron McKenna) for the **Antiguan Liquidators on the Criminal Appeal**
MR S ISAACS QC & MR J GOLDRING (instructed by Baker Botts) for the **US Receivers**
MR A MITCHELL QC & MR C CONVEY for the **Serious Fraud Office**

APPROVED JUDGMENT

The Chancellor

Introduction

1. Stanford International Bank Ltd ("SIB") was incorporated in Antigua and Barbuda on 7th December 1990. At all times its registered office has been there. It is alleged that SIB was involved in a fraudulent 'Ponzi' scheme operated by Sir Allen Stanford and his associates under which some 27,000 investors, primarily from North, Central and South America, bought certificates of deposit from SIB for some $104bn. The scheme collapsed at the beginning of 2009. Thereafter the following events material to these appeals occurred:

(1) On 16th February 2009 the United States Securities Exchange Commission ("the SEC") filed a complaint ("the SEC Complaint") in the US District Court for the Northern District of Texas Dallas Division against, among others, Sir Allen Stanford, James M. Davis, Laura Pendergest-Holt and SIB alleging fraudulent breaches of securities laws. On the same day the SEC applied for and obtained an order for the appointment of Mr Ralph S. Janvey ("the US Receiver") as receiver of the assets, wherever situate, of those defendants and interim freezing and other orders against them.

(2) On 19th February 2009 the Financial Services Regulatory Commission of Antigua and Barbuda ("FSRC") appointed Messrs Peter Wastell and Nigel Hamilton-Smith joint receiver-managers of SIB and an associate company and conferred on them the powers and duties previously vested in the directors of SIB. The appointment was made under the power contained in s.287 International Business Corporations Act.

(3) On 26th February 2009, on the application of FSRC, the High Court of Antigua and Barbuda granted freezing and other orders against SIB and the associate company and under the power conferred by s.220 International Business Corporations Act, appointed Messrs Wastell and Hamilton-Smith to be joint receiver-managers of SIB and the associate company with such powers as the court might determine.

(4) On 16th March 2009 the joint receiver-managers reported to the High Court of Antigua and Barbuda that SIB was insolvent, incapable of being reorganised via a receivership and should be put into liquidation.

(5) On 24th March 2009 a petition for the compulsory winding up of SIB under s.300 International Business Corporations Act was presented to the High Court of Antigua and Barbuda by FSRC. A petition to wind-up SIB under s.220

International Corporations Act had already been presented to that court by an investor, Mr Fundora, on 9th March 2009 and was being opposed by the joint receiver-managers.

(6) On 27th March 2009 the SEC applied, without notice, to the High Court in England and obtained from Jack J orders over 6th April 2009 freezing the assets of, amongst others, SIB. The injunction was continued by Stadlen J on 6th April, Bean J on 27th April and Stadlen J on 18th May before being discharged by Jack J on 24th July 2009 (see paragraph 1(16) below).

(7) On 1st April 2009 the US Receiver applied to the High Court in Antigua and Barbuda for an order entitling him to intervene in the winding-up petitions in respect of SIB presented to that court by Mr Fundora and FSRC. That application came before the court in Antigua on 6th and 7th April 2009 and dismissed on 7th April.

(8) On 6th April 2009 the US Department of Justice (Criminal Division) ("DoJ") wrote to the Central Authority of the United Kingdom ("the Letter of Request"), pursuant to the US/UK Mutual Assistance in Criminal Matters Treaty, requesting the immediate assistance of the UK in relation to the investigation by the DoJ of alleged violations of US criminal laws involving fraud on investors committed by, amongst others, Sir Allen Stanford, James M. Davis, Laura Pendergest-Holt and SIB. The Letter of Request, to which I shall refer in detail later, sought the restraint of all assets of those defendants in the UK so that they might be secured for confiscation at a later date.

(9) On 7th April 2009 in-house counsel for the Serious Fraud Office ("the SFO") applied to HH Judge Kramer QC sitting at the Central Criminal Court for a restraint order against those named in the Letter of Request under Article 8 the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 SI 3181 ("the ERO"). The evidence in support of the application consisted of a witness statement of Mr Tanvir Tehal, a barrister employed by the SFO, to which was exhibited the Letter of Request. HH Judge Kramer QC made the orders sought until further order of that court or of the Court of Appeal. He gave to any person affected by the order leave to apply on not less than three clear days notice to vary or discharge it. The restraint order and the evidence in support of the application for its grant were not served on SIB until, respectively, 27th April and 24th July 2009.

(10) On 15th April 2009 the High Court of Antigua and Barbuda made an order on the petition of FSRC for the liquidation and dissolution of SIB under the supervision of the court and appointed Messrs Wastell and Hamilton-Smith to be joint liquidators ("the Antiguan Liquidators"). Paragraph 5 of the order vested all assets of SIB of whatever nature and wherever situated in the Antiguan Liquidators. On the same day the petition presented by Mr Fundora was dismissed for lack of standing. The applications of the US Receivers had already been dismissed on 7th April. We were told that appeals to the Court of Appeal of the East Caribbean are pending in respect of those dismissals.

(11) On 22nd April 2009 the Antiguan Liquidators applied to the High Court in England under article 15 of the UNCITRAL Model Law on Cross-Border Insolvency ("Uncitral"), given the force of law in the United Kingdom by the Cross-Border Insolvency Regulations 2006 SI No: 1030, for recognition of the Antiguan liquidation of SIB as a foreign main proceeding, as defined in Article 2(g), and for an order entrusting the distribution of the assets of SIB situate in Great Britain to them in their capacity as such liquidators.

(12) On 8th May 2009 the US Receiver also applied to the High Court in England under article 15 of Uncitral for recognition of the US Receivership of SIB (and other Stanford entities) as the foreign main proceeding and of himself as the foreign representative of SIB.

(13) On 18th June 2009 an indictment against Sir Allen Stanford, James Davis, Laura Pendergest-Holt and an employee of FSRC Leroy King, but not SIB, was laid in the US District Court for Southern Texas, Houston Division. It avers a number of offences of mail, wire and securities fraud contrary to the laws of the US.

(14) The recognition applications of the Antiguan Liquidators and the US Receiver were heard by Lewison J on 10th to 12th June. Lewison J was not then told of the restraint order, nor did he give SFO the opportunity to be heard on the applications which he should and would have done if the provisions of ERO Article 17(6) had been brought to his attention. Lewison J handed down his reserved judgment on 3rd July 2009. I shall refer to it in detail later. In summary he acceded to the application of the Antiguan Liquidators but dismissed that of the US Receiver. In addition he indicated that the Antiguan Liquidators should secure the assets of SIB within this jurisdiction and remit them to Antigua to be administered in the winding-up there. There was a subsequent hearing on 9th July to determine the form of order Lewison J should make at which he was told of the existence of the restraint order and modified his order so as to take effect subject to the restraint order.

(15) On 17th July 2009 the Antiguan Liquidators applied to HH Judge Kramer QC for a variation of the restraint order to enable the directions of Lewison J to be carried out. Immediately before the hearing of that application on 24th July the evidence before the court on 7th April when the restraint order was made was produced for the first time to those representing the Antiguan Liquidators. They then and there expanded their application to HH Judge Kramer QC so as to seek the discharge of the restraint order altogether on grounds of misrepresentation and material non-disclosure.

(16) On the same day, namely 24th July 2009, on the application of the Antiguan Liquidators Jack J discharged the freezing order he had originally made on 27th March 2009 on the grounds that given the existence of the Antiguan Liquidation, US Receivership and restraint order it was an unnecessary complication in an already complex situation.

(17) HH Judge Kramer QC gave judgment on 29th July 2009. He refused to

discharge the restraint order on grounds of misrepresentation or material non-disclosure or to vary it so as to enable the Antiguan Liquidators to implement the direction of Lewison J.
(18) Permission to appeal the order of Lewison J was given to the SFO by Lloyd LJ on 31st July 2009 and permission to appeal the order of HH Judge Kramer QC was granted to the Antiguan Liquidators by the Court of Appeal on 18th August 2009.

2. These events have now generated four appeals to this court, namely:

(1) the appeal of the US Receiver from the order of Lewison J dismissing his application,

(2) the appeal of the US Receiver from the order of Lewison J granting recognition to the Antiguan Liquidation as the foreign main proceeding,

(3) the like appeal of the SFO from that order of Lewison J, and

(4) the appeal of the Antiguan Liquidators from the order of HH Judge Kramer QC refusing to discharge or vary the restraint order.

In addition there were applications from all three parties for permission to adduce fresh evidence, all of which we granted because they were not opposed. It is our duty to decide these appeals but I share the regret expressed by Jack J, HH Judge Kramer QC and Lewison J that the dividends ultimately distributed to the investors in the CDs issued by SIB are likely to have been substantially eroded by the costs involved in these disputes between three public bodies as to which of them should be responsible for collecting and distributing the assets of SIB.

3. I shall deal first with the three appeals concerning the order of Lewison J. I shall then consider the fourth appeal from the order of HH Judge Kramer QC. Finally, having reached my conclusions on all the appeals, I shall consider what overall order I consider that this court should make.

Recognition applications under the Uncitral Model Law

4. The first three appeals depend on the proper construction and application of the Uncitral Model Law as given the force of law in the United Kingdom by the regulation to which I have referred. It is derived from the UNCITRAL Model Law adopted by the United Nations on 30th May 1997. The regulation implementing it requires, by regulation 2(2), that it be interpreted by reference to any documents of the working group of the UN which produced it and the Guide to its enactment ("the Uncitral Guide") prepared in response to the request for its preparation made by the UN Commission on International Trade in May 1997. Article 8 of Uncitral provides that:

> "In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith."

5. The argument before us has revolved around the four definitions contained in Article 2(g) to (j) which are in the following terms:

> "(g) "foreign main proceeding" means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;
>
> (h) "foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of sub-paragraph (e) of this article;
>
> (i) "foreign proceeding" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of

the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation;

(j) "foreign representative" means a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;"

6. As the Uncitral Guide points out in paragraph 71:

> "The definitions of proceedings or persons emanating from foreign jurisdictions avoid the use of expressions that may have different technical meaning in legal systems and instead describe their purpose or function. This technique is used to avoid inadvertently narrowing the range of possible foreign proceedings that might obtain recognition and to avoid unnecessary conflict with terminology used in the laws of the enacting state. ....the expression "insolvency proceedings" may have a technical meaning in some legal systems but it is intended...to refer broadly to proceedings involving companies in severe financial distress."

7. Notwithstanding the large number of definitions contained in Article 2, including one of an "establishment" as "any place of operations where the debtor carries out a non-transitory economic activity with human means and assets or services", there is no definition of the phrase "centre of its main interests". This is used in the definition of foreign main proceeding in order to differentiate a foreign proceeding which is main from those which are not. The effect of recognition as foreign main proceedings is spelled out in Article 20. The phrase is also used in the European Community Regulation on Insolvency Proceedings (Council Regulation (EC) 1346/2000) and in that context was considered by the European Court of Justice in **Re Eurofood IFSC Ltd** [2006] Ch. 508 ("**Eurofood**"). I shall refer to both the Regulation and the judgment in some detail later.

8. The broad issues which arose before Lewison J and now arise on these appeals may

be described as follows:

> (1) Are either or both the Antiguan Liquidation or the US Receivership a foreign proceeding defined in Article 2(i) as being
>
> > (a) a collective judicial or administrative proceeding in a foreign state (including an interim proceeding),
> >
> > (b) pursuant to a law relating to insolvency,
> >
> > (c) for the purpose of reorganisation or liquidation?

And if so

> (2) Is such foreign proceeding taking place in the state where SIB has its centre of main interests?

Lewison J concluded that the Antiguan Liquidation was, but the US Receivership was not, a foreign proceeding. He also concluded that the centre of SIB's main interests was Antigua so that the Antiguan Liquidation was a foreign main proceeding. I will deal with the issues relating to the first question first.

Which, if either, of the Antiguan Liquidation and the US Receivership is a foreign proceeding?

9. The Uncitral Guide noted in paragraph 23 that:

> "To fall within the scope of the foreign law, a foreign proceeding needs to possess certain attributes. These include the following: basis in insolvency-related law of the originating State; involvement of creditors collectively; control or supervision of the assets and affairs of the debtor by a court or another official body; and reorganization or liquidation of the debtor as part of the purpose of the proceeding."

The Antiguan Liquidation

10. In the case of the Antiguan Liquidation the petition to which I have referred in paragraph 1(5) above set out details in relation to SIB and then averred that SIB had failed to comply with its obligations to file quarterly returns, previous returns had been inaccurate, it had failed to take reasonable precautions to prevent falsification of its records and was insolvent but not able to be restructured or restored so as to resume its business of international banking. FSRC sought an order that SIB be liquidated and dissolved pursuant to s.300 International Business Corporations Act and the appointment of the receiver-managers as liquidators under ss. 304 to 306 of that Act. That Act relates to corporations formed thereunder for the purpose of carrying on any international trade or business. It is to be distinguished from the Companies Act 1995 of Antigua and Barbuda which relates to companies generally.

11. Sections 304 to 306 International Business Corporations Act are contained in Part IV of that Act entitled Winding Up Corporations. This is to be distinguished from Part IV Companies Act 1995 which relates to winding up of companies more generally and appears to be closely modelled on the provisions of Part V Companies Act 1948. Part IV International Business Corporations Act also contains provisions for winding up, voluntarily or compulsorily (s.284), the payment of the debts due to creditors of any description before any payment to members (ss.286 and 290), for priority of claims in a winding-up (s.289), winding-up a company if it is just and equitable to do so (s.301(b)(ii)) and the powers and duties of liquidators (ss.307 and 308). S.307(g) imposes on a liquidator the duty to apply to the court for directions if he concludes the company is unable to pay its debts.

12. The order on the petition presented by FSRC was made by Harris J. In his judgment

he referred not only to the breaches of obligation by SIB on which the petitioner relied but also the obvious insolvency of SIB. In his order he directed the liquidators to collect all the assets of SIB, wherever situate and provided for them to vest in the Antiguan Liquidators (paras 4 and 5). Paragraph 7 required the Antiquan Liquidators to hold all such assets for the benefit of depositors, creditors and investors in accordance with their interests under the laws of Antigua and Barbuda and in the priority indicated. The Antiguan Liquidators were constituted as foreign representatives (para 20) and authorised to apply for recognition in other jurisdictions (para 21). All proceedings against SIB were stayed or prohibited (para 25).

13. In paragraphs 94 and 95 of his judgment Lewison J concluded:

> "94. It is, in my judgment, clear from the court's order and the judgment of Harris J that it was not basing the order on section 300 alone. It made the order because, having considered the evidence, it concluded that it was just and equitable that SIB be wound up. An important part of the evidence was that SIB was insolvent and could not be reorganised via the receivership. In my judgment at least one of the reasons why Harris J made the order that he did was that he was satisfied that SIB was insolvent.
>
> 95. I hold, therefore, that the Liquidators were appointed pursuant to a law relating to insolvency and that they are entitled to be recognised as foreign representatives of a foreign proceeding."

14. By his appellant's notice the US Receiver appealed against the recognition of the Antiguan Liquidation as the foreign main proceeding. In the written argument of his counsel the conclusion that the Antiguan Liquidation was a foreign proceeding was not seriously challenged. Rather it was contended that if the Antiguan Liquidation came within the definition of a foreign proceeding contained in Uncitral Article 2(i)

then so must the US Receivership. Similarly in its appeal from the order of Lewison J the SFO did not contend that Lewison J was wrong to have concluded that the Antiguan Liquidation was a foreign proceeding within the meaning of Article 2(i).

15. In my view Lewison J was right to conclude that the Antiguan Liquidation was a foreign proceeding as defined. Part IV of the relevant Act provided for the winding up of corporations incorporated in Antigua for the purpose of carrying on an international trade or business on just and equitable grounds, which include insolvency, as well as infringements of regulatory requirements. The combination of that part of the Act and the order of the court made provision for the collection of all the assets of SIB and their application in satisfaction of all its obligations in the order of priority for which the law provided. That process was expressly subject to the supervision of the High Court of Antigua and Barbuda. Creditors and others were obliged to seek their remedy in the liquidation because individual proceedings were stayed or prohibited. The ultimate purpose of the process was the liquidation, in the sense of dissolution of SIB. Such a process satisfies all the conditions for the application of the definition because it is collective, judicial and pursuant to a law relating to insolvency.

The US Receivership

16. The only real issue on this part of the appeals is whether the US Receivership also possesses the characteristics needed to satisfy the definition of a foreign proceeding contained in Article 2(i). The US Receiver was appointed in the proceedings to which I have referred in paragraph 1(1) above. Paragraphs 15 to 17 of the Complaint

set out the authority, jurisdiction and venue provisions on which SEC relied. They were s.20(b) Securities Act 1933, s.21(d) Securities Exchange Act 1934, s.41(d) Investment Company Act 1940 and s.209(d) Investment Advisers Act 1940. Each of those provisions entitled the SEC to bring proceedings in respect of the matters described for an injunction and a civil penalty payable to the US Treasury. In addition s.21(d)(5) Securities Exchange Act 1934 entitled the SEC to seek and the Federal Court to grant any equitable relief that might be appropriate or necessary for the benefit of investors. It was under that provision that the US Receiver was appointed.

17. In paragraphs 25 to 57 of the Complaint the SEC set out in detail the facts it alleges. In paragraphs 58 to 80 it set out in detail the six causes of action on which it relies relating to violations of the Securities Act and other laws. The relief sought extends to injunctions to restrain continued violations, freezing orders, disclosure of assets and books and records, discovery, disgorgement of illicit gains and profits and civil penalties. The claim for the appointment of a receiver is made in these terms:

> "Order the appointment of a temporary receiver for [SIB] for the benefit of investors, to marshal, conserve, protect and hold funds and assets obtained by [SIB] and [its] agents, co-conspirators, and others involved in this scheme, wherever such assets may be found, or, with the approval of the court, dispose of any wasting asset in accordance with the application and proposed order provided herewith."

18. The order appointing the US Receiver was made by the District Judge on 16th February 2009 and amended on 12th March 2009. Both orders recited that it appeared that:

> "this order is both necessary and appropriate in order to prevent waste

and dissipation of the assets of [SIB] to the detriment of the investors."

By paragraph 1 the court assumed exclusive jurisdiction and took possession of the assets of whatever kind and wherever located of SIB. By paragraph 2 the US Receiver was appointed receiver of those assets with the full powers of an equity receiver under common law as well as such powers as were enumerated in the order. Paragraphs 3 and 4 set out the receiver's duties and paragraph 5 conferred on him wide ranging powers to enable him to carry them out. Paragraph 7 and 8 stayed or prohibited actions or proceedings against SIB or its assets. Paragraph 6 of the amended order gave the US Receiver power to seek relief on behalf of SIB under the US Bankruptcy Code.

19. Both the US Receiver and the Antiguan Liquidators relied on evidence of a US lawyer in relation to the nature of a receivership under US law. They were respectively Professor Jay L. Westbrook and Professor Daniel M. Glosband. They disagreed on whether the US common law under which receivers are appointed can be categorised as a law relating to insolvency; but as the proper construction and application of the definition contained in Article 2(i) of Uncitral is a matter of law for this court it is unnecessary to explain why. They were in substantial agreement that a receiver appointed under the US common law, may, in the court's discretion, be directed by the court to distribute the property of a debtor which is vested in him or under his control pro rata amongst a specified class be they investors or creditors more generally.

20. Lewison J considered the nature of a foreign proceeding as defined (paras 37 to 42) and the terms of the order appointing the US Receiver (paras 71 to 78). He set out the

submissions of counsel for the US Receiver, the Antiguan Liquidators and Sir Allen Stanford at some length (paras 79 to 83). His conclusion on whether the US Receivership is a foreign proceeding within Article 2(i) Uncitral is set out in paragraphs 84 and 85 in the following terms:

> "84. As I have said, it seems to me that the Receiver's authority derives from the terms of the order. I do not, therefore, consider that it is profitable to discuss the sorts of powers which might be conferred on receivers generally. Thus I agree with [counsel for Sir Allen Stanford] that the question is not whether an equitable receivership could generally or ever give rise to *pari passu* distribution. What matters, to my mind, is what powers and duties have been conferred or imposed on the Receiver by *this* order. I do not consider that the powers and duties conferred or imposed on the Receiver amount to a "foreign proceeding" for the purposes of the Cross Border Insolvency Regulations, largely for the reasons given by [counsel for Sir Allen Stanford and the Antiguan Liquidators]. In short:
>
> i) The recited purpose of the order was to prevent dissipation and waste, not to liquidate or reorganise the debtors' estates;
>
> ii) The detriment that the court was concerned to prevent was detriment to *investors*;
>
> iii) The underlying cause of action which led to the making of the order had nothing to do with insolvency and no allegation of insolvency featured in the SEC's complaint. Indeed there is no evidence that any of the personal Defendants (i.e. Sir Allen, Mr Davis or Ms Pendergest-Holt) is in fact insolvent, yet the appointment of the Receiver over their assets must have the same foundation as his appointment over the assets of the corporate Defendants;
>
> iv) The powers conferred on and duties imposed on the Receiver were duties to gather in and preserve assets, not to liquidate or distribute them. (The order does not, at least on its face, confer any power on the Receiver to sell any of the Defendants' assets of which he might take possession);
>
> v) In so far as the order mentions creditors who are not investors, they are mentioned only to allow claims to be compromised. The reference to distributions to creditors does not sanction actual distribution; it merely describes the reason why expenses are to be kept to a minimum;

vi) The order does not preclude claims from being made against the Defendants outside the receivership if either they do not relate to the underlying causes of action on which the SEC's application was based, or they are brought in the District Court for Northern Texas;

vii) Under the order the Receiver has no power to distribute assets of the Defendants. It would need a further application to the court to enable him to do so;

viii) The fact that some receiverships may be classified for some purposes as "insolvency proceedings" or be treated as acceptable alternatives to bankruptcy does not mean that this receivership satisfies the definition of foreign proceeding in the Cross-Border Insolvency Regulations 2006;

ix) The general body of common law or equitable principles which bear on the appointment of a receiver and the conduct of a receivership is not "a law relating to insolvency" since it applies in many different situations many (if not most) of which have nothing to do with insolvency; and many of the principles leave a good deal to discretion.

85. I do not say that any one of these factors is decisive, but cumulatively they lead to only one conclusion. I hold, therefore, that the receivership is not a "foreign proceeding". I would also hold that since the Receiver has not yet been authorised to administer the liquidation or reorganisation of SIB he is not yet a "foreign representative" as defined, even if the receivership is a "foreign proceeding". It follows that the receivership cannot be recognised under the Cross Border Insolvency Regulations 2006."

21. Counsel for the US Receiver challenges the overall conclusion of Lewison J and the individual factors on which he relied. Counsel's submissions may be summarised as follows:

(1) The judge's consideration of the terms of the order appointing the US Receiver was incomplete because he did not refer to the power conferred by paragraph 6 of the amended order enabling the receiver to seek relief on behalf of SIB under the US Bankruptcy Code, nor did he pay sufficient regard to the extent of the powers conferred on the receiver under the US common law by paragraph 2 of the order. Such powers enable a receiver to propose to the court an appropriate plan for the distribution of the assets vested in him or under his control and that plan may extend to creditors generally.

2) The terms of the US Receivership order provide for collective redress in that it

extends to all assets wherever located and stays or prohibits actions against either SIB or its assets.

(3) Although the primary purpose of the US Receivership is, as the orders proclaim, to prevent waste or dissipation the powers it confers are equally consistent with the ultimate distribution of the assets.

(4) Although neither the US common law nor the terms of the order appointing the US Receivership contain any provisions for the proof of claims and the distribution of assets amongst claimants the necessary details will, at its discretion, be supplied by the court in a subsequent order authorising a distribution plan proposed by the receiver.

(5) The relevant law does not have to be statutory nor need it relate only to insolvency. The US Receiver is comparable to a provisional liquidator appointed under English law.

(6) The US Receivership is for the purposes of the reorganisation or liquidation of an insolvent body which has been engaged in fraudulent activities.
(7) There is no difference between the duties and functions of the US Receiver and of the Antiguan Liquidators sufficient to justify the latter being recognised as a foreign proceeding but not the former.

22. SFO did not seek permission to appeal from the part of the order of Lewison J which dismissed the application for recognition made by the US Receiver and made no submissions in respect of it. Counsel for the Antiguan Liquidators supported the decision of Lewison J for the reasons he gave. As, in substance, I agree with them I do not find it necessary to set them out at length.

23. It is clear from the origin and objective of Uncitral, Article 8 thereof and the Uncitral Guide that Uncitral should not be construed by reference to any particular national system of law. It is intended to embrace all systems of law which satisfy the conditions described in the definitions contained in Article 2(i) to (j) so as to provide for reciprocity between all the states which may incorporate Uncitral into their domestic law. Further the definition of foreign proceeding contained in Article 2(i) contains a number of factors, namely "collective...proceeding", "pursuant to a law

relating to insolvency", "control or supervision" of "the assets and affairs of the debtor" by a foreign court, "for the purpose of reorganisation or liquidation". Whilst each factor has to be considered the definition must be read as a whole.

24. I would start with the phrase "pursuant to a law relating to insolvency" for this governs all the other factors. It is contended that such law does not have to be statutory. I agree. It is submitted that it does not have to relate exclusively to insolvency. I agree with that submission in broad terms too. But the first step must be to identify the relevant law. The law of England and Wales relates to insolvency in the sense that it includes the Insolvency Act but unless the proceeding in question is taken under that Act (or some similar jurisdiction) it cannot sensibly be described as "pursuant to a law relating to insolvency". So it is necessary, in my view, to start by identifying the law, whether statutory or not, under or pursuant to which the relevant proceeding was brought and is being pursued. Having done so it is then necessary to consider whether that law relates to insolvency and whether the other factors to which the definition refers can be regarded as being brought about 'pursuant' to that law.

25. I have identified in paragraph 16 above the provisions of the US law relied on in the complaint filed by the SEC as conferring jurisdiction on the District Court for the Northern District of Texas. Those provisions relate generally to the protection of investors and confer on the SEC wide powers of investigation, prevention by injunction, criminal proceedings or civil penalty and 'disgorgement' of illicit gains. In my view it is plain, and I did not understand counsel for the US Receiver to contend otherwise, that none of these statutory provisions can be categorised as 'a law

relating to insolvency'.

26. One of them, s.21(d)(5) Securities Exchange Act 1934, entitled the SEC to seek and the Federal Court to grant any equitable relief that might be appropriate or necessary for the benefit of investors. It may be that the inherent jurisdiction of the District Court would also have justified such an appointment. The appointment of a receiver is a well-known head of equitable relief. But the appointment of a receiver, whether under s.21(d)(5) Securities Exchange Act 1934 or under the inherent jurisdiction of the court, as equitable relief for the protection of investors in proceedings relating to securities fraud does not, without more, mean that the other ingredients of the definition were brought about 'pursuant to a law relating to insolvency'. The fact that the court may subsequently make orders which bring into force a process which can be recognised as an insolvency proceeding is immaterial unless and until it is done. The principles of the common law and equity do not 'relate to insolvency' unless and until they are activated for that purpose.

27. It is because there is no such activation or order in this case that the other issues arise. Thus, whilst the US Receivership is an interim judicial proceeding in a foreign state it is not 'collective' in the relevant sense because it is for the protection of investors not the wider class of creditors generally, notwithstanding the occasional reference to claimants in the orders. Nor is it, at this stage, for the purpose of reorganisation or liquidation; it is for the protection of investors and the assets of SIB.

28. The analogy with the appointment of a provisional liquidator in England is, in my view, a false one as the appointment of a provisional liquidator is made under either

the statutory law relating to insolvency or a comparable common law or equitable principle. Similarly this conclusion is not inconsistent with that in relation to the Antiguan Liquidation. In the latter case the jurisdiction under Part IV International Business Corporations Act is that under which corporations formed under Antiguan law to carry on any international trade or business are wound up. The grounds for such winding up include the just and equitable ground which, conventionally, includes insolvency. When the winding up order is made, but not before, it gives rise to a collective judicial scheme for the liquidation or reorganisation of the company.

29. For all these reasons, which are, in essence, those given by Lewison J in paragraph 84 of his judgment I conclude that the US Receivership is not a foreign proceeding within the definition contained in Article 2(i) Uncitral. It follows that the US Receiver cannot be a foreign representative within the definition contained in Article 2(j). Accordingly in my view the answer to the first question I have posed in paragraph 8 above is that the Antiguan Liquidation is, but the US Receivership is not, a foreign proceeding within the meaning of that expression as defined in Article 2(i); similarly the Antiguan Liquidators are, but the US Receiver is not, a foreign representative of SIB within the meaning or that expression as defined in Article 2(j). I should add that before Lewison J the US Receiver also sought recognition at common law in respect of both SIB and what were called Stanford entities. Lewison granted it in relation to the Stanford entities but not in relation to SIB for the reasons he gave in paragraphs 104 and 105. The US Receiver formally contended that Lewison J was wrong in that respect too for reasons given in paragraphs 137 to 141 of counsel's written argument. Those grounds were not developed in oral argument by counsel for any party and it is not clear to me whether this part of the appeal of the US

Receiver was abandoned. Suffice it to say that if it was not abandoned I would reject it for the reasons given by Lewison J.

Centre of Main Interests

30. Given that the Antiguan Liquidation is a foreign proceeding it will be a foreign main proceeding if, but only if, SIB's centre of main interests ("COMI") was in the state where, and at the time when, that proceeding was commenced, namely in Antigua, see Article 2(g) and **Re: Staubitz-Schreiber** [2006] ECR I 701. Article 16.3 of Uncitral provides that:

> "In the absence of proof to the contrary, the debtor's registered office...is presumed to be the centre of the debtor's main interests".

Lewison J considered how the court should apply that article in cases where there was a disputed question of fact but no cross-examination. His answer given in paragraph 10 of his judgment, which has not been criticised before us, was that:

> "...the court should apply the same test as it applies in deciding questions of jurisdiction under the EC Judgments Regulation 44/2001: viz. that the court must be satisfied, or as satisfied as it can be having regard to the limitations which an interlocutory process imposes, that the company's COMI is not in the state in which its registered office is located: cf. *Bols Distilleries BV v Superior Yacht Services Ltd* [2007] 1 W.L.R. 12, § 28."

31. In paragraphs 11 to 31 of his judgment Lewison J summarised the relevant facts relating to SIB and the Stanford Financial Group of which it formed part under three separate headings. The first heading related to what the judge called SIB's public

face. He recorded the details of its incorporation and the situation of its registered office. He set out (para 11) details of the substantial office building in Antigua it occupied, its employees of whom 88 worked in Antigua. The remainder worked in Canada but probably reported to people in the US or the US Virgin Islands. The judge then considered (para 12) at some length the details of SIB, as reported to the public in its disclosure statement to depositors, including the composition of its board of directors, the business of SIB, the fact that it was regulated by FSRC in Antigua but in no other jurisdiction and the contact address and telephone number in Antigua. He dealt with statements made in various items of marketing materials in paragraphs 13 and 14. The judge then described how SIB obtained deposits through referral agreements with independent financial advisers (para 15), the terms on which they were invested (para 16) and where they were held (paras 17 to 20) and observed that the bulk of SIB's actual investments were outside the US (para 21). The judge concluded with descriptions of the other banking services provided by SIB (para 22), where and how board meetings were held (para 22) and the types of management expense incurred as shown by its audited accounts (para 24). Lewison J then referred (paras 26 and 27) to the composition of the Stanford Financial Group as controlled by Sir Allen Stanford and how it was marketed as a whole (para 28).

32. The judge then considered what he described as "behind the scenes", namely that, in the light of the evidence uncovered so far, Sir Allen Stanford was at the centre of a massive and fraudulent Ponzi scheme (para 29). He found the evidence of the extent to which decisions at strategic level were taken by Sir Allen Stanford and Mr James L. Davis to be inconclusive. In paragraph 31 he recorded that Mr Davis was domiciled

and resident in the US. He continued:

> "So far as Sir Allen is concerned, he is a citizen of both the USA and Antigua (where he was knighted). He has a high profile in Antigua where he has been a major investor and benefactor. He is also a frequent visitor. Amongst other things he has built the Stanford Cricket Ground and two restaurants in close proximity to SIB's building; he owns the Antigua Sun (Antigua's largest newspaper) and was the sponsor of Antiguan Sail Week. He has homes in the USA. But for tax reasons he spends much of his time (at least half the year) in St Croix in the US Virgin Islands. There is also evidence that at the relevant time he lived in part on his yacht."

33. Lewison J then considered the origins of Uncitral and the use of COMI in the EC Regulation on Insolvency Proceedings. He referred to the decision of the European Court of Justice on the meaning of COMI in the context of the EC Regulation in **Eurofood**. He recorded the submissions of counsel on the meaning of COMI. The judge held (para 70) that:

> "i) The relevant COMI is the COMI of SIB;
>
> ii) Since its registered office is in Antigua, it is presumed in the absence of proof to the contrary, that its COMI is in Antigua;
>
> iii) The burden of rebutting the presumption lies on the Receiver;
>
> iv) The presumption will only be rebutted by factors that are objective;
>
> v) But objective factors will not count unless they are also ascertainable by third parties;
>
> vi) What is ascertainable by third parties is what is in the public domain, and what they would learn in the ordinary course of business with the company."

34. The judge then left the question of COMI and considered (paras 71 to 95) whether either the US Receivership or the Antiguan Liquidation was a foreign proceeding. In paragraphs 96 to 99 he applied his interpretation of COMI to the facts of the case and concluded that they were not sufficient to rebut the presumption that the COMI of SIB was where its registered office was, namely in Antigua. This conclusion is challenged by the US Receiver on, essentially, three grounds:

> (1) the judge misdirected himself as to the facts relevant to the rebuttal of the presumption,
>
> (2) the judge wrongly concluded that on the evidence before him the presumption had not been rebutted,
>
> (3) the fresh evidence which we permitted the US Receiver to adduce on this appeal, taken together with the evidence before the judge, is sufficient to rebut the presumption.

I will deal with those submissions in that order. It is to be noted that, whatever the outcome, the Antiguan Liquidation will remain a foreign proceeding and the Antiguan Liquidators foreign representatives. This issue will determine whether, in addition, the provisions of Uncitral Article 20 will apply. That Article imposes a stay on proceedings against SIB or its assets except criminal proceedings or proceedings brought by a body having regulatory functions in the exercise of those functions, see Article 20.4(b).

Facts relevant to the rebuttal of the presumption

35. This issue arises from the judge's conclusion in sub-paragraphs iv) – vi) of paragraph 70 of the judgment of Lewison J which I have quoted in paragraph 33 above. In

addition when he returned to the subject of COMI in later paragraphs of his judgment he said (para 98):

> ".....as I have held, the presumption can only be rebutted by factors that are both objective and ascertainable by third parties...."

The judge arrived at that conclusion by applying the principle applied by the European Court of Justice in **Eurofood** because the same expression was used in the relevant EC Regulation in much the same context and he ought to follow it, whether or not bound to do so, in preference to his own earlier decision in **Re Lennox Holdings Ltd** [2009] BCC 155.

36. To understand the arguments and to explain my conclusion it is necessary to consider the evolution of both the EC Regulation and Uncitral. Both were preceded by the European Convention on Insolvency Proceedings. Its preparation began in 1960. It was open for signature by member states from 23rd November 1995. The Convention applied to proceedings which satisfied four conditions but as there might be more than one proceeding satisfying those conditions it also provided for 'main insolvency proceedings'. They were defined as proceedings in the contracting state where the debtor had his centre of main interests. In May 1996 the UK Government refused to sign the Convention. In July 1996 there was signed what became known as the Virgós-Schmit Report on the Convention. Though never formally adopted it was and is regarded as an authoritative commentary on the Convention and the subsequent regulation derived from it. In paragraphs 75 and 76 the authors stated:

> "75. The concept of "centre of main interests" must be interpreted as the place where the debtor conducts the administration of his interests

> on a regular basis and is therefore, ascertainable by third parties. The rationale of this rule is not difficult to explain. Insolvency is a foreseeable risk. It is therefore important that international jurisdiction (which as we will see, entails the application of the insolvency laws of that Contracting State) be based on a place known to the debtor's potential creditors. This enables the legal risks which would have to be assumed in the case of insolvency to be calculated.
>
> ....
>
> 76. The Convention offers no rule for groups of affiliated companies (parent-subsidiary schemes). The general rule to open or to consolidate insolvency proceedings against any of the related companies as a principal or jointly liable debtor is that jurisdiction must exist according to the Convention for each of the concerned debtors with a separate legal entity. Naturally, the drawing up of a European norm on associated companies may affect this answer."

37. Some 11 months later on 30th May 1997 Uncitral was adopted by the United Nations. The phrase 'centre of main interests' was used so as to distinguish main from non-main foreign proceedings in Article 2(g). It is used again in the application of the presumption for which Article 16.3 provides, see Article 17.2(a), but not otherwise. The Uncitral Guide pointed out in paragraph 31 that the phrase corresponded to the formulation in article 3 of the European Convention on Insolvency Proceedings

> "...thus building on the emerging harmonization as regards the notion of a "main" proceeding. The determination that a foreign proceeding is a "main" proceeding may affect the nature of the relief accorded to the foreign representative."

The Uncitral Guide pointed out again in paragraph 72 that the phrase used to define a foreign main proceeding was used also in the Convention on Insolvency Proceedings. Similarly the Official Records of the UN General Assembly 52nd Session Supplement No.17 paragraph 153, which is also admissible in the interpretation of Uncitral, see

regulation 2(2)(b) Cross Border Insolvency Regulation 2006, records that:

> "The view was expressed that the meaning of the term 'centre of main interests' in sub-paragraph (b) was not clear and that its use would create uncertainty. In response, it was stated that the term was used in the European Union Convention on Insolvency Proceedings and that the interpretation of the term in the context of the Convention would be useful also in the context of the Model Provisions."

We were told that the Uncitral Model Law has been adopted by 17 states including the US in 2005, the UK and New Zealand in 2006 and Australia in 2008.

38. The EC Regulation on Insolvency Proceedings (EC) No: 1346/2000 was promulgated on 29th May 2000 and came into force on 31st May 2002. It superseded the Convention which the UK had refused to sign but included for the first time a number of additional recitals including recital (13) which states:

> "The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."

Article 3, headed "International jurisdiction" provides:

> "The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open the insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary."

Provision was made by Article 3(2) for secondary insolvency proceedings to be opened in the Member State in which the debtor possessed an establishment but

confined to the assets of the debtor situated in that Member State.

39. Thus there is a clear correlation between the words used and the purpose to which they are applied in both Uncitral and the EC Regulation. In both there is a rebuttable presumption that the COMI is the state in which the registered office of the company is situated. We were referred to a number of decisions of courts in the US, the UK and the European Court of Justice in relation to the material required to rebut the presumption. It is convenient to refer to them in chronological order whether they are dealing with Uncitral or the EC Regulation. They are **Eurofood**; **In re SPhinX Ltd** (2006) 351 B.R.103; **Tricontinental Exchange Ltd** (2006) B.R. 627; **Bear Stearns High Grade Structured Strategies Master Fund Ltd** (2008) 389 B.R. 325; **Basis Yield Alpha Fund** (2008) 381 B.R.37; **Re Ernst & Young** (2008) 383 B.R. 773; **Re Innua Canada Ltd** (2009) WL 1025090 and **Re Lennox Holdings Ltd** [2009] BCC 155.

