A

Chancery Division

Fibria Celulose S/A *v* Pan Ocean Co Ltd and another

Pan Ocean Co Ltd and another *v* Fibria Celulose S/A

[2014] EWHC 2124 (Ch)

B

2014 April 2, 3, 4; June 30

Morgan J

Insolvency — Cross-border insolvency — Foreign proceedings — Shipowner and charterer entering into contract of affreightment governed by English law — Contract providing right of termination by either party on insolvency of other party — Shipowner entering insolvency process in Republic of Korea — Process recognised by Companies Court as foreign main proceedings for purposes of cross-border insolvency law — Shipowner's administrator contending termination provision unenforceable under Korean insolvency law and applying for order restraining service of termination notice by charterer — Whether service of notice "commencement or continuation of individual actions or individual proceedings" allowing recognising court to grant stay — Whether court having power to apply foreign insolvency law in granting "any appropriate relief" under English Regulations — Whether court restricted to relief available in domestic insolvency proceedings — Cross-Border Insolvency Regulations 2006 (SI 2006/1030), Sch 1, art 21(1)

C

D

The shipowner, a company incorporated under the laws of the Republic of Korea, entered into a long-term contract of affreightment with the charterers. The contract was governed by English law and provided for London arbitration. Clause 28 provided for termination with immediate effect on notice in writing for default including insolvency. The shipowner became insolvent and an insolvency process of rehabilitation was commenced in the Republic of Korea, which was recognised by the Companies Court as foreign main proceedings for the purposes of the Cross-Border Insolvency Regulations 2006[1]. The charterer did not want to pay freight in excess of the then market rate and sought to rely on clause 28 to terminate the contract. The shipowner's administrator contended that, while it was admittedly valid under English law, as a matter of Korean insolvency law the contracts termination provision was unenforceable. The administrator sought an order restraining the charterer from serving a termination notice, either pursuant to the court's power to stay the "commencement or continuation of individual actions or proceedings" under article 21(1)(a) of Schedule 1 to the 2006 Regulations or, alternatively, pursuant to the power in article 21(1) to grant "any appropriate relief".

E

F

On the administrator's application—

G

Held, dismissing the application, that the service of a notice to terminate under clause 28.1 of the contract was not the commencement or continuation of an individual action or proceeding within article 21(1)(a) of Schedule 1 to the Cross-Border Insolvency Regulations 2006; that, accordingly, the court did not have power under article 21(1)(a) to restrain the charterer from serving a termination notice under clause 28.1; that although the words "any appropriate relief" in article 21(1) of Schedule 1 to the 2006 Regulations were capable of a very wide meaning, that width demanded caution in construing the words literally; that, in light, in particular, of the documents to which the court was directed to have regard by the 2006 Regulations, the phrase "any appropriate relief" was not intended to allow the recognising court to go beyond the relief it would grant in relation to a domestic insolvency; that, in any

H

[1] Cross-Border Insolvency