40. **Eurofood** concerned a subsidiary company with its registered office in the Republic of Ireland of an Italian holding company. The Italian parent was confronting a financial crisis and was in extraordinary administration proceedings in Italy. A creditor presented a petition for the winding up of the Irish subsidiary in Ireland and a provisional liquidator was appointed. The court in Italy then determined that the centre of main interests of the subsidiary was in Italy so that under the EC Regulation the Italian court, not the Irish court, had jurisdiction to wind it up. The Supreme Court of the Republic of Ireland referred to the European Court of Justice a number of questions designed to ascertain which court had jurisdiction to wind up the Irish subsidiary. The fourth question sought guidance on the governing factors to be

regarded in determining the centre of a debtor's main interests.

41. The fourth question was considered by Advocate-General Jacobs in paragraphs 106 to 126 of his opinion. He concluded in paragraph 126:

> "I accordingly conclude that, where the debtor is a subsidiary company and where its registered office and that of its parent company are in two different member states and the subsidiary conducts the administration of its interests on a regular basis in a manner ascertainable by third parties and in complete and regular respect for its own corporate identity in the member state in which its registered office is situated, the presumption that the centre of the subsidiary's main interests is in the member state of its registered office is not rebutted merely because the parent company is in a position, by virtue of its shareholding and power to appoint directors, to control, and does in fact control, the policy of the subsidiary and the fact of such control is not ascertainable by third parties."

42. That question was considered by the European Court of Justice in paragraphs 26 to 37 of its judgment. The court concluded, so far as now material, in paragraphs 29 to 34:

> "29. Article 3(1) of the Regulation provides that, in the case of a company, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.
>
> 30. It follows that, in the system established by the Regulation for determining the competence of the courts of the member states, each debtor constituting a distinct legal entity is subject to its own court jurisdiction.
>
> 31. The concept of the centre of main interests is peculiar to the Regulation. Therefore, it has an autonomous meaning and must therefore be interpreted in a uniform way, independently of national legislation.
>
> 32. The scope of that concept is highlighted by the thirteenth recital in the Preamble to the Regulation, which states : "The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore

> ascertainable by third parties."
>
> 33. That definition shows that the centre of main interests must be identified by reference to criteria that are both objective and ascertainable by third parties. That objectivity and that possibility of ascertainment by third parties are necessary in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings. That legal certainty and that foreseeability are all the more important in that, in accordance with article 4(1) of the Regulation, determination of the court with jurisdiction entails determination of the law which is to apply.
>
> 34. It follows that, in determining the centre of the main interests of a debtor company, the simple presumption laid down by the Community legislature in favour of the registered office of that company can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect."

43. **In re SPhinX Ltd** (2006) 351 B.R.103 concerned a company incorporated in the Cayman Islands carrying on business as a hedge fund. Its registered office was in the Cayman Islands but it had no physical offices, employees or assets there. It carried on no trade or business in the Cayman Islands and, as an offshore company, was prohibited from doing so. Its business was conducted under a discretionary investment management agreement by a company incorporated in Delaware and located in New York. The company was put into voluntary liquidation subject to the supervision of the court in the Cayman Islands. The voluntary liquidators sought recognition of the Cayman Islands liquidation under Chapter 15 of the US Bankruptcy Code as a foreign main proceeding. Recognition was opposed by certain US Creditors.

44. Chapter 15 was inserted into the US Bankruptcy Code for the express purpose of

incorporating Uncitral. The court noted that there were, at that stage, no decisions of US courts dealing with COMI and referred to the "recent" ruling of the European Court of Justice in **Eurofood.** In the light of the facts of the instant case the court concluded that the presumption in favour of the registered office was rebutted. It recognised the Cayman Island Liquidation as a foreign non-main proceeding. The joint liquidators appealed contending that the Cayman Island liquidation should be recognised as a foreign main proceeding. The appeal was dismissed on the ground that the court below had been right to conclude that

> "...objective factors ascertainable to third parties pointed to the SPhinX Funds' COMI not being located within the Cayman Islands thereby sufficiently rebutting the statutory presumption."

45. **Tricontinental Exchange Ltd** (2006) B.R. 627 was not concerned with the evidence required to rebut the presumption because the registered office of the company was in the state in and from which the alleged fraudulent scheme had been managed. **Eurofood** was not referred to or considered.

46. **Bear Stearns High Grade Structured Strategies Master Fund Ltd** (2008) 389 B.R. 325 was factually very similar to **Tricontinental Exchange Ltd** and the same conclusion was reached both at first instance and on appeal. The principle in **Eurofood** was recognised as consistent with that of Chapter 15. **Basis Yield Alpha Fund** (2008) 381 B.R.37 was concerned only with the question whether a company incorporated under the laws of the Cayman Islands and having its registered office there, so that the presumption applied, was entitled to summary judgment to the effect that its COMI was in the Cayman Islands notwithstanding that, as it was registered as

an offshore company, it was precluded from carrying on any business in the Cayman Islands. It was held that there was a genuine issue of material fact sufficient to preclude a summary judgment.

47. In **Re Ernst & Young** (2008) 383 B.R. 773 the status of foreign main proceeding was accorded to the receivers appointed by the court in respect of a company formed under the law of Canada. It had carried on business in fraud of investors in conjunction with a company incorporated in Colorado. The regulatory body for Colorado contended that the COMI of both companies was in Colorado because that was where the fraud occurred. The court concluded, in effect, that those facts were not sufficient to rebut the presumption. In **Re Innua Canada Ltd** (2009) WL 1025090 a receiver appointed by the court in Canada succeeded in obtaining recognition of the receivership in New Jersey in respect of the parent company registered in the Turks and Caicos Islands and its subsidiary incorporated in Canada. The registered offices were in the respective states of incorporation. The court concluded that the presumption applied in the case of the Canadian subsidiary and was rebutted in the case of the parent incorporated in the Turks and Caicos Islands.

48. Finally I should refer shortly to the decision of Lewison J in **Re Lennox Holdings Ltd** [2009] BCC 155. In that case an application had been made for administration orders in respect of a group of companies two of which had their registered offices in Spain. The question was whether the court in England had jurisdiction in the case of the two companies with registered offices in Spain. Lewison J considered that he had jurisdiction on the basis that to rebut the presumption it was necessary to show that the head office functions were performed in a state other than that in which its

registered office was situate. He reached that conclusion on the basis of the advice of the Advocate-General in **Eurofood** who, he considered, had gone into the matter rather more fully than the court itself. Having had the benefit of adversarial argument in this case he concluded that the head office function test was wrong in law. In paragraph 61 of his judgment under appeal he said:

> "Simply to look at the place where head office functions are actually carried out, without considering whether the location of those functions is ascertainable by third parties, is the wrong test. The way in which the ECJ approached recital (13) was not to apply the factual assumption underlying it but to apply its rationale. I accept this submission. To the extent that I considered and applied the head office functions test in *Lennox Holdings* on the basis accepted by Jacobs A-G in § 114, I now consider that I was wrong to do so. Pre-*Eurofood* decisions by English courts should no longer be followed in this respect. I accept [counsel for the Antiguan Liquidators] submission that COMI must be identified by reference to factors that are both objective and ascertainable by third parties. This, I think, coincides with the view expressed by Chadwick LJ (before the decision in *Eurofood*) in *Shierson v Vlieland-Boddy* [2005] 1 W.L.R. 3966 (§ 55):
>
> "In making its determination the court must have regard to the need for the centre of main interests to be ascertainable by third parties; in particular, creditors and potential creditors. It is important, therefore, to have regard not only to what the debtor is doing but also to what he would be *perceived* to be doing by an objective observer." (Emphasis added)

49. Lewison J then considered what was meant by "ascertainable" and concluded in paragraph 62 that:

> "...one of the important features is the *perception* of the objective observer. One important purpose of COMI is that it provides certainty and foreseeability for creditors of the company at the time they enter into a transaction. It would impose a quite unrealistic burden on them if every transaction had to be preceded by a set of inquiries before contract to establish where the underlying reality differed from the

apparent facts."

He rejected the submissions that either of the US cases to which I have referred led to a different conclusion or that if a company had been used as an engine of fraud some other test should be applied.

50. I have already quoted in paragraph 33 above the conclusion of Lewison J summarised in paragraph 70 of his judgment. He summarised the effect of those conclusions when returning to this issue in paragraph 98 quoted in paragraph 35 above. In their written argument counsel for the US Receiver submitted that Lewison J should have applied the head office functions test he had recognised in **Re Lennox Holdings Ltd** and not the objective and ascertainable test he applied in this case**.** They submit that though there are obvious similarities between Uncitral and the EC Regulation both in the definitions and the rebuttable presumptions there are differences too. They rely on the fact that the definition of foreign main proceeding in Uncitral is wider than that of 'insolvency proceedings' in the EC Regulation in that the former comprehends at least some types of receivership but the latter does not. They suggest that the EC Regulation is based on mutual trust between Member States, as indicated in recital 22, but Uncitral does not in that it does not depend on reciprocity. This is demonstrated by the fact that Uncitral is part of the law of England and Wales but not of Antigua and Barbuda. They point out that there is nothing in Uncitral comparable to recital 13 of the EC Regulation.

51. The US Receiver also contends that Lewison J was wrong in applying the ascertainability test to limit the facts which might be considered to those which are in

the public domain or apparent to a typical third party doing business with the company. He contends that they should include those which would be ascertained on investigation. Finally he contends that the existence of fraud perpetrated by a group of companies or individuals means that the COMI of each individual or company involved is that of the fraudulent entity as a whole. As SIB was concerned in a massive Ponzi scheme managed and directed from the US the COMI of SIB and all the other companies and individuals involved should be recognised to be in the US wherever their registered offices or habitual residence might be. In oral argument counsel for the US Receiver accepted that ascertainability of a particular fact is a relevant consideration but not, he submitted, a necessary precondition. Likewise he explained that he did not contend that the existence of fraud constituted an exception to the general rule or changed the relevant test.

52. Counsel for the SFO did not enter into this controversy. His concern was that whichever proceeding was recognised and on whatever basis the restraint order originally granted on 7th April 2009 should take priority over them. Counsel for the Antiguan Liquidators supported the decision of Lewison J for the reasons he gave. In particular counsel contended that the judge was right to follow the decision of the ECJ in **Eurofood** and to apply the ascertainability test in preference to that of the head office functions test he had applied in **Re Lennox Holdings Ltd**.

53. The appropriate starting point for consideration of these submissions is the question whether Lewison J was right to follow **Eurofood**. In my view he was. The COMI test was first adopted in the European Convention on Insolvency Proceedings. In that context it was plain from the Virgós-Schmit Report para 75, quoted in paragraph 36

above, that the appropriate test depended on ascertainability by those who dealt with the debtor so that they should know which law would govern the debtor's insolvency. There can be little doubt but that recital 13 of the EC Regulation was intended to reflect that rationale. The derivation of COMI in Uncitral and the various guides to its interpretation in that context show that it was intended that it should bear at least a similar meaning. Thus both the UN Session paper and the Uncitral Guide, both quoted in paragraph 37 above, expressly refer to the corresponding use of the phrase in the EC Convention. The EC Regulation is the successor of the European Convention.

54. The same expression used in different documents may bear different meanings because of their respective contexts. I can see nothing in the respective contexts of Uncitral and the EC Regulation to require different meanings to be given to the phrase COMI. In both of them the phrase is used to identify the proceeding which should take priority, in one form or another, over other similar proceedings taken in other jurisdictions. In both of them the concern is that persons dealing with the debtor should be able to know before insolvency intervenes which system of law would govern the eventual insolvency of their counterparty. Further as both Uncitral and the EC Regulation apply in England and Wales it is essential that each should be interpreted in a manner consistent with the other. It would be absurd if the COMI of a company with its registered office in, say, Spain which is being wound up both there and in the US should differ according to whether the court in England was applying Uncitral on an application by the US liquidators for recognition as a foreign main proceeding or the EC Regulation in deciding whether the court in England may entertain a petition to wind up the Spanish company here. It follows that if there is

any difference in the test promulgated by the ECJ in **Eurofood** and that applied by the courts in the US then it is right that the court in England should apply the **Eurofood** test.

55. It is not strictly necessary to consider whether the US cases to which I have referred indicate any different test to that propounded in **Eurofood**. Lewison J considered that they did, see paragraph 67 of his judgment, but decided to follow **Eurofood** whether or not, strictly, it was binding on him. But the test, as formulated by the appellate court in **re SPhinX Ltd,** referred in terms to "objective factors ascertainable to third parties", see quotation in paragraph 44 above. That is the same test. Whether or not it was correctly applied in the later cases to which I have referred is not for me to say. Accordingly I see nothing in the US cases to suggest any different conclusion to that dictated by **Eurofood**.

56. I have quoted the relevant passages from the judgment of ECJ in **Eurofood** in paragraphs 40 to 42 above. In my view it clearly established the following propositions:

> (1) It is apparent from paragraph 30 of the judgment of the ECJ that each company or individual has its own COMI. Under Uncitral, as applied in England and Wales, it is not possible to have a COMI of some loose aggregation of companies and individuals. It follows that there can be no COMI by reference to an entity comprising all those involved in the fraudulent Ponzi scheme. The COMI of SIB depends on the application of the presumption to SIB.
>
> (2) It is clear from paragraph 34 of the judgment of the ECJ that the presumption "can be rebutted only [by] factors which are both objective and ascertainable". That this test is not the same as the head office functions test adopted by Lewison J in **Re Lennox Holdings Ltd** and Lawrence Collins J in **Re Collins & Aikman Corp Group** [2006] BCC 606 para 16 is plain. Moreover the specific criticism of paragraph 98 of the judgment of Lewison J, quoted in paragraph 35 above, that he wrongly elevated the ascertainability test into a pre-condition for consideration

is not correct. The judge was there accurately paraphrasing the effect of the ECJ's judgment in **Eurofood**.

(3) Thus it is conclusively established that the factors relevant to a rebuttal of the presumption must be both objective and ascertainable by third parties. Lewison J confined factors ascertainable by third parties to matters already in the public domain and what a typical third party would learn as a result of dealing with the company and excluded those which might be ascertained on enquiry. The good sense of this conclusion is demonstrated by the cases in English domestic law relating to constructive notice and its various degrees, see, for example, **Baden v Societe Generale S.A** [1993] 1 WLR 509, 575 paras 250-274. To extend ascertainability to factors, not already in the public domain or apparent to a typical third party doing business with the company, which might be discovered on enquiry would introduce into this area of the law a most undesirable element of uncertainty.

(4) Whether or not factors, not already in the public domain or so apparent, ascertainable on reasonable enquiry are relevant to a rebuttal of the presumption that cannot extend the range of ascertainable factors to the fraudulent Ponzi scheme. That, inevitably, is neither a matter of general knowledge nor ascertainable on reasonable enquiry. It was suggested that after the fraudulent scheme had been uncovered the facts as to its previous existence had become public knowledge and should be relevant to the rebuttal of the presumption. No doubt the COMI of a company may change as the situation of its registered office may change, but it can only do so by reference to main interests which it still has and facts within the public domain or so apparent at the time of their occurrence. The allegations of fraud have not yet been proved before a court of competent jurisdiction (but Mr James Davis has pleaded guilty to three counts in relation to the fraud), SIB's interests main or otherwise ceased on discovery of the alleged fraudulent scheme and the activities now said to rebut the presumption were not in the public domain or so apparent when they occurred.

(5) If and insofar as the ECJ in its judgment may have formulated a test different from that suggested by the Advocate-General (having regard to the references to ascertainability in paragraph 126 of his opinion quoted in paragraph 41 above I do not believe he did) the definitive test has to be that to which the court referred.

For all these reasons I would reject the submission that Lewison J applied the wrong test.

57. I turn then to the second submission to which I referred in paragraph 34 above, namely, that on the basis of the evidence before him, Lewison J should have concluded that the presumption was rebutted. The judge's conclusion was based on

the facts he summarised in paragraphs 1, 11 to 31 and 97 of his judgment. He considered each of the 8 matters that counsel for the US Receiver drew specifically to his attention. He held in paragraph 99 that those matters even when taken together were not sufficient to rebut the presumption "reinforced as it is by other objective facts ascertainable to third parties". Counsel for the US Receiver submitted that the judge reached a wrong conclusion and set out in an appendix to their written argument details of a number of areas in which it was alleged that the judge had given no or insufficient weight to certain facts. Counsel for the Antiguan Liquidators contended that the summary given in the appendix to the written argument of counsel for the US Receiver misstated the relevant evidence and that when correctly stated it did not support the submission made.

58. I have no hesitation in rejecting the US Receiver's submission. Provided that he applied the right test, and for the reasons already given I believe that he did, the conclusion of the judge was a matter of fact for him. Moreover it was a multi-factorial conclusion of fact, such as was referred to by Lord Hoffmann in **Designers Guild Ltd v Russell Williams (Textiles) Ltd** [2003] 1 WLR 2416, 2423H-2424B. (see also **Assicurazioni Generali SpA v Arab Insurance Group** [2003] 1 WLR 577 para 16oHo.) It is not suggested that there was no evidence to justify the conclusion of the judge or that his conclusion is plainly wrong. It follows that it is not open to this court to contradict the judge's conclusion on the same evidence as was before him.

59. Accordingly I turn to the third submission summarised in paragraph 34 above, namely that the fresh evidence we permitted the US Receiver to adduce when taken together

with the evidence before the judge does lead to the conclusion that the presumption has been rebutted. The fresh evidence is contained in or is exhibited to the witness statement of Robert Preston-Jones, the solicitor acting for the US Receiver, and comprises (1) the third witness statement of Karyl van Tassel made on 2nd July 2009, (2) the Willis Class Action and (3) the Davis Plea Agreement. I will deal with each in turn.

60. The witness statement of Karyl van Tassel was sent to Lewison J after he had sent a draft of his judgment to the legal representatives for the parties and just before he handed it down. There is exhibited to it what has been called 'the Audit evidence' and 'the FSRC evidence'. The Audit evidence is to the effect that the auditor of SIB, C.A.S.Hewlett, was regularly paid bribes by or on behalf of Sir Allen Stanford. It is suggested that this fact undermines any reliance put upon the place where the accounts of SIB were audited. I can see that it might undermine any reliance placed on the accuracy of the audited accounts. It has no effect on the location where they were audited. Further the judge did not rely on the location of the audit otherwise than as reinforcing the presumption, see paragraph 97, arising from the location of the registered office of SIB. And even if he had this factor could not have been relevant to the rebuttal of the presumption because, obviously, it was not in the public domain or apparent to a typical third party doing business with SIB at any relevant time. In my view this evidence is plainly irrelevant to the question of the COMI of SIB.

61. Also annexed to the third witness statement of Karyl van Tassel is evidence indicating that the chief executive office of FSRC and the individual responsible for the appointment of the Antiguan Liquidators as receivers and for presenting the winding

up petition in Antigua, Mr Leroy King, was also bribed by or on behalf of Sir Allen Stanford in order to give SIB 'a clean bill of health'. This fact is said to undermine the reliance placed by Lewison J on the regulation in Antigua to which SIB was subject as an indication of the COMI of SIB. It seems to me that this evidence is also irrelevant. It does not establish that SIB was subject to regulation anywhere else, such bribes were secret and unascertainable and, in any event, the judge did not rely on the place of regulation otherwise than as supportive of the presumption.

62. The Willis Class action is one brought on 2nd July 2009 in the US courts by a group of holders of CDs issued by SIB against an insurer broker alleged to have given false assurances as to the safety and soundness of the Stanford group generally and of SIB's CDs in particular. It is alleged, for example in paragraph 86 of the complaint, that SIB was held out to be a US based business guaranteed and insured at Lloyd's. Accordingly it is suggested that the 'public face' of SIB to which Lewison referred was not that of an Antiguan bank. But none of the five exhibits attached to the complaint supports the allegation. None of them states that SIB was based in the US. By contrast one of them states that SIB was based in Antigua and another that it "is not a US bank [and so] not covered by the [Federal Deposit Insurance Company]". In my view this evidence is of no assistance.

63. The Davis Plea Agreement is dated 27th August 2009 and sets out facts relevant to the fraud which James M. Davis admitted. It is relied on to support the Audit Evidence and the FSRC evidence and to demonstrate that SIB was a small part of a larger, fraudulent entity based in the US. But there is nothing in it to suggest that the COMI

of SIB alone was not in Antigua. This evidence is irrelevant too.

64. I should also refer to three other documents exhibited to the witness statement of Mr Preston-Jones. The first is the indictment against Sir Allen Stanford and others on 18th June 2009 laid in the US District Court for the Southern District of Texas, Houston Division. This demonstrates the allegations made against the various defendants but does not prove them. The second is the second amended complaint made by the SEC against Sir Allen Stanford and others, but not SIB, in the US District Court for Northern Texas. I do not understand that this is said to do more than keep this court up to date. The third contains papers relating to proceedings for recognition brought by the Antiguan Liquidators and the US Receiver in Canada.

65. On 11th September 2009 Auclair J recognised the US Receiver but not the Antiguan Liquidators. There appear to have been two basic reasons. First, the judge looked for "the real and important connection" with SIB rather than the rebuttal in accordance with the **Eurofood** test of any presumption arising from the location of its registered office. Second, the court considered the conduct of the Antiguan Liquidators in removing the data on SIB's server in Canada without the approval of the court to be such as to render them unsuitable for recognition in Canada. We were told that the order of Auclair J is under appeal. But the two reasons for the judge's conclusions have no bearing on the proceedings here.

66. For all these reasons I conclude that none of the fresh evidence relied on by the US Receiver is of any relevance on this appeal. Indeed had its adduction been opposed I

consider that it is obvious that we would not have given permission for it.

Summary of conclusions on the appeals from the orders of Lewison J

67. For all these reasons I conclude, in agreement with Lewison J, that:

(1) The US Receivership is not a foreign proceeding within the meaning of that expression as defined in Article 2(i) of Uncitral.

(2) The Antiguan Liquidation is a foreign proceeding within the meaning of that expression so defined and the Antiguan Liquidators are foreign representatives of those proceedings.

(3) The presumption as to the centre of main interests of SIB contained in Article 16.3 Uncitral has not been rebutted.

(4) Accordingly the Antiguan Liquidation is the foreign main proceeding within the meaning of that expression as defined in Article 2(g) of Uncitral.

Whether Lewison J should have made the order he did both as to recognition and otherwise I leave until after my consideration of the appeal from the order of HH Judge Kramer QC made on 29th July 2009 refusing to set aside the restraint order he had made on 7th April 2009.

Appeal from the order of HH Judge Kramer QC made on 29th July 2009

68. The Proceeds of Crime Act 2002 makes provision in Part 2 for the Crown Court in England and Wales to make an order confiscating the proceeds of crime. That jurisdiction is supported by the jurisdiction conferred by ss 40 to 47 to make restraint orders to prevent dealings with certain property. Such a restraint order has the effects specified in s.58. The circumstances in which either type of order may be made and the persons against whom and the nature of the property which may be subjected to

such orders are set out in detail. S.444 enables the provisions of the Act to be extended to deal with external requests or orders. An external request is a request by an overseas authority to prohibit dealing with relevant property which is identified in the request (s.447(1)). A relevant order may be for the recovery of specified property or a specified sum of money (s.447(2)). Property is "relevant" if there are reasonable grounds to believe that it may be needed to satisfy an external order which has been or which may be made (s.447(7)).

69. The power conferred by s.444 was exercised by The Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 SI No: 3181, to which I shall refer as 'ERO'. Part 2 of ERO, comprising articles 6 to 55, gives effect to such orders in England and Wales. By Article 6 the Secretary of State to whom the external request is directed may refer it to, as in this case, the Director of the SFO. Article 6(5) entitles the relevant director to ask for further information from the overseas authority. Article 7 sets out the conditions to be satisfied if the Crown Court is to give effect to the external request. In this case it was the first condition set out in Article 7(2) namely that a criminal investigation had been started in the country from which the external request came and there was reasonable cause to believe that the alleged offender, i.e. SIB, had benefited from its criminal conduct. In that event Article 8 provides that the Crown Court:

> "may make an order ("a restraint order") prohibiting any specified person from dealing with relevant property which is identified in the external request and specified in the order."

Such order may be subject to exceptions and cannot affect property subject to charges

under five specified provisions.

70. Article 9 provides that an application for a restraint order may only be made by the Director of the SFO or other relevant prosecutor and may be made on an ex parte application to a judge in chambers. Article 10 entitles any person affected by the restraint order to apply to the Crown Court for the variation or discharge of that order and to appeal to the Court of Appeal from a refusal to do so. On such an appeal the Court of Appeal "may make such order as it believes is appropriate". Article 11 makes hearsay evidence of any degree admissible in restraint proceedings.

71. Article 17 provides, so far as material to these appeals:

> "(5) If a court in which proceedings are pending in respect of any property is satisfied that a restraint order has been applied for or made in respect of the property, the court may either stay the proceedings or allow them to continue on any terms it thinks fit.
>
> (6) Before exercising any power conferred by paragraph (5), the court must give an opportunity to be heard to—
>
> (a) the relevant Director, and
>
> (b) any receiver appointed in respect of the property under article 15, 27 or 30."

It is these provisions which should have been, but were not, brought to the attention of Lewison J.

72. Much of the argument before us revolved around the provisions of Article 46(1)-(3), which effectively reproduce s.69(1)-(3) of the Act containing what is conventionally described as 'the legislative steer'. They provide, so far as material to these appeals:

(1) This article applies to -

(a) the powers conferred on a court by this Part;

[(b)...]

(2) The powers—

(a) must be exercised with a view to the value for the time being of realisable property or specified property being made available (by the property's realisation) for satisfying an external order that has been or may be made against the defendant;

(b) must be exercised, in a case where an external order has not been made, with a view to securing that there is no diminution in the value of the property identified in the external request;

[(c)....

(d)...]

(3) Paragraph (2) has effect subject to the following rules—

(a) the powers must be exercised with a view to allowing a person other than the defendant or a recipient of a tainted gift to retain or recover the value of any interest held by him;

[(b)....

(c).....]

73. Article 49(2) incorporates the definition of "free property" contained in s.82 of the Act. Article 49(3) incorporates the provisions in relation to property contained in s.84(2)(a) and (c) to (g) and s447(4) to (6) of the Act. Those provisions are in the following terms:

"82. Free property

Property is free unless an order is in force in respect of it under any of these provisions–

(a) section 27 of the Misuse of Drugs Act 1971 (c. 38) (forfeiture orders);

(b) Article 11 of the Criminal Justice (Northern Ireland) Order 1994

(S.I. 1994/2795 (N.I. 15)) (deprivation orders);

(c) Part 2 of the Proceeds of Crime (Scotland) Act 1995 (c. 43) (forfeiture of property used in crime);

(d) section 143 of the Sentencing Act (deprivation orders);

(e) section 23 or 111 of the Terrorism Act 2000 (c. 11) (forfeiture orders);

(f) section 246, 266, 295(2) or 298(2) of this Act."

"84 Property: General Provisions

[(1)....]

(2) The following rules apply in relation to property–

(a) property is held by a person if he holds an interest in it;

[(b)...]

(c) property is transferred by one person to another if the first one transfers or grants an interest in it to the second;

(d) references to property held by a person include references to property vested in his trustee in bankruptcy, permanent or interim trustee (within the meaning of the Bankruptcy (Scotland) Act 1985 (c. 66)) or liquidator;

(e) references to an interest held by a person beneficially in property include references to an interest which would be held by him beneficially if the property were not so vested;

(f) references to an interest, in relation to land in England and Wales or Northern Ireland, are to any legal estate or equitable interest or power;

(g) references to an interest, in relation to land in Scotland, are to any estate, interest, servitude or other heritable right in or over land, including a heritable security;"

"447 Interpretation

[(1)....

(2)...

(3)...]

(4) Property is all property wherever situated and includes–

(a) money;

(b) all forms of property, real or personal, heritable or moveable;

(c) things in action and other intangible or incorporeal property.

(5) Property is obtained by a person if he obtains an interest in it.

(6) References to an interest, in relation to property other than land, include references to a right (including a right to possession).

[(7)-(12)]

74. I should also refer to Article 54(a) which provides:

"54. In this Part "defendant"—

(a) in relation to a restraint order means—

(i) in a case in which the first condition in article 7 is satisfied, the alleged offender;

(ii) in a case in which the second condition in article 7 is satisfied, the person against whom proceedings for an offence have been started in a country outside the United Kingdom (whether or not he has been convicted);"

There was not incorporated into ERO the provisions of Part 9 of the Act which modify the provisions of the Insolvency Act 1986 in the case of a person adjudicated bankrupt in England and Wales or of a company being wound up under that Act. In such cases a pre-existing bankruptcy or winding-up takes priority over a restraint order.

75. As I indicated in paragraph 1(8) and (9) above the restraint order in this case was sought pursuant to the Letter of Request dated 6th April 2009 sent by the US Department of Justice to the Central Authority of the United Kingdom and duly

referred to the SFO. The Letter of Request stated that SIB amongst others was being investigated by various US Federal law enforcement agencies for violations of US Criminal laws that prohibit wire, mail and securities fraud and money laundering. It stated that the evidence collected to date indicated that SIB amongst others had transferred the proceeds of such violations to bank accounts in the UK and elsewhere and were liable to confiscation. The letter went on to indicate that SIB had been used as an instrument of fraud by the individuals being investigated, that the fraud had generated $7.2bn of investments and that some $110m had been transferred to accounts in the UK. The Letter of Request then asked the UK authorities to freeze and restrain all proceeds of the alleged crimes so that the US authorities might provide restitution to the world-wide victims of the crimes. It gave notice that further requests might be made later. It continued:

> "**Time Constraints**
>
> US authorities request the UK authorities file an application to freeze or restrain the identified criminal assets requested by close of business on Tuesday 7th April 2009. Details of such need will be provided on request."

The Letter of Request also sought confidentiality so as not to prejudice the ongoing enquiries in the US.

76. The letter continues with a summary of the facts relied on for the allegation that the individuals "acting through SIB (an off-shore bank domiciled in Antigua) and through a network of...financial advisers" executed the massive fraud alleged. It describes the US proceedings to date including the appointment of the US Receiver and the

injunction granted by the District Court for the Northern District of Texas. It sets out the tracing attempts made by the US authorities and the discovery of three accounts in the name of SIB held with Credit Suisse, four with HSBC and one with Longley Asset Management UK in London. After setting out the offences alleged to have been committed, details of the persons and entities alleged to have been involved, including SIB, the letter concludes with a request to freeze any and all assets located in the UK except those held in the names of Stanford Bank of Panama and Bank of Antigua with Credit Suisse or HSBC in London because:

> "The United States needs this particular freeze or restraint in order to ensure that these assets are legally secured for criminal or quasi-criminal confiscation efforts and to protect those assets from potential dissipation by other persons to the possible prejudice of the real victims of the Stanford fraud and money laundering conspiracies."

The letter continues with details of five accounts in the name of SIB with Credit Suisse in London and four at HSBC and the likelihood of further requests for confiscation and other orders. It concluded with the statement:

> "Ultimately, all the confiscated proceeds will be returned to all the world-wide victims on a pro rata pursuant to US law, and for these assets, the relevant UK laws."

77. The Letter of Request was dealt with in the SFO by an employed barrister, Mr Tanvir Tehal. He made a witness statement to which he exhibited the Letter of Request. In paragraph 3 he stated:

> "I do not have personal knowledge of this case and rely entirely on information contained in [the Letter of Request]".

He then dealt with the formal requirements for the making of a restraint order on the

incorrect basis that criminal proceedings in the US had been commenced against SIB. In paragraph 8 he said:

> "To the best of my knowledge there is a civil freezing order made by the High Court in London on 6th April 2009 against those assets which are the subject of this witness statement and the restraint order sought. The reason for this restraint order is that it is believed that the civil freezing order will be discharged shortly."

He then referred to the risk of dissipation, the orders sought and who the orders should be served on and how.

78. As recorded in paragraph 1(9) above the restraint order was made by HH Judge Kramer QC on an ex parte application made on 7th April 2009. The transcript of the proceedings indicates that the judge was told that there was an ongoing investigation in the US into SIB and the Stanford Group, that the restraint order was needed in order to preserve assets to answer a confiscation order in due course and that the US authorities did not wish the contents of the witness statement to be disclosed. The order and the evidence in support of it were served on SIB as described in paragraph 1(9) above. On 17th July 2009 the application for its variation was made as indicated in paragraph 1(15) above and was disposed of by HH Judge Kramer QC on 29th July 2009 as stated in paragraph 1(17) above. Two days before Judge Kramer gave judgment Mr Addy J. de Kluiver, a senior trial attorney in the US Department of Justice, made a further witness statement in answer to questions put to him by counsel for the SFO.

79. The first question was why the SFO was not informed in the Letter of Request of the

appointment of the Antiguan Liquidators. The answer is in these terms:

> "The existence *vel non* of an Antiguan receiver at the time of the letter of request had no relevance to our criminal case, so we are not sure why we would be under any obligation to disclose that fact. Moreover at the time we sent out the letter of request, the Antiguan receiver, while appointed by the FSRC, had not been legally recognised as such by any court. At the time, the only receiver that had been recognised by any court was the US Receiver, and the only orders obtained regarding assets were the US orders of restraint obtained by the SEC that are referenced in the Letter of Request."

80. The second and third questions sought information as to when Mr de Kluiver first knew that SIB was not to be a defendant to the criminal proceedings in the US and whether the assets of SIB in London were liable to forfeiture or confiscation by the US authorities. He replied that by 6th April 2009 no final decision whether to prosecute SIB had been taken but that SIB could be added to the indictment at any time. Further SIB's assets in London were liable to forfeiture because SIB was the alter ego of the individual defendants and an instrumentality in money laundering.

81. By the fourth question the deponent was asked to comment on the allegation made in court that:

> "The US authorities have knowingly attempted to frustrate the work of the Antiguan Liquidator by not disclosing the appointment of the liquidator in the Letter of request on which the SFO acted and obtained the Restraint Order?"

The response was as follows:

> "See first response to question (a). The US Receiver who has been vigorously opposing the Antiguan receiver is not acting in concert with the Department of Justice. The US Receiver has an obligation to protect the victims' interests that arise under US laws separate and apart from our criminal powers and he answers only to the judge who appoints him. The Department of Justice does not control the actions of the Judge the US Receiver reports to. The criminal powers that the

> Department of Justice exercises are completely unrelated to the US Receiver's actions. At no time did lawyers for the Antiguan receiver contact the criminal prosecutors and inform us of their plans of going after all assets in all countries regardless of the costs and duplication of effort. They still have not contacted us and the criminal indictment identifying which assets we intend to forfeit has been in the public domain for over one month now."

82. In his judgment delivered on 29th July 2009 HH Judge Kramer QC set out the facts and described the application before him as one to discharge the order he had made on the 7th April for material misrepresentation or non-disclosure and alternatively for its variation. The material misrepresentations or non-disclosure alleged related to

(1) the fact that SIB was and is not a defendant to the criminal proceedings in the US.

(2) the fact that the alleged urgency would have been undermined had SFO disclosed, as it should have done,

(a) the proceedings in Antigua,

(b) the appointment of the US Receiver,

(c) the communications of the US Receiver and the Antiguan Liquidators with the UK banks holding the deposits sought to be frozen,

(d) the freezing order made by Jack J on 27th March 2009 and

(e) the world-wide coverage of the frauds allegedly perpetrated by SIB.

3) the statement made to the court on 7th April 2009 that the freezing order made by Jack J was shortly to be discharged was made without any evidence to support it.

(4) the failure of SFO to serve on SIB the evidence relied on before HH Judge Kramer QC on 7th April 2009 until 24th July 2009 delayed the application to set it aside.

83. The judge then set out the relevant provisions of ERO and posed four questions, namely was there material (1) misrepresentation or (2) non-disclosure as a result of

which the order was obtained? Even if there was (3) should the order be discharged? In any event (4) should the order be varied as requested? I pause to observe that the first two questions posed by the judge were the wrong ones. The question is not whether the order was obtained as a result of the misrepresentation or non-disclosure but whether the information not disclosed was material to be taken into account in deciding whether or not to grant relief without notice and if so on what terms, see e.g. **Dormeuil Freres SA v Nicolian Ltd** [1988] 1 WLR 1362, 1368.

84. The judge then answered each of the four questions he had posed for himself. With regard to the first question he concluded:

> "It is true that in paragraph 5 of his witness statement Mr Tehal misrepresented the position [sc. SIB was a defendant to the criminal proceedings] but I accept the submission that that was an innocent error made in haste and not a material one."

Given that the judge had asked himself the wrong question the conclusion that the misrepresentation was not material cannot be correct.

85. In relation to question 2 the judge concluded that there was non-disclosure of the Antiguan Liquidators (which must have been a reference to the Antiguan receiver-managers and the liquidation proceedings) as at that date but he accepted the argument set out in the skeleton argument of counsel for SFO that, in effect, such non-disclosure made no difference to the result. But that submission specifically accepted that the existence of the Antiguan Liquidators was material to the exercise of the court's discretion. In fact, of course, on 7th April 2009 the individuals who were subsequently appointed liquidators were in office as court appointed receiver-

managers and the winding-up proceedings had been commenced. Thus, not only did the judge not ask himself the right question but his answer to the wrong question demonstrates that the answer to the right question was affirmative. The judge did not deal at all with the remaining allegations of non-disclosure I have summarised in paragraph 82(2) and (3) above.

86. The judge then considered the third question. He reminded himself of the purpose of a restraint order and the duty of the court to act fairly. He referred to ERO Article 46(2)(b) and adopted the reasoning of Laws and Longmore LJJ in **Jennings v Crown Prosecution Service** [2005] EWCA Civ 746 at paras 52 to 56 and 64 as to the balance to be struck between the public interest and the requirement that a party, including an emanation of the State, must act in strict compliance with the rules and standards as to disclosure to be made on an ex parte application. In the context of the instant case he saw no reason to discharge the restraint order. For similar reasons he declined to vary the order. In conclusion he added:

> "Even if I am wrong in my answers to the four questions, are there now grounds for making the order sought by SFO? I am satisfied that as of today's date, there being no freezing order in place in the Queen's Bench Division, the order can and should still be made by this court. The position is that the funds in question were transferred to this jurisdiction by the individual defendants in the name of SIB, prima facie, fraudulently. Accordingly, it is, in my judgment, in the public interest to make the order and, were it necessary for me to do so, I would."

87. In these circumstances counsel for the Antiguan Liquidators submits that the restraint order should be set aside for the following summary reasons:

> (1) Material facts were misrepresented or not disclosed by DoJ/SFO when they applied ex parte for the restraint order granted on 7th April 2009 such that the order then made should be set aside.

(2) On the making of the winding-up order in Antigua on 15th April 2009 title to all the moveable assets of SIB of vested in the Antiguan Liquidators.

(3) On 29th July 2009 HH Judge Kramer QC should have recognised that Article 46(3)(a) then required him to withhold a restraint order in order that the Antiguan Liquidators might retain or recover the property vested in them by the Antiguan Liquidation.

I will deal with those submissions in that order.

88. I have no doubt that there was substantial misrepresentation and non-disclosure of material matters when the ex parte application was made to HH Judge Kramer QC. First, he was not told of the position in Antigua. By 7th April 2009 the receiver-managers had been confirmed in office by the High Court of Antigua and Barbuda (paragraph 1(3) above), they had reported to the court that SIB was insolvent and should be put into liquidation (paragraph 1(4) above) and two petitions to wind up SIB had been presented to the High Court in Antigua and Barbuda (paragraphs 1(3)-1(5) above) and were about to be heard. That these facts were known to the DoJ or would have been if the most elementary enquiries had been made of the High Court in Antigua is clearly established by the witness statement of Addy J. de Kluiver quoted in paragraph 79 above.

89. Second, the judge was not told about the actions of the SEC in obtaining a freezing order over the assets of SIB from Jack J on 27th March 2009. It is curious that Mr Tehal stated in paragraph 3 of his witness statement that he had no knowledge of the case except what the Letter of Request had informed him yet in paragraph 8 of the same witness statement he mentioned the High Court freezing order notwithstanding that the Letter of Request does not. So it would appear that Mr Tehal must have been

told of the freezing order by someone; but what was the basis for his statement in paragraph 8 that "it is believed that the civil freezing order is about to be discharged"? Although it was initially granted on 27th March 2009 until 6th April 2009 there was every likelihood that it would be continued from time to time until a full inter partes hearing could be held, as indeed it was. Had proper enquiries been made the judge would have been told, as the fact was, that the freezing order had, on 6th April, been continued over 27th April 2009.

90. Third, although the Letter of Request referred to the appointment of a receiver in respect of SIB and the grant of temporary injunctions by the US District Court for the Northern District of Texas, such appointment was not referred to in the body of Mr Tehal's witness statement as it should have been, see **National Bank of Sharjah v Dellbourg** [1993] 2 Bank L.R. 109. No reference was made to the extensive powers granted to the US Receiver or of the fact that under the order appointing him the US court had assumed exclusive jurisdiction and taken possession of all the assets of SIB wherever located. It may be that the DoJ was not acting in concert with the SEC or the US Receiver, as Mr de Kluiver states in his witness statement made on 27th July 2009, but there is no suggestion that information available to the SEC or US Receiver would not have been made freely available to the DoJ had they asked.

91. Fourth, HH Judge Kramer QC was not told of the correspondence between the English solicitors for the Antiguan receiver-managers and the various financial institutions holding assets of SIB. For instance on 27th February 2009 the solicitors notified HSBC, Credit Suisse, Marex Financial and Longley Asset Management of the appointment of both the Antiguan receiver-managers and the US Receiver. In

practical terms none of those financial institutions would have accepted instructions on behalf of SIB from any of the former officers of SIB. This correspondence was known to the US Receiver and should have been known to the DoJ. The judge was not told of the substantial publicity given to the troubled Stanford Group either but it is clear from the transcript of the hearing before him on 7th April 2009 that he was well aware of it.

92. Fifth, the affidavit of Mr Tehal was misleading and incorrect in stating in paragraph 5 that proceedings had been commenced in the US thereby satisfying the second condition specified in ERO Article 7(3). In its context that must have been a reference to criminal proceedings but none had been commenced by 7th April 2009. This mistake is not of itself of great significance because the condition specified in Article 7(2) to the effect that there was an ongoing criminal investigation was satisfied and the judge was told that this was the basis of the application before him.

93. Taken together the matters which should have been disclosed but were not undermined the allegation made in both the Letter of Request and the witness statement of Mr Tehal that there was an immediate risk of dissipation of the assets of SIB such as to warrant the grant of a restraint order unlimited in point of time on an ex parte application. The judge could not have been criticised had these matters been disclosed, as they should have been, and he had declined to make any order on an ex parte application. The obvious course would have been to see if the application for the restraint order could be heard by the same judge as would hear the application for the renewal of the freezing order on 27th April. At the most he might have granted a restraint order for a limited period so as to hold the position until a proper inter partes

hearing could be arranged. For these reasons I conclude that not only did HH Judge Kramer QC ask himself the wrong questions but he gave the wrong answer to them. The effect or result of the non-disclosure was the grant of an order unlimited in point of time which, on proper disclosure, could not have been justified.

94. In these circumstances the public interest to which Laws LJ referred in **Jennings v CPS** [2006] 1 WLR 182, 198 para 56 did not require the court to make the order HH Judge Kramer QC made on 7th April 2009 and this court is entitled in its discretion to set aside the restraint order so that the SFO may be deprived of any advantage it obtained by means of the non-disclosure, see **Brinks Mat Ltd v Elcombe** [1988] 1 WLR 1350, 1357 and to mark its disapproval of the conduct of SFO/DoJ [**ibid** p.1359]. In addition it has the power conferred by ERO Article 10(3) to make such order as it believes is appropriate. What advantage may have been obtained and what is appropriate now depends on the other contentions of the Antiguan Liquidators summarised in paragraph 87 above. I approach them on the assumption that no restraint order had been made on 7th April 2009.

95. As recorded in paragraph 1(10) above the order for the winding up of SIB in Antigua also appointed the then receiver-managers as joint liquidators and vested all SIB's property of whatever nature and wherever situated in them. As the law of Antigua and Barbuda was the law of both the place of incorporation of SIB and of its COMI the winding up order had the effect under the law of England and Wales of vesting the moveables of SIB in the Antiguan Liquidators even before recognition under Uncitral of the Antiguan Liquidation as the foreign main proceeding, see Dicey, Morris and Collins 14th Ed. rules 195(2) and 197. Given my assumption as stated in paragraph

94 above it is unnecessary to consider the application or effect of **Galbraith v Grimshaw** [1910] AC 508.

96. On 29th July 2009 Judge Kramer decided that even if the restraint order were then set aside the proper exercise of the discretion of the court would have been to grant it afresh. Counsel for the Antiguan Liquidators submits that the judge was wrong. They submit that as at 29th July and on the assumption the restraint order had been set aside the proper exercise of the court's discretion would have been to refuse to grant a restraint order. They contend that because of the terms and effect of the winding up order made in Antigua Article 46(3)(a) applied and required the refusal of a restraint order so that the Antiguan Liquidators might retain or recover the assets of SIB vested in them.

97. It was accepted that as at 29th July 2009 at least one of the conditions imposed by ERO Article 7 was satisfied. The evidence indicated that the property sought to be restrained was relevant property within the definition contained in s.447(7). Proceedings for an offence had been commenced in the US against, amongst others, Sir Allen Stanford and there was reasonable cause to believe that he had benefited from his criminal conduct. In any event the investigation as against SIB had not, so far as I am aware, been concluded.

98. On an application for a restraint order made on 29th July the court would have to exercise the discretion given by Article 8(1) in accordance with the legislative steers given in Article 46(1)-(3). The submission summarised in paragraph 96 above rests on the proposition that the Antiguan Liquidators have an interest in the bank deposits

referred to in the Letter of Request and are "persons other than the defendant" for the purposes of Article 46(3)(a). For the reasons already given I would accept that they have an interest in those deposits but I do not accept that they are persons other than the defendant. S.84(2)(d), quoted in paragraph 73 above, is applicable in accordance with ERO Article 49(3). Given that it is made applicable to external orders and requests the word "liquidator" must, in my view, extend to a liquidator appointed under the law of the place of the company's incorporation or COMI. The effect is that references to property held by SIB include references to property vested in the Antiguan Liquidators.

99. Arden LJ has raised the possibility that the unsecured creditors of SIB, both individually and collectively, hold interests in the assets of SIB for the purposes of Article 46, that the court should have those interests in mind when exercising its discretion whether or not to grant a restraint order and should insert a proviso to any such order such that those interests are preserved. As Hughes LJ points out no party before us and no unsecured creditor contended that the unsecured creditors held such an interest. Accordingly it is not a point which arises for decision on this appeal. My provisional view is the same as that of Hughes LJ. Further, I agree with him that even if unsecured creditors might have such an interest it would not be either necessary or appropriate to insert any proviso into any restraint order we may make. If an unsecured creditor seeks to establish such an interest then he must do so in the Crown Court, not in the Court of Appeal on the final disposition of these appeals.

100. It follows that Article 46(3)(a) would not have applied to an application for a restraint order made on 29th July 2009 so the discretion afforded by Article 8(1) would have to

be exercised in accordance with the legislative steer given in Article 46(2)(b), namely "with a view to securing that there is no diminution in the value of the property". In my view this consideration would require the grant of a restraint order on 29th July 2009 because by then the freezing order originally obtained by the SEC had been discharged by Jack J but also to stop for the time being the risk of the diminution in the value of the deposits held with the specified banks in the name of SIB in paying the costs of either the Antiguan Liquidation or the US Receivership.

101. But the question remains whether to ensure that the advantage obtained by the grant of the restraint order on 7th April 2009 without full disclosure requires merely an order that SFO pay the costs to date or an order discharging the original restraint order with costs and granting it afresh as of 29th July 2009. I find it hard to imagine what advantage there could have been. Nevertheless it seems to me that in principle this court should make the latter order so that any advantage which might have arisen is denied to SFO/DoJ. I would reserve for further argument the question whether those costs should be assessed on an indemnity basis or only on the standard basis.

102. I summarise my conclusions on the appeal of the Antiguan Liquidators from the order of HH Judge Kramer QC made on 29th July 2009 as follows:

(1) There was material misrepresentation and non-disclosure by SFO/DoJ on the ex parte application on which the restraint order was made on 7th April 2009.

(2) The order then made should be set aside with an order for payment by the SFO of the costs of and occasioned by the original application and of the application to set it aside.

(3) The question whether such costs should be assessed on an indemnity basis, if not agreed, should be reserved for further argument.

(4) The restraint order originally sought should be re-granted with effect from

29th July 2009.

Conclusions on both appeals

103. As I indicated in paragraph 3 above it is necessary to have regard to the conclusions on each appeal and the effect they may have on each other. Only then can the terms of the final orders to be made on each of them be determined. Each of the Antiguan Liquidators, the US Receiver and the SFO/DoJ contended that it was better placed than either of the other two to administer the world-wide assets of SIB and recompense the victims of the frauds perpetrated by the individuals charged in the US through the instrumentality of SIB. The Antiguan Liquidators contend that they are the representatives of SIB duly appointed under the law of the place of its incorporation or its COMI and well able to collect and administer all the assets of SIB and distribute them amongst all the creditors. The US Receiver contends that he is better able to do so amongst all the victims of the fraud and not only those who are creditors of SIB. The SFO/DoJ submit that they can carry out the same functions as the US Receiver but at public expense rather than at the expense of the victims or creditors.

104. None of these solutions is ideal in that the US Receiver and the SFO/DoJ would not, seemingly, compensate creditors of SIB who are not victims of the frauds but the Antiguan Liquidators would not directly compensate victims of the frauds who were not also creditors of SIB. On the other hand there will be a good deal more for the victims if the administration of the assets and their distribution is entrusted to the SFO/DoJ for that should avoid most of the very substantial costs being incurred by both the Antiguan Liquidators and the US Receiver. Further the court is, in my view,

entitled to place reliance on the passage in the Letter of Request I have quoted at the end of paragraph 76 above confirmed by the statements in the witness statement of Mr Addy J.de Kluiver made on 29th October 2009 to the effect that the assets of SIB in England will be distributed to the victims pro rata and pursuant to the relevant UK laws. In principle, therefore, I see no reason not to make the restraint order as of 29th July 2009 so as to confer administrative priority on the SFO/DoJ.

105. But it does not follow from this conclusion that the order recognising the Antiguan Liquidation as the foreign main proceeding should be withheld pursuant to ERO Article 17(4). Not only is Uncitral Article 17 mandatory but the exercise of the jurisdiction conferred by ERO for making forfeiture and other orders requires a representative of SIB authorised to consider and, if thought fit, oppose subsequent applications of SFO/DoJ for confiscation or other orders. Prima facie the jurisdiction conferred by Article 20(2)-(6) of Uncitral is wide enough to enable this court to tailor the effect of the recognition order and the powers of the Antiguan Liquidators so as to confer priority of administration of the assets of SIB on SFO/DoJ. Further it is for consideration whether the provisions of Article 22 of Uncitral can be used so as to provide some protection for creditors of SIB who are not also victims of the fraud. I understood it to have been agreed at the hearing that we should allow further argument on what powers should be conferred on the Antiguan Liquidators in the light of all our conclusions. Accordingly I would, in addition to the specific matters to which I have already referred:

(1) Make a restraint order with effect from 29th July 2009 on the appeal of the Antiguan Liquidators from the order of HH Judge Kramer QC made on that day.

(2) Recognise the Antiguan Liquidation and the Antiguan Liquidators as the foreign main proceeding and the foreign representatives respectively in relation to

SIB.

(3) Adjourn for agreement or further argument the question whether and if so to what extent the powers conferred by Article 20(2) Uncitral should be exercised so as to avoid inconsistency between those two orders or their consequences.

Lady Justice Arden :

Introduction

106. Were it not for the making of a winding up against SIB on 15 April 2009, I would have no hesitation about agreeing with the Chancellor that the order of HHJ Kramer QC dated 7 April 2009, and continued by him on 29 July 2009, should be (a) discharged by this Court by reason of material non-disclosure and (b) re-imposed with effect from 29 July 2009. However, I respectfully differ from him over the interests which a restraint order may affect. The unsecured creditors of SIB arguably became interested in the assets of SIB when the order for its winding up was made, and arguably any restraint order must be made subject to their interests. The parties should be given the opportunity to make submissions on these questions as they have not yet been fully argued, and their resolution may affect the issue whether the restraint order of 7 April 2009 should be discharged and whether, and, if so, on what terms, it should be re-imposed. If either of the parties wishes to argue them, they cannot simply be left "for another day".

107. The issues arising out of the making of the restraint order on 7 April 2009 are the correct starting point for resolving these appeals. However, on the issues arising out of the matters heard by Lewison J, in substantial agreement with the Chancellor, I consider that Lewison J came to the right conclusion on the questions that were

decided by him in his careful judgment dated 3 July 2009.

108. I am indebted to the Chancellor for his clear and comprehensive judgment, which will greatly shorten my task. I also adopt his description of the background and the definitions contained in his judgment.

109. The points which I make in this judgment will be organised under the following headings:

A. The materiality of the non-disclosure by the SFO prior to the making by HHJ Kramer QC of the restraint order dated 7 April 2009

B. The effect on the restraint order dated 7 April 2009 of the non-disclosure by the DoJ/SFO: should the order have been discharged by HHJ Kramer QC? Should this court now make a new restraint order?

C. Effect for the purposes of Article 46(3)(a) ERO of the winding up on SIB on 15 April 2009

D. Recognition of the Antiguan Liquidators -- appeal against the order of Lewison J dated 3 July 2009

E. Guidance as to the practice for future cases

F. Conclusions

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A. THE MATERIALITY OF THE NON-DISCLOSURE BY THE SFO PRIOR TO THE MAKING BY HHJ KRAMER QC OF THE RESTRAINT ORDER DATED 7 APRIL 2009

110. I agree with the judgment of the Chancellor on this issue (paragraphs 88 to 94). In my judgment, there has, even now, been no frank explanation of exactly how much the DoJ knew as at 6 April 2009 (when the LOR was issued) about the appointment of the

Antiguan receivers on 26 February 2009, or the presentation by the Financial Services Regulatory Commission of Antigua and Barbuda ("FSRC") of a petition for the winding up of SIB or of the other winding up petition mentioned by the Chancellor. These petitions were both relevant at 7 April 2009, though the latter, which was presented by a creditor, was opposed, and was dismissed by the Antiguan court on 15 April 2009. Nor has there been any satisfactory explanation of the reasons why HHJ Kramer QC was told that the application was required to be made so urgently. It is said by Mr Mitchell QC that there was a risk of flight by individual defendants but Mr Kovalevsky QC threw doubt on this in fact and in any event this was really a reason for confidentiality. Even now there is no explanation why more accurate information about the freezing orders obtained in the High Court in London was not available for the application to HHJ Kramer QC. I note that the hearing in Antigua of the winding up petition of the FSRC took place in the same week as the application was first made to HHJ Kramer QC in London.

111. In my judgment, the petitions for the winding up of SIB ought to have been disclosed to HHJ Kramer QC because, if an order was made, a liquidator would be appointed with power to collect the assets, thus reducing the risk of dissipation, and also because it was reasonably arguable that on the making of a winding up order the unsecured creditors would acquire interests for the purposes of Article 46(3)(a) ERO. The petitions, it may be noted, had been presented on 9 and 24 March 2009 and so were clearly not presented to pre-empt the restraint order.

112. In my judgment, had there been proper disclosure of in particular the Antiguan proceedings and those before Jack J, there would have been no need to make a

restraint order on 7 April 2009, and such an order should not then have been made. Even a temporary order was unnecessary, though it could have been made on strict terms as to immediate service on SIB and with liberty for SIB to apply to discharge it on very short notice. Mr Mitchell sought to meet these difficulties by submitting both orally and in writing that, if told of the winding up petition, HHJ Kramer QC might have regarded the threat of the appointment of the liquidators as a threat of dissipation in itself in view of the enormous costs which their appointment would generate. That would not by itself have justified the making of a restraint order without notice. It would have been a wholly innovative and unprecedented application on which the court would need submissions from both parties. There would be no risk of dissipation in the meantime; thus the reason suggested by Mr Mitchell for making the application would without more be an attempt to use the court's processes to steal a march on the prospective liquidators by removing assets which they would on appointment be entitled to control. The right course would be to obtain an order for short service on SIB.

113.The only point of difference between the Chancellor and Hughes LJ on non-disclosure is on the *Dellbourg* point, by which I mean the point that information about the US Receiver should have been in the witness statement placed before HHJ Kramer QC on the application for a restraint order, rather than simply in the letter of request (LOR). I agree with the Chancellor for the reasons he gives. As the Chancellor explains, the information in the LOR about the US Receiver was inadequate. There was no reference to his power to take possession of the assets of SIB. If the exercise of putting the material information into the witness statement had been performed, it is more likely that proper thought would have been given to why information about the

US Receiver was material to the application for a restraint order and what then had to be disclosed. That supports the wisdom of requiring disclosure to be made in the statement.

B. THE EFFECT ON THE RESTRAINT ORDER DATED 7 APRIL 2009 OF THE NON-DISCLOSURE BY THE SFO: SHOULD THE ORDER HAVE BEEN DISCHARGED BY HHJ KRAMER QC? SHOULD THIS COURT NOW MAKE A NEW RESTRAINT ORDER?

114. For the reasons given by the Chancellor, I agree that, certainly had there been no winding up order on 15 April 2009, the restraint order made on 7 April 2009 should have been discharged in July 2009. I agree with the Chancellor that, because of the seriousness of the non-disclosure, the restraint order has to be discharged. As explained, I consider that there is a continuing failure to make proper disclosure of the DoJ/SFO's knowledge as at 7 April 2009 of the events and proceedings then unfolding in Antigua and of the reason for urgency. I bear in mind, in accordance with what this Court said in *Jennings v CPS* [2005] EWCA Civ 746 at [55] to [57], the fact that the application was made in the public interest. However, there was in fact no real risk of dissipation on 7 April 2009. Mr Mitchell did not suggest that the sanction of discharge of a restraint order was excluded by Article 46 or any other article of ERO and in the light of *Jennings* such an argument may not be open to him in this court in any event.

115. I also agree that this Court should in principle impose a new restraint order. Article 46(2)(b) ERO (set out below) specifically requires the court to exercise its powers to make a restraint order. This particular provision is more than a mere steer. It is, in effect, a direction that a restraint order should be made and maintained in force at all times. *Webber v Webber* [2007] 2 FLR 116 at [42], on which the Antiguan Liquidators relied, does not assist as that was concerned with two apparently conflicting domestic statutory schemes for dealing with the assets sought to be restrained. There is no reason why a new restraint order, if imposed, should not take effect from 29 July 2009 in replacement for that discharged for material non-disclosure. There would be no point in discharging the original restraint order and re-imposing it with effect from 7 April 2009.

116. If some third party had acquired an interest in the property restrained after the date of the restraint order imposed on that date, then, in agreement with Hughes LJ, I consider that that is a factor that would have had to be considered in deciding whether the restraint order should be discharged. It follows that it is reasonably arguable that, if the creditors of SIB now have an interest in the assets of SIB which would be overridden by a restraint order, or which they can assert under Article 46(3)(a) ERO, the court, when deciding whether to discharge or re-impose a restraint order, have to determine whether such interest existed in law and, if it did, take it into account in its decision whether to discharge the restraint order on the grounds of non-disclosure.

117. I note, though it is a separate matter, that, even if the creditors have an interest in the assets of SIB, it is still possible that some pre-existing interest of individual victims of

the fraud will trump them, but no such interest has yet been asserted by them.

118. If the issue of the nature of the creditors' interest, if any, in SIB's assets is not resolved before any final decision is taken on whether to discharge the restraint order the following situation may arise. Suppose that the restraint order dated 7 April 2009 is discharged and that this court makes a new restraint order with effect from 29 July 2009. Suppose further that at a later date it is determined that the creditors have an interest in the assets the subject to the restraint order for the purposes of Article 46(3)(a) by virtue of only of the order for the winding up of SIB on 15 April 2009. Suppose further that in that event the SFO wishes to argue that, notwithstanding the material non-disclosure found by this court, the restraint order dated 7 April 2009 should not to be discharged because the interest of the creditors would then take precedence and that interest only arose after the original restraint order was made. Such an argument might be founded upon the terms of Article 46 (2). (I would add that if they wish to take this course they might well be required to give fuller information about the application for that order than they have done to date). They will not be able to advance that argument if by then the order of 7 April 2009 has already been discharged. The clock cannot then be turned back. Put another way, the question whether the creditors have any interest in the assets of SIB for the purposes of article 46(3)(a) is a logically prior issue which should, if it is reasonably arguable and the point is one which the parties wish to argue, be decided first. To hear more argument would also enable the Antiguan Liquidators to amplify the argument foreshadowed in their skeleton argument (as explained below) and, if successful, to achieve the release of substantial liquid funds which they say are urgently needed for the purposes of the liquidation. If the parties decide not to argue the point, they will have to accept any

consequences that flow from such waiver.

119. The restraint order dated 7 April 2009 was not served on SIB until 27 April 2009. I infer from this that the liquidators did not know about it until then. The winding up order was therefore made in ignorance of the restraint order and not to pre-empt it.

C. EFFECT FOR THE PURPOSES OF ARTICLE 46(3)(A) ERO OF THE WINDING UP ON SIB ON 15 APRIL 2009

120. It is clear that ERO does not protect any interest of the defendant. But it does clearly require protection to be given to the interests of other persons: see Article 46(3)(a) ERO, which is considered in more detail below.

121. As a matter of law, the liquidators have two capacities. First, they are the agents of SIB. Secondly they are trustees for the unsecured creditors (see below and in the **Annex** to this judgment). However, their only interest in the assets of SIB (subject to any lien for their costs and remuneration, which has not been raised) is as trustees: they have no other interest as unsecured creditors.

122. In their written argument, the liquidators stated that the position in the winding up of SIB in Antigua is comparable to that in English law, namely that on winding up a trust arises over the company's assets for the benefit of all creditors pursuant to the statutory winding up scheme. At paragraph [68] of their skeleton argument, they submitted that the legislative steer in Article 46 (3)(a) requires the court to exercise its powers with a view to allowing certain persons, who have an interest in the assets,

other than the defendants and the recipient of tainted gifts, to retain the value of their interests. A footnote states that those persons in this case are the liquidators in whom SIB's assets are vested and the creditors on whose behalf liquidators hold SIB's assets on trust. Again, at paragraph [88] of their skeleton argument under a cross heading "*Article 46 (3)(*a)", the liquidators submitted that:

> "In this case the legislative steer must in any event give way to the Liquidators (and SIB's creditors') interest in the restrained assets:
>
> …
>
> (2) Article 46 (3)(a) is operative because neither the liquidator nor SIB's creditors are defendants or the recipients of a tainted gift within the meaning of article 46 (3)(a).
>
> (3) The assets within this jurisdiction have since their appointment on 15 April 2009 vested in, and been held for SIB's creditors on trust by, the Liquidators…"

123. However, no submissions in amplification of these written submissions were made orally, and accordingly the SFO and US Receiver did not make submissions thereon. According to my notes of the hearing, in the course of argument by Mr Kovalevsky, I interposed to suggest that the winding up of SIB might have divested SIB of the beneficial interest of its assets, but this point was not taken up. The argument of the liquidators was that the assets were vested in the liquidators and that the liquidators were different persons from SIB. But Mr Kovalevsky had no real answer to the s 84(2)(d) point on this.

124. The position of the liquidators is confirmed in a recent email to the court in which counsel for the liquidators observe: "It is not strictly accurate, however, to say that the creditors' interest is separate from the interest of the Liquidators, but rather that their

interest arises under the same statutory trust of SIB's assets of which the Liquidators are the trustees." Thus the liquidators have not focused on the interests of the creditors as such.

125. In all the circumstances, this Court cannot resolve the question whether unsecured creditors have any interest which this Court should protect under Article 46(3)(a). Counsel for the SFO in a recent e-mail to the court described the argument that "unsecured creditors hold any interest in the assets of SIB separate and additional to any interest therein held by the liquidators" as "untenable". In my judgment, for the reasons given below, that submission is wrong, and the question whether they have such an interest is properly arguable, and in the events which have happened that question can be raised even though it was not raised before HHJ Kramer QC or fully argued on this appeal. As it has not been fully argued, I have reached no concluded view on it.

126. I propose to deal with this point in these stages: (a) the basic statutory scheme for domestic restraint orders; (b) whether the scheme is different in its effect in relation to external restraint orders; (c) the significance of s 84(2)(d) POCA, and (d) the effect of this conclusion on the obligation imposed by the court under Article 46(3)(a) ERO.

127. This interaction of insolvency law and the proceeds of crime legislation is a matter of some difficulty and importance. Of course, in some legislation, Parliament treats a company as if it were no more than its shareholders. The statutory duties of auditors, for instance, are owed to the company in the interests only of its shareholders and not those of its creditors: *Stone & Rolls Ltd (in liquidation) v Moore Stephens* [2009]

UKHL 39. But POCA contains express provisions dealing with the position of a company in liquidation, and contemplates that the order may affect the course of the liquidation. When I refer to an "insolvency proceeding", I mean either a bankruptcy or a liquidation, whether voluntary or compulsory.

(a) The basic statutory scheme for domestic restraint orders

128. I start with the provisions of POCA where the related criminal proceedings are within England and Wales and the insolvency is governed by the Insolvency Act 1986. The interaction between insolvency law and POCA is described thus in the explanatory notes for POCA:

> "Section 417: Modifications of the 1986 Act
>
> 559. The purpose of Part 9 is to explain what happens when the same property is subject both to criminal confiscation legislation and to insolvency legislation. The Part is United Kingdom-wide and much of it is based on earlier legislation. *Sections 417-419* deal with the interaction of the insolvency legislation of England and Wales with the confiscation legislation of England and Wales, Scotland and Northern Ireland ("the 1986 Act" means the Insolvency Act 1986 in this context). This is necessary because both the criminal confiscation legislation and the insolvency legislation throughout the United Kingdom affect property in other jurisdictions.
>
> 560. The basic rule expressed by *section 417* is that, if at the time a person is adjudged bankrupt under the 1986 Act a restraint order has previously been made or a receiver or administrator has previously been appointed in respect of any of his property, that property is excluded from his estate for the purpose of the bankruptcy. So any of that property first goes to satisfy the confiscation order, rather than being dispersed to creditors. The legislation is designed to prevent defendants from attempting to use the insolvency legislation to defeat the purpose of the confiscation legislation.
>
> 561. *Schedule 11* makes some related consequential amendments to the Insolvency Act 1986. They deal with the problem that property can only be included in a bankrupt's estate at the time the bankruptcy order is made. If restraint or receivership action is underway when the

bankruptcy order is made, any unconfiscated property cannot be given to the creditors at a later date. The amendments provide that property not required for confiscation can subsequently be included in the bankrupt's estate. See also the note on *Schedule 11, paragraph 16*, amendments to the Insolvency Act 1986.

Section 418: Restriction of powers

562. This section, on the other hand, explains the circumstances under which the bankruptcy legislation takes priority. If a person is adjudged bankrupt before a restraint order is made or a receiver or administrator is appointed, no property that is for the time being comprised in the bankrupt's estate may then be placed under restraint or subject to realisation under the confiscation legislation. However, once the creditors have been satisfied, any remaining property may be used to satisfy the confiscation order.

563. Further to the problem described under the previous section and dealt with in *Schedule 11, paragraph 16*, *subsections (3)(d) and (e)* prevent the confiscation court from exercising its powers in relation to property left over after a confiscation order has been satisfied. This will ensure that, where a bankruptcy order has been made, any surplus sums will go into the bankrupt's estate for distribution to creditors, rather than being distributed by the Crown Court to the defendant and others under the confiscation legislation…

Winding up in England & Wales and Scotland

Section 426: Winding up under the 1986 Act

568. *Section 426* deals with the situation where an insolvent company rather than an individual holds realisable property. Broadly, if action is taken under the confiscation legislation before a winding up order is made, confiscation takes precedence over insolvency. The provision is thus analogous to that which applies to personal bankruptcy in England and Wales or Northern Ireland, and sequestration in Scotland. This section covers the company insolvency legislation of both England and Wales and Scotland. The same legislation, the Insolvency Act 1986, applies to company insolvency in the two jurisdictions."

129. It is not necessary for me to set out the statutory provisions themselves for the purposes of this judgment. The effect of these parts of the statutory scheme with respect to the assets on which it is intended to fasten may be summarised as follows: once subject to a restraint order, always subject to a restraint order. Likewise once

subject to insolvency proceeding governed by domestic law, always subject to that insolvency proceeding. The result is entirely logical: a restraint order is simply a freezing order: it cannot of itself effect changes in the ownership of assets though it may prevent certain new interests from arising. The policy would appear from the explanatory notes to be to prevent a defendant using an insolvency proceeding commenced *after* a restraint order as a means of defeating a restraint order. There is no mention of extending this policy to insolvency proceedings commenced *before* a restraint order is made. The explanatory notes make it clear that there are circumstances (*viz.* the prior commencement of an insolvency proceeding) when the insolvency proceeding has priority over the public interest in restraint and confiscation.

130. In his judgment, Hughes LJ contemplates that a restraint order may be made against a company in liquidation only if the liquidation post-dates the restraint order (judgment of Hughes LJ, paragraph 181 (i)). He also canvasses the possibility that a confiscation order may be made against a company in liquidation whether the liquidation commences before or post-dates the making of the restraint order (judgment of Hughes LJ, paragraph 181 (ii) and (iii)). This is not consistent with the passage from the explanatory notes set out above, and in my respectful judgment it does not represent the effect of POCA. Moreover, one would not expect the position to be different as between confiscation and restraint. If the assets were in existence at all material times, one would not expect them to be within the restraint order and then not capable of being subject to confiscation, or vice-versa. If the position were otherwise, the result would be neither fair nor logical. The liquidator or trustee in bankruptcy would continue to conduct the realisation of assets and act as the officeholder but if a

conviction occurs and the confiscation order ensues, it will turn out that the officeholder will not have exercised the powers following the restraint order for the benefit of creditors but will have conducted himself for the benefit of those entitled under the confiscation order. In my judgment, it would be very odd if the special statutory powers in the Insolvency Act 1986 intended to benefit creditors, such as the power to avoid earlier transactions and to examine officers on oath, could be used to boost the assets available for confiscation. Moreover, it would follow that if the liquidator or trustee happens to have distributed to creditors after the restraint order before conviction occurs, those assets would fall entirely outside the confiscation order. That would create a perverse incentive to deal with the liquidation as quickly as possible. In my judgment such an interpretation would be unlikely to be correct.

131. Where the law of some other jurisdiction governs the insolvency proceeding, i.e. the winding up takes place outside England and Wales, then questions would arise as to whether that proceeding was recognised in England and Wales. If it was, and the rights of creditors were in substance the same as those in an insolvency proceeding governed by the Insolvency Act 1986, one would in the first instance expect the interaction of the insolvency proceeding and the proceeds of crime legislation to be the same.

132. It is to be noted that a domestic restraint order may be made against a company incorporated in the United Kingdom or a company incorporated elsewhere. Moreover, companies that may be wound up under the Insolvency Act 1986 include companies registered in other jurisdictions. Likewise, an external restraint order may be made either against a company incorporated outside the United Kingdom or indeed against

a company incorporated within the United Kingdom. S 426 POCA (referred to in the explanatory notes set out above) applies to any company which may be wound up under the Insolvency Act 1986. However, the insolvency proceeding must be one governed by the law of England and Wales or the law of Scotland. S 426 does not therefore apply where a restraint order is made against a defendant which is, or becomes, subject to an insolvency proceeding commenced in, say, Antigua.

133. The position of unsecured creditors in a liquidation commenced outside England and Wales, if a domestic restraint order is to be made, is under the statutory scheme left to be governed by s 69(3)(a) POCA, which is in the same terms as Article 46(3)(a) ERO, considered below.

(b) Is the scheme different in its effect in relation to external restraint orders?

134. One would also expect that the domestic scheme would in general be replicated in relation to the interaction of an external restraint order or an order enforcing the same (an external order). There is no reason on the face of it to make the position of the creditors in a liquidation of a defendant any worse simply because the restraint order is an external restraint order rather than a domestic one. Indeed, it might be argued that such a result would offend Article 14 of the European Convention on Human Rights ("the Convention"), taken with Article 1 of the First Protocol to the Convention ("FPC").

135. The Chancellor has observed in his judgment:

> "There was not incorporated into ERO the provisions of Part 9 of the Act which modify the provisions of the Insolvency Act 1986 in the

> case of a person adjudicated bankrupt in England and Wales or of a company being wound up under that Act. In such cases a pre-existing bankruptcy or winding-up takes priority over a restraint order."

136. The silence of ERO on this point means that the answer has to be found in ERO read against the background of the general law.

137. For the reasons given above, the only issue with which I have to deal is whether the point is reasonably arguable. In my judgment, it is reasonably arguable that the unsecured creditors of SIB have an interest for the purposes of Article 46(3)(a). In summary, my reasons, which are amplified in the **Annex** to this judgment, are as follows:

i) It is reasonably arguable that, for the purposes of Article 46(3), (referred to by the Chancellor as "the legislative steer"), the creditors of SIB are "persons other than the defendant".

ii) The question whether the creditors have an "interest" for the purposes of Article 46(3) is a question governed in the first instance by the law of the liquidation of SIB. However, there is no evidence as to the law of Antigua, which accordingly this court should treat as the same as the law of England and Wales.

iii) Under the law of England and Wales, a winding up order divests a company of the beneficial ownership of its assets, and the creditors have (at least) the right to ensure that the assets are duly distributed. It is therefore reasonably arguable that they have an "interest" for the purposes of Article 46(3)(a).

(c) Significance of s 84(2)(d) POCA

138. It is said that s 84(2)(d) POCA produces an effect contrary to that stated in the explanatory notes (see for example the judgment of Hughes LJ at paragraph 181 (iii)).

S 84 has been applied in part to orders under ERO (Article 49), and it is convenient to set out s 84 as it applies under ERO and to assets in England and Wales:

> 84 Property: general provisions
>
> (1) Property is all property wherever situated and includes—
>
> (a) money;
>
> (b) …
>
> (c) things in action and other intangible or incorporeal property.
>
> (2) The following rules apply in relation to property—
>
> (a) property is held by a person if he holds an interest in it;
>
> (b) property is obtained by a person if he obtains an interest in it;
>
> (c) property is transferred by one person to another if the first one transfers or grants an interest in it to the second;
>
> (d) references to property held by a person include references to property vested in his trustee in bankruptcy, permanent or interim trustee (within the meaning of the Bankruptcy (Scotland) Act 1985) or liquidator;
>
> (e) references to an interest held by a person beneficially in property include references to an interest which would be held by him beneficially if the property were not so vested;"

139. In my judgment, the effect of s 84(2)(d) is to make it clear that, where the following two conditions are fulfilled, references to property held by a company include references to property held by its liquidator. The two conditions are: (i) that the company is in liquidation; and (ii) that an order has been made that its assets vest in its liquidator. Both those conditions are fulfilled in the case of the Antiguan Liquidators so that the property of SIB now vested in them is treated as "held" by SIB for the purposes of ERO. In a liquidation conducted in England and Wales, an order of the court is required to vest the property of a company in liquidation in its liquidator, and such an order is now not normally made. But, even if that is not the position in Antigua, s 84(2)(d) can only apply in those cases where a vesting order is

made or that is the effect of the law governing the liquidation. Thus, s 84(2)(d) does not lay down some universal rule applying to all liquidations, and, because of that, it would be unlikely to have the effect of depriving unsecured creditors of any interest in the property of the company in liquidation which they would otherwise have just because a vesting order has been made. This is all the more likely when it is borne in mind that a vesting order need not relate to all the assets of the company. If the creditors have an interest in the assets of the company (a point which I consider below), those assets are (to that extent) treated as "held" by the creditors: see s 84(2)(a). In any event, s 84(2)(d) cannot displace the statutory scheme as set out in ss 417, 418 and 426 POCA and summarised in the explanatory notes set out above. S 9 POCA (dealing with the amount that may be confiscated under a domestic confiscation order) does not alter this conclusion because it only empowers the court to make an order over free "property" "held" by the defendant. The meaning of "property" is subject to s 84, to which I have already referred. Where a company is the registered owner of property but is also a trustee of it for someone else, the beneficial interest in the property is treated as held by that other person: see s 84(2)(a).

140. I agree with Chancellor that the Antiguan Liquidators, who are appointed under the law of Antigua and Bermuda, are on the evidence capable of being treated as "liquidators" for the purposes of s 84(2)(d).

141. When a confiscation order is made pursuant to POCA, it is made by reference to property held by the defendant, which does not include property in which another person has an interest (s 84(2)(a)). Where action is taken to enforce a restraint order made under ERO, the court must decide whether to give effect to it. It would not be

able to give effect to it if to do so would be incompatible with the Convention rights of any person affected by it (Human Rights Act 1998 ("HRA"), s 6; Article 21 ERO). Convention rights include the right of property guaranteed under Article 1 FPC.

(d) Effect of this conclusion on the obligation imposed by Article 46(3)(a) ERO

142. What should the court do in this situation? It is convenient to set out the material parts of Article 46 ERO again:

> "46 Powers of court and receiver
>
> (1) This article applies to—
>
> (a) the powers conferred on a court by this Part;
>
> (b) …
>
> (2) The powers—
>
> (a) must be exercised with a view to the value for the time being of realisable property or specified property being made available (by the property's realisation) for satisfying an external order that has been or may be made against the defendant;
>
> (b) must be exercised, in a case where an external order has not been made, with a view to securing that there is no diminution in the value of the property identified in the external request;
>
> (c) must be exercised without taking account of any obligation of a defendant or a recipient of a tainted gift if the obligation conflicts with the object of satisfying any external order against the defendant that has been or may be registered under article 22;
>
> (d) may be exercised in respect of a debt owed by the Crown.
>
> (3) Paragraph (2) has effect subject to the following rules—
>
> (a) the powers must be exercised with a view to allowing a person other than the defendant or a recipient of a tainted gift to retain or recover the value of any interest held by him;…"

143. Article 46(3)(a) uses the phrase "person other than the defendant". For the reasons given by the Chancellor in paragraph 92 of his judgment, SIB is the defendant. SIB, therefore, is not a "person other than the defendant". It is unnecessary to ask whether the liquidator constitutes a "person other than the defendant" since s 84 (2)(d) POCA (see above) states that "references to property held by a person include references to property vested in his…liquidator" and the liquidators accordingly cannot show that any property is "held" by them for the purposes of POCA or ERO (except perhaps, which was not argued, if the liquidators' claim was purely in their capacity as trustee). In any event the liquidators, in their capacity as agents, of SIB must be treated as in the same position as SIB itself by virtue of the application of the maxim *qui facit per alium facit per se*.

144. That leaves the question whether the unsecured creditors of SIB in its liquidation could be persons "other than the defendant": they derive their title from SIB, but then so would any purchaser of an asset from SIB or the recipient of a gift. The reference to the "defendant" cannot cover every successor in title by means of gift or, it would follow, a purchase, since recipients of tainted gifts are separately mentioned and excluded. Moreover, if a recipient of a tainted gift is excluded, a recipient of other gifts must be included, and if they, being volunteers, are included it is difficult to see why creditors, who gave value for their debts, should not be included too if they have an interest in the assets. In those circumstances, in my judgment, if creditors could show an interest in the assets of SIB it is at least reasonably arguable that they are persons "other than the defendant" and I need not consider the matter further as the matter has not yet been fully argued. There is certainly no express statutory provision which states that, for the purpose of Article 46(3)(a), an unsecured creditor should be

considered as one and the same as his debtor in liquidation.

145. By Article 46(3)(a) Parliament has laid a duty upon the courts to allow a person other than the defendant to retain or recover the value of any interest held by him.

146. In my judgment, Article 46(3)(a) imposes a duty on the court of its own motion. However, Parliament would have imposed that duty with the knowledge of our adversarial system, and accordingly, in my judgment, the duty imposes no obligation on the court actually to investigate whether a person has in fact got an interest: it is up to that person to pursue it, and the court must of course give him an appropriate opportunity to be heard.

147. If the court on which the Article 46(3)(a) duty is imposed is aware that a person may be entitled to claim an interest, in my judgment, it would be better to make this known to the world by including in the order a reservation about that person's possible interest. I accept that such a reservation is not necessary, but, in my judgment, it is desirable, especially in a case such as this where the point has already been put in issue. It does no harm, and I would not regard it as inappropriate.

148. It may turn out that neither the SFO nor the liquidators wants the question of whether the unsecured creditors of SIB has an "interest" in the assets the subject of the restraint order to be determined. If so, so be it. But, if not, my provisional view is that that issue could most efficiently be determined by this court or under its directions, thus minimising any delay. Consideration could be given at the same time to the question whether a representative creditor should be joined for this purpose. I

need hardly add that the point is of importance not just in the liquidation of SIB but also to others concerned with the proceeds of crime legislation.

D. RECOGNITION OF THE ANTIGUAN LIQUIDATORS – APPEAL AGAINST THE ORDER OF LEWISON J DATED 3 JULY 2009

149. I agree with the judgment of the Chancellor, with the following amplifications.

150. Importantly, I agree with the Chancellor that Lewison J was correct to apply the decision in *Eurofood* to the interpretation of the UNCITRAL model code. I agree with the Chancellor that this is likely to lead to fewer conflicts between the decisions of courts of the member states of the European Union. However, it does not entirely eliminate the risk of conflict since the question of where the COMI is situated depends in part on the facts, and the evidence placed before different national courts may be different.

151. In my judgment, it should be noted that the position of the US Receiver must depend on his powers as they presently stand. In other words, if he acquires more powers, he may be entitled to be recognised as a foreign representative if such a course were to serve any purpose.

152. In determining the location of the COMI, the key question appears to be where the head office functions are based. The COMI must be determined on an objective basis and be ascertainable by third parties. It does not appear to be a question of where the principal place of business is conducted since this would give rise to uncertainty.

There can in principle only be one place where head office functions are carried out, and that makes it easier to identify the COMI. The test is designed to achieve speed and ease of recognition. There are, however, difficulties in the test and some of them are described by Gerald McCormack in *Reconstructing European Insolvency Law* (2010) 30 *Legal Studies* 126 at 129-133, and in articles listed in the footnotes to those pages. The difficulties do not have to be considered in this case.

153. I respectfully differ from the Chancellor to a small extent on the test to be applied to review the first instance decision on where the COMI is situated. What the judge has to do is make findings as to what activities were conducted in each potential COMI, and then ask whether they amounted to the carrying on of head office functions and then quantitatively and qualitatively whether they were more significant than those conducted at the registered office. Where the judge's findings as to where particular activities were carried on are challenged, the appropriate test for the appellate court will be that laid down in *Assuricazioni Generali SpA v Arab Insurance Group* [2002] EWCA Civ 1642 at [17], where it was said that "Where the correctness of a finding of primary fact or of inference is in issue, it cannot be a matter of simple discretion how an appellant court approaches the matter. Once the appellant has shown a real prospect (justifying permission to appeal) that a finding or inference is wrong, the role of an appellate court is to determine whether or not this is so, giving full weight of course to the advantages enjoyed by any judge of first instance who has heard oral evidence." (That passage, which quoted a passage from the earlier case in this Court of *Todd v Adam*, together with [16] cited by the Chancellor, was approved by the House of Lords in *Datec Electronic Holdings v United Parcels Service* [2007] UKHL 23 at [46]). It is where the challenge on appeal, as here, is to the assessment made by

the judge as to whether the presumption that the COMI was at the registered office was rebutted, that the separate test in *Designers' Guild v Russell Williams (Textiles)* [2000] 1 WLR 2416 and *Assuricazione* at [16] applies.

154. That still leaves the question what order Lewison J should have made if informed of the making of a restraint order (and assuming that the same had not been then discharged). It is not meaningful to ask this question because of subsequent developments in this case. There is an outstanding application for relief in connection with the declaration that the Antiguan proceedings is the foreign main proceeding for the purposes of Article 2(g) of UNCITRAL. That application may show that it was important to determine that questions determined by Lewison J irrespective of the making of the restraint order. However, it is also possible that the unsecured creditors of SIB have a sufficient interest in the assets sought to be restrained and it is possible that it would have been sufficient for that claim to be made without the time and expense involved in establishing the status of SIB's liquidators under UNCITRAL. In those circumstances, the appropriate course might well have been simply to adjourn the proceedings in the Chancery Division and await the outcome of the proceedings for a restraint order.

E. GUIDANCE AS TO THE PRACTICE FOR FUTURE CASES

155. In 199 to 208 of his judgment, Hughes LJ gives guidance as to the practice for the future. I respectfully agree with what he says. This guidance will no doubt prove a most useful beacon for Crown Court judges to steer their course by.

F. CONCLUSIONS

156. For the reasons given above, I would make the orders which the Chancellor proposes with two qualifications.

157. The first qualification is this. In my judgment, for the reasons given above, the restraint order should not be discharged and a new restraint order imposed before the parties have had an opportunity of arguing, if they wish to do so, whether the unsecured creditors of SIB have any interest in its assets for the purposes of Article 46 (3)(a). If the opportunity is declined, or, if taken up, leads to no different result, the restraint order dated 7 April 2009 should be discharged and a new order re-imposed with effect from 29 July 2009. Even if these parties do not wish to argue this point, it is likely to be open to a creditor to argue that there is such an interest at any time before an external order is made and effect is given to it by taking possession of the property the subject of the restraint order. It is open to this court to give directions forthwith for the purposes of the hearing of such an application.

158. My second qualification is this. All the matters in paragraph 105 of the judgment of the Chancellor are yet to be argued, and the adjournment for further argument should in my judgment be an occasion for working out any consequences of this Court's decision on the main issues, in addition to dealing with the outstanding application of the liquidators referred to above.

ANNEX to judgment of Arden LJ

Reasons why unsecured creditors arguably have an interest in the assets of SIB (in liquidation) for the purposes of Article 46(3)(a) of The Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005

1. In paragraph 137 of my judgment I have given reasons for holding that it is reasonably arguable that the creditors have an interest in SIB for the purposes of Article 46(3)(a) ERO. In this Annex I amplify those reasons.

(i) It is reasonably arguable that, for the purposes of Article 46(3), (referred to by the Chancellor as "the legislative steer"), the creditors of SIB are "persons other than the defendant"

2. See paragraph 143 of my judgment. This proposition does not require further elaboration. For the reasons given by the Chancellor in paragraph 92 of his judgment, SIB is a "defendant".

(ii) The question whether the creditors have an "interest" for the purposes of Article 46(3) is a question governed by the law of the liquidation of SIB. However, there is no evidence as to the law of Antigua, which accordingly the court should treat as the same as English law

3. The law governing the rights of creditors in relation to the assets of the company in liquidation is a matter for the *lex fori* of the liquidation, which creates such rights, if any. Here, SIB was wound up by an order of the court in Antigua. Accordingly the law of Antigua governs the question whether creditors have any interest with respect to the assets of SIB. There is no evidence on this point about the law of Antigua. Accordingly this court would apply English law.

(iii) Under the law of England and Wales, a winding up order divests a company of the

beneficial ownership of its assets, and the creditors have (at least) the right to ensure that the assets are duly distributed. It is therefore reasonably arguable that they have an "interest" for the purposes of Article 46(3)(a)

4. When a company is wound up, a liquidator will be appointed. He will have power to control the assets of the company. Sometimes, as in this case, the assets are vested in the liquidator. However, that vesting does not affect the status of the liquidators. This is conveniently described in a recent edition of *Palmer's Company Law* at 15-323 as follows:

> "[The] status [of a liquidator] is as follows:
>
> (a) He is an officer of the court. This means that the liquidator must act in an honest and impartial manner and is responsible to the court for the performance of his duties.
>
> (b) He is agent for the company.[2] Thus he can bind the company without incurring personal liability.
>
> (c) In certain respects he is a trustee for the creditors as a general body.[3] However, as mentioned above the property does not vest in him without an order; he is chosen and remunerated on a commercial basis for his professional skills; he is not protected from liability for breach of trust under section 30 of the Trustee Act 1925[4] and the right of tracing property which passes through his hands is more limited than in the case of an ordinary trustee.[5]
>
> Nevertheless the assets are impressed with a trust in this sense, that they constitute a fund to be administered by the liquidator as officer of the court and agent for the company, under the direction of the court, for the benefit of all persons interested in the winding up.[6] This does not mean that the liquidator is trustee for individual creditors while the company is still in existence.[7] He owes them a statutory duty for breach of which they can bring an action even after the company has been dissolved.[8] In short, like a director, he is a distinct species of fiduciary whose office is an amalgam of statutory rules and agency and trust principles.
>
> [2] Re Anglo-Moravian Hungarian Junction Ry. Co. (1875) 1 Ch.D. 130, CA; Knowles v. Scott [1891] 1 Ch. 717; Butler v. Broadhead [1975] Ch.97, 108.

[3]Re Albert Life Assurance Co. (1871) 15 S.J 923; Paraguasu Co., Black & Co.'s Case (1873) L.R 8 Ch.254; Re Oriental Inland Steam Co. (1874) L.R. 9 Ch.App.557,559,560; cf.Pulsford v. Devenish [1903] 2 Ch.625,633; Ayerst (Inspector of Taxes) v. C & K (Construction) Ltd [1976] A.C 167;[1975] 2 All E.R.537,542-543, HL; Butler v. Broadhead, n.11, above.

[4]Re Windsor Steam Coal Co. (1901) Ltd [1928] Ch.609; [1929] 1 Ch.151 (CA); Re Home & Colonial Insurance Co. Ltd [1930]1 Ch.102.

[5]Butler v.Broadhead [1975] Ch.97; Re Millingen's Ltd [1934] S.A.S.R. 72,80.

See B.H. McPherson, The Law of Company Liquidations (5th ed., 2001), para. 8.22.

[6]Re Oriental Inland Steam Co., ex p. Scinde Railway Co. (1874) L.R.9 Ch. App.557; Re Anglo-Moravian Junction Railway Co. (1875) 1 Ch.D. 130, 133; Knowles v. Scott (1891) 1 Ch. 717; Re Hill's Waterfall Estate and Goldmining Co. [1896] 1 Ch. 947. See Palmer, Company Precedents, Pt II, p.180.

[7]Knowles v.Scott [1891] 1 Ch.717; Re Hill's Waterfall Estate and Goldming Co. [1896] 1 Ch. 947. cf.Re South Australian Petroleum Fields Ltd [1894] W.N. 189.

[8]Pulsford v. Devenish [1903] 2 Ch. 625: Re New Zealand Joint Stock Corporation (1907) 23 T.L.R. 238; Argyll's v. Coxeter (1913) 29 T.L.R.355; Smith (James) & Son (Norwood) Ltd v. Goodman [1936] 1 Ch. 216; Re Armstrong Whitworth Securities Co. Ltd [1947] Ch. 674...."

5. The leading modern authority on the effect of a winding up under the law of England and Wales on the ownership of the company's assets is *Ayerst v C & K Construction* [1976] AC 167. Lord Diplock gave the leading judgment, with which the other members of the House agreed. His judgment refers to the statutory scheme in the Companies Act 1948, but for present purposes there is no material difference between this and the current statutory scheme to be found in the Insolvency Act 1986. Lord Diplock held:

> "My Lords, the making of a winding-up order brings into operation a statutory scheme for dealing with the assets of the company that is ordered to be wound up. The scheme is now contained in Part V of the Companies Act 1948 and extends to voluntary as well as to compulsory winding up;... For the sake of simplicity, in stating the essential characteristics of the statutory scheme I propose to refer only to those sections of the Companies Act 1948 which apply in a compulsory winding up and to omit those sections which have a

corresponding effect in the case of a voluntary winding up.

Upon the making of a winding-up order:

> (1) The custody and control of all the property and choses in action of the company are transferred from those persons who were entitled under the memorandum and articles to manage its affairs on its behalf, to a liquidator charged with the statutory duty of dealing with the company's assets in accordance with the statutory scheme (section 243). …
>
> (2) The statutory duty of the liquidator is to collect the assets of the company and to apply them in discharge of its liabilities (section 257 (1)). If there is any surplus he must distribute it among the members of the company in accordance with their respective rights under the memorandum and articles of association (section 265)….
>
> (3) All powers of dealing with the company's assets, including the power to carry on its business so far as may be necessary for its beneficial winding up, are exercisable by the liquidator for the benefit of those persons only who are entitled to share in the proceeds of realisation of the assets under the statutory scheme….

The question of the beneficial ownership of the company's property was dealt with explicitly by both James L.J. and Mellish L.J. in *In re Oriental Inland Steam Co.* (1874) 9 Ch. App. 557:

> "The English Act of Parliament has enacted that in the case of a winding up the assets of the company so wound up are to be collected and applied in discharge of its liabilities. That makes the property of the company clearly trust property. It is property affected by the Act of Parliament with an obligation to be dealt with by the proper officer in a particular way. Then it has ceased to be beneficially the property of the company; …" (*per* James L.J. at p. 559)….

The authority of this case for the proposition that the property of the company ceases upon the winding up to belong beneficially to the company has now stood unchallenged for a hundred years…

My Lords, it is not to be supposed that in using the expression "trust" and "trust property" in reference to the assets of a company in liquidation the distinguished Chancery judges whose judgments I have cited and those who followed them were oblivious to the fact that the statutory scheme for dealing with the assets of a company in the course of winding up its affairs differed in several aspects from a trust of specific property created by the voluntary act of the settlor. … All that was intended to be conveyed by the use of the expression "trust

> property" and "trust" in these and subsequent cases (of which the most recent is *Pritchard v. M. H. Builders (Wilmslow) Ltd.* [1969] 1 W.L.R. 409) was that the effect of the statute was to give to the property of a company in liquidation that essential characteristic which distinguished trust property from other property, viz., that it could not be used or disposed of by the legal owner for his own benefit, but must be used or disposed of for the benefit of other persons."

6. In his speech in *Ayerst*, Lord Diplock refers to *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] AC 694. In that case the Privy Council held that a residuary legatee did not have a beneficial interest in an estate in the course of its administration. If and to the extent that this decision applies to creditors in a winding up under the Insolvency Act 1986, the result would be that the creditors would themselves have no beneficial interest in specific assets of SIB but would have a right to have them appropriated in payment of its debts and liabilities in accordance with the statutory scheme for distribution. Lord Radcliffe, giving the advice of the Privy Council, held that it was not necessary for the beneficial interest to the assets in administration to be vested in anyone during the course of the administration: the residuary legatee was sufficiently protected by his remedy against the personal representative. Although he approved the ruling of Lord Herschell in *Sudeley v AG* [1897] AC 11 (HL) that the residuary legatee did not "have any estate, right, or interest, legal or equitable, in" the assets under administration, he accepted that in some senses the residuary legatee could be said to have an "interest" in the assets under administration (pages 713B-C and 715D-F). Their interest, in my judgment, is an interest in possession and not a mere future interest.

7. In any event, the question of the meaning of "interest" in Article 46(3) must be determined in its context. In that regard, I note that the applicable definition of "property" in s 84 POCA includes things in action (s 84(1)(c)). Moreover s 447(6)

POCA (which applies by virtue of Article 49 ERO) contains the following expansive provision:

> "(6) References to an interest, in relation to property other than land, include references to a right (including a right to possession)."

8. Support for the proposition that the creditors obtain an interest may also be derived from the authorities on the late registration of company charges. Many charges over assets of a company have to be registered at the Companies Registry within twenty-one days (Companies Act 2006, s 878). The register of charges can be rectified out of time so as to permit the late registration of a charge (Companies Act 2006, s 888), but such an order usually contains words saving rights acquired by parties against the property charged prior to the date of rectification. Prior to winding up, an unsecured creditor of the company cannot oppose an order for rectification. However, on liquidation the creditors are treated as acquiring rights against the company's property: "…on the winding-up commencing every creditor had a right to say, "So much per cent. of the assets belongs to me in due course of liquidation." (per Buckley J in *Re Anglo-Oriental Carpet Manufacturing Co Ltd* [1903] 1 Ch 914). As Lord Brightman, delivering the judgment of this court, put it in *re Ashpurton Estates Ltd* [1983] Ch 110, 123 (which post-dates *Ayerst*):

> "It soon became established that, so long as the company was a going concern at the date of registration, the proviso did not protect, and was not intended to protect, an unsecured creditor who had lent money at a time when the charge should have been but was not registered: see *Re Ehrmann Brothers Ltd* [1906] 2 Ch 697 and *Re Cardiff Workmen's Cottage Co Ltd* [1906] 2 Ch 627. The reason for this was that such unsecured creditor could not have intervened to prevent payment being made to the lender whose charge was not registered (whom I will call 'the unregistered chargee'). Nor could such unsecured creditor have prevented the creation of a new charge, duly registered, to take the place of the unregistered charge. The proviso was intended to protect only rights acquired against, or affecting, the property comprised in the

> unregistered charge, in the intervening period between the date of the creation of the unregistered charge and the registration of such charge. Such persons would include a subsequent chargee of the relevant property; a creditor who has levied execution against the relevant property; and an unsecured creditor if, but only if, the company has gone into liquidation before registration is effected. *Once the company has gone into liquidation, the existing unsecured creditors are interested in all the assets of the company, since the liquidator is bound by statute to distribute the net proceeds pari passu among the unsecured creditors, subject to preferential debts. The assets of the company are at that stage vested in the company for the benefit of its creditors. The unsecured creditors are in the nature of cestuis que trust with beneficial interests extending to all the company's property*." (emphasis added)

9. Moreover, if the creditors do not have an interest, consideration would have to be given to the question whether the rights of the creditors constituted "property" for the purposes of Article 1 FPC, and the provisions of s 3 HRA might be in point.

10. Those provisions of ss 426 (4) to (6) POCA are, in my judgment, correctly not applied to a restraint order under ERO because the rights of creditors vis-à-vis the assets of the company in liquidation in another jurisdiction are not a matter for English law (see generally Dicey, Morris & Collins, *The Conflict of Laws* 14 ed., Vol. 2, pp. 1378-9). Moreover it is open to different systems of law to take different views about those rights. However, if their rights are the same as those of creditors in an English winding up, these provisions indicate that Parliament considered that the creditors following winding up did have a relevant interest.

11. Furthermore, Lord Diplock left open the question whether a person other than a residuary legatee might have a fully vested interest in the assets of the deceased in the course of administration, and thus conceivably some creditors (eg preferential

creditors, if any) might have an interest in the assets of the company in winding up.

12. In *National Provincial Bank v Ainsworth* [1965] AC 1175 at 1248, a case concerning the question whether a deserted wife had an "overriding interest" in the matrimonial home, Lord Wilberforce held that:

> "Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability."

13. But, whereas a deserted wife could not require to be accommodated in any particular property of her husband and could not obtain an order preventing him from disposing of the matrimonial home to a third party, creditors in a liquidation have a right to see that all the company's assets are (subject to prior charges) applied in paying their debts and can prevent execution being levied on any of those assets. They can also assign their interests in the liquidation, and their interests persist until the company is dissolved. Thus their claims would appear to meet the requirements laid down by Lord Wilberforce that they should be "definable, identifiable by third parties, capable in [their] nature of assumption by third parties, and have some degree of permanence or stability".

14. I make no reference to any interest of shareholders or contributories as SIB is insolvent.

15. It is not material that an order recognising the appointment of the liquidators in England and Wales was not made until 3 July 2009. The interest, if any, which arose

on winding up is in principle capable of being asserted at any time while the assets are subject to a restraint order.

Conclusion on the potential interest of unsecured creditors of SIB in its liquidation commencing before the date of the restraint order

16. In my judgment, contrary to the submission of SFO, it is reasonably arguable that the unsecured creditors of SIB in its liquidation commencing before the making of a restraint order have an interest in its assets the purposes of Article 46(3)(a) ERO. They are collectively entitled to direct that the assets be distributed in accordance with the statutory provisions for winding up. They can take steps to prevent the assets from being subject to privation by creditors seeking to levy execution. They have been described by this court as having "beneficial interests" in the assets of the company in liquidation.

17. If I am correct in my interpretation of the domestic system of restraint orders, the analysis in this Annex would appear potentially to put SIB's unsecured creditors, in the event of a supervening restraint order, in a position which is consistent with that of creditors of a defendant which is subject to a winding up under the Insolvency Act 1986 made prior to a domestic restraint order.

18. This court should, unless the parties do not wish it to do so, determine whether the unsecured creditors have an interest in SIB's assets for the purposes of Article 46(3)(a) before discharging the restraint order dated 7 April 2009. Alternatively a creditor may require the issue to be determined separately hereafter: see paragraph 158 of my judgment of which this Annex forms part.

Lord Justice Hughes:

159. For all the reasons so clearly set out in the judgment of the Chancellor, and summarised in paragraph 67, I respectfully agree with his four conclusions in relation to the judgment of Lewison J, and have nothing to add. I agree also with his formulation in paragraph 58 of the correct test for this court upon appeal.

160. I deal here separately with the appeal from Judge Kramer QC, although I should say at the outset that my reasoning is in most respects, though not quite all, the same as that of the Chancellor, and my conclusion is the same.

<u>POCA and the ERO</u>

161. The ERO (made under enabling powers contained in s 444 POCA) is designed to give powers for (i) the implementation here of overseas confiscation orders ("external orders": s 447(2)), and (ii) the making of restraint orders in response to requests from overseas authorities ("external requests": s 447(1)).

162. An English confiscation order is not made *in rem* in relation to traced proceeds of crime. Rather, it is an order to pay a sum calculated according to the statute's (expansive) rules for determining the quantum of a defendant's "benefit", and it is to be paid out of any assets held by him, whatever their provenance. That is the effect of sections 6-10 POCA, and in particular ss 6(5), 7(1) & (2) and 9(1). Some foreign systems adopt a similar approach, but some rely upon tracing the actual proceeds of crime. A system such as ours is sometimes referred to as a 'value based' regime; one relying on tracing is sometimes referred to as a 'specific property based' regime.

Neither are English statutory expressions, but in the context of foreign proceedings both POCA and the ERO consistently juxtapose references to orders for the recovery of 'specified property' with references to those for the recovery of 'a specified sum of money': see for example s 447(2)(b). It may be that some countries operate systems which combine both types of approach. Whatever other forms of order may or may not be made from time to time in the USA, in the present case it has been clear from the outset that the American prosecutors rely upon the assertion that the contents of the bank accounts which it seeks to restrain are the traceable proceeds of crime.

163. An English restraint order made under s 41 POCA is an anticipatory and protective order, sharing many characteristics with a civil freezing order. It is designed to preserve assets against the possibility of a future confiscation order. It is defined as an order "prohibiting any specified person from dealing with any realisable property held by him.": s 41(1). The specified person need not be, and often is not, an actual or potential defendant. Although the statute here introduces for the first time the expression 'realisable property', that concept is defined in s 83 in terms which effectively mirror the definition in section 9(1) of assets which may be attacked in due course by a confiscation order, that is to say (i) free property held by the defendant and (ii) free property which has been the subject of a tainted gift. Those provisions are thus geared as one would expect to the English value based confiscation system.

164. The equivalent words in Article 8(1) of the ERO define the restraint order which may be made as one "prohibiting any specified person from dealing with *relevant* property which is identified in the external request and specified in the order". That modification of wording, substituting 'relevant' for 'realisable' is designed to cater

both for value based systems and those relying on tracing.

165. "Relevant property" is defined in s 447(7) as property in respect of which "there are reasonable grounds to believe that it may be needed to satisfy an external order which has been or may be made." That belief may accordingly arise in relation either to traceable property sought under an overseas specific property based regime or to any assets sought under an overseas value based regime.

166. Both domestically and under the ERO, the making of a restraint order is a matter of discretion. The operative words in both section 41(1) and Article 8(1) are "the Crown Court **may** make". However, the discretion is not left wide open by the statutory provisions. Section 69 and its ERO equivalent Article 46 provide guidance on its exercise, sometimes referred to as 'the legislative steer'. It will be necessary to consider Article 46 below.

The application made to Judge Kramer QC.

167. The application presented to Judge Kramer QC ex parte on 7 April 2009 was based upon the first condition in Article 7: Article 7(2), and that condition was satisfied. The contrary has not been argued. The contents of the bank accounts were 'relevant property' because there were reasonable grounds to believe that they might be needed to satisfy an American confiscation order. A criminal investigation had been begun, and there was reasonable cause to believe that the various persons under investigation had benefited from the fraud. It should be noted that Article 7(2) does not require that the person(s) who appear to have benefited from crime should necessarily be the

person(s) in whose name the assets are held, any more than section 41 requires for a domestic restraint order that the assets should be in the hands of the alleged criminal. Although in fact SIB was named as a person under investigation, it was a quite sufficient basis for a restraint order that Stanford or one or more of his associates was alleged to have benefited from criminal conduct, providing that the assets in question might reasonably be needed to satisfy an American confiscation order if subsequently made.

168. The contents of the Letter of Request ('LOR') also showed that the US prosecutors' prospective claim to confiscation (and perhaps the American confiscation system generally) was and is based squarely upon the tracing of identifiable proceeds of crime. It was not, and is not, a potential claim to a value based sum of money, such as an English confiscation order would be. One consequence of this is that arguments as to when an English court would or would not pierce the corporate veil of SIB are irrelevant. What matters in the case of an external request for the restraint of identified property is whether the *foreign* jurisdiction may make an order in relation to the property identified, so that there are reasonable grounds for believing that it may be needed to satisfy a foreign confiscation order. Here, because the property was said to be the direct proceeds of the fraud and because of the way the American regime works, a foreign confiscation order was clearly on the cards in America and there were reasonable grounds for believing that the contents of the bank accounts would be needed to satisfy it.

169. By the time of the second, inter partes, hearing before Judge Kramer in July criminal proceedings had been begun in the USA against the individual defendants. SIB had

not been prosecuted, although only for the purely pragmatic reason that to prosecute it would add nothing except cost to the prosecution of the individuals. It follows that as at the time of the second hearing before Judge Kramer the second condition, viz Article 7(3), applied and was satisfied. The contents of the bank accounts were identified and were 'relevant property' because there were reasonable grounds to believe that they would be needed to satisfy an American confiscation order (based upon tracing) if made. Proceedings had been begun against Stanford and others. There was cause to believe that those persons, named in the LOR, had benefited from their criminal conduct. They were 'defendants' for the purposes of Article 7(3) because they were persons against whom proceedings had been begun (Article 54(a)(ii)). That SIB was not a defendant did not matter. Once again, it is not a requirement of Article 7(3) that the property restrained be held in the name of the defendant, providing there are reasonable grounds to believe that it may be required to satisfy an external order. Moreover Article 7(2) seems to me to have continued to apply, since SIB remained under investigation by the prosecutors and if their case is correct must have been equally guilty of the alleged fraud. We do not know enough about the intricacies of the Texan criminal process to know whether it might at any time have been necessary to add it to the indictment as a defendant. No doubt ordinarily once the only prosecution which is going to ensue has been begun the relevant condition becomes Article 7(3) in place of Article 7(2), but it may not infrequently happen that a prosecution is begun against some defendants whilst a decision about others is not finally made and they remain under investigation. Of course, if the only prospect of a foreign confiscation order in relation to the assets in question were to depend on a prosecution being started against an additional defendant and that looks to be unlikely,

the court may well refuse, in the exercise of its discretion, to make a restraint order. But that is not this case.

170. The contention of the Antiguan Liquidators that the restraint order should not have been made, alternatively should now be discharged, was founded upon the threefold arguments that:

i) the US prosecutors, via the SFO, failed in their duty of frank disclosure when applying for the restraint order without notice, indeed made positive misrepresentations;

ii) once the liquidators had been appointed as such (on 15 April 2009) the assets of SIB vested in them, giving them an interest in the UK bank accounts which Article 46(3)(a) of the ERO recognises should be retained by them; and

iii) for other reasons, chiefly in order to allow the Antiguan liquidation to proceed unhindered, the discretion accorded to the court by the ERO should not have been exercised on 7 April in favour of making a restraint order without notice, or should have been exercised on 29 July by discharging it.

It is convenient to deal first with the second argument, which raises questions relating to the inter-relation of restraint orders and insolvency.

<u>The 'interest' of the Antiguan Liquidators.</u>

171. There is obvious potential for competition between on the one hand the interests of creditors of a defendant and on the other the public interest in the criminal court being enabled in due course to make and enforce a confiscation order, whether or not the latter is associated with any compensation for victims of crime. If and when a confiscation order is made, unsecured creditors of the defendant are postponed to the enforcement of the order: see s 9. At the prior stage when a restraint order is under consideration, the same ordinarily applies: SFO v Lexi Holdings [2008] EWCA Crim 1443.

172 Where a defendant is insolvent and an official with statutory duties, the liquidator or trustee in bankruptcy, is charged with administering the estate for the benefit of creditors generally there is a similar potential for competition with the public interest in a restraint order preserving assets for an eventual confiscation order. In the domestic context this competition is resolved by the rules contained in sections 417, 418 and 426 (see below).

173. Those rules have not been reproduced in the ERO. It may be that one reason is that it would be inappropriate (and incompetent) for English law to direct what can and cannot fall into the estate in a foreign bankruptcy or under the powers of a foreign liquidator. What *has* been transposed to the ERO is the so-called 'legislative steer' contained in s 69(1) – (3) POCA. In the ERO it appears in Article 46(1) – (3), in terms identical to s 69 except for minor terminological alterations to meet the distinct case of external requests or orders.

174 In this case, the US prosecutor says that Article 46(2) means that the ERO powers

ought to be exercised by making a restraint order, and thus preserving the contents of the specified bank accounts, without diminution, so that they are available to satisfy an American confiscation order if and when it is made. By contrast, the Antiguan Liquidators say that Article 46(3), to which Article 46(2) is expressly subject, means that at least from their appointment as such on 15 April 2009 and the order vesting the assets of SIB in them, they have an interest in the bank accounts held in the name of SIB and no restraint order should be made or continued which would interfere with their retention of that interest.

175. I agree that under Antiguan law the winding up order vested the assets of SIB in the liquidators. Note that in this respect English law differs subtly: assets vest in a trustee in bankruptcy, but do not, absent a specific order, vest in a company's liquidator. But I do not agree that Article 46(3) means that no restraint order ought to be made over the bank accounts. The terminology of Article 46, as of its domestic elder brother s 69, is complex, in part perhaps because it applies not simply, or principally, to making or refusing restraint orders but to all the various powers contained in Part 2 of the ERO, including those giving effect to external orders and governing the activities of management receivers and enforcement receivers. But the plain purpose of Article 46(3), as of s 69(3) which is in identical terms, is to keep free from the confiscation process (and restraint in aid of it) interests in property which are independent of the person who is the potential object of a confiscation order.

176. The role of a liquidator or trustee in bankruptcy is merely to administer the assets of the insolvent company or individual. He stands in the place of the insolvent and is his agent. This is recognised by section 84 of the Act which contains general rules

relating to property. Those not irrelevant to foreign proceedings are applied to the ERO by Article 49(3). Among those thus applied is s 84(2)(d), which provides:

> "(d) references to property held by a person include references to property vested in his trustee in bankruptcy, permanent or interim trustee (within the meaning of the Bankruptcy (Scotland) Act 1985 (c 66) or liquidator."

177. SIB was, both in April and July, an alleged offender and under investigation. That meant that it was a 'defendant' for the purposes of Article 46(3)(a): see Article 54(a)(i). Accordingly the bank accounts in question remained its property for the purposes of the ERO. That means that they are its property for the purposes of Article 46(2)(a) and the court is required to exercise its powers with a view to them being made available to meet any confiscation order which may be made. It is impossible in the face of that position to treat the position of the liquidators as an independent interest for the purposes of Article 46(3)(a).

Creditors' interest ?

178. I did not understand the Antiguan Liquidators to argue that even if they do not have an interest for the purposes of Article 46(3)(a), the creditors of SIB nevertheless do. I have, however, had the advantage of seeing in draft the judgment of Arden LJ which raises this possibility. It has not been argued and for that reason I do not think that we ought to purport to decide it. My clear provisional view is that unsecured creditors do not 'hold' such an 'interest'. As I understand it, the position of the unsecured creditor is that he can enforce the liquidator's statutory and fiduciary duty to administer the assets, but that is not a proprietary interest nor any other kind of interest (if such there

be) within Article 46(3). But whatever may be the exact position for other purposes of unsecured creditors (whether collectively, if they have any collective capacity, or individually) under a liquidation or bankruptcy, I am for my part unable to see that they can have an interest in the assets for the purposes of Article 46(3). That would render impossible any confiscation order in any case of insolvency, since by definition if there is insolvency the debts will swallow up all the assets. It would be inconsistent with my reading of s 84(2)(d). It would enable an insolvent defendant to avoid confiscation by voluntary or collusive bankruptcy or liquidation.

179. If there is, contrary to my clear provisional view, an arguable case for such an interest in the creditors, I agree with Arden LJ that that does not give rise to a duty upon the court before whom an application for a restraint order is made to enquire into it unless and until it is asserted. A restraint order alters no rights; it merely freezes the property to which it is applied. There is no difficulty in third parties who assert rights in that property coming forward to make their claim, and this is what is commonly done by those such as spouses claiming a proprietary right in dwelling houses and business associates claiming a proprietary right over business assets. If such a claim is upheld, the remedy is the discharge or variation of the restraint order to take account of it. An application for such variation or discharge remains available to any creditor in this case if he wishes to contend that he has such an interest. I should not wish anything that I have said to encourage such application.

180. For my part I would not think it helpful for a restraint order to carry on its face a reservation referring to some as yet unasserted third party interest, because of the danger that those bound by the order may entertain doubt about what they can and

cannot do. But if it were clear to a judge making a restraint order that there might be a third party claim he is of course perfectly entitled to say, when making his order, that he has as yet had no opportunity to consider such a possibility. Equally, if the third party claim is known to be being asserted, the judge may in an appropriate case give directions for it to be adjudicated upon.

Sections 417-8 & 426

181. The rule created by these sections does not apply to the ERO. Nor have we heard any argument about this rule. Accordingly there is no occasion to decide its meaning. I would record only these observations:

i) As between a restraint order and a bankruptcy/liquidation these sections clearly establish a rule that the first in time prevails.

ii) The more difficult question is whether once a confiscation order (not a restraint order) is made, any assets which remain under administration by the trustee in bankruptcy or the liquidator are excluded from realisation to satisfy the confiscation order.

iii) Whilst I see the logical attraction of the interpretation set out in the judgment of Arden LJ, I have, for my part, real difficulty, despite paragraph 562 of the explanatory notes, quoted by her, in reading the Act in that way. The powers which ss 418(2)(a) and 426(5)(a) either prevent being exercised or modify, where there is a pre-existing bankruptcy or winding-up order, are those

'conferred on a court by ss 41-67' and conferred on a receiver under ss 48 and 50. Those are, save for s 50 (enforcement receivers), all powers relating to restraint orders and not to realisation of assets to satisfy a confiscation order. Sections 418 and 426 do not appear in any manner to alter the property available to satisfy a confiscation order, if in due course one be made, and that property includes assets then in the hands of the trustee or liquidator: see the route to the definition of property which runs from s 6(5) via ss 7(1) & (2), s 9, s 82 and s 83 to s 84(2)(d).

iv) Whilst I also agree that there may be unsatisfactory features of the statutory position as I see it to be, there are also significant difficulties if it is otherwise. In particular, it would as it seems to me enable a dishonest defendant to evade the prospect of a confiscation order by conniving in an insolvency order made before there could be a restraint order, and the potential for that to be done with a view to preserving assets for persons claiming to be creditors but linked in some manner to the defendant would be considerable. At best, there would be scope for unseemly races between insolvency practitioners and prosecutors.

All this is, however, for another day.

Non-disclosure/misrepresentation

182. A number of complaints of misrepresentation or non-disclosure are made about the original application to Judge Kramer.

183. Mr Tehal mis-stated the position when saying that proceedings had been begun and (by implication) that SIB was one of the defendants to them. But he disclaimed any knowledge of the case beyond what was in the LOR, and the latter made it quite clear what the true position was, as did oral information given to the judge. For the reasons given above, the condition in Article 7(2) and/or (3) was met in any event, whichever was the case. The judge concluded that the error in Mr Tehal's affidavit was irrelevant. I agree. It was a telling demonstration of sloppiness (no doubt in a hurry), but the true position was made clear to the judge, and the error made no difference at all. The Antiguan liquidator did not submit to us that *this* mis-statement justified setting aside the restraint order.

184. Much more significantly, the judge was not told of the Antiguan proceedings. Under them the company which held the assets he was being asked to restrain had been put into the hands of receivers, and there were contested winding up proceedings about to be tried. There is no excuse for the failure to tell him this. In his later witness statement of 27 July 2009, Mr de Kluiver, a senior attorney in the US Department of Justice and one of the prosecutors in the American case, said this:

> "The existence *vel non* of an Antiguan receiver at the time of the letter of request had no relevance to our criminal case, so we are not sure why we would be under any obligation to disclose that fact. Moreover at the time we sent out the letter of request, the Antiguan receiver, while appointed by the FSRC, had not been legally recognised as such by any court. At the time, the only receiver that had been recognised by any court was the US Receiver, and the only orders obtained regarding assets were the US orders of restraint obtained by the SEC that are referenced in the Letter of Request.
>
> ……
>
> The US Receiver who has been vigorously opposing the Antiguan receiver is not acting in concert with the Department of Justice. The US Receiver has an obligation to protect the victims' interests that

> arise under US laws separate and apart from our criminal powers and he answers only to the judge who appoints him. The Department of Justice does not control the actions of the Judge the US Receiver reports to. The criminal powers that the Department of Justice exercises are completely unrelated to the US Receiver's actions."

This statement appears to be close to an admission that the Antiguan proceedings were known to the American prosecutors seeking the English restraint order. If they did not know, they certainly ought to have found out. They were travelling several thousand miles to ask a foreign court to assist them, and in a hurry. They had a clear duty to ascertain what the legal status was, in its country of incorporation, of the company holding the assets which they were chasing. They knew that in addition to their contemplated prosecution the American receiver had been appointed by the regulatory authority, the SEC. Making the assumption in their favour that the receiver and the prosecutors were quite separate bodies, there clearly needed to be liaison between them. There plainly was such liaison, for the LOR speaks frequently of the appointment of the receiver and of the fact that he had obtained freezing orders in the USA; indeed it appears from what we were told that the prosecutors had, in co-operation with the receiver, left pre-trial restraint in America to him, because of the way local law worked. The American receiver knew all about the Antiguan proceedings because he had intervened in them. It was factually wrong to state that at the time of the LOR the Antiguan receivers (as they then were) had not been recognised by any court, for they had been appointed as such by the Antiguan High Court on 26 February 2009, over a month earlier. By the time of the LOR moreover, petitions to wind up SIB were pending and the court hearing of the US Receiver's application to intervene was starting in Antigua either that day or the next. It may be true that the existence of the Antiguan receivers had no relevance to the criminal

prosecution in Texas but that is the wrong question. The question is whether they had relevance, as professionals appointed to control the assets of SIB, to an application to a foreign court to freeze those same assets, especially when there was pending an application to wind the company up. That question admits of only one answer.

185. With that serious failure of disclosure went an assertion to Judge Kramer about the civil freezing order previously applied for in the UK by the American SEC and made by Jack J on 27 March 2009. Mr Tehal's affidavit asserted:

> "The reason for the application for this restraint order is that it is believed that the civil freezing order will be discharge (*sic*) shortly."

It is mysterious where this assertion came from. There is no reference to it in the LOR, although one might expect that the American prosecutors might have been kept abreast of the existence of Jack J's order. On the face of it the only probable source is the SEC or its US Receiver, the former of whom had been the applicant for Jack J's order. It is true that that order had been made without notice and with a return date of 6 April, but by the time of the hearing before Judge Kramer that day had passed and the order had been continued. The applicant prosecutors, who were asserting an expectation that the order would be discharged can have no excuse for not knowing that it had in fact been continued. It was clearly at least likely that it would be continued from time to time at least until a full inter partes hearing could be held, as indeed it was. The judge needed to be told all of this.

186. The application to Judge Kramer was demonstrably made in considerable haste. The LOR (dated 6 April 2009) contained the following request:

> **"Time Constraints**
>
> US authorities request the UK authorities file an application to freeze or restrain the identified criminal assets requested by close of business on Tuesday 7th April 2009. Details of such need will be provided on request."

The LOR also sought confidentiality so as not to prejudice the ongoing enquiries in the US.

187. It was not nearly good enough to assert such need for urgency without justifying it. The SFO, charged with presenting the application, was under a clear duty to find out from the US prosecutors what the need for urgency was and to tell the judge. It may be that the assertion in Mr Tehal's affidavit that the civil freezing order was about to be discharged represented some attempt to justify this claim to expedition, but judges are not to be left to guess at what basis there may be for their being asked to act with urgency, and in any event no evidential basis was offered for that assertion. Nor was it right simply to assert a request for confidentiality. We are now told that the concern was that the individual potential defendants might flee the jurisdiction of the US prosecutors before the indictment could be laid. I would myself accept that there may well have existed such a risk, but if so there was no possible reason not to tell the judge. Of course every court is aware that the conduct of criminal investigation frequently consists of delicate balancing of public and confidential activities. An *application* for a restraint order may be made without notice, and frequently this is necessary if a criminal is not to be tipped off and given the opportunity to move assets. But there are two vital qualifications which appear to have been ignored in this case:

i) the fact that the application is made without notice to the defendant or holder of the assets does not justify keeping the judge in the dark about what is going on; on the contrary, it is this which creates the onerous duty of full and frank disclosure to the court; and

ii) once an order is made, the investigators have to that extent gone public; the fact of the order and at least the bulk of the evidence on which it was made are going to have to be disclosed to all interested parties, if not immediately then at least very soon.

188. The existence of the American receivership was properly disclosed in the LOR, as was the fact that an asset freeze had been granted in Texas. It is true that in Bank of Sharjah v Dellbourg [1993] 2 Bank LR 109 at 112 this court observed that the proper place for relevant facts is in the affidavit rather than in the exhibits. I agree that it is wrong for relevant facts to be left to be extracted from different places in a bundle of separate exhibits, especially where the hearing will be one-sided, but in this case the affidavit did scarcely more than produce the relevant single operative document, which was the LOR. I would not myself criticise that course; it was better to let the LOR speak for itself than to attempt to précis it. Had the LOR then had a variety of exhibits attached, Dellbourg would have applied, but it did not.

189. The Antiguan Liquidators also complained that they were not provided with the evidence which had been put before Judge Kramer until the beginning of the *inter partes* hearing. Whether or not there was sufficient reason for that, it is not a complaint of failure to disclose relevant material to the judge when seeking an order

without notice and no more need be said about it.

190. I conclude that there were serious and material failures of the duty of candour in this case. It matters not where the responsibility for it lies as between the US prosecutors and the SFO as the DoJ's English agents and (presumably) advisors. The applicants failed to disclose:

i) the existence of the Antiguan proceedings, the prior appointment of receivers over SIB and the pending application to wind it up; and

ii) the correspondence between the Antiguan receivers and the banks;

and they misstated or at least failed to explain:

iii) the risk of Jack J's order being discharged; and

iv) the consequential need for urgency.

191. Whilst I respectfully agree with the view expressed by Slade LJ in Brinks Mat v Ellcombe [1988] 1 WLR 1350 that it can be all too easy for an objector to a freezing order to fall into the belief that almost any failure of disclosure is a passport to setting aside, it is essential that the duty of candour laid upon any applicant for an order without notice is fully understood and complied with. It is not limited to an obligation not to misrepresent. It consists in a duty to consider what any other interested person would, if present, wish to adduce by way of fact, or to say in answer

to the application, and to place that material before the judge. That duty applies to an applicant for a restraint order under POCA in exactly the same way as to any other applicant for an order without notice. Even in relatively small value cases, the potential of a restraint order to disrupt other commercial or personal dealings is considerable. The prosecutor may believe that the defendant is a criminal, and he may turn out to be right, but that has yet to be proved. An application for a restraint order is emphatically not a routine matter of form, with the expectation that it will routinely be granted. The fact that the initial application is likely to be forced into a busy list, with very limited time for the judge to deal with it, is a yet further reason for the obligation of disclosure to be taken very seriously. In effect a prosecutor seeking an *ex parte* order must put on his defence hat and ask himself what, if he were representing the defendant or a third party with a relevant interest, he would be saying to the judge, and, having answered that question, that is what he must tell the judge. This application is a clear example of the duty either being ignored, or at least simply not being understood. This application came close to being treated as routine and to taking the court for granted. It may well not be the only example.

192. On the *inter partes* hearing in July, Judge Kramer directed himself that there were four questions: was there material (1) misrepresentation or (2) non-disclosure, as a result of which the order was obtained ? Even if there was, (3) should the order be discharged ? In any event, (4) should the order be varied as requested ?

193. I agree that the first two questions elided two different issues. The principal question is not whether the order was obtained as a result of the misrepresentation or non-disclosure but whether the information not disclosed was material to be taken into

account in deciding whether or not to grant relief without notice and if so on what terms: see e.g. Dormeuil Freres SA v Nicolian Ltd [1988] 1 WLR 1362, 1368. Once that question is answered in the affirmative, one comes to the consequential question whether the order made ought to be discharged. The judge accepted the SFO's submission that a restraint order would have been made even if there had been disclosure of the Antiguan proceedings, but that was to go straight to the consequential question. There could only be one answer to the question whether that non-disclosure was material; it was. The judge did not address separately the treatment of urgency and the civil freezing order, but those too involved material failings of candour.

194. What if the judge had been told all that he should have been told in April ? Certain it is that the case was not the ordinary one where there is a danger of the defendant personally moving or dissipating the assets; that much was known because of the disclosed existence of the civil freezing order. He wouH For my part I agree with the SFO that if the judge had been told of the Antiguan proceedings he would have perceived a risk that the Antiguan receivers, or liquidators if that they became, would make application to discharge the civil freezing order so that they could proceed to collect in SIB's assets. Similarly, while the correspondence between the Antiguan receivers and the banks would have made it unlikely that the latter would accept instructions from anyone else, it would have left it very likely that, absent some restraint, the instructions of the receivers/liquidators would be accepted. But he would have approached the application quite differently. It would have been clear to him that the Antiguan Liquidators had a potential claim to the release of the money which would have to be weighed against the prosecutors' claim for a restraint order.

That required that the liquidators be heard. The liquidators meanwhile were not absent restraint; the assets were frozen by the civil injunction. The judge would have been likely, as it seems to me, to point out that with a civil restraint order in force, the US prosecutors did not need a separate criminal restraint order that day. They had only to put the Antiguan receivers/liquidators on notice of their interest in any application to discharge the civil order, and of their intention to seek a criminal restraint order if co-operation was not offered. He might also have taken steps to see whether the application for a criminal restraint order could not be heard at the same time as any further application in relation to the civil freezing order: see the practical suggestions made below at paragraphs 203-212. At most, he might have made a short-term restraint order with an identified return date and an order for service upon the Antiguan Liquidators, so as to enable them, in the exercise of their public functions, to be heard as soon as convenient, but even that was unnecessary. He was unable to consider any of this because of the misleading information which he was given.

195. In the particular circumstances of this case I accordingly agree that the proper course at the further hearing of 29 July would have been to set aside the restraint order obtained on 7 April on the grounds of non-disclosure, and to consider afresh the question whether a restraint order should or should not be made.

196. Judge Kramer deprived the SFO of its costs at the July hearing. So far as I can see, the costs of the Antiguan Liquidators in relation to that hearing are unlikely to have been different if the April application had been dealt with in the manner in which it should have been. The difference between, on the one hand, resisting the prosecutors' application to continue the order and applying to discharge it and, on the other,

resisting a fresh application for an order, seems unlikely to have sounded in costs. If, however, there is any difference in the costs, I would be sympathetic to an application that the SFO pay the difference. On this topic I would give the Antiguan Liquidators the opportunity to make further written submissions if so advised, with the opportunity for the SFO to respond.

197. I would observe in passing that this is an invitation by the court to offer further written submissions upon a discrete topic which did not arise during oral argument. That is quite different from the generally illegitimate practice of a party seeking to supplement its already very full oral submissions with further written arguments after the hearing, but without any invitation from the court to do so. It was wrong for the Antiguan Liquidators to attempt the latter course after the end of the hearing before us, and it clearly put the SFO to additional cost in responding. A similar unsatisfactory practice, extending to the filing of further evidence, appears to have been adopted after the hearing before Lewison J.

Discretion

198. There are unusual features of this case that (i) there appears to be little risk of the alleged criminals getting their hands on the assets in question, at least unless the allegations prove to be misplaced, but (ii) there are no less than three institutional claimants all seeking to administer those assets. I doubt whether anyone could fail to agree with Jack and Lewison JJ and Judge Kramer that it is a matter of considerable regret that the lack of co-operation between them has greatly increased the costs at the eventual expense of the victims of the fraud and perhaps other creditors, but the

contest is a fact. Moreover, it is an unusual feature of the US prosecutors' case that the confiscation order which they seek in due course is one which will have as its object the compensation of victims of the fraud. I do not agree that the court's discretion ought to be exercised to refuse a restraint order. The legislative steer points firmly in favour of making such an order and the assurance that if a confiscation order ensues it will be treated as a means of compensation, rather than of mere deprivation, adds strength to the case. The liquidators would not distribute whatever assets they collect in the same way as the US prosecutors. First, ordinary creditors would rank alongside the victims of the alleged fraud. We have no reliable figures for their numbers or nature, but even assuming that there are none who are closely connected with the alleged criminals it is contrary to the steer provided by Article 46(2) to treat them the same as the victims. Secondly, although it may well be that most of the victims of the alleged fraud parted with their money to SIB, a significant number (parting, we were told, with over $1bn) did not, and those who did not could not be the subject of any distribution by the liquidators. Thirdly, the costs of the liquidators are considerable; their own case led them to seek the release from the London assets of over $1.6m to fund expenses to date, and likely future expenses are said to run at something like $3m per year. Nor would the costs of any distribution by the US Receiver be insubstantial. Although any distribution to victims via an eventual confiscation order would not be without some cost, there is good reason on the material before us to conclude that because there would in effect be a large element of public funding the net sums available for distribution would be much greater if this route is taken.

199. A further reason for exercising the discretion in this way is that there are good

grounds for believing that the assets in dispute are not merely property of the fraudulent company from which repayment to victims might be made, but are the traceable proceeds of the fraud. As between, on the one hand, those who invested these funds as a result of fraudulent inducements and, on the other, those who have commercial or other claims upon SIB, there is elementary justice in taking steps which will improve the prospects of the former receiving at least something from assets traceable to their investment.

200. Should the restraint order be re-imposed with effect from the original hearing before Judge Kramer on 7 April, or from the inter partes hearing in July ?

201. It is worth pointing out that if, contrary to what I at least think to be the position, the winding up order created for the unsecured creditors an interest in the assets for the purposes of Article 46(3), which previously they did not have, and if the rule in s 426 is to be applied to the ERO by analogy, and if the effect of that rule is to remove assets under winding up order from any eventual realisation to satisfy a confiscation order, there would then be a reason to re-impose the restraint order with effect from 7 April. If a properly informed judge should have been told of all those conditions, then he ought, if he had known the true position, to have made a restraint order then. In that event, the civil injunction would not sufficiently have protected the assets for future confiscation.

202. Since, however, in my view these conditions did not apply, and in particular the creditors did not have an interest created by the winding up order, the civil injunction did sufficiently protect the assets. It was because of the civil injunction that the public interest explained by this court in Jennings v CPS [2005] EWCA Civ 746; [2006] 1 WLR 182 did not militate in favour of the re-imposition of the order from April,

notwithstanding the failures of disclosure. In the circumstances of this case I therefore do not disagree with the Chancellor's proposal that the restraint order should be re-imposed from July.

Conclusions on the appeals

203. Accordingly I concur in the Chancellor's proposal that this court should make a restraint order with effect from 29 July 2009. I also concur in the other orders which he proposes at paragraph 105 of his judgment. The only matter reserved for further argument was the question of what use should be made of article 20(2) of Uncitral. Even if asked to do so, it would not be appropriate for us at this late stage to consider any claim to an interest by SIB's unsecured creditors, when such was argued before neither the judge nor us.

Practice: restraint orders and concurrent civil proceedings

204. This case is a good example, but by no means the only one, of the manner in which an application for a restraint order under POCA 2002 may interlock with complex issues which arise in other litigation. It provides an opportunity to consider the best methods of managing such applications.

205. Prior to POCA 2002 all applications for restraint orders under either the Criminal Justice Act 1988 or the Drug Trafficking act 1994 had to be made in the High Court. Now, by sections 40-41 of POCA the jurisdiction is committed to the Crown Court. The same court has the only jurisdiction to vary or discharge a restraint order once made: see section 42. Subsections 58(5) and (6) plainly contemplate that other

litigation relating to property which is subject to a restraint order may, as a result of the order, need to be stayed or permitted to proceed only on terms. Accordingly the initiative is firmly in the hands of the Crown Court.

206. It does not follow that efforts should not be made to achieve two aims where possible. The first is to do what is practicable to match suitable judicial expertise to the case. The second is to manage restraint order applications and associated litigation, so far as can be accomplished, in a co-ordinated manner.

207. Many applications for restraint orders are made in circumstances of some urgency and initially *ex parte*. They must be made to whichever judge is currently available in a convenient Crown Court. In London there is a special expertise at Southwark Crown Court which justifies making complicated applications there where possible, but it will not always be practicable. Elsewhere in the country there may also be particular Crown Court judges well used to dealing with such applications; similarly, allocation to them by listing officers is desirable, but will not always be possible.

208. In SFO v Lexi Holdings plc [2008] EWCA Crim 1443; [2009] 2 WLR 905 this court said this at paragraph 92:

> "..there can be no doubt that the issues which arose in this case concerning beneficial interests, equitable charges and tracing were far from straightforward. They are not part of the daily work of most Crown Court judges, and indeed this constitution of the Court of Appeal (Criminal Division) was deliberately arranged so as to ensure that appropriate expertise in matters normally falling within the jurisdiction of the Chancery Division was available. Sometimes issues may arise in restraint order proceedings about equitable interests which are not unduly complicated and can readily be dealt with in the Crown Court. In other cases the sums involved may not warrant any unusual steps. But there may be other times when the complexities are such

> that it may not be wise for the Crown Court judge to embark on seeking to decide those issues."

Those far-sighted words are well borne out by the present case involving an apparent fraud running into several billions of dollars, a contested Antiguan winding up, an American court-appointed receiver, separate American prosecutors, competing applications for cross-border recognition of insolvency administrations, and concurrent proceedings in Canada if not also elsewhere. Crown Court judges should not of course shrink from deciding issues of civil law where they properly can, even if they are less familiar to them than is the daily round of the criminal jurisdiction. But there will be a few cases where the complexities are such that a Crown Court judge should not fear to explore the possibility of onward allocation to another judge. The legal complexities may be of property law or equity, as in Lexi Holdings, but are not limited to those issues. They may be of insolvency and cross-border recognition, as here. In some cases they may relate to tax law or the law of matrimonial property and ancillary relief.

209. Even in such a case, the Crown Court judge will ordinarily have to deal with the initial application. If it is apparent that the case is one of the few which require special expertise, he may, depending on the circumstances, either adjourn the application without making any order or make a restraint order for a limited period and appoint a relatively short return date for a fuller hearing. In other cases, the potential for complexity may arise only on application for variation or discharge. At whichever stage the need for consideration of special expertise arises, it is open to the judge to seek the assistance of his Circuit's Presiding Judge in exploring the question of whether a judge of suitably mixed expertise can be found to deal with the case from

that point on.

210. Section 8 Senior Courts Act 1981 provides that:

> "8(1) The jurisdiction of the Crown Court shall be exercisable by –
>
> (a) any judge of the High Court; or
>
> (b) any Circuit Judge, Recorder or District Judge (Magistrates' Courts);
>
> …..
>
> and any such persons when exercising the jurisdiction of the Crown Court shall be judges of the Crown Court."

211. The judge eventually hearing the restraint order proceedings should ordinarily have some experience of criminal cases, the nature of the confiscation regime, and the manner in which prosecutions and the defence thereto proceed. But there is no reason why a judge of the High Court should not sit in the Crown Court to deal with a complex restraint order case. He or she may be from the Queen's Bench, Chancery or Family Division, or Commercial Court, according to need and availability. Some cases may be suitable for hearing by a specialist mercantile or chancery senior circuit judge. The Presiding Judge will be in a position to consult the appropriate Head of Division (in London) or Liaison Judge (on circuit) in order to explore availability. It will need to be remembered that the availability of the relatively few judges of suitable mixed expertise will be quite limited and calls upon it need to be judged carefully. The decisions involved are matters of pure case management and are most unlikely to generate appealable rulings.

212. The process described is quite different from one in which an application is made uninvited by a party to a High Court judge and coupled with a request that he

constitute himself a judge of the Crown Court without reference to the court where restraint proceedings are in process. Such latter procedure is not appropriate, as Sir Mark Potter P held in T v B & RCPO [2009] 1 FLR 1231.

213. The need for this procedure to work properly in the few cases where it will be called for underlines still further the essential requirement that applicants for restraint orders make full disclosure to the initial judge of potential complications. The present case is a vivid illustration. The failure of the prosecution to discover and reveal the pending and all too patent Antiguan winding up proceedings, and to tell the judge what was happening in the equally patent civil freezing order proceedings, was inexcusable, wherever the responsibility for it lay. It was equally inexcusable that notice of the lengthy proceedings before Lewison J was never given to the prosecutors, nor was that judge's attention drawn to Article 17(5) of the ERO.

Re Tantleff, Alan

[2022] SGHC 147

General Division of the High Court — Originating Summons No 203 of 2022
Aedit Abdullah J
25 April 2022; 24 June 2022

***Insolvency Law** — Cross-border insolvency — Recognition of foreign insolvency proceedings — Application made by foreign representative of real estate investment trust undergoing Chapter 11 proceedings in US without presence of trustee of unitholders — Application to recognise and enforce Chapter 11 plan and confirmation order as appropriate additional relief — Whether collective investment scheme authorised under Securities and Futures Act (Cap 289, 2006 Rev Ed) came within scope of UNCITRAL Model Law on Cross-Border Insolvency — Whether relief could be granted under UNCITRAL Model Law on Cross-Border Insolvency for recognition and enforcement of foreign insolvency judgments and orders — Article 21(1)(*g*) UNCITRAL Model Law on Cross-Border Insolvency — Securities and Futures Act (Cap 289, 2006 Rev Ed)*

Facts

The application concerned three entities consisting of Eagle Hospitality Real Estate Investment Trust ("EH-REIT"), Eagle Hospitality Trust S1 Pte Ltd ("S1") and Eagle Hospitality Trust S2 Pte Ltd ("S2") (collectively, the "Singapore Chapter 11 Entities"). EH-REIT was a publicly held real estate investment trust in Singapore with DBS Trustee Ltd as its trustee, and the EH-REIT was part of a stapled trust, Eagle Hospitality Trust ("EHT"). Securities of EHT were issued in Singapore to the public through an initial public offering on the mainboard of Singapore Exchange Securities Trading Ltd.

Both S1 and S2 were Singapore-incorporated companies that were wholly owned by EH-REIT. S1 and S2 served as important links between the ultimate controllers and owners of the Eagle Hospitality Group (consisting of EH-REIT and other subsidiaries) and the revenue-generating arm of the group. Through directly and indirectly wholly-owned companies, the Eagle Hospitality Group owned a portfolio comprising of 18 full-service hotel properties (collectively, the "Hotels"), all of which were located in the US. The Eagle Hospitality Group faced serious financial difficulties over the course of 2020 and it eventually voluntarily filed for Chapter 11 reorganisation in 2021.

The Applicant, in his capacity as foreign representative, sought recognition of the foreign proceedings and court orders in the US pursuant to the UNCITRAL Model Law on Cross-Border Insolvency (30 May 1997) (the "Model Law"). The foreign proceedings concerned the Singapore Chapter 11 Entities in Cases No 21-10120-CSS, No 21-10037-CSS and No 21-10038-CSS under Chapter 11 of the United States Bankruptcy Code 11 USC (US) (1978) (the "US Bankruptcy Code") in the US Bankruptcy Court (the "Singapore Entities' Chapter 11 Proceedings"). In addition to this, recognition was sought for the Chapter 11 plan of liquidation in the US (the "Chapter 11 Plan") and the US Bankruptcy Court's confirmation of the Chapter 11 Plan (the "Confirmation Order").

The Applicant also sought the following additional reliefs: (a) the Applicant to be recognised as the foreign representative of the Singapore Chapter 11 Entities; (b) the Applicant to be entrusted with the administration and realisation of property and assets of the Singapore Chapter 11 Entities and to implement the Chapter 11 Plan; and (c) DBS Trustee Ltd, in its capacity as trustee of EH-REIT, to be authorised to take all appropriate steps to wind down the Singapore Chapter 11 Entities in accordance with Singapore law and perform obligations under the Chapter 11 Plan.

Held, granting the application in part:

(1) The EH-REIT did not come within the scope of the Model Law as implemented in Singapore. Part 11 of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("IRDA") implemented the Model Law, but Pt 11 was within that segment of the IRDA (Pts 4 to 12) that dealt with corporate entities. EH-REIT was not a corporate entity, but was instead, a collective investment scheme authorised under the Securities and Futures Act (Cap 289, 2006 Rev Ed) ("SFA"). There was nothing in the IRDA or its language that would extend its application to EH-REIT, and there was no mention of business trusts or real estate investment trusts: at [25] and [26].

(2) The types of entities excluded from the scope of the Model Law, by the Minister's orders under s 252(1) of the IRDA, suggested that the Model Law only applied to corporate entities and that in a similar vein, non-corporate entities governed by the SFA (such as EH-REIT) did not fall within the Model Law. Further, entities which were authorised under the SFA were excluded from the scope of the Model Law, and it was logical to infer that the EH-REIT itself would not come within the Model Law as well. The English position in *Rubin v Eurofinance SA* [2010] 1 All ER (Comm) 81 was not followed. Nothing in the UNCITRAL materials suggested that the Model Law could apply to EH-REIT and further, it seemed that Parliament wanted to exclude entities under the SFA from the Model Law as enacted in Singapore. The restructuring of EH-REIT would probably have to proceed by way of a separate application for common law recognition and would have to involve DBS Trustee Ltd. The analysis for recognition under the Model Law was only proceeded with for S1 and S2: at [27], and [30] to [32].

(3) The Singapore Entities' Chapter 11 Proceedings under the US Bankruptcy Code were clearly foreign proceedings within the meaning of Art 2(*h*) of the Model Law, as noted in previous cases. The remaining issue was whether the Singapore Entities' Chapter 11 Proceedings should be recognised as foreign main proceedings or foreign non-main proceedings. The starting point was that the centre of main interest ("COMI") of S1 and S2 was presumed to be Singapore pursuant to Art 16(3) of the Model Law as they were both incorporated in and had registered offices in Singapore. However, this presumption could be displaced on the presence of proof to the contrary by other factors which were objectively ascertainable by third parties that pointed the COMI away from the place of registration to some other location: at [33], [34], [36] and [37].

(4) Both S1 and S2 were not active, operational companies. Rather, they were part of the Eagle Hospitality Group, which had its main business operations and

assets based in the US. The substantial assets consisting of the portfolio of 18 full-service Hotels were all located in the US where the income would be derived as well. Further, the significant creditors of S1 and S2 were based in the US, and the governing law of the various agreements with the creditors was US law. In the circumstances, the presumption under Art 16(3) of the Model Law had been displaced and the COMI for both S1 and S2 was the US: at [39] to [43].

(5) The fact that the proceedings were ongoing in the US was irrelevant in determining the COMI, as were the activities of the foreign representative. The jurisprudential basis of the COMI requirement was to determine the centre of gravity of the company's commercial activity, that is, where it was centred while it was alive and flourishing. The US authorities which suggested otherwise should not be followed as the US approach appeared to be a form of bootstrapping and would allow the parties to choose their COMI in an artificial manner. It would be better to assess the COMI by looking at the activities of the company before the foreign restructuring took place: at [45] and [50].

(6) While the Model Law did not explicitly provide for the recognition and enforcement of foreign insolvency orders and judgments, the list of reliefs in Art 21 of the Model law was non-exhaustive in nature and the court was not restricted unnecessarily in its ability to grant any type of relief that was required in the circumstances of the case: at [68].

(7) It was well established within the US Chapter 15 jurisprudence that foreign insolvency orders and judgments could be recognised and enforced locally, subject to limited exceptions. The US equivalent of Art 21 of the Model Law had been interpreted to extend to the recognition and enforcement of foreign insolvency-related orders and judgments confirming foreign reorganisation plans. In contrast, the position in the UK was much more circumscribed with regard to interpreting the UK equivalent of Art 21 of the Model Law, and the recognition and enforcement of foreign insolvency judgments was not permitted in *Rubin v Eurofinance SA* [2012] 3 WLR 1019 ("*Rubin (UKSC)*"): at [70], [71] and [75].

(8) The US approach should be preferred over the UK approach in interpreting the scope of Art 21 of the Model Law. The Singapore Ministry of Law had expressed its preference for the US approach and had intentionally amended the language of Art 21(1)(*g*) of the Model Law to align Singapore's position with that of the US. Thus, it was the US jurisprudence that was persuasive in determining the scope of relief to be granted, and the UK approach in *Rubin (UKSC)* was not endorsed in Singapore: at [77] and [78].

(9) In granting recognition and enforcement of foreign insolvency judgments and orders, the Singapore court was not merely acting as a rubber stamp, but instead, had to carefully scrutinise the circumstances in which the foreign order was granted and ensure that interested parties were adequately protected. This requirement was encapsulated in Art 22(1) of the Model Law. There was adequate protection for the relevant parties here as the Chapter 11 process was supervised by the US Bankruptcy Court, the requisite voting requirements for the confirmation of the Chapter 11 Plan were properly satisfied, and there was opportunity provided for creditors to be heard. The Singapore creditors and the stapled security holders of EHT were also duly notified about the developments.

All creditors were also notified of the present recognition application and no objections were received. Recognition of the Chapter 11 Plan and Confirmation Order was therefore granted as appropriate additional relief under Art 21(1)(*g*) of the Model Law for S1 and S2. The additional relief sought by the Applicant was granted as these were uncontroversial, save that these were limited to S1 and S2 only: at [81] to [83] and [91].

(10) As regards EH-REIT, some form of common law recognition was required. However, The Applicant did not have the standing to make an application on behalf of DBS Trustee Ltd. Instead, DBS Trustee Ltd should satisfy the Singapore court that the winding down and other steps contemplated were in accordance with Singapore law and the trust deed. The court could not see how any matters affecting the winding down of EH-REIT could be brought in this summons. A separate application should be made in respect of EH-REIT: at [85], [87], [88] and [95].

[Observation: While the court was previously amenable to taking an expanded view of Art 2(*h*) of the Model Law, the better course was to grant recognition of the Chapter 11 Plan and Confirmation Order under Art 21(1)(*g*) of the Model Law instead. Nevertheless, some views in passing regarding Art 2(*h*) of the Model Law were set out and the issue was left open for future determination: at [56].]

Case(s) referred to

Ashapura Minechem Ltd, Re 480 BR 129 (Bankr SDNY, 2012) (refd)

British American Isle of Venice (BVI) Ltd, Re 441 BR 713 (Bankr SD Fla, 2010) (not folld)

CFG Peru Investments Pte Ltd, Re HC/OS 665/2021 (21 September 2021) (refd)

CGG SA, Re 579 BR 716 (Bankr SDNY, 2017) (refd)

EHT US1, Inc, Re 630 BR 410 (Bankr D Del, 2021) (refd)

Energy Coal SPA, Re 582 BR 619 (Bankr D Del, 2018) (refd)

Fairfield Sentry Ltd, Re 714 F 3d 127 (2nd Cir, 2013) (refd)

Fibria Celulose S/A v Pan Ocean Co Ltd [2014] Bus LR 1041 (refd)

Lupatech SA, Re 611 BR 496 (Bankr SDNY, 2020) (refd)

Magyar Telecom BV, Re 2013 Bankr LEXIS 5716 (Bankr SDNY, 11 December 2013) (refd)

Metcalfe & Mansfield Alternative Investments, Re 421 BR 685 (Bankr SDNY, 2010) (refd)

Oi Brasil Holdings Coöperatief UA, Re 578 BR 169 (Bankr SDNY, 2017) (refd)

Oi SA, Re 587 BR 253 (Bankr SDNY, 2018) (folld)

Opti-Medix Ltd, Re [2016] 4 SLR 312 (refd)

Oversight and Control Commission of Avanzit, SA, Re 385 BR 525 (Bankr SDNY, 2008) (refd)

Rooftop Group International Pte Ltd, Re [2020] 4 SLR 680 (refd)

Rubin v Eurofinance SA [2010] 1 All ER (Comm) 81, HC (Eng) (not folld)

Rubin v Eurofinance SA [2013] 1 AC 236; [2012] 3 WLR 1019, SC (Eng) (not folld)

Salvati, Re 2009 Bankr LEXIS 5722 (Bankr SDNY, 7 May 2009) (refd)

Sino–Forest Corp, Re 501 BR 655 (Bankr SDNY, 2013) (refd)
United Securities Sdn Bhd v United Overseas Bank Ltd [2021] 2 SLR 950 (refd)
Zetta Jet Pte Ltd, Re [2019] 4 SLR 1343 (folld)

Legislation referred to

Business Trusts Act 2004 (2020 Rev Ed)
Companies Act 1967 (2020 Rev Ed) s 4(1)
Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ss 61(1), 96(4), 252(1), 252(2)(*b*), Pts 4–12, Pt 11, Third Schedule
Insolvency, Restructuring and Dissolution (Prescribed Companies and Entities) Order 2020 para 5(1), para 5(1)(*z*), para 5(1)(*zf*)
Securities and Futures Act (Cap 289, 2006 Rev Ed) ss 286, 289
Bankruptcy Code 11 USC (1978) (US) §1521, §1521(a), §1521(a)(7), Ch 11, Ch 15
Companies Act 2006 (c 46) (UK) s 895
Cross-Border Insolvency Regulations 2006 (SI 2006 No 1030) (UK) Sch 1

Ong Tun Wei Danny, Ng Hui Ping Sheila and Chen Lixin (Rajah & Tann Singapore LLP) for the applicant.

24 June 2022 Judgment reserved.

Aedit Abdullah J:

1 The present application is brought by Mr Alan Tantleff (the "Applicant"), in his capacity as foreign representative of three entities, for the recognition of foreign proceedings and court orders pursuant to the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on Cross-Border Insolvency (30 May 1997) (the "Model Law"). The Model Law is given the force of law in Singapore under s 252(1) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("IRDA").

2 This application concerns three entities consisting of Eagle Hospitality Real Estate Investment Trust ("EH-REIT"), Eagle Hospitality Trust S1 Pte Ltd ("S1") and Eagle Hospitality Trust S2 Pte Ltd ("S2") (collectively, the "Singapore Chapter 11 Entities"). The Applicant was appointed by the United States Bankruptcy Court for the District of Delaware ("US Bankruptcy Court") to be the foreign representative of the Singapore Chapter 11 Entities. Prior to this, the Applicant was the chief restructuring officer of the Eagle Hospitality Group consisting of EH-REIT and its direct and indirect subsidiaries.

3 The Applicant is seeking for the proceedings concerning the Singapore Chapter 11 Entities in Cases No 21-10120-CSS, No 21-10037-CSS and No 21-10038-CSS under Chapter 11 of the United States Bankruptcy Code 11 USC (US) (1978) (the "US Bankruptcy Code") in the

US Bankruptcy Court (the "Singapore Entities' Chapter 11 Proceedings") to be recognised in Singapore as foreign main proceedings within the meaning of Art 2(*f*) of the Model Law, or as foreign non-main proceedings within the meaning of Art 2(*g*) of the Model Law. In addition to this, the Applicant requests for the recognition of the Chapter 11 plan of liquidation in the US (the "Chapter 11 Plan") and the US Bankruptcy Court's confirmation of the Chapter 11 Plan.

4 Regarding the additional reliefs, the Applicant seeks the following:

(a) the Applicant to be recognised as the foreign representative of the Singapore Chapter 11 Entities within the meaning of Art 2(*i*) of the Model Law;

(b) the Applicant to be entrusted with the administration and realisation of all or any part of the property and assets of the Singapore Chapter 11 Entities that are located in Singapore, to effectuate and/or implement the Chapter 11 Plan and its confirmation; and

(c) for DBS Trustee Ltd, in its capacity as trustee of EH-REIT (the "EH-REIT Trustee"), to be authorised to take all appropriate steps to wind down the Singapore Chapter 11 Entities in accordance with Singapore law and to perform other obligations set out under the Chapter 11 Plan.

Background

The Eagle Hospitality Group

5 EH-REIT is a publicly held real estate investment trust in Singapore. EH-REIT is part of a stapled trust, Eagle Hospitality Trust ("EHT"), consisting of EH-REIT and Eagle Hospitality Business Trust ("EH-BT"). EH-REIT's trustee is DBS Trustee Ltd, which is incorporated in Singapore. EH-REIT's manager was Eagle Hospitality REIT Management Pte Ltd, which was removed as manager on 30 December 2020 pursuant to a directive issued by the Monetary Authority of Singapore. EH-BT's trustee-manager is Eagle Hospitality Business Trust Management Pte Ltd, which is also incorporated in Singapore.

6 The Eagle Hospitality Group, consisting of EH-REIT and its direct and indirect subsidiaries, was listed on the Singapore Exchange Securities Trading Ltd ("SGX-ST") in May 2019 with the principal strategy of investing in a diversified portfolio of income-producing real estate properties which are used primarily for hospitality and/or hospitality-related purposes. The investments are conducted on a long-term basis and with an initial geographical focus on the US. Through directly and indirectly wholly-owned companies, the Eagle Hospitality Group owned a portfolio comprising of 18 full-service hotel properties (collectively, the

"Hotels" or the "Properties"), all of which are located in the US, and each of which is owned by a separate US-incorporated holding company (save for one Hotel, the Queen Mary) (each, a "Propco").

7 Both S1 and S2 are Singapore-incorporated companies that are wholly owned by EH-REIT. S1 is the indirect 100% holding company of USHIL Holdco Member, LLC and CI Hospitality Investment, LLC, which are in turn, indirect 100% holding companies for each of the Propcos that own the Hotels (other than the Queen Mary) in the Eagle Hospitality Group portfolio. In addition, S1 and S2 are the direct 100% holding companies of EHT US1, Inc ("the US Corp") and EHT Cayman Corp Ltd ("the Cayman Corp"), respectively.

8 As disclosed in EHT's prospectus (the "Prospectus"), EH-REIT had obtained a Tax Ruling (as defined in the Prospectus) in relation to certain Singapore income tax treatment of the distributions received by S1, S2, EH-REIT and the stapled security holders of EHT ("Stapled Security Holders"). The Tax Ruling is subject to certain terms and conditions, which include, *inter alia*, that: (a) S1 and S2 will each be a wholly-owned subsidiary of EH-REIT; and (b) S2 will wholly own the Cayman Corp. The distribution policy of EHT contemplated that each of the Propcos would distribute cash upstream to the US Corp, which would then distribute cash to the Cayman Corp through interest payments and/or repayment of the principal in relation to a loan from the Cayman Corp. In turn, the Cayman Corp would distribute cash to S2, whilst S2 would then distribute dividends up to EH-REIT and the Stapled Security Holders. Thus, S1 and S2 served as important links between the ultimate controllers and owners of the Eagle Hospitality Group and the revenue-generating arm of the group.

9 Securities of EHT were issued in Singapore to the public through an initial public offering on the mainboard of SGX-ST. There were 3,749 Stapled Security Holders as of 31 December 2021.

The Chapter 11 Proceedings in the US

10 The Eagle Hospitality Group faced serious financial difficulties over the course of 2020 stemming from: significant defaults on the part of lessees of the Hotels (*eg*, defaulting on rental payment obligations and payment of outgoings), the onset of the global COVID-19 pandemic, and problems relating to the former EH-REIT manager's activities. The defaults by the lessees continued until the termination of the leases by the Propcos in the last quarter of 2020, and this had pushed the Eagle Hospitality Group into a liquidity crisis.

11 On 18 January 2021, due to the liquidity issues and potential impending actions to be taken by the creditors of the Eagle Hospitality Group, a number of EH-REIT's downstream companies (including S1 and S2, but not including EH-REIT) (the "Initial Chapter 11 Entities")

voluntarily filed for Chapter 11 reorganisation and sought a debtor-in-possession financing facility (the "DIP Financing Facility"). These Initial Chapter 11 Entities entered into a commitment letter for the provision of the DIP Financing Facility with a lender to extend a US$100m senior secured super-priority debtor-in-possession term loan facility pursuant to the US Bankruptcy Code. The Initial Chapter 11 Entities were permitted to use the proceeds of the DIP Financing Facility for working capital needs, general corporate needs, and other purposes of the Initial Chapter 11 Entities, including funding the costs of the Chapter 11 cases. At a hearing on 21 January 2021, the US Bankruptcy Court, amongst other things:

(a) authorised the joint administration, for procedural purposes, of the Initial Chapter 11 Entities' Chapter 11 cases;

(b) approved the DIP Financing Facility on an interim basis, allowing the Initial Chapter 11 Entities to borrow up to US$9.3m until the next hearing to be held on 11 February 2021;

(c) authorised, on an interim basis, the Initial Chapter 11 Entities to pay certain critical vendors for the ongoing operations and maintenance of the Hotels in EH-REIT's portfolio post-Chapter 11 filings;

(d) appointed the Initial Chapter 11 Entities' chief restructuring officer to act as foreign representative in any Singapore proceedings to recognise the Chapter 11 cases as foreign proceedings; and

(e) confirmed the application of the worldwide automatic stay in respect of any claims against the Initial Chapter 11 Entities.

12 As EH-REIT was not yet a party to the Chapter 11 process or the DIP Financing Facility, the EH-REIT Trustee made an application to the Singapore court (*vide* HC/OS 46/2021) to be granted powers to take immediate action on behalf of EH-REIT to join the Chapter 11 process in the US and have access to the DIP Financing Facility to meet ongoing expenditures of EH-REIT itself. On 22 January 2021, Vinodh Coomaraswamy J granted the EH-REIT Trustee's application by way of HC/ORC 413/2021, which allowed the EH-REIT Trustee to "step into the shoes" of the manager of EH-REIT until such time as a replacement manager was appointed. Following this, on 27 January 2021, in its capacity as trustee and on behalf of EH-REIT, the EH-REIT Trustee filed a voluntary petition for relief under Chapter 11 in the US Bankruptcy Court. In conjunction with EH-REIT's Chapter 11 filing, an application was also made to jointly administer, for procedural purposes, EH-REIT's Chapter 11 case with the Initial Chapter 11 Entities (the Initial Chapter 11 Entities and EH-REIT are collectively known as the "Chapter 11 Entities"), which was granted by the US Bankruptcy Court on the same day.

13 Subsequently, at a hearing on 24 February 2021, the US Bankruptcy Court, amongst others:

(a) approved the DIP Financing Facility on a final basis, allowing the Chapter 11 Entities (including EH-REIT) to borrow an aggregate amount of up to US$100m (which can be increased up to US$125m under certain circumstances) and the use of such proceeds in accordance with an approved budget and subject to the terms of the order approving the DIP Financing Facility;

(b) authorised (but did not require), on a final basis, the payment of certain critical vendors for the ongoing operations and maintenance of the Hotels in EH-REIT's portfolio; and

(c) in connection with the Chapter 11 filing, confirmed the application of the worldwide automatic stay in respect of any claims against EH-REIT.

14 Concurrently, in connection with the Chapter 11 cases, the EH-REIT Trustee instructed Moelis & Company (in its capacity as financial adviser to the Chapter 11 Entities) to commence a process for the restructuring and recapitalisation of EH-REIT and/or the sale of the Properties in the portfolio of EHT that were owned by certain Chapter 11 Entities. Following this, 14 of the Properties were sold off and the lease relating to the Queen Mary Property was rejected.

15 After the completion of the sale process, the Chapter 11 Entities other than Urban Commons Queensway LLC (collectively, the "Liquidating Chapter 11 Entities"), the committee of unsecured creditors of the Chapter 11 Entities appointed in the Chapter 11 cases, and the Bank of America NA (as the administrative agent of a syndicated credit agreement, being EH-REIT's largest debt facility), negotiated and reached an agreement on the terms of a Chapter 11 plan of liquidation (*ie*, the Chapter 11 Plan). On 14 October 2021, the Liquidating Chapter 11 Entities filed with the US Bankruptcy Court: (a) the Chapter 11 Plan in respect of the Liquidating Chapter 11 Entities; and (b) the proposed disclosure statement (the "Disclosure Statement") which contained information on the Chapter 11 Plan for the purpose of providing adequate information to creditors of the Liquidating Chapter 11 Entities to make a reasonably informed decision as to whether to vote to accept or reject the Chapter 11 Plan.

16 Following certain revisions made to the Disclosure Statement due to objections received, a revised Disclosure Statement was made and approved by the US Bankruptcy Court on 4 November 2021. The Liquidating Chapter 11 Entities then proceeded to solicit votes to accept or reject the Chapter 11 Plan from classes of creditors who were entitled to vote on the Chapter 11 Plan. Under the Chapter 11 Plan, the Stapled Security Holders were deemed to have rejected the Chapter 11 Plan, and therefore were not

entitled to vote on the Chapter 11 Plan and did not receive a ballot to vote. Nevertheless, copies of the relevant notices which set out further information about the process and options available were mailed to the Stapled Security Holders. The relevant voting requirements under the US Bankruptcy Code in relation to the Chapter 11 Plan were satisfied, and on 20 December 2021, the US Bankruptcy Court entered an order confirming the Chapter 11 Plan for the Liquidating Chapter 11 Entities (the "Confirmation Order"). Accordingly, the Liquidating Chapter 11 Entities, their creditors and the Stapled Security Holders are bound by the terms of the confirmed Chapter 11 Plan.

17 The Chapter 11 Plan contemplates, *inter alia*, (a) the allocation and distribution of the net sale proceeds from the sale of the properties that were owned by certain Chapter 11 Entities to the Chapter 11 Entities' creditors and other stakeholders; and (b) the resolution of outstanding claims against, and equity interests in, each of the Liquidating Chapter 11 Entities. It is unlikely that claims of all creditors of the Liquidating Chapter 11 Entities will be satisfied in full from the sale proceeds after accounting for various secured claims. In relation to the Stapled Security Holders, they would receive contingent interests in a liquidating trust that would entitle them to a distribution only if there is value available in EH-REIT and only if holders of claims against EH-REIT have been paid in full. Based on current projections, it is not expected that the Stapled Security Holders will receive any distributions.

18 Additionally, under the Chapter 11 Plan, it has also been agreed that the Applicant, as the liquidating trustee, will be authorised to take all actions reasonably necessary to dissolve the Liquidating Chapter 11 Entities (other than the Singapore Chapter 11 Entities), Urban Commons Queensway LLC, and the non-debtor affiliates of the Chapter 11 Entities. Further, and pertinently, the Chapter 11 Plan contemplates that the EH-REIT Trustee shall take all appropriate necessary steps to put into effect the termination, liquidation or dissolution of the Singapore Chapter 11 Entities in accordance with and subject to Singapore law.

19 The Chapter 11 proceedings are still ongoing, and it is anticipated that these Chapter 11 cases will be closed around 31 December 2022. Against this backdrop, the Applicant has filed the present application for the recognition of the foreign proceedings and court orders to implement the Chapter 11 Plan and Confirmation Order (and to dissolve the Singapore Chapter 11 Entities).

Summary of the Applicant's arguments

20 The Applicant submits that the requirements for recognition under Art 17(1) of the Model Law are satisfied. First, the Singapore Entities' Chapter 11 Proceedings are "foreign proceeding[s]" within the meaning of Art 2(*h*) as they are a form of protected reorganisation and have been stated

to fall squarely within the provision in previous cases. Second, the Applicant is a "foreign representative" within the meaning of Art 2(*i*) of the Model Law as he was appointed by the US Bankruptcy Court as the foreign representative for S1, S2 and EH-REIT. Third, the requirements under Art 17(1)(*c*) are satisfied as the relevant documents provide sufficient evidence of the existence of the foreign proceedings and the appointment of the foreign representative. The statement identifying all relevant proceedings against the Singapore Chapter 11 Entities has also been produced. Fourth, the requirement under Art 17(1)(*d*) is satisfied as the application was filed in the High Court of Singapore and there is jurisdiction over the Singapore Chapter 11 Entities. S1 and S2 are both incorporated and have registered offices in Singapore, while EHT had issued securities on the mainboard of SGX-ST.

21 Next, the Applicant argues that the Singapore Entities' Chapter 11 Proceedings should be recognised as foreign main proceedings. While S1 and S2 have their registered offices in Singapore and EH-REIT is listed on the SGX-ST, the presumption that Singapore is the centre of main interest ("COMI") is rebutted in this case. The Singapore Chapter 11 Entities are part of the Eagle Hospitality Group, which has its main business operations and assets based in the US. The portfolios of income-producing Hotels are all located in the US, and each of the Hotels is owned by a Propco that was incorporated in the US. All of the larger creditors of the Singapore Chapter 11 Entities are based in the US, with US law being the governing law of the various agreements between the respective Singapore Chapter 11 Entities and their creditors. Further, the Singapore Chapter 11 Entities have been subject to the control and supervision of the US Bankruptcy Court for over one year, and the Applicant, a US-based citizen, has been actively managing the Singapore Chapter 11 Entities. The foreign representative's actions and activities in managing the entities abroad are relevant to the determination of the COMI, following the approach taken in US cases. Alternatively, the Singapore Entities' Chapter 11 Proceedings should be recognised as foreign non-main proceedings.

22 The Applicant also submits that the Chapter 11 Plan and Confirmation Order should be recognised as they fall within the definition of a "foreign proceeding" under Art 2(*h*) of the Model Law. This is consistent with the UNCITRAL guide materials, and the US Bankruptcy Court retains jurisdiction and supervision over the process under the Chapter 11 Plan even after the Confirmation Order has been issued.

23 Further and/or in the alternative, upon recognition in Singapore of the Singapore Entities' Chapter 11 Proceedings as a "foreign proceeding", Art 21(1)(*g*) of the Model Law provides the court with the power to recognise the Chapter 11 Plan and Confirmation Order as part of the additional relief to be granted. The court has the power under that provision to recognise (and enforce) insolvency-related, non-monetary

judgments as this is consistent with the interpretation based on the UNCITRAL materials. The approach of US and Canadian cases which permit the recognition and enforcement of foreign insolvency-related judgments should be preferred over the more restrictive approach taken in the UK as this is consistent with Parliament's intention. As a final alternative, recognition should be granted under common law.

24 In relation to the other additional reliefs stated above at [4], the Applicant argues that these are necessary for the Applicant to implement the Chapter 11 Plan and Confirmation Order.

Recognition of the Singapore Entities' Chapter 11 Proceedings

Whether proceedings or orders concerning the restructuring of a real estate investment trust can be recognised under the IRDA and the Model Law

25 I am doubtful about EH-REIT coming within the scope of the Model Law as implemented in Singapore. That implementation is by way of Pt 11 of the IRDA, and s 252(1) of the IRDA provides that the Model Law (with certain modifications), as set out in the Third Schedule of the IRDA, has the force of law in Singapore. However, Pt 11 is within that segment of the IRDA (Pts 4 to 12 of the IRDA) that deals with corporate entities. EH-REIT is clearly not a corporate entity. Rather, it is a collective investment scheme authorised under the Securities and Futures Act (Cap 289, 2006 Rev Ed) ("SFA") in which a designated trustee acts for the benefit of the unitholders.

26 I do not see anything in the IRDA or its language that would extend its application to EH-REIT. Part 4 and s 61(1) of the IRDA specify the interpretation of the terms used in Pts 4 to 12 of the IRDA, and it is clear that these are limited to corporate insolvency only – there is no mention of business trusts nor real estate investment trusts ("REITs"). This makes sense, as there is already the enactment of other legislation such as the Business Trusts Act 2004 (2020 Rev Ed) ("BTA") and the SFA that would govern aspects of a business trust or a REIT (such as the winding up of a registered business trust under the BTA by order of court).

27 Additionally, the types of entities excluded from the scope of the Model Law, by the Minister's orders under s 252(1) of the IRDA, suggest that the Model Law only applies to corporate entities and that in a similar vein, non-corporate entities governed by the SFA (such as EH-REIT) do not fall within the scope of the Model Law. Section 252(1) of the IRDA provides that the Model Law has force of law, subject to certain modifications to adapt it for application, in Singapore. In turn, Art 1(2) of the Model Law provides that: "This Law does not apply to any proceedings concerning such entities or classes of entities which the Minister may, by order in the *Gazette*, prescribe." The list of entities which are excluded can be found under para 5(1) of the Insolvency, Restructuring and Dissolution

(Prescribed Companies and Entities) Order 2020 which makes reference to a banking corporation, a finance company, *etc*. Under para 5(1)(*z*), a trustee for a collective investment scheme authorised under s 286 of the SFA (and who is approved under s 289 of the SFA) is excluded from the scope of the Model Law. For completeness, it is also provided under para 5(1)(*zf*) that "any other corporation that is licensed, approved, authorised, designated, recognised or registered under the provisions of … (ii) the Business Trusts Act; … (ix) the Securities and Futures Act …" is also excluded from the scope of the Model Law. Two observations may be made. First, the exclusion of entities relates mostly to corporate entities with a separate legal personality, unlike the present EH-REIT. Second, entities which are authorised under the SFA (or the BTA for that matter) are excluded from the scope of the Model Law, and it is logical to infer that EH-REIT itself would not come within the Model Law as well. One possible reason for the exclusion of entities under the SFA may be the need to cater for the interests of a large number of individual unitholders under the various collective investment schemes. Thus, EH-REIT does not come within the scope of the Model Law as implemented in Singapore.

28 I note that under the US Bankruptcy Code, EH-REIT could be considered as a "corporation" for the purposes of being an eligible debtor under Chapter 11. As noted by Christopher Sontchi CJ in *In re EHT US1, Inc* 630 BR 410 (Bankr D Del, 2021) at 423: "Section 109(d) of the Bankruptcy Code provides that only 'a person … may be a debtor' under Chapter 11. The term 'person' is defined under section 101(14) as including an 'individual, partnership, and corporation …' The term 'corporation,' in turn, is defined in section 101(9) as being limited to certain business entities, including a 'business trust.'" Having determined that Singapore law governed the issue, Sontchi CJ held that EH-REIT was a business trust despite not being registered under the BTA after being persuaded by the expert testimony of Professor Hans Tjio (at 428). Thus, it was an eligible debtor under the US Bankruptcy Code. Given that Art 2(*c*) of the Model Law provides that the reference to a "debtor" means a "corporation", it may be arguable that the Model Law could apply to EH-REIT. However, the difficulty is that under our local legislation, specifically the Companies Act 1967 (2020 Rev Ed), the term "corporation" under s 4(1) is not expressly defined to include business trusts (unlike the position in the US), much less a collective investment scheme authorised under the SFA. Hence, under Singapore law, EH-REIT is not a corporation, and consequently, not a "debtor" within the meaning of Art 2(*c*) of the Model Law. Further, as noted above at [27], entities relating to the BTA are also excluded from the scope of the Model Law as enacted in Singapore.

29 A contrary position has been taken in England. In *Rubin and another v Eurofinance SA and others* [2010] 1 All ER (Comm) 81 ("*Rubin (EWHC)*"), an entity known as The Consumers Trust ("TCT") was brought

into proceedings under Chapter 11 of the US Bankruptcy Code, and the US court approved a plan of liquidation under Chapter 11 (at [13]). The English High Court noted that this entity was considered as a "business trust" and that it was common ground that "bankruptcy proceedings can be brought in New York in relation to a business trust, even though it has no separate legal personality for any other purpose" (at [10]). The foreign representatives of TCT then sought recognition of the Chapter 11 case in England as a foreign main proceeding under the equivalent UK legislation enacting the Model Law. However, it was argued by the respondent that the Model Law could not apply as TCT was not a separate legal entity as a matter of English law (at [36]):

> The first point taken in response to the application for recognition by Mr Staff is that, whilst it is clear that a business trust is treated in US bankruptcy law as a separate legal entity, and can be the subject of insolvency remedies – according to the applicants' United States counsel, Mr Friedman, TCT 'is an insolvent corporate entity' – it is not a separate legal entity as a matter of English law. Articles 15 and 17, read together with the definitions of 'foreign proceeding' and 'foreign representative' in art 2 require the existence of 'a debtor'. Mr Staff submits that the word 'debtor' must be given its ordinary meaning in English law, from which it follows that there is no debtor and that the Model Law cannot be applied in this case, or in any other case in which the insolvent estate in a foreign jurisdiction is not that of an individual or of a corporate entity recognised in English law as an independent legal entity.

The English High Court rejected that submission and found that the Model Law could apply to business trusts. This was on the basis that, *inter alia*, having regard to the international origins of the Model Law and the need to promote uniformity in its application under Art 8, a "parochial interpretation" of the term "debtor" and the following "refus[al] to provide any assistance in relation to a bona fide insolvency proceeding taking place in a foreign jurisdiction" should be eschewed (at [40]). The English court then held that TCT was a "debtor" under the Model Law and recognised the Chapter 11 proceedings as a foreign main proceeding (at [42]).

30 While one can appreciate the need to promote uniformity in the application of the Model Law under Art 8, I do not think that *Rubin (EWHC)* should be followed in Singapore. In interpreting the Model Law as enacted in Singapore, s 252(2)(*b*) of the IRDA allows us to have regard to the "Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency", UNCITRAL, 30th Sess, UN Doc A/CN.9/442 (1997) ("the UNCITRAL 1997 Guide"). Additionally, the revised guide – "UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation" (2013) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf> (accessed 19 May 2022) ("the UNCITRAL 2013 Guide") – may also be referred to as noted in *Re Zetta Jet Pte Ltd and others*

(Asia Aviation Holdings Pte Ltd, intervener) [2019] 4 SLR 1343 ("*Zetta Jet (No 2)*") at [37] (where the UNCITRAL 1997 Guide is silent, the court may consider the UNCITRAL 2013 Guide but the UNCITRAL 1997 Guide prevails in the event of conflict). Neither document contains any mention that the Model Law is intended to apply to business trusts or REITs. Further, within the UNCITRAL 2013 Guide, it is provided that a contracting State to the Model Law still retains the sovereignty to decide which entities to exclude from its scope of application (at para 57):

> Paragraph 2 indicates that the enacting State might decide to exclude the insolvency of entities other than banks and insurance companies; the State might do so where the policy considerations underlying the special insolvency regime for those other types of entity (e.g. public utility companies) call for special solutions in cross-border insolvency cases.

As observed above at [26]–[27], there is nothing in our domestic legislation which suggests that the Model Law could apply to EH-REIT (even if it could be described as a business trust) and on the contrary, it seems that Parliament wanted to exclude entities under the SFA from the Model Law as enacted in Singapore. Hence, I am doubtful that EH-REIT comes within the scope of the Model Law as implemented in Singapore.

31 The restructuring of EH-REIT will probably have to proceed by way of a separate application for common law recognition and would have to involve the EH-REIT Trustee (*ie*, DBS Trustee Ltd), who was not present in this application. As will be explained below at [87], I cannot see how the Applicant can have the standing to make the application on behalf of DBS Trustee Ltd.

32 S1 and S2 do not run into this difficulty of falling outside the scope of the Model Law and I proceed with the analysis for these two corporate entities.

Whether the Singapore Entities' Chapter 11 Proceedings should be recognised as foreign main proceeding even though the presumptive COMI is in Singapore

33 I am persuaded by the Applicant's submissions on the requirements of Art 17 (see above at [20]) as these are relatively uncontroversial issues. The Singapore Entities' Chapter 11 Proceedings under the US Bankruptcy Code are clearly "foreign proceeding[s]" within the meaning of Art 2(*h*) as stipulated under Art 17(1)(*a*) of the Model Law, and this was previously recognised in *Re Rooftop Group International Pte Ltd and another (Triumphant Gold Ltd and another, non-parties)* [2020] 4 SLR 680 ("*Re Rooftop*") and noted in *Zetta Jet (No 2)* ([30] *supra*) at [25].

34 Rather, the key issue is whether the Singapore Entities' Chapter 11 Proceedings should be recognised as foreign main proceedings or foreign non-main proceedings. Under Art 17(2)(*a*) of the Model Law, it is provided

that the foreign proceeding must be recognised as a foreign main proceeding (which is defined in Art 2(*f*) of the Model Law) if it takes place in the State where the debtor has its COMI.

35 The requirements for the determination of the COMI were considered in *Zetta Jet (No 2)*. As noted at [80], the focus is on the centre of gravity of the objectively ascertainable factors. Further, in ascertaining the COMI, there is no need to maintain the distinction between different entities within a group strictly and it is possible for the analysis to be made of the activities of an entire group of companies (at [83]).

36 The starting point is the presumption under Art 16(3) of the Model Law, which operates such that the place of the debtor-company's registered office is presumed to be its COMI (*Zetta Jet (No 2)* at [29]). Here, S1 and S2 are both incorporated in and have registered offices in Singapore. Thus, the COMI of both debtor companies is presumed to be Singapore.

37 However, this presumption may be displaced if the place of the company's central administration and various factors which are objectively ascertainable by third parties, particularly creditors and potential creditors of the debtor company, point the COMI away from the place of registration to some other location (*Zetta Jet (No 2)* at [76]; *Re Rooftop* at [12(b)]). The rebuttal of the presumption does not need to be made out on a balance of probabilities, but operates as a starting point that is subject to displacement by other factors on the presence of proof to the contrary (*Zetta Jet (No 2)* at [31]). Some factors which may be considered when determining the COMI are: the location of substantial assets, location of sales (*Re Rooftop* at [15]), the location from which control and direction were administered, the location of clients, the location of creditors, the location of operations, the governing law, *etc* (*Zetta Jet (No 2)* at [85]).

38 Here, what commercial activity there was appeared to be centred in the US, particularly as regards S1, which is the indirect 100% holding company of USHIL Holdco Member, LLC and CI Hospitality Investment, LLC, which are in turn, indirect 100% holding companies for each of the Propcos that own the revenue-generating Hotels in the Eagle Hospitality Group portfolio. I note that S2 is only concerned with a Cayman entity (*ie*, the Cayman Corp) under it. However, it is apparent that S2 plays an important role in facilitating the distribution of dividends up to EH-REIT and the Stapled Security Holders from the income generated by the US-based Propcos (see above at [8]).

39 It is clear that both S1 and S2 are not active, operational companies. Rather, they are part of the Eagle Hospitality Group, which has its main business operations and assets based in the US. The substantial assets in play, consisting of the portfolio of 18 full-service Hotels, are all located in the US where the income would be derived as well. These are immovable fixed properties and provide a good indication of the COMI, in contrast to

the situation in *Zetta Jet (No 2)* (at [106]) where the location of planes was not indicative of the COMI as it was expected that assets in the business of aircraft rental and charter might be dispersed in the location most appropriate. In my view, the location of S1 and S2's operations and substantial assets are therefore relevant indicators of their COMI being the US.

40 Further, S1 and S2 did not have creditors in Singapore as of 18 January 2021 (the date of their respective voluntary petitions for relief under Chapter 11). Their only creditors were in the US (such as the debt incurred under a credit facility with the Bank of America NA) according to their respective "Global Notes and Statement of Limitations, Methodology, and Disclaimers Regarding the Debtors' Schedules of Assets and Liabilities and Statements of Financial Affairs" which were filed in the US Bankruptcy Court on 19 March 2021. S1 and S2 (along with EH-REIT) were joint borrowers under a credit facility with the Bank of America NA and the bank had an unsecured claim of US$357,968,703.28 against them. Another significant creditor was the Bank of the West, a bank headquartered in California, with an unsecured claim of US$18,448,253.94. Thus, the significant creditors of S1 and S2 are all based in the US.

41 After S1 and S2 had filed their voluntary petitions for relief under Chapter 11, there were some invoices billed to S1 and S2 from pre-petition Singapore creditors who had provided corporate secretarial services and incurred nominee director fees, but these were much smaller creditors (all of whom have been paid under the Chapter 11 process) and they do not shift the centre of gravity in determining the COMI.

42 It is also noted that US law is the governing law of the various agreements between the respective Singapore Chapter 11 Entities and their creditors. In particular, both the Bank of America NA credit facility and the secured swap agreement with the Bank of the West are governed by US law.

43 In the circumstances, given that the operations and assets of S1 and S2 are in the US, that the larger creditors are located in the US, and that US law governs the various agreements, I conclude that the presumption under Art 16(3) of the Model Law has been displaced and the COMI for both S1 and S2 is the US.

The irrelevance of the ongoing Chapter 11 proceedings in the US and the foreign representative's activities

44 For completeness, I note that the Applicant also contends that the control and supervision of the US Bankruptcy Court in the Singapore Entities' Chapter 11 Proceedings, and the activities of the Applicant as the chief restructuring officer and subsequently as liquidating trustee, are relevant factors that point to the COMI of S1 and S2 being the US. For the

avoidance of doubt, I do not accept these arguments as reasons for my conclusion above at [43] that the COMI of S1 and S2 is the US.

45 To my mind, the fact that the Singapore Entities' Chapter 11 Proceedings are ongoing in the US is irrelevant in determining the COMI, as are the activities of the foreign representative. The jurisprudential basis of the COMI requirement is to determine the centre of gravity of the company's commercial activity, that is, where it was centred while it was alive and flourishing – in other words, a corporation's real home. A hospital bed, or a crypt, does not count.

46 As for the relevance of a foreign representative's actions to determining the COMI, I previously observed in *Zetta Jet (No 2)* ([30] *supra*) that the foreign representative's actions are irrelevant in the ascertainment of the COMI and rejected the approach taken in the US (at [101]–[103]):

> 101 The applicants point to the fact that the US-based Trustee undertook efforts to restructure Zetta Jet Singapore from the date of his appointment to the cessation of the business of the Zetta Entities, *ie*, from 5 October 2017 to 30 November 2017.
>
> 102 However, I would not take the foreign representative's actions as being relevant in the ascertainment of COMI. The work being done by the foreign representative would flow from the assumption of jurisdiction by the foreign court on whatever basis it considers appropriate.
>
> 103 I am mindful that I differ in this regard from the approach of the US courts … which held that 'any relevant activities, including liquidation activities and administrative functions, may be considered in the COMI analysis' … I am not, however, convinced that it is proper to consider such activities in determining COMI.

47 As noted in *Zetta Jet (No 2)* at [103], the US position is that the activities of the foreign representative are relevant. In *In re Fairfield Sentry Ltd* 714 F 3d 127 (2nd Cir, 2013) ("*re Fairfield*"), the United States Court of Appeals for the Second Circuit held that "any relevant activities, including liquidation activities and administrative functions, may be considered in the COMI analysis" and it was observed that the COMI should correspond to the place where the debtor "conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties" (at 137–138).

48 In the subsequent decision of *In re Oi Brasil Holdings Coöperatief UA* 578 BR 169 (Bankr SDNY, 2017), *re Fairfield* was cited for the proposition that the activities of foreign liquidators and administrators could be relevant to a COMI analysis (at 222). However, the activities of a judicial administrator must be of sufficient significance to produce a shift in the COMI (at 222) and provide a meaningful basis for the expectation of third parties (at 223).

49 That was the case in *In re British American Isle of Venice (BVI) Ltd* 441 BR 713 (Bankr SD Fla, 2010), where the work done by the liquidator of the company was significant (reviewing the company's books, taking control of company assets and undertaking the investigation of the investments, *etc*) and the extended passage of time meant that third parties necessarily considered his office in the British Virgin Islands to be the location of the debtor company's COMI (at 723). Where a foreign representative remains in place for an extended period and relocates the primary business of the debtor to his location, thereby causing creditors and other parties to look to the foreign representative, this could lead to the conclusion that the COMI has become lodged with the foreign representative (at 723).

50 Nevertheless, I decline to follow the US authorities. As I have noted previously in *Zetta Jet (No 2)* ([30] *supra*) at [102], the "work being done by the foreign representee would flow from the assumption of jurisdiction by the foreign court". Where the business activities of a company are subsequently managed in the jurisdiction where the foreign proceedings were commenced, I do not think that creditors would necessarily look to the actions of the foreign representative. The US approach appears to be a form of bootstrapping and will allow the parties to choose their COMI (so to speak) in an artificial manner. To my mind, it would be better to assess the COMI by looking at the activities of the company before the foreign restructuring takes place (even though the relevant date for determining the COMI is at the date of application for recognition). The location of the activities of the foreign representative is therefore irrelevant.

51 While I appreciate that the US cases have set a relatively high threshold before the COMI can be shifted in this manner, I remain unconvinced that the foreign representative's actions are relevant in determining the COMI. Looking to other jurisdictions, it appears that the work done and activities of the foreign representative are not usually considered by the courts around the world (in those jurisdictions which have adopted the Model Law) to be "among the most important" five factors in determining the COMI (see UNCITRAL, "Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency" (2021) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/20-06293_uncitral_mlcbi_digest_e.pdf> (accessed 22 May 2022) ("UNCITRAL Digest") at p 41). In fact, it appears to be a largely US-centric phenomenon.

52 I am therefore not persuaded by the Applicant's submission that the fact that the Singapore Entities' Chapter 11 Proceedings are ongoing in the US, or the Applicant's activities in his capacity as foreign representative, are relevant factors pointing to the COMI of S1 and S2 being the US. Nevertheless, in view of the findings above at [38]–[42] regarding the other factors applicable to the present case, the presumption that the COMI is

Singapore is displaced in favour of the US. Accordingly, the Singapore Entities' Chapter 11 Proceedings are recognised as foreign main proceedings within the meaning of Art 2(*f*) and pursuant to Art 17(2)(*a*) of the Model Law.

Whether the Singapore Entities' Chapter 11 Proceedings should be recognised as Foreign Non-Main Proceedings

53 Having decided that the Singapore Entities' Chapter 11 Proceedings in relation to S1 and S2 should be recognised as foreign main proceedings, the issue of whether they can be recognised as foreign non-main proceedings is now moot and does not arise on the facts. The fallback submission of the Applicant does not need to be considered.

Recognition of the Chapter 11 Plan and Confirmation Order

54 I turn to the Applicant's prayer that the Chapter 11 Plan and Confirmation Order be recognised as foreign proceedings under the Model Law. The commercial objective of the recognition of the Chapter 11 Plan and Confirmation Order sought by the Applicant is apparently to allow the affairs of the Singapore Chapter 11 Entities to be wound up as efficiently as possible. The Chapter 11 Plan resolves the outstanding liabilities and contemplates the eventual winding down of the Singapore Chapter 11 Entities, including S1 and S2. It is thus necessary for the Confirmation Order, along with the Chapter 11 Plan, to first be recognised by the Singapore courts, before the Singapore Chapter 11 Entities can be properly dissolved in Singapore. Given the presence of Singapore creditors, recognition would also ensure that any creditor action or potential proceedings in Singapore is prevented.

55 The Applicant argues that the liabilities should be resolved in Singapore to efficiently dissolve the relevant entities as opposed to going into a parallel liquidation scenario. Certainty would be achieved, and the Chapter 11 Plan can be implemented in Singapore without any hitch. Thus, to ensure all matters are resolved smoothly, the Chapter 11 Plan and Confirmation Order should be recognised in Singapore.

Basis of recognition

Article 2(h) of the Model Law

56 Having considered the arguments before me, while I was previously amenable to taking an expanded view of Art 2(*h*) of the Model Law, considering the continued supervision and jurisdiction of the US Bankruptcy Court over the Chapter 11 Plan and Confirmation Order, I am of the view that the better course is to grant recognition of the Chapter 11 Plan and Confirmation Order as foreign orders under Art 21(1)(*g*) of the Model Law instead. Nevertheless, I set out some views in passing regarding

Art 2(*h*) of the Model Law and leave the issue open for future determination.

57 The Applicant submits that the court has the ability to recognise and give effect to not only the Singapore Entities' Chapter 11 Proceedings, but also the Chapter 11 Plan and Confirmation Order, as they fall within the scope of the definition of a "foreign proceeding" under Art 2(*h*) of the Model Law.

58 Article 2(*h*) reads:

> (*h*) 'foreign proceeding' means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the property and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation …

59 As laid down by the Court of Appeal in *United Securities Sdn Bhd (in receivership and liquidation) and another v United Overseas Bank Ltd* [2021] 2 SLR 950 ("*United Securities*") at [53], there are at least four cumulative attributes (to be considered as a whole) required for a proceeding to constitute a "foreign proceeding" under Art 2(*h*) of the Model Law:

(a) The proceeding must involve creditors collectively.

(b) The proceeding must have its basis in a law relating to insolvency.

(c) The court must exercise control or supervision of the property and affairs of the debtor in the proceeding.

(d) The purpose of the proceeding must be the debtor's reorganisation or liquidation.

In the present circumstances, only requirement (c) is in doubt – regarding whether the court exercises control or supervision of the debtor's property and affairs post-confirmation of the Chapter 11 Plan.

60 The question that arises is whether the approval of the Chapter 11 Plan by the Confirmation Order, means that the US Bankruptcy Court no longer retains control or supervision over the matter. For this third attribute to be satisfied, the control or supervision must be "formal in nature", though it "may be potential rather than actual" and may be exercised directly by the court or indirectly through an insolvency representative (*United Securities* at [67]). Thus, it is sufficient for the foreign court to have supervision over the foreign insolvency representative who possesses direct control. One example cited by the Court of Appeal which satisfies this requirement is a proceeding in which the court has exercised control or supervision over the debtor company, but at the time

of application for recognition, is no longer required to do so (*United Securities* at [69]).

61 The Applicant cites a part of the UNCITRAL 2013 Guide (at para 75) which suggests that this court could recognise the Chapter 11 Plan and Confirmation Order:

> Proceedings in which the court has exercised control or supervision, but at the time of the application for recognition is no longer required to do so should also not be excluded. An example of the latter might be cases where a reorganization plan has been approved and although the court has no continuing function with respect to its implementation, the proceedings nevertheless remain open or pending and the court retains jurisdiction until implementation is completed.

One could suggest that the Chapter 11 Plan, which has been approved by the Confirmation Order, is no different from a "reorganization plan" mentioned in the UNCITRAL 2013 Guide. This would mean that post-confirmation of the Chapter 11 Plan, the proceeding would still fall within the definition of a foreign proceeding under Art 2(*h*) of the Model Law.

62 Indeed, other materials support this interpretation. The authors of *Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law* (Look Chan Ho gen ed) (Globe Law & Business, 4th Ed, 2017) ("*A Commentary on the UNCITRAL*") observe at p 178 that a foreign insolvency proceeding will remain as a "foreign proceeding" even after judicial confirmation of a reorganisation plan, until the proceeding is closed and the debtor's affairs are no longer subject to the foreign court's control. In the UNCITRAL Digest, it is suggested (at p 8) that where a reorganisation plan has been approved and although the court has no continuing function with respect to its implementation, the proceeding nevertheless remains open or pending and the court retains jurisdiction (*eg*, to settle any dispute over the interpretation of the plan or to oversee the debtor's performance pursuant to the plan) until implementation is completed.

63 To better understand whether a court will still retain supervision and control, what happens after a Chapter 11 plan of liquidation has been confirmed is relevant. In *In re Oversight and Control Commission of Avanzit, SA* 385 BR 525 (Bankr SDNY, 2008) ("*Oversight & Control*"), this situation was summarised (at 535) as such:

> … Under the Bankruptcy Code, and unless the confirmation order or the plan states otherwise, confirmation revests the property of the estate in the debtor, free and clear of all claims and interests, 11 U.S.C. §1141(b), (c), and discharges the debtor. 11 U.S.C. §1141(d). The reorganized debtor goes about its business, free of the constraints placed on trustees under the Bankruptcy Code. When the case has been fully administered, a final decree is entered closing the case. …

> Between confirmation and the final decree, the bankruptcy court continues to exercise jurisdiction over the case, albeit in a more limited fashion. Thus, although the jurisdiction 'shrinks,' … it does not end. The bankruptcy court retains jurisdiction under 11 U.S.C. § 1142(b) to direct the debtor or any necessary party to execute an act necessary for the consummation of the plan and it has 'continuing responsibilities to satisfy itself that the [p]lan is being properly implemented.' …

Thus, even after confirmation of a Chapter 11 plan of liquidation and up until the final decree closing the case, the US bankruptcy court continues to maintain control or supervision necessary to implement the Chapter 11 plan even if this is in a more limited fashion. Case law under Chapter 15 of the US Bankruptcy Code (which encapsulates the Model Law as enacted in the US) also suggests that a "foreign proceeding" under Art 2(*h*) of the Model Law is not restricted to the approval of a restructuring or repayment plan, but can extend to the implementation of the plan (see Look Chan Ho, *Cross-Border Insolvency: Principles and Practice* (Sweet & Maxwell, 2016) ("*Principles and Practice*") at p 98). Further, leaving a foreign representative in control of the business and operations is not necessarily inconsistent with supervision by a foreign court (see *In re Ashapura Minechem Ltd* 480 BR 129 (Bankr SDNY, 2012) at 138).

64 In *Oversight & Control*, a petition was filed for recognition of Spanish proceedings under Chapter 15 of the US Bankruptcy Code. The equivalent of a Chapter 11 plan or a repayment agreement, known in Spain as a "convenio", had been negotiated with the creditors and the convenio had been approved by the Spanish court. The issue was whether the control and supervision of the Spanish court ceased upon approving the convenio, such that the Spanish proceedings were no longer a "foreign proceeding" capable of recognition. It was undisputed by the parties (at 535) that the debtor company's status was "similar to a chapter 11 debtor after confirmation". The US court held that even though the management and daily control of the debtor company had been returned, the Spanish insolvency court had not surrendered all supervision and control as it continued to oversee the payment of claims to creditors and to settle any disagreement concerning the "interpretation, enforcement and/or performance" of the convenio (at 534). It may have been the case that the Spanish court's level of control or supervision was reduced, but it had not entirely ceased. Hence, even after the "convenio" received final approval, the Spanish insolvency proceedings did not lose their status as a "foreign proceeding" as the Spanish court still exercised control and supervision over the debtor company's assets and affairs, to the extent necessary to ensure compliance with and consummation of the convenio (at 536).

65 Some parallels may be drawn to the present circumstances. While the Chapter 11 Plan has been confirmed, it is provided in para 40 of the Confirmation Order that the US Bankruptcy Court "shall retain and have exclusive jurisdiction of all matters" relating to the Chapter 11 Plan.

Article XIII of the Chapter 11 Plan then sets out a list of matters which the US Bankruptcy Court continues to have jurisdiction over, which includes, *inter alia*, hearing any disputes arising in connection with the "interpretation, implementation or enforcement" of the Chapter 11 Plan and recovering all assets of the debtor companies wherever located. In the circumstances, it would appear that the US Bankruptcy Court still retains some jurisdiction over the process under the Chapter 11 Plan, even after the Confirmation Order has been issued. Thus, the Chapter 11 Plan and Confirmation Order could fall within the scope of "foreign proceeding[s]" as defined in Art 2(*h*) of the Model Law.

66 However, as explained above at [56], my preference would be to give recognition to the Chapter 11 Plan and the Confirmation Order pursuant to Art 21(1)(*g*) of the Model Law instead. At this juncture, it is relevant to point out that *Oversight & Control* is perhaps one of the only few cases in which a post-confirmation repayment plan was recognised under Art 2(*h*) of the Model Law. As will be seen below, it is more orthodox to recognise the Chapter 11 Plan and the Confirmation Order under Art 21(1)(*g*) of the Model Law as a form of additional relief, and the cases in that regard are much more numerous. Hence, I make no pronouncement on whether a Singapore court has the ability to recognise a post-confirmation plan of liquidation (or other foreign insolvency judgments) under Art 2(*h*) of the Model Law, and leave this issue open for future determination.

Article 21(1)(g) of the Model Law

67 Article 21(1) of the Model Law provides that upon the recognition of a foreign proceeding, the court may grant any appropriate relief. Specifically, under Art 21(1)(*g*), this includes granting any additional relief that may be available to a Singapore insolvency officeholder, including any relief provided under s 96(4) of the IRDA. The Applicant submits that upon the recognition of the Singapore Entities' Chapter 11 Proceedings as "foreign proceedings", the court is empowered to grant recognition and enforcement of the Chapter 11 Plan and Confirmation Order.

68 It is pertinent to note that the Model Law does not explicitly provide for the recognition and enforcement of foreign insolvency orders and judgments. Nevertheless, as proposed by the UNCITRAL 2013 Guide (at para 189), the list of reliefs in Art 21 should be regarded as non-exhaustive in nature and the court is not restricted unnecessarily in its ability to grant any type of relief that is required in the circumstances of the case. Hence, it is said that "[i]t is in the nature of discretionary relief that the court may tailor it to the case at hand" (the UNCITRAL 2013 Guide at para 191).

69 In some States, it has been suggested that the recognising court can give effect to the position in the foreign main proceeding, which might mean the relief that can be ordered in the recognising State is not limited to

the relief that would be available in a hypothetical domestic insolvency proceeding (*In re Sino–Forest Corporation* 501 BR 655 (Bankr SDNY, 2013) at 665–666). In contrast, in other States, courts have held that the words "any appropriate relief" do not allow the court to grant relief that would not be available when dealing with a domestic insolvency (*Fibria Celulose S/A v Pan Ocean Co Ltd and another* [2014] Bus LR 1041 at [107]–[108]). I had previously commented in *Re Rooftop* ([33] *supra*) at [27]) that assistance of a particular form may not be granted if in the same circumstances it may be denied or is not available to a local representative. However, as explained below at [77]–[78], I am satisfied on the material before me that the court may, in appropriate circumstances, apply foreign insolvency law when granting discretionary relief under Art 21(1)(*g*) of the Model Law as the phrase "under the law of Singapore" has been deliberately omitted. The circumstances and degree of discretion can only be specified incrementally.

70 Looking to the US cases, it is well established in Chapter 15 jurisprudence that foreign insolvency orders and judgments may be recognised and enforced locally, subject to limited exceptions such as public policy considerations (*A Commentary on the UNCITRAL* at p 249; *Principles and Practice* at p 167).

71 The US equivalent of Art 21 of the Model Law is §1521(a) of the US Bankruptcy Code, which reads:

> **§1521. Relief that may be granted upon recognition**
>
> (a) Upon recognition of a foreign proceeding, whether main or nonmain, where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including—
>
> …
>
> (7) granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a).

§ 1521(a) of the US Bankruptcy Code has been interpreted to extend to the recognition and enforcement of foreign insolvency-related orders and judgments confirming foreign reorganisation plans. For instance, in *In re Lupatech SA* 611 BR 496 (Bankr SDNY, 2020), it was noted (at 502) that "appropriate relief" under §1521 includes "enforcing a foreign order confirming a debtor's plan", but that the relief will only be granted if the interests of the creditors and other interested entities are sufficiently protected.

72 Consistent with this position, the US courts have recognised and enforced foreign insolvency-related court orders from abroad. In *In re Salvati*, 2009 Bankr LEXIS 5722 (Bankr SDNY, 7 May 2009), an English

company had commenced proceedings before the English High Court for a scheme of arrangement pursuant to s 895 of the Companies Act 2006 (c 46) (UK). The scheme was approved at the sanction hearing, and a sanction order was granted. The US court held that the sanction order was entitled to recognition and enforcement in the US. Other English schemes of arrangement and the accompanying sanction orders have also been recognised and enforced in the US (see *In re Magyar Telecom BV* 2013 Bankr LEXIS 5716 (Bankr SDNY, 11 December 2013)).

73 In *In re CGG SA* 579 BR 716 (Bankr SDNY, 2017) ("*re CGG SA*"), the applicant sought the recognition and enforcement of an order entered by a French court sanctioning a French safeguard plan (which restructured the debts of the company). The French court had given a sanctioning order after the safeguard plan had obtained the requisite approval from creditors. The US court held (at 720) that "the recognition and enforcement of the [s]anctioning [o]rder [was] 'appropriate relief' under section 1521(a) of the Bankruptcy Code" and gave the sought-after relief. However, the US court did not do so blindly, but also took notice that (a) the interests of the creditors and shareholders were sufficiently protected under the safeguard plan; (b) the interested parties had been given the opportunity to be heard in the French court; and (c) the safeguard plan might not be fully implemented if relief were not granted, to the detriment of the parties who fully supported it.

74 In addition to the foregoing brief survey of authorities, other authorities demonstrating that the US courts are open to recognising and enforcing foreign insolvency-related orders and judgments from various jurisdictions include: *In re Oi SA* 587 BR 253 (Bankr SDNY, 2018) ("*re Oi SA*") (concerning a Brazilian reorganisation plan); *In re Metcalfe & Mansfield Alternative Investments* 421 BR 685 (Bankr SDNY, 2010) (a Canadian plan of compromise and arrangement); and *In re Energy Coal SPA* 582 BR 619 (Bankr D Del, 2018) (an Italian debt restructuring plan).

75 In contrast, the position in the UK is much more conservative and circumscribed with regard to interpreting the UK equivalent of Art 21 of the Model Law. The relevant provision is found in Schedule 1 to the Cross-Border Insolvency Regulations 2006 (SI 2006 No 1030) (UK), and provides as such:

> *Article 21. Relief that may be granted upon recognition of a foreign proceeding*
>
> 1. Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including—
>
> > …
> >
> > (g) granting any additional relief that may be available to a British insolvency officeholder under the law of Great Britain, including any

> relief provided under paragraph 43 of Schedule B1 to the Insolvency Act 1986.

Coming back to the case of *Rubin (EWHC)* (mentioned above at [29]), an appeal against the English High Court's decision was subsequently heard by the English Court of Appeal. The English Court of Appeal's decision was then, in turn, appealed against and heard by the UK Supreme Court in *Rubin v Eurofinance SA* [2012] 3 WLR 1019 ("*Rubin (UKSC)*"), though the issue of whether the Model Law as enacted in the UK (the "UK Model Law") could apply to business trusts was no longer in play. In *Rubin (UKSC)*, it was argued by the respondent that the recognition and enforcement of foreign-insolvency judgments was one of the reliefs available under Art 21 of the UK Model Law, and the fact that "recognition and enforcement of foreign judgments is not specifically mentioned in article 21 as one of the forms of relief available, does not mean that such relief cannot be granted" (at [141]). Thus, the foreign representatives of TCT sought enforcement of a judgment by the US bankruptcy court in respect of fraudulent conveyances and transfers against Eurofinance SA and others. However, the UK Supreme Court rejected that submission on the basis that the UK Model Law "say[s] nothing about the enforcement of foreign judgments" and it "would be surprising if the Model Law was intended to deal with judgments in insolvency matters" when no consensus could even be reached regarding the recognition and enforcement of judgments in civil and commercial matters which had been the subject of intense international negotiations at the Hague Conference on Private International Law (at [142]–[143]). It was concluded that "the Model Law is not designed to provide for the reciprocal enforcement of judgments" (at [144]).

76 *Rubin (UKSC)* has not been well received: see, for example, academic critique noting that "the Supreme Court's reasoning in respect of Article 21 is unconvincing" (*A Commentary on the UNCITRAL* at p 248; *Principles and Practice* at p 165). It is also observed that in an attempt to get around the decision of the UK Supreme Court in *Rubin (UKSC)*, the UNCITRAL Working Group V drafted a proposed model law to allow for the recognition of foreign insolvency judgments, especially if the judgment comes from the jurisdiction of the debtor's COMI (Neil Hannan, *Cross-Border Insolvency: The Enactment and Interpretation of the UNCITRAL Model Law* (Springer, 2017) at p 244).

77 In this regard, the Applicant submits that the UK's position should not be adopted. The Singapore Ministry of Law has expressed its preference for the US approach in relation to Art 21(1)(*g*) over the UK approach. In the draft Companies (Amendment) Bill 2017 that the Ministry of Law sought public consultation on, the draft Art 21(1)(*g*) of the Model Law provided that the reliefs available included "any additional relief that may be available to a Singapore insolvency officeholder *under the law of*

Singapore" [emphasis added]. However, in the final version of the Model Law, the italicised phrase was deleted. This was intentionally done in order to align the Singapore position with that of the US, rather than the UK, as observed from the Ministry's Response to Feedback from Public Consultation on the Draft Companies (Amendment) Bill 2017 to Strengthen Singapore as an International Centre for Debt Restructuring <https://www.mlaw.gov.sg/files/Annex_A-Goverment_Response_to_Public%20Consult_Feedback_for_Companies_Act_Amendments.pdf/> (accessed 24 May 2022):

> 11.2.1 In respect of Art 21(1)(g), we received a comment that despite similar wording in their respective provisions, the UK and US differ in their approaches on the scope of relief that may be granted. It was therefore suggested that Singapore should signal whether the US or UK approach should be adopted in respect of relief that may be granted under Art 21(1)(g).
>
> 11.2.2 After consideration of this issue, the suggestion has been noted and accepted. Thus, this provision has been amended to align the wording with the US provision in Chapter 15 of the US Bankruptcy Code.

The language of the Model Law as enacted in Singapore (the "Singapore Model Law") is distinct from that of the UK Model Law, as it removes the qualifier that the relief granted must be available "under the laws of [the State]". From the above passage, it is clear that the Ministry of Law was concerned with the "scope of relief that may be granted" under Art 21(1)(*g*) of the Singapore Model Law, and has expressly chosen to align the language of the provision with that under Chapter 15 of the US Bankruptcy Code.

78 In the circumstances, the US approach should be preferred and it is the US jurisprudence which should be persuasive in determining the scope of relief to be granted. The holding in *Rubin (UKSC)* is not endorsed in Singapore and I decline to follow the English authorities that depart from the US position. I accept the Applicant's arguments that the Singapore court is empowered under Art 21(1)(*g*) of the Model Law to grant recognition of the Chapter 11 Plan and Confirmation Order as foreign orders, following the proposition found in the US authorities. I do not consider that the difference in the language of the enacting provisions in the US and Singapore makes a substantial difference. While §1521(a) of the US Bankruptcy Code contains the additional phrase "to effectuate the purpose of this chapter" (see above at [71]), the difference is not material. This is because the purpose of Chapter 15 is *in pari materia* with the objectives stated in the preamble to our Model Law. Additionally, while the version of Art 21(1)(*g*) enacted in Singapore contains the modifier "available to a Singapore insolvency officeholder" after "any additional relief" (see above at [77]), I do not read Art 21(1)(*g*) to be so restricted, in line with the Ministry of Law's comments that the scope of relief that may be granted should follow the US approach and the US provisions contain a similar modifier. This also follows from the fact that the phrase "under the law of

Singapore" was eventually removed, which signifies that an expansive view is to be taken.

79 The section heading of Art 21(1) of the Model Law contains the phrase "any appropriate relief". Invoking the section heading alone would circumvent the issue that the enforcement of a foreign rehabilitation plan is not ordinarily "relief that may be available to a Singapore insolvency officeholder" under Art 21(1)(*g*) of the Model Law. I do note that in the unreported case of *Re CFG Peru Investments Pte Ltd and another* HC/OS 665/2021 (21 September 2021), the Singapore High Court recognised a US Chapter 11 plan and the accompanying confirmation order under the Model Law but did not specify whether the relief was granted under the section heading of Art 21(1) or Art 21(1)(*g*) of the Model Law.

80 Nevertheless, Art 21(1)(*g*) of the Model Law can be read as an extension of Art 21(1) and the principles governing the reliefs available apply equally to both. Little distinction is made by the US courts. In *re Oi SA* ([74] *supra* at 265), the US Bankruptcy Court for the Southern District of New York considered that the reliefs available under §1521(a) of the US Bankruptcy Code (the equivalent of Art 21(1) of the Singapore Model law) encompass the reliefs available under §1521(a)(7) (the equivalent of Art 21(1)(*g*) of the Singapore Model Law):

> Section 1521(a) of the Bankruptcy Code provides that '[u]pon recognition of a foreign proceeding, … where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief….' 11 U.S.C. § 1521(a). Such 'appropriate relief' includes a non-exhaustive list of certain types of relief that is enumerated by the statute, including 'any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a).' 11 U.S.C. § 1521(a)(7). …

Hence, in *re Oi SA* (at 266), the recognition of the Brazilian reorganisation plan (known as the "recuperação judicial plan") and the Brazilian court order confirming the plan was granted as "'appropriate relief' under Section 1521(a)(7)", even though the language of "appropriate relief" is found only in the chapeau of §1521(a) of the US Bankruptcy Code. Following the reasoning in that case, the relief in the present application can be granted pursuant to Art 21(1)(*g*) of the Model Law.

81 However, in granting recognition and enforcement of foreign insolvency judgments and orders, the Singapore court is not merely acting as a rubber stamp. Following the guidance laid down in *re CGG SA* (see above at [73]), the Singapore court must carefully scrutinise the circumstances in which the foreign order was granted and ensure that interested parties were given an opportunity to be heard and that the relevant creditors and shareholders are adequately protected. This requirement is encapsulated in Art 22(1) of the Model Law which provides

that in granting relief under Art 21, the court must be satisfied that the interests of the creditors and other interested persons, including if appropriate the debtor, are "adequately protected". As elaborated upon in the UNCITRAL 2013 Guide (at para 196), the "idea underlying article 22 is that there should be a balance between relief that may be granted to the foreign representative and the interests of the persons that may be affected by such relief". Adequate protection must be afforded to interested parties.

82 Turning to the present circumstances, I note that the Chapter 11 process, leading up to the approval of the Confirmation Order endorsing the Chapter 11 Plan, was conducted under the supervision of and with the approval of the US Bankruptcy Court. The requisite voting requirements for the confirmation of the Chapter 11 Plan were properly satisfied. There was opportunity provided for creditors to appear and be heard before the US Bankruptcy Court. Further, the Singapore creditors had been duly notified about the developments in the Singapore Entities' Chapter 11 Proceedings and the Chapter 11 Plan via public announcements on SGXNet and the Eagle Hospitality Trust website. In relation to the Stapled Security Holders, they had been informed via announcements and the revised Disclosure Statement that it is not expected that they will receive any distributions. Copies of the relevant notices (including the notice of the hearing on confirmation of the Chapter 11 Plan), which set out further information on the process and the options that the Stapled Security Holders may take in connection with the Chapter 11 Plan, were also mailed out to them.

83 Specifically, in relation to the present recognition application, the Applicant has given notice of the application to all creditors by way of announcement on the SGXNet, the EH-REIT website and the Donlin, Recano & Company, Inc website (the claims and noticing agent engaged in providing public access to the court papers filed in the Singapore Entities' Chapter 11 Proceedings). The Applicant informs that he has not received any notice from any creditor of any objection to this present application. Thus, I find that the interests of relevant parties are adequately protected. The recognition of the Chapter 11 Plan and Confirmation Order is therefore granted as appropriate additional relief under Art 21(1)(*g*) of the Model Law in relation to S1 and S2.

Common law

84 As has been noted in a number of instances, I am reluctant to invoke common law recognition where it would seem to have been contemplated that the Model Law would govern the proceedings, either by allowing or prohibiting a particular result. Where the Model Law is applicable to the subject matter, the court would be slow to allow common law recognition to be invoked as an alternative basis as the existence of a detailed recognition regime created by legislation displaces the need for the

common law doctrine to apply (*Re Rooftop* ([33] *supra*) at [58]). In the present case, the Applicant's request for recognition of the Chapter 11 Plan and Confirmation, at least in relation to S1 and S2, is governed by the Model Law, as is apparent from my conclusion above at [83]. Thus, in relation to S1 and S2, common law recognition would not be available. I do not deal with the alternate submissions made by the Applicant on this front.

85 As regards EH-REIT, some form of common law recognition would probably be required, given my finding at [30] above that the Model Law does *not* apply to entities such as EH-REIT. However, I am doubtful whether any application for common law recognition can be pursued without the joining of the EH-REIT Trustee, as I elaborate below.

Relief in respect of the EH-REIT Trustee and common law recognition

86 What is sought by the Applicant is authorisation for the EH-REIT Trustee (namely, DBS Trustee Ltd) to take steps to wind down the entity. In my judgment, this should be done in a separate application with the relevant supporting affidavit. The recognition of the Applicant as the foreign representative and the recognition of the Singapore Entities' Chapter 11 Proceedings does not absolve DBS Trustee Ltdfrom exercising its duties and responsibilities as the EH-REIT Trustee.

87 I cannot see how the Applicant could also have the standing to make an application on behalf of DBS Trustee Ltd. If obligations are owed under Singapore law, which presumably they are, DBS Trustee Ltdshould satisfy the Singapore court that the winding down and other steps contemplated are in accordance with Singapore law, and that it is satisfied, as the EH-REIT Trustee, that these are appropriate under the terms of the trust deed. DBS Trustee Ltd must also demonstrate to the court that no prejudice will be occasioned to the Stapled Security Holders.

88 Furthermore, I cannot see how any matters affecting the winding down of EH-REIT could be brought in this summons: the winding down of a trust is not covered by the empowering Act, *ie*, the IRDA, and is outside the scope of the Model Law as enacted in Singapore. While there is express provision made for business trusts to be wound up in Singapore under the BTA (*eg*, by order of court), there is no such equivalent provision under the SFA for collective investment schemes, such as EH-REIT, that are authorised under it. The dissolution of EH-REIT would have to be done in accordance with the terms of the trust deed, which would specify details such as the manner in which the assets are to be sold and how the remaining assets (if any) are to be distributed to the various unitholders.

89 It may be that a separate application will add to the complexity of the process of implementing the Chapter 11 Plan and Confirmation Order, but that is what our legal framework requires. I cannot give orders for DBS Trustee Ltd to liquidate EH-REIT in these proceedings.

90 Common law recognition may possibly be available for the recognition of the Singapore Entities' Chapter 11 Proceedings in relation to EH-REIT. The common law test may have to be applied instead (see *Re Opti-Medix Ltd (in liquidation) and another matter* [2016] 4 SLR 312). But no comment is made on whether such an application would succeed under common law recognition, and this issue will be determined at the appropriate juncture.

Other reliefs sought

91 In relation to the additional relief sought above at [4(a)]–[4(b)], I do not find that controversial issues are raised and will grant them, save that these are limited to S1 and S2 only (instead of all the Singapore Chapter 11 Entities including EH-REIT).

92 The prayer at [4(a)] is sought so that the Applicant can be properly authorised by the Singapore courts as a "foreign representative" under Art 2(*i*) of the Model Law to perform his duties and obligations set out under the Chapter 11 Plan and Confirmation Order. The UNCITRAL 2013 Guide provides (at para 86) that the "fact of appointment of the foreign representative in the foreign proceeding … is sufficient for the purposes of the Model Law" and the definition of a "foreign representative" is "sufficiently broad to include debtors who remain in possession after the commencement of insolvency proceedings". The Applicant was duly appointed by the US Bankruptcy Court to be the foreign representative of S1 and S2 on 21 January 2021 in relation to the Singapore Entities' Chapter 11 Proceedings. Certified copies of the US Bankruptcy Court orders expressly appointing the Applicant as foreign representative of the respective entities have been provided to the court. Thus, this prayer is granted. The prayer at [4(b)] is also granted to enable the Applicant to administer the assets located in Singapore arising out of any investigations pursuant to the Chapter 11 Plan.

93 However, there should be no expatriation of funds or proceedings to be instituted without obtaining the leave of court.

Conclusion

94 For the abovementioned reasons, the court grants recognition for the Singapore Entities' Chapter 11 Proceedings, the Chapter 11 Plan and the Confirmation Order under the Model Law as enacted in Singapore. However, these are only in respect of S1 and S2. Should there be any intention to repatriate the assets of S1 and S2 from Singapore, the Applicant is required to obtain the leave of the court before proceeding to do so.

95 In respect of EH-REIT, a separate application should be made. In principle, I would think that this should be made by the EH-REIT Trustee, DBS Trustee Ltd. However, I will consider arguments if the application can

be made by the Applicant with at least the participation of the EH-REIT Trustee. It would also be fair and appropriate for the Stapled Security Holders to be given an opportunity to come before the court as well.

Reported by Darien The.

United Securities Sdn Bhd (in receivership and liquidation) and another v United Overseas Bank Ltd

[2021] SGCA 78

Court of Appeal — Civil Appeal No 10 of 2021
Judith Prakash JCA, Steven Chong JCA and Chao Hick Tin SJ
7 May 2021; 10 August 2021

***Insolvency Law** — Cross-border insolvency — Recognition of foreign insolvency proceedings — Malaysian court making winding-up order against company — Company commencing action in Malaysian court — Whether writ action should be recognised as foreign proceeding — Articles 2(*h*) and 17 UNCITRAL Model Law on Cross-Border Insolvency (30 May 1997)*

***Insolvency Law** — Cross-border insolvency — Stay of proceedings — Malaysian court making winding-up order against company — Secured creditor commencing action in Singapore against company — Singapore court recognising Malaysian winding-up proceeding as foreign main proceeding — Whether Singapore action should be stayed — Articles 20 and 21 UNCITRAL Model Law on Cross-Border Insolvency (30 May 1997)*

Facts

The first appellant was United Securities Sdn Bhd (in receivership and liquidation) ("USSB"), and the second appellant was its liquidator. The respondent was United Overseas Bank Ltd ("UOB"), a Singapore bank.

USSB entered into a loan agreement ("the Loan Agreement") with Overseas Union Bank Ltd ("OUB") for OUB to provide USSB with credit facilities. OUB and USSB also entered into a deed of debenture ("the Debenture"), which created a fixed charge in OUB's favour over all of USSB's shares in City Centre Sdn Bhd ("CCSB").

USSB defaulted on the loan granted by OUB. Subsequently, UOB took over all of OUB's interest in the Loan Agreement and the Debenture. On 30 January 2007, a winding-up order was made against USSB in Malaysia ("the Malaysian Winding-Up Proceeding"). Prior to that, CCSB had also been wound up. Parcels of land belonging to CCSB were sold as part of its winding up and the remainder of the proceeds of sale after its debts were paid formed its liquidation surplus ("the Surplus Funds").

Parallel proceedings were subsequently commenced in Malaysia and Singapore concerning the issue of UOB's and USSB's rights and obligations under the Loan Agreement and the Debenture, including their entitlement to the Surplus Funds. In Malaysia, this took the form of a writ action commenced in the High Court in Malaya by USSB ("the Malaysian Writ Action"). In Singapore, UOB commenced HC/OS 414/2020 ("OS 414").

Following the commencement of OS 414, UOB applied to the High Court in Malaya for a stay of the Malaysian Writ Action. Meanwhile, in Singapore, the appellants filed, among other applications, HC/OS 780/2020 ("OS 780") seeking the court's recognition of the Malaysian Winding-Up Proceeding and the Malaysian Writ Action under the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency (30 May 1997) ("the Model Law"), given the force of law in Singapore via s 252 of the Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) ("IRDA"). Consequent to such recognition, the appellants further sought a stay of OS 414 pursuant to Arts 20 and/or 21 of the Model Law as enacted in Singapore ("the SG Model Law"). Prior to the hearing of OS 780, UOB's application for a stay of the Malaysian Writ Action was dismissed by the High Court in Malaya which held that Malaysia was the appropriate forum. UOB appealed against this decision to the Malaysian Court of Appeal.

The High Court judge ("the Judge") dismissed OS 780. The Judge held that the Malaysian Winding-Up Proceeding had to be recognised as a "foreign main proceeding" under the SG Model Law, but that the Malaysian Writ Action was not entitled to recognition as such or as a "foreign non-main proceeding". Furthermore, the Judge held that no stay under Art 20 of the SG Model Law operated in respect of OS 414, and declined to grant any discretionary stay under Art 21 of the SG Model Law. Dissatisfied, the appellants appealed against the Judge's decision.

Shortly before the hearing of the appeal against the Judge's decision, the Malaysian Court of Appeal allowed UOB's appeal in respect of the appropriate forum, holding that Singapore was the more appropriate forum. As a result, the Malaysian Writ Action was stayed. The appellants applied for leave to appeal to the Federal Court of Malaysia, which was still pending at the time of the hearing of the appeal.

Held, dismissing the appeal:

(1) It was not feasible to hold over the hearing of the appeal until the Malaysian Federal Court delivered its decision on the appropriate forum issue. The appellants were asking the court to delay the hearing of the appeal, and in turn the hearing of OS 414, for an indeterminate period of time to await an uncertain outcome that was unlikely to affect the appeal in any event. There was no reason to do so: at [27].

(2) Article 20(1) of the SG Model Law provided that upon recognition of a foreign main proceeding, an automatic stay and suspension arose in respect of certain actions, proceedings and rights. However, Art 20(2) delineated the ambit of any such stay or suspension by making it the same as would have been available under Singapore law had the debtor been wound up in Singapore. Furthermore, Art 20(3) of the SG Model Law provided certain exceptions to the stay and suspension arising under Art 20(1): at [32] and [34] to [36].

(3) Given the Judge's holding that the Malaysian Winding-Up Proceeding was a foreign main proceeding, the single critical issue on appeal was whether a stay of OS 414 ought to be granted under the SG Model Law: at [30] and [31].

(4) As OS 414 concerned the determination of UOB's and USSB's respective rights, obligations and liabilities under the Loan Agreement and Debenture, it was an individual action or individual proceeding "concerning the debtor's property, rights, obligations or liabilities". Therefore, it fell within the scope of the automatic stay arising under Art 20(1)(*a*) of the SG Model Law: at [37].

(5) The next question was what the position would have been if USSB had been wound up under the IRDA. In this regard, it was well established that leave would readily be granted to secured creditors to proceed with enforcing their security, notwithstanding any stay of proceedings. In this case, UOB was *prima facie* a secured creditor and OS 414 was directed at allowing UOB to establish its purported rights as a secured creditor against USSB. Therefore, notwithstanding the recognition of the Malaysian Winding-Up Proceeding and the automatic stay arising therefrom, leave was granted to UOB to proceed with OS 414: at [38], [39] and [44].

(6) There was no reason to grant a discretionary stay of OS 414 under Art 21 of the Model Law. Given that a secured creditor's security was regarded as standing apart from the pool of assets available for *pari passu* distribution amongst unsecured creditors, the grant of a discretionary stay of proceedings was not necessary to protect the debtor's property or the creditors' interests: at [47].

[Observation: There were at least four cumulative attributes required for a proceeding to constitute a "foreign proceeding" under the SG Model Law: (a) the proceeding had to involve creditors collectively; (b) the proceeding had to have its basis in a law relating to insolvency; (c) the court had to exercise control or supervision of the property and affairs of the debtor in the proceeding; and (d) the purpose of the proceeding had to be the debtor's reorganisation or liquidation: at [53].

The Malaysian Writ Action bore none of the attributes required to constitute a "foreign proceeding". First, it was not a collective proceeding. It did not contemplate the consideration and eventual treatment of the rights, obligations and claims of USSB's creditors generally, and did not concern substantially all of USSB's assets and liabilities. Second, the law on which the Malaysian Writ Action was based did not relate to insolvency. Third, the Malaysian Writ Action did not involve the Malayan High Court's control or supervision of USSB's property and affairs. The court's role was simply to determine the issues disputed between the parties. Finally, the purpose of the Malaysian Writ Action was not USSB's reorganisation or liquidation, but to determine the parties' rights, obligations and liabilities under the Loan Agreement and the Debenture, and consequently, the parties' entitlement to the Surplus Funds: at [54], [62], [66], [70] and [75].]

Case(s) referred to

ABC Learning Centres Ltd, Re 445 BR 318 (refd)

Betcorp, Re 400 BR 266 (refd)

British American Insurance Co Ltd, Re 425 BR 884 (refd)

Gold & Honey, Ltd, Re 410 BR 357 (refd)

Kim and Yu v STX Pan Ocean Co Ltd [2014] NZHC 845 (refd)

Korea Asset Management Corp v Daewoo Singapore Pte Ltd [2004] 1 SLR(R) 671; [2004] 1 SLR 671 (folld)
Rubin v Eurofinance SA [2011] Ch 133; [2011] 2 WLR 121, CA (Eng) (distd)
Rubin v Eurofinance SA [2013] 1 AC 236; [2012] 3 WLR 1019, SC (Eng) (refd)
SCK Serijadi Sdn Bhd v Artison Interior Pte Ltd [2019] 1 SLR 680 (folld)
Williams v Simpsons (No 5) [2010] NZHC 1786 (refd)
Zetta Jet Pte Ltd, Re [2019] 4 SLR 1343 (folld)

Legislation referred to

Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) s 252
Bankruptcy Code 11 USC (US) Chapter 15
Corporations Act 2001 (Cth)
Cross-Border Insolvency Regulations 2006 (SI 2006 No 1030) (UK)
Insolvency (Cross-border) Act 2006 (NZ)

Abraham Vergis SC (Providence Law Asia LLC) (instructed), Suresh s/o Damodara, Ong Ziying Clement, Lim Qiu'en and Ning Jie (Damodara Ong LLC) for the appellants;
Lee Eng Beng SC and Cheong Tian Ci Torsten (Rajah & Tann Singapore LLP) for the respondent.

10 August 2021

Judith Prakash JCA (delivering the grounds of decision of the court):

Introduction

1 This appeal arose from a set of parallel proceedings in Singapore and Malaysia which concerned the issue of the respondent's and the first appellant's respective rights and obligations under a loan agreement and deed of debenture. Whereas the respondent is seeking to have the issue determined in Singapore, the appellants seek to have it determined in Malaysia.

2 As part of the appellants' efforts to halt the Singapore proceedings, they applied to the Singapore High Court for recognition of certain Malaysian proceedings under the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency (30 May 1997) ("the Model Law"), given the force of law in Singapore via s 252 of the Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) ("IRDA"). For convenience, we shall refer to the Model Law as enacted in Singapore as "the SG Model Law". The appellants contended that upon recognition of the Malaysian proceedings as either a "foreign main proceeding" or a "foreign non-main proceeding" pursuant to the SG Model Law there should be a stay of the Singapore proceeding. In his oral grounds of decision rendered on 12 January 2021, the High Court judge ("the Judge") recognised one of the Malaysian proceedings as being a

"foreign main proceeding" covered by the SG Model Law, but nevertheless declined to grant a stay of the Singapore proceeding. Dissatisfied, the appellants appealed against the Judge's decision.

3 We heard and dismissed the appeal on 7 May 2021. As the principles applicable to recognition of foreign proceedings under the SG Model Law and the effects of such recognition have not been fully explored in local jurisprudence, this appeal afforded us an opportunity to consider such principles, having regard to the UNCITRAL authorities, textbooks, as well as foreign case law.

The Model Law

4 Before we go on to discuss the facts and issues in this appeal, it may be helpful to make some brief comments on the Model Law. The account that follows is a paraphrase of the account in *UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective*, UN Doc A/CN.9/732 and Add 1–3 (2014) as updated in 2013 (see *UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective: Note by the Secretariat*, UN Doc A/CN.9/778 (2013)) ("*The Judicial Perspective*").

5 The Model Law was developed by UNCITRAL and endorsed by the General Assembly of the United Nations in 1997. The Model Law does not lay down any substantive principles of insolvency law; those are governed by the domestic laws of the individual jurisdictions. Instead, it provides procedural mechanisms to facilitate more efficient disposition of cases in which the insolvent debtor has assets or debts in more than one jurisdiction. The SG Model Law therefore gives effect to four principles:

(a) the "access principle" which sets out the circumstances in which a "foreign representative" of an insolvent debtor has rights of access to the Singapore courts in order to seek recognition and relief;

(b) the "recognition" principle which deals with the Singapore courts' recognition of foreign insolvency proceedings as either a foreign "main" or "non-main" proceeding;

(c) the "relief" principle which deals with both interim and permanent relief that the Singapore court may provide after it recognises foreign proceedings as "main" or "non-main"; and

(d) the co-operation and coordination principle which obliges courts and insolvency representatives in different jurisdictions to communicate with each other and co-operate to ensure the fair administration of the debtor's estate.

6 Most relevant for present purposes are the recognition principle and the relief principle. These prescribe the circumstances in which insolvency proceedings in a foreign jurisdiction should be recognised by Singapore courts and be given effect to by the imposition of a stay of local proceedings

against the debtor in question. Such recognition is only given to those proceedings which qualify as a "foreign main proceeding" or a "foreign non-main proceeding". The definitions of these terms as set out in Art 2 of the SG Model Law are set out below:

> **Article 2. Definitions**
>
> For the purposes of this Law —
>
> …
>
> (*f*) 'foreign main proceeding' means a foreign proceeding taking place in the State where the debtor has its centre of main interests;
>
> (*g*) 'foreign non-main proceeding' means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment;
>
> (*h*) 'foreign proceeding' means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, under a law relating to insolvency or adjustment or debt in which proceeding the property and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation;
>
> …

7 Once the court holds that the relevant foreign proceeding meets either of these definitions, then the provisions of Arts 20 and 21 of the SG Model Law come into play. Articles 20 and 21 read:

> **Article 20. Effects of recognition of a foreign main proceeding**
>
> 1. Upon recognition of a foreign proceeding that is a foreign main proceeding, subject to paragraph 2 of this Article —
>
> (*a*) commencement or continuation of individual actions or individual proceedings concerning the debtor's property, rights, obligations or liabilities is stayed;
>
> (*b*) execution against the debtor's property is stayed; and
>
> (*c*) the right to transfer, encumber or otherwise dispose of any property of the debtor is suspended.
>
> 2. The stay and suspension mentioned in paragraph 1 of this Article are —
>
> (*a*) the same in scope and effect as if the debtor had been made the subject of a winding up order under this Act; and
>
> (*b*) subject to the same powers of the Court and the same prohibitions, limitations, exceptions and conditions as would apply under the law of Singapore in such a case,
>
> and the provisions of paragraph 1 of this Article are to be interpreted accordingly.

3. Without prejudice to paragraph 2 of this Article, the stay and suspension mentioned in paragraph 1 of this Article do not affect any right —

(*a*) to take any steps to enforce security over the debtor's property;

(*b*) to take any steps to repossess goods in the debtor's possession under a hire-purchase agreement (as defined in section 88(1) of this Act);

(*c*) exercisable under or by virtue of or in connection with any written law mentioned in Article 1(3)(*a*) to (*i*); or

(*d*) of a creditor to set off its claim against a claim of the debtor,

being a right which would have been exercisable if the debtor had been made the subject of a winding up order under this Act.

4. Paragraph 1(*a*) of this Article does not affect the right to —

(*a*) commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor; or

(*b*) commence or continue any criminal proceedings or any action or proceedings by a person or body having regulatory, supervisory or investigative functions of a public nature, being an action or proceedings brought in the exercise of those functions.

5. Paragraph 1 of this Article does not affect the right to request or otherwise initiate the commencement of a proceeding under Singapore insolvency law or the right to file claims in such a proceeding.

6. In addition to and without prejudice to any powers of the Court under or by virtue of paragraph 2 of this Article, the Court may, on the application of the foreign representative or a person affected by the stay and suspension mentioned in paragraph 1 of this Article, or of its own motion, modify or terminate such stay and suspension or any part of it, either altogether or for a limited time, on such terms and conditions as the Court thinks fit.

Article 21. Relief that may be granted upon recognition of a foreign proceeding

1. Upon recognition of a foreign proceeding, whether a foreign main proceeding or a foreign non-main proceeding, where necessary to protect the property of the debtor or the interests of the creditors, the Court may, at the request of the foreign representative, grant any appropriate relief, including —

(*a*) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's property, rights, obligations or liabilities, to the extent they have not been stayed under Article 20(1)(*a*);

(*b*) staying execution against the debtor's property to the extent it has not been stayed under Article 20(1)(*b*);

(*c*) suspending the right to transfer, encumber or otherwise dispose of any property of the debtor to the extent this right has not been suspended under Article 20(1)(*c*);

(*d*) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's property, affairs, rights, obligations or liabilities;

(*e*) entrusting the administration or realisation of all or part of the debtor's property located in Singapore to the foreign representative or another person designated by the Court;

(*f*) extending relief granted under Article 19(1); and

(*g*) granting any additional relief that may be available to a Singapore insolvency officeholder, including any relief provided under section 96(4) of this Act.

2. Upon recognition of a foreign proceeding, whether a foreign main proceeding or a foreign non-main proceeding, the Court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's property located in Singapore to the foreign representative or another person designated by the Court, provided that the Court is satisfied that the interests of creditors in Singapore are adequately protected.

3. In granting relief under this Article to a representative of a foreign non-main proceeding, the Court must be satisfied that the relief relates to property that, under the law of Singapore, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

4. No stay under paragraph 1(*a*) of this Article affects the right to commence or continue any criminal proceedings or any action or proceedings by a person or body having regulatory, supervisory or investigative functions of a public nature, being an action or proceedings brought in the exercise of those functions.

8 With that brief introduction to set the scene, we turn to the facts of this case.

Facts

The parties

9 The first appellant is United Securities Sdn Bhd (in receivership and liquidation) ("USSB"), a Malaysian company which was wound up on 30 January 2007 by the Malaysian court. The second appellant is Robert Teo Keng Tuan, USSB's liquidator. USSB is the beneficial owner of all the issued shares in City Centre Sdn Bhd (in liquidation) ("CCSB"), a wholly-owned subsidiary of USSB which had been wound up by the Malaysian court on 25 April 2000.

10 The respondent is United Overseas Bank Ltd ("UOB"), a Singapore bank. USSB is indebted to UOB and that debt is purportedly secured by a charge over USSB's shares in CCSB ("the CCSB Shares").

The Loan Agreement and the Debenture

11 On 17 December 1982, Overseas Union Bank Ltd ("OUB") and USSB entered into a loan agreement ("the Loan Agreement") for OUB to provide USSB with certain credit facilities. On the same date, USSB executed a deed of debenture ("the Debenture") which created a fixed charge ("the Charge") in OUB's favour over all of the CCSB Shares. The following clauses of the Loan Agreement are pertinent.

(a) Clause 25.1 provided that the Loan Agreement and the Debenture "shall be governed by and construed in all respects in accordance with the laws of Singapore".

(b) Clause 25.2 provided that USSB "irrevocably agrees that any legal action or proceedings against it with respect to [the Loan] Agreement and the Debenture may be brought in the courts of Singapore" and that USSB "irrevocably submits … to the non-exclusive jurisdiction of the [Singapore] courts".

(c) Clause 25.6 provided that USSB:

> … irrevocably waives any objection … to the venue of any suit, action or proceeding arising out of or relating to [the Loan] Agreement … selected by [UOB] and … further irrevocably waives any claim that the venue so selected is not a convenient forum for any such suit, action or proceeding.

12 On 27 December 1982, the CCSB Shares which were then registered in the name of USSB were transferred to and registered in the sole name of OUB Nominees (Malaysia) Sdn Bhd pursuant to the Debenture. OUB Nominees (Malaysia) Sdn Bhd subsequently changed its name to UOB Nominees 2006 (Tempatan) Sdn Bhd ("UOB Nominees"). At the time of the appeal before us, UOB Nominees remained the registered holder of the CCSB Shares.

13 On 19 December 1983, USSB defaulted on the loan granted by OUB. In May 1985, pursuant to the Loan Agreement and the Debenture, receivers were appointed over the properties and assets of USSB charged to OUB. In 2002, following OUB's merger with UOB, UOB took over all of OUB's interest in the Loan Agreement and the Debenture.

The winding up of CCSB and USSB

14 A winding-up order against CCSB was made in Malaysia on 25 April 2000. Several years later, on 30 January 2007, a similar order was made against USSB in Companies Winding Up No D5286182005 ("the Malaysian Winding-Up Proceeding").

15 On 12 May 2017, 16 parcels of land belonging to CCSB were sold as part of its winding up. After CCSB's debts were paid, a sum of money remained from the proceeds of sale – this formed CCSB's liquidation

surplus ("the Surplus Funds"). For the purposes of distributing the Surplus Funds, CCSB's liquidators filed an application on 18 September 2017 in the High Court in Malaya, seeking directions as to whether UOB Nominees was the sole and rightful contributory of CCSB.

16 On 12 February 2018, the Malayan High Court held that UOB Nominees was the sole and rightful contributory of CCSB and that the Surplus Funds should be distributed to it. However, this decision was set aside by the Malaysian Court of Appeal on 7 August 2019, on the basis that the form of the application had not been appropriate for the determination of the ownership of the CCSB Shares. UOB Nominees' application for leave to appeal against the Malaysian Court of Appeal's decision was subsequently dismissed by the Malaysian Federal Court. The Malaysian Federal Court then imposed an undertaking on CCSB's liquidators not to distribute the Surplus Funds pending the determination of the rights and obligations of the parties. Hence, at the time of the appeal before us, the Surplus Funds remained with CCSB.

Parallel proceedings in Malaysia and Singapore

17 Subsequently, parallel proceedings were commenced in Malaysia and Singapore concerning the issue of UOB's and USSB's rights and obligations under the Loan Agreement and the Debenture. In Malaysia, this took the form of a writ action commenced in the High Court in Malaya on 9 December 2019 by USSB against UOB, UOB Nominees, CCSB and CCSB's liquidators ("the Malaysian Writ Action"). In the Malaysian Writ Action, USSB sought, among other things, the following relief:

> (a) A declaration that the Surplus Funds and any interest or benefit earned thereon did not form part of the assets or property or undertaking of CCSB subject to the Charge.
>
> (b) A declaration that UOB and/or UOB Nominees had not established a legal entitlement to the Surplus Funds.
>
> (c) A declaration that all such interest in the property and assets subject to the Charge as had been vested in UOB by virtue of the Charge had been extinguished, and that UOB and/or UOB Nominees had no interest in the property and assets subject to the Charge.

18 In Singapore, UOB commenced HC/OS 414/2020 ("OS 414") on 21 April 2020. In OS 414, UOB sought, among other things, the following relief:

> (a) A declaration that UOB's rights under the Debenture were valid and exercisable, including UOB's security over all the rights attached to the CCSB Shares and UOB's entitlement to all the benefits derived from those rights to the extent of the outstanding debt owed by USSB to UOB.

(b) A declaration that UOB's security over all the rights attached to the CCSB Shares pursuant to the Debenture included the right to the Surplus Funds.

(c) A declaration that UOB was not prevented by time-bar from exercising its rights under the Debenture and taking all necessary steps to realise its security in the CCSB Shares and all the rights attached to the CCSB Shares.

(d) A declaration as to the quantum of the outstanding debt owed by USSB to UOB under the Loan Agreement.

19 Following the commencement of OS 414, UOB applied to the High Court in Malaya on 27 May 2020 for a stay of the Malaysian Writ Action. UOB argued that having regard to the jurisdiction clause in the Loan Agreement, Malaysia was not the appropriate forum in which to determine the dispute.

20 Meanwhile, back in Singapore, USSB filed HC/SUM 2635/2020 ("SUM 2635") in OS 414 on 3 July 2020. In SUM 2635, USSB sought to challenge the validity of the service of OS 414 on USSB as well as the Singapore court's jurisdiction over USSB. Alternatively, USSB sought a stay of OS 414 on the basis that Singapore was not the appropriate forum.

21 SUM 2635 was dismissed on 12 August 2020 and USSB appealed against this decision in HC/RA 211/2020 ("RA 211"). Immediately thereafter, the appellants commenced HC/OS 780/2020 ("OS 780") seeking the court's recognition of the Malaysian Winding-Up Proceeding and the Malaysian Writ Action as "foreign main proceedings" or "foreign non-main proceedings" under the SG Model Law. Consequent to such recognition, the appellants further sought a stay of OS 414 pursuant to Arts 20 and/or 21 of the SG Model Law.

22 Before the hearing of OS 780 and RA 211 in Singapore, further developments took place in Malaysia. UOB's application for a stay of the Malaysian Writ Action was dismissed on 1 October 2020 by the High Court in Malaya which held that Malaysia was the appropriate forum. UOB appealed against this decision to the Malaysian Court of Appeal on 13 October 2020.

23 In Singapore, on 12 January 2021, the Judge dismissed OS 780 and RA 211. USSB was refused leave to appeal against the decision in RA 211 (the stay application). As such, a notice of appeal was filed only in respect of OS 780.

24 On 26 April 2021, shortly before this appeal was heard by this court, the Malaysian Court of Appeal delivered its decision allowing UOB's appeal in respect of the appropriate forum. The Malaysian Court of Appeal held that Singapore was the more appropriate forum for the dispute. As a result, the Malaysian Writ Action was stayed. On 4 May 2021, the appellants

applied for leave to appeal to the Federal Court of Malaysia against the Malaysian Court of Appeal's decision. This application for leave to appeal was still pending at the time of the hearing before us.

The decision below

25 We turn now to the reasons for the Judge's dismissal of OS 780. In the proceedings below, the Judge held that the Malaysian Winding-Up Proceeding had to be recognised as a "foreign main proceeding" under the SG Model Law but that the Malaysian Writ Action was not entitled to recognition as such or even as a "foreign non-main proceeding". The Judge found that the Malaysian Writ Action was not a foreign proceeding within the meaning of the SG Model Law as it "lack[ed] the collective nature required and [was] not sufficiently connected to an insolvency or reorganization". In this regard, the Judge observed that the Malaysian Writ Action was concerned with UOB's rights to the Surplus Funds under the Loan Agreement and the Debenture. It would be determined, if at all, on the contract or agreement between the parties. The Malaysian Writ Action was not a collective proceeding under a law relating to insolvency or adjustment of debt, in which the debtor company was under the control of a foreign court for the purposes of reorganisation or liquidation.

26 Furthermore, in relation to the stay of OS 414 sought by the appellants, the Judge observed that "[w]hether or not UOB has any right in respect of [CCSB] and the related matters should be determined in the ordinary course of civil litigation, and does not impinge on the winding up in Malaysia". The Judge thus held that no stay under Art 20 of the SG Model Law operated in respect of OS 414, and declined to grant any discretionary stay under Art 21 of the SG Model Law.

Our decision

Preliminary issues

27 Before setting out our decision proper, we make two preliminary points. First, at the hearing before us, the appellants' counsel, Mr Abraham Vergis SC ("Mr Vergis"), requested that the court hold over the hearing of the appeal until the Malaysian Federal Court delivered its decision on the appropriate forum issue. In our view, this was not feasible. Although it appeared that the appellants intended to apply to expedite the proceedings in Malaysia, there was no indication as to when those proceedings would eventually be concluded. Indeed, the appellants had yet to obtain *leave* to pursue the appeal to the Federal Court, much less have the actual appeal heard and then determined. Furthermore, it had already been finally determined in RA 211 that Singapore was the appropriate forum. As such, a stay of OS 414 could only be granted on the basis that the issues therein were properly to be decided by USSB's liquidators rather than by the Singapore court. This inquiry was independent of whether the Malaysian

Writ Action would be stayed or would be allowed to proceed by the Malaysian Federal Court. In other words, the appellants were asking this court to delay the hearing of the appeal, and in turn the hearing of OS 414, for an indeterminate period of time to await an uncertain outcome that was unlikely to affect the appeal in any event. We saw no reason to do so and thus declined to hold over the hearing of the appeal as requested by Mr Vergis.

28 Second, it ought to be observed that in interpreting the various provisions of the SG Model Law, we took into consideration the texts and guides developed by UNCITRAL as well as the case law from other jurisdictions. We were cognisant of Art 8 of the SG Model Law, which provides that "regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith". As the High Court observed in *Re Zetta Jet Pte Ltd and others (Asia Aviation Holdings Pte Ltd, intervener)* [2019] 4 SLR 1343 at [38]:

> … I bear in mind the preamble to the Singapore Model Law, emphasising co-operation and efficiency between the courts of States involved in cross-border insolvency, and Art 8 of the Singapore Model Law, which requires regard to be paid to the Singapore Model Law's international origin and the promotion of uniformity in its application. I am of the view that the Singapore courts should attempt to tack as closely as possible to the general interpretive trends taken in other jurisdictions that apply the Model Law in its various enactments.

29 Having addressed the preliminary issues, we now turn to our decision in the appeal proper.

Stay of OS 414

30 In our view, the single critical issue on appeal was whether a stay of OS 414 ought to be granted under the SG Model Law in the light of the Judge's holding that the Malaysian Winding-Up Proceeding was a foreign main proceeding. By reason of the decision of the Malaysian Court of Appeal, the Malaysian Writ Action no longer needed to be considered.

31 As UOB had conceded from the beginning that the Malaysian Winding-Up Proceeding was a foreign main proceeding and did not appeal against its recognition as such, the appellants could rely on that recognition to seek a stay of OS 414 under the SG Model Law, regardless of whether the Malaysian Writ Action was also recognised as a foreign proceeding. Accordingly, whether a stay of OS 414 ought to be granted due to the recognition of the Malaysian Winding-Up Proceeding was the dispositive issue and the appeal was decided on this basis.

Article 20 of the SG Model Law

32 We turn first to the relevant provisions under Art 20 of the SG Model Law. These have been set out in full at [7] above. The starting point is

Art 20(1), which provides that upon recognition of a foreign main proceeding, the following consequences arise:

> (a) commencement or continuation of individual actions or individual proceedings concerning the debtor's property, rights, obligations or liabilities is stayed;
>
> (b) execution against the debtor's property is stayed; and
>
> (c) the right to transfer, encumber or otherwise dispose of any property of the debtor is suspended.

33 The above effects arise only upon the recognition of foreign *main* proceedings, which may explain their automatic nature and wider scope relative to the relief afforded under other provisions of the SG Model Law. The purpose of the automatic stay and suspension arising under Art 20(1) is explained in *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation*, UN Doc A/CN.9/442 (1997) as updated in 2013 (see *Revision of the Guide to Enactment of the Model Law on Cross-Border Insolvency and Part Four of the Legislative Guide on Insolvency Law of the United Nations Commission on International Trade Law*, GA Res 68/107, 68th Sess (2013)) (the "*Guide*") at para 37, as follows:

> … Such stay and suspension are 'mandatory' (or 'automatic') in the sense that either they flow automatically from the recognition of a foreign main proceeding or, in the States where a court order is needed for the stay or suspension, the court is bound to issue the appropriate order. The stay of actions or of enforcement proceedings is necessary to provide 'breathing space' until appropriate measures are taken for reorganization or liquidation of the assets of the debtor. The suspension of transfers is necessary because in a modern, globalized economic system it is possible for a multinational debtor to move money and property across boundaries quickly. The mandatory moratorium triggered by the recognition of the foreign main proceeding provides a rapid 'freeze' essential to prevent fraud and to protect the legitimate interests of the parties involved until the court has an opportunity to notify all concerned and to assess the situation.

34 However, the stay and suspension arising under Art 20(1) are subject to Art 20(2) of the SG Model Law, which provides that they are "the same in scope and effect as if the debtor had been made the subject of a winding up order" under the IRDA and "subject to the same powers of the Court and the same prohibitions, limitations, exceptions and conditions as would apply under the law of Singapore in such a case". This qualification is explained in the *Guide* at para 183 as follows:

> Notwithstanding the 'automatic' or 'mandatory' nature of the effects under article 20, it is expressly provided that the scope of those effects depends on exceptions or limitations that may exist in the law of the enacting State. Those exceptions may be, for example, the enforcement of claims by secured creditors, payments by the debtor in the ordinary course of business, initiation of court action for claims that have arisen after the commencement

> of the insolvency proceeding (or after recognition of a foreign main proceeding) or completion of open financial-market transactions.

35 Thus, Art 20(2) delineates the ambit of any stay or suspension arising under Art 20(1) by making such stay or suspension the same as what would have been available under Singapore law had the debtor been wound up in Singapore. As observed in *Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency* (2021) at p 16, Art 20(2) "grant[s] protection to those classes of people who would normally receive protection in insolvency proceedings commenced in the enacting State". In this way, recognition of a foreign proceeding "has its own effects rather than importing the consequences of the foreign law into the insolvency system of the enacting State" (see the *Guide* at para 178). This is in line with the basic approach of the Model Law, which is not to "attempt a substantive unification of insolvency law" but to provide a procedural "framework for cooperation between jurisdictions" in order to "facilitate and promote a uniform approach to cross-border insolvency" (see the *Guide* at para 3; *The Judicial Perspective* at paras 9 and 27).

36 In addition to the qualification contained in Art 20(2), Art 20(3) of the SG Model Law provides certain exceptions to the stay and suspension arising under Art 20(1). Specifically, Art 20(3) stipulates that the stay and suspension do not affect the following rights, provided that such rights would have been exercisable if the debtor had been made the subject of a winding-up order under the IRDA:

> (a) any right to take any steps to enforce security over the debtor's property;
>
> (b) any right to take any steps to repossess goods in the debtor's possession under a hire-purchase agreement;
>
> (c) any right exercisable under or by virtue of or in connection with the statutes set out in Arts 1(3)(*a*)–1(3)(*i*); and
>
> (d) any right of a creditor to set off its claim against a claim of the debtor.

(1) Article 20(1)

37 Applying the above provisions to the present case, the first question was whether OS 414 fell within the ambit of proceedings stayed or suspended pursuant to Art 20(1). As Arts 20(1)(*b*) and 20(1)(*c*) were clearly inapplicable, the only issue was whether OS 414 was an individual action or individual proceeding "concerning the debtor's property, rights, obligations or liabilities" within the meaning of Art 20(1)(*a*). It was not seriously disputed that it was – OS 414 concerned the determination of UOB's and USSB's respective rights, obligations and liabilities under the Loan

Agreement and Debenture. Therefore, OS 414 fell within the scope of the automatic stay arising under Art 20(1)(*a*) of the SG Model Law.

(2) Article 20(2)

38 That was not the end of the matter, however. As we observed above, the automatic stay is the same in scope and effect as if the debtor had been wound up in Singapore. It is also subject to the same powers of the court and the same prohibitions, limitations, exceptions and conditions as would apply under Singapore law in such a situation. The next question therefore was what the position would have been if USSB had been wound up under the IRDA.

39 In this regard, it is well established that leave will readily be granted to secured creditors to proceed with enforcing their security, notwithstanding any stay of proceedings that arises upon the winding up of the debtor. This was explained by this court in *SCK Serijadi Sdn Bhd v Artison Interior Pte Ltd* [2019] 1 SLR 680 ("*Artison*") at [11] as follows:

> … [*T*]*here is in some sense an 'exception' carved out for secured creditors … In general, the court will more readily grant leave to secured creditors to proceed with enforcing their security, notwithstanding the stay …* because their security is regarded as standing apart from the pool of assets available for *pari passu* distribution amongst unsecured creditors. Thus, in *Korea Asset Management Corp v Daewoo Singapore Pte Ltd* [2004] 1 SLR(R) 671 ('*Korea Asset Management*') at [49], V K Rajah JC observed that leave to proceed would readily be given to an applicant who was 'merely attempting to claim from the company, property which *prima facie* belongs to the applicant', and this expressed the law's recognition 'that the rights of a secured creditor or *in rem* rights should not be fettered as a matter of course by the initiation of insolvency proceedings' (see also *Power Knight Pte Ltd v Natural Fuel Pte Ltd* [2010] 3 SLR 82 ('*Power Knight*') at [27]). … [emphasis added]

40 Furthermore, as V K Rajah JC (as he then was) observed in *Korea Asset Management Corp v Daewoo Singapore Pte Ltd* [2004] 1 SLR(R) 671 at [41], an applicant purporting to be a creditor and seeking the court's leave to proceed with its action need only show a *prima facie* case. This refers to a case that "is brought *bona fide*, underpinned by credible facts and is, even without a serious investigation of the factual matrix, capable of succeeding if and when heard".

41 The above sets out the principles that would have applied had USSB been wound up in Singapore. In transposing these principles to the SG Model Law context via Art 20(2), we had regard to the decision of the High Court of New Zealand in *Kim and Yu v STX Pan Ocean Co Ltd* [2014] NZHC 845 ("*STX Pan Ocean*"). In that case, the respondent was the subject of an administration proceeding in Korea. The Korean administration proceeding was recognised in New Zealand as a foreign main proceeding pursuant to the Insolvency (Cross-border) Act 2006 (NZ), which enacted

the Model Law. Nevertheless, the claimants sought the leave of the High Court of New Zealand to continue their statutory claims *in rem* against a ship that had been demise chartered by the respondent. Gilbert J held that notwithstanding the automatic stay that arose upon recognition, the court had a discretion under Art 20(2) to allow a person to commence or continue proceedings. Article 20(2) of the Model Law as enacted in New Zealand provided as follows (see *STX Pan Ocean* at [20]):

> Paragraph (1) of this article does not prevent the Court, on the application of any creditor or person, from making an order, subject to such conditions as the Court thinks fit, that the stay or suspension does not apply in respect of any particular action or proceeding, execution, or disposal of assets.

42 In construing this provision, Gilbert J observed at [23] that:

> … The Law Commission considered that each of the consequences that flow from art 20 would occur as a result of most formal insolvency regimes in New Zealand and that the discretion reserved under art 20(2) should enable the High Court to exercise the same type of discretion to override the consequences of stay or suspension as it has under other insolvency provisions. …

43 Gilbert J found on the facts that the claimants had obtained security against the ship immediately upon issue of the admiralty proceedings, which took place prior to the commencement of the Korean administration proceeding. The respondent's rights to the ship were therefore subject to the claimants' "secured claims". Thus, "[c]onsistent with usual practice … where leave would normally be given for secured creditors to commence or continue proceedings to establish their security", the claimants were granted leave to continue their claims against the ship (see *STX Pan Ocean* at [29]–[30], [43]). In other words, the ordinary principles and practice that applied under New Zealand insolvency law applied virtually identically to the stay or suspension arising under Art 20(1) of the Model Law.

44 In this case, it was clear that UOB was *prima facie* a secured creditor. On the face of the evidence, the Debenture created the Charge over the CCSB Shares as security for any sums disbursed under the Loan Agreement. The Malaysian companies' register also reflected UOB as being a registered chargee of USSB, with the charge status stated as "unsatisfied". Furthermore, OS 414 was directed at allowing UOB to establish its purported rights as a secured creditor against USSB. The fact that the appellants were disputing UOB's security interest was insufficient to displace this *prima facie* conclusion. Therefore, notwithstanding the recognition of the Malaysian Winding-Up Proceeding and the automatic stay arising therefrom, we granted leave to UOB to proceed with OS 414.

Article 21 of the SG Model Law

45 For completeness, we consider whether, alternatively, a stay of OS 414 ought to have been granted under Art 21 of the SG Model Law. Although

this point was not pursued by the appellants on appeal, it had been argued in the proceedings below and was addressed by the Judge in his oral grounds of decision.

46 The relevant provision was Art 21(1)(*a*) of the SG Model Law:

> 1. Upon recognition of a foreign proceeding, whether a foreign main proceeding or a foreign non-main proceeding, where necessary to protect the property of the debtor or the interests of the creditors, the Court may, at the request of the foreign representative, grant any appropriate relief, including —
>
> (*a*) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's property, rights, obligations or liabilities, to the extent that they have not been stayed under Article 20(1)(*a*);

47 In our judgment, there was no reason to grant a discretionary stay of OS 414 under Art 21 of the SG Model Law. As we concluded at [44] above, UOB was *prima facie* a secured creditor and OS 414 was directed towards enabling UOB to establish its purported security rights against USSB. Given that a secured creditor's "security is regarded as standing apart from the pool of assets available for *pari passu* distribution amongst unsecured creditors" (see *Artison* ([39] *supra*) at [11], cited at [39] above), the grant of a discretionary stay of proceedings was not necessary to protect the property of the debtor or the interests of the creditors.

48 For these reasons, notwithstanding the recognition of the Malaysian Winding-Up Proceeding as a foreign main proceeding, we did not order a stay of OS 414 either under Art 20 or 21 of the SG Model Law.

Recognition of the Malaysian Writ Action

49 As we observed at [30] above, the appeal was decided on the basis of whether OS 414 ought to be stayed following the recognition of the Malaysian Winding-Up Proceeding. There was therefore no need for us to determine the issue of recognition of the Malaysian Writ Action. However, given that this was one of the first few cases concerning the requirements for recognition of a "foreign proceeding" under the SG Model Law, we consider it useful to nevertheless provide our views on the issue.

50 The relevant provisions of Art 17 of the SG Model Law read as follows:

> **Article 17. Decision to recognise a foreign proceeding**
>
> 1. Subject to Article 6, a proceeding must be recognised if —
>
> (*a*) it is a foreign proceeding within the meaning of Article 2(*h*);
>
> (*b*) the person or body applying for recognition is a foreign representative within the meaning of Article 2(*i*);

> (*c*) the application meets the requirements of Article 15(2) and 15(3); and
>
> (*d*) the application has been submitted to the Court mentioned in Article 4.
>
> 2. The foreign proceeding must be recognised —
>
> (*a*) as a foreign main proceeding if it is taking place in the State where the debtor has its centre of main interests; or
>
> (*b*) as a foreign non-main proceeding, if the debtor has an establishment within the meaning of Article 2(*d*) in the foreign State.

51 The main point of contention between the parties was Art 17(1)(*a*) – whether the Malaysian Writ Action was a *foreign proceeding* within the meaning of Art 2(*h*). Article 2(*h*) defines a "foreign proceeding" as:

> (*h*) … a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, under a law relating to insolvency or adjustment or debt in which proceeding the property and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation;

52 This definition is explained in the *Guide* at para 66 as follows:

> The attributes required for a foreign proceeding to fall within the scope of the Model Law include the following: basis in insolvency-related law of the originating State; involvement of creditors collectively; control or supervision of the assets and affairs of the debtor by a court or another official body; and reorganization or liquidation of the debtor as the purpose of the proceeding …

53 There are, therefore, at least four attributes required for a proceeding to constitute a "foreign proceeding" under the SG Model Law, which "are cumulative" and "should be considered as a whole" (see the *Guide* at para 68). These attributes are as follows.

(a) The proceeding must involve creditors collectively.

(b) The proceeding must have its basis in a law relating to insolvency.

(c) The court must exercise control or supervision of the property and affairs of the debtor in the proceeding.

(d) The purpose of the proceeding must be the debtor's reorganisation or liquidation.

54 In our view, the Malaysian Writ Action bore none of these attributes. Accordingly, it was *not* a foreign proceeding within the meaning of Art 2(*h*) of the SG Model Law. We examine each of the attributes in turn.

Collective proceeding

55 The first attribute concerns whether the proceeding involves the creditors collectively. The term "collective proceeding" was explained in the *Guide* at paras 69–70 as follows:

> 69. For a proceeding to qualify for relief under the Model Law, it must be a collective proceeding because *the Model Law is intended to provide a tool for achieving a coordinated, global solution for all stakeholders of an insolvency proceeding.* It is not intended that the Model Law be used merely as a collection device for a particular creditor or group of creditors who might have initiated a collection proceeding in another State. Nor is it intended that the Model Law serve as a tool for gathering up assets in a winding up or conservation proceedings that does not also include provisions for addressing the claims of creditors. …
>
> 70. *In evaluating whether a given proceeding is collective for the purpose of the Model Law, a key consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding*, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors. … Examples of the manner in which a collective proceeding … might deal with creditors include providing creditors that are adversely affected by the proceeding with a right (though not necessarily the obligation): to submit claims for determination and to receive an equitable distribution or satisfaction of those claims, to participate in the proceedings, and to receive notice of the proceedings in order to facilitate their participation. …
>
> [emphasis added]

56 *Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law* (Look Chan Ho gen ed) (Globe Law & Business, 3rd Ed, 2012) ("*Look Chan Ho*") observes at p 158 that for a proceeding to be collective, it must concern all creditors of the debtor generally. Richard Fisher and Adam Al-Attar in Richard Fisher & Adam Al-Attar, "The UNCITRAL Model Law" in *Cross-Border Insolvency* (Richard Sheldon gen ed) (Bloomsbury Professional, 4th Ed, 2015) provide examples of proceedings that are collective in nature – winding-up or bankruptcy proceedings, and even certain forms of reorganisation proceedings (see paras 3.39, 3.42 and 3.43). At para 3.36, they explain that:

> The basic notion of a collective proceeding is aimed at identifying those cases where there is a single insolvency representative able to control the realisation or assets for the purpose of *pro rata* distribution among all creditors, as opposed to a proceeding designed to assist a particular creditor to obtain payment or a process designed for some purpose other than to address the insolvency of the debtor.

57 Other jurisdictions have adopted similar positions. In *Williams v Simpsons (No 5)* [2010] NZHC 1786, the High Court of New Zealand held at [5] that:

> … The term 'collective' distinguishes a formal insolvency regime (under which the debtor's assets are realised for the benefit of all creditors) from private proceedings against a debtor, in which a single creditor seeks judgment for its own benefit.

58 Similarly, in *Re Betcorp* 400 BR 266 ("*Betcorp*"), the US Bankruptcy Court observed at 281 that "[a] collective proceeding is one that considers the rights and obligations of all creditors". Applying that principle, the US Bankruptcy Court held that a voluntary liquidation commenced under Australian law was a foreign proceeding falling within the scope of chapter 15 of the US Bankruptcy Code 11 USC (US), which implemented the Model Law (see *Betcorp* at 285).

59 *Betcorp* was cited and applied in *In Re Gold & Honey, Ltd* 410 BR 357 ("*Gold & Honey*"), where the US Bankruptcy Court declined to recognise an Israeli receivership proceeding as a foreign proceeding under chapter 15 of the US Bankruptcy Code. The US Bankruptcy Court held that the Israeli receivership proceeding was not a collective proceeding, observing that the receivership proceeding did not require the receivers to consider the rights and obligations of all creditors. Instead, it was more akin to an individual creditor's replevin or repossession action. It was primarily designed to allow the creditor to collect its debts, rather than a proceeding instituted by a debtor for the purposes of paying off all creditors with court supervision (see *Gold & Honey* at 370). It is notable that although the Israeli receivership proceeding concerned all of the debtor's assets present in Israel (see *Gold & Honey* at 371), this was not sufficient to ground a finding that it was collective in nature. As *Look Chan Ho* observes at p 159, citing *Gold & Honey*, "[r]eceivership in consequence of enforcement of security is naturally not collective, even where the receivership covers most of the debtor's assets".

60 A similar distinction was drawn in *In re ABC Learning Centres Ltd* 445 BR 318 ("*ABC Learning Centres*") between receivership proceedings concerned only with the secured creditors' interests and insolvency proceedings falling within the scope of the Model Law. In *ABC Learning Centres*, the US Bankruptcy Court was faced with an application for recognition of certain Australian liquidation proceedings. At the time, the debtor was also under a set of receivership proceedings commenced by several of the debtor's secured creditors. It was agreed that the receivership proceedings were not collective in nature as they were, by design, for the benefit of the secured creditors. The US Bankruptcy Court commented on the distinction between the liquidation proceedings and the receivership proceedings in *ABC Learning Centres* at 330, as follows:

> … Liquidators and Receivers have clearly delineated roles under the Corporations Act. Liquidators are appointed by the creditors as a whole and are responsible for winding up the affairs of a company and ultimately dissolving it; specific duties include: collecting assets; establishing deadlines

> for proving claims; distributing assets per the priorities set forth in the Corporations Act; convening required meetings; maintaining records; creating and distributing required reports to various parties … and conducting investigations into possibly voidable transactions. … Receivers, on the other hand, are appointed by a secured creditor and their primary role is to recover secured assets for the benefit of the secured creditor and return any surplus to the company. …

61 *Betcorp* and *Gold & Honey* were cited with approval in *In Re British American Insurance Company Limited* 425 BR 884, where the US Bankruptcy Court held at 902 that:

> For a proceeding to be collective … *it must be instituted for the benefit of creditors generally rather than for a single creditor or class of creditors*. … The Guide to Enactment suggests that a foreign proceeding must *contemplate the 'involvement of creditors collectively.'* …
>
> From the foregoing, the Court concludes that the word 'collective' … *contemplates both the consideration and eventual treatment of claims of various types of creditors, as well as the possibility that creditors may take part in the foreign action*. Notice to creditors, including general unsecured creditors, may play a role in this analysis.
>
> [emphasis added]

62 Having regard to the above principles, we were of the view that the Malaysian Writ Action was not a collective proceeding. It did not contemplate the consideration and eventual treatment of the rights, obligations and claims of USSB's creditors generally. Nor did it concern substantially all of USSB's assets and liabilities. Instead, it focused on *one particular aspect* of USSB's assets, specifically, USSB's purported entitlement to the Surplus Funds. If determined, it would address USSB's legal rights and obligations *vis-à-vis* only *one* of its creditors, namely, UOB. Furthermore, the Malaysian Writ Action was a civil action between USSB as the plaintiff, and UOB, UOB Nominees, CCSB, and CCSB's liquidators as the defendants. Out of all these parties, only UOB was USSB's creditor. Although UOB's receiver and one of USSB's creditors had been granted leave by the Malayan High Court to intervene in the Malaysian Writ Action, it bears emphasis that these parties had to seek the court's leave to intervene in the first place and had no automatic right to participate in the proceedings. Furthermore, on appeal by UOB, the Malaysian Court of Appeal eventually set aside the Malayan High Court's order allowing USSB's creditor to intervene in the Malaysian Writ Action. All of these points indicated that the Malaysian Writ Action was not collective in nature.

Basis in a law relating to insolvency

63 The second attribute concerns whether the proceeding has its basis in a law relating to insolvency. The *Guide* explains this attribute at para 73 as follows:

> This formulation is used in the Model Law to acknowledge the fact that liquidation and reorganization might be conducted under law that is not labelled as insolvency law (e.g. company law), but which nevertheless deals with or addresses insolvency or severe financial distress. The purpose was to find a description that was sufficiently broad to encompass a range of insolvency rules irrespective of the type of statute or law in which they might be contained and irrespective of whether the law that contained the rules related exclusively to insolvency. …

64 *Look Chan Ho* opines at pp 162–163 that:

> As 'law relating to insolvency' is not a defined term, the … court ought to rely on the plain meaning of the term and its general connotation consistent with ordinary English usage:
>
> > *Insolvency law can be described as the prevention, regulation, or supervision of discontinuity in the legal relations of a person (legal entity) that is in financial difficulties, including the discontinuity of that person itself.*
>
> [emphasis in original]

65 It was apparent that the phrase "under a law relating to insolvency" had been deliberately framed in a broad manner so as to cater to the wide range of laws that were intended to fall within the scope of the Model Law. The *Guide* explains this approach at para 65 as follows:

> The definitions of proceedings or persons emanating from foreign jurisdictions avoid the use of expressions that may have different technical meanings in different legal systems and instead describe their purpose or function. This technique is used to avoid inadvertently narrowing the range of possible foreign proceedings that might obtain recognition and to avoid unnecessary conflict with terminology used in the laws of the enacting State. … [T]he expression 'insolvency proceedings' may have a technical meaning in some legal systems, but is intended in subparagraph *(a)* to refer broadly to proceedings involving debtors that are in severe financial distress or insolvent.

66 In light of the above, the court in determining whether a proceeding is conducted "under a law relating to insolvency" should adopt a commonsense approach which focuses on the *substance* of the relevant law. Specifically, whether the relevant law "deals with or addresses insolvency or severe financial distress". Here, although the Malaysian Writ Action, *factually speaking*, concerned insolvent companies and surplus funds arising out of a liquidation, the *law* on which the Malaysian Writ Action was based did not relate to insolvency. Rather, it was an ordinary civil action commenced under the Malayan High Court's civil jurisdiction, to be determined based on a number of different types of law, none of which dealt with insolvency or severe financial distress. We were therefore of the view that the Malaysian Writ Action did not have its basis in a law relating to insolvency.

Control or supervision by the court of the debtor's property and affairs

67 The third attribute concerns whether the proceeding involves the court's exercise of control or supervision of the debtor's property and affairs. Such control or supervision must be "formal in nature", although they "may be potential rather than actual" and may be exercised directly by the court or indirectly through an insolvency representative (see the *Guide* at para 74). It is notable that "both assets *and* affairs of the debtor should be subject to control or supervision; it is not sufficient if only one or the other are covered by the foreign proceeding" [emphasis added] (see the *Guide* at para 76).

68 A straightforward example of a proceeding that involves the court's control or supervision of the debtor's property and affairs is a liquidation proceeding. In *Betcorp* ([58] *supra*), the US Bankruptcy Court found that an Australian voluntary liquidation proceeding was subject to the supervision of the Australian court. In reaching this decision, the US Bankruptcy Court considered that the liquidators and creditors could request the Australian court to determine any question arising in the winding up of a company, and that the Australian court had a broad mandate to review the actions of liquidators (see *Betcorp* at 22). Similarly, the US Bankruptcy Court found in *ABC Learning Centres* ([60] *supra*) at 331–332 that the Australian court had control of and played a supervisory role in the Australian liquidation proceedings, as provided for by numerous sections of the Corporations Act 2001 (Cth).

69 Further examples of proceedings that involve the requisite control and supervision by the court are provided in the *Guide* at paras 74–75: a debtor-in-possession; expedited proceedings in which the court exercises control or supervision at a late stage of the insolvency process; and proceedings in which the court has exercised control or supervision, but at the time of the application for recognition is no longer required to do so.

70 In this case, it was clear that the Malaysian Writ Action did not involve the Malayan High Court's control or supervision of USSB's property and affairs. The court's role in the Malaysian Writ Action was simply to determine the issues disputed between the parties, as it would do in any ordinary civil action. Although USSB's property and affairs *were* subject to the control and supervision of the Malaysian courts, this was by virtue of the Malaysian Winding-Up Proceeding, rather than the Malaysian Writ Action.

Purpose of reorganisation or liquidation

71 The fourth and final attribute concerns whether the purpose of the proceeding is the reorganisation or liquidation of the debtor. The *Guide* provides several examples of proceedings that *do not* satisfy this requirement at paras 77–78:

(a) proceedings that are designed to prevent dissipation and waste, rather than to liquidate or reorganise the insolvent estate;

(b) proceedings designed to prevent detriment to investors rather than to all creditors;

(c) proceedings in which the powers conferred and the duties imposed upon the foreign representative are more limited than the powers or duties typically associated with liquidation or reorganisation (*eg*, the power to do no more than preserve assets); and

(d) financial adjustment measures or arrangements undertaken between the debtor and some of its creditors on a purely contractual basis concerning some debt, where the negotiations do not lead to the commencement of an insolvency proceeding conducted under the insolvency law.

72 At this juncture, we address the appellants' reliance on the English Court of Appeal's decision in *Rubin and another v Eurofinance SA and others* [2011] 2 WLR 121 ("*Rubin*"). In *Rubin*, the English Court of Appeal held that adversary proceedings – the equivalent of undervalue transaction and preference claims – formed "part and parcel" of the insolvency proceedings and thus could be given the same recognition under the Model Law as set out in the Cross-Border Insolvency Regulations 2006 (SI 2006 No 1030) (UK). This was because such adversary proceedings were "part of collecting the bankrupt's assets with a view to distributing them to creditors", as well as "part of the plan which the bankruptcy court approved" and "an integral part" of the insolvency proceedings (see *Rubin* at [25] and [60]). By analogy to such adversary proceedings, the appellants sought to argue that the Malaysian Writ Action should similarly be recognised under the SG Model Law.

73 In our view, however, the appellants' reliance on *Rubin* was misplaced. Even if *Rubin* was correct in concluding that adversary proceedings may be recognised as foreign proceedings under the Model Law, the Malaysian Writ Action was clearly distinguishable from adversary proceedings. The proceedings recognised in *Rubin* arose from the use of mechanisms specially available in the insolvency regime to allow the debtor's legal representative to bring actions against third parties for the collective benefit of all creditors. Such proceedings were therefore central to the collective nature of bankruptcy (see *Rubin* at [61]). In contrast, the Malaysian Writ Action was not part of any insolvency plan approved by the Malaysian court nor an integral part of the Malaysian Winding-Up Proceeding. Nor did the Malaysian Writ Action arise from any mechanism specially available in the insolvency regime. In this regard, we agreed with the Judge's observations:

…

(b) I was referred to the example of adversary proceedings in US cases, but these were, in contrast, quite different. I note most adversary proceedings are similar to unfair preference or clawback proceedings under Commonwealth insolvency law: they are actions by the estate to recover assets or proceeds of the estate which were unlawfully taken away to avoid being caught by the insolvency.

(c) In contrast, the Malaysian [W]rit [A]ction was the determination of issues of property or ownership rights and obligations that are no different from any that could arise in any civil proceeding. The only thing possibly colouring it with the nature of an insolvency or collective claim was that it involved the foreign insolvency representative. It is true that the determination by the Malaysian courts would affect the size of the estate in the end, but it does so through the operation not of insolvency or reorganization law. Extending the operation of Model Law recognition to this extent could effectively extend recognition to all manner of foreign civil judgments, beyond the ambit of the [IRDA].

…

74 For completeness, we note that *Rubin* was subsequently overturned on appeal by the UK Supreme Court in *Rubin and another v Eurofinance SA and others (Picard and others intervening); In re New Cap Reinsurance Corpn Ltd (in liquidation; New Cap Reinsurance Corpn Ltd and another v Grant and others* [2012] 3 WLR 1019, although on a different point of law. On appeal, as it was no longer disputed that the adversary proceedings should be recognised under the Model Law, the point was not specifically considered by the UK Supreme Court.

75 The purpose of the Malaysian Writ Action was *not* USSB's reorganisation or liquidation. Instead, it was to determine the parties' rights, obligations and liabilities under the Loan Agreement and Debenture, which would in turn affect the parties' entitlement to the Surplus Funds.

76 In light of the above analysis, we took the view that the Malaysian Writ Action did not possess any of the cumulative attributes required for it to constitute a "foreign proceeding" within the meaning of Art 2(*h*) of the SG Model Law. Accordingly, we agreed with the Judge's decision not to recognise the Malaysian Writ Action as a foreign proceeding under Art 17 of the SG Model Law, whether as a foreign main proceeding or a foreign non-main proceeding.

Conclusion

77 For all of the above reasons, we dismissed the appeal.

Reported by Cheng Le En Leanne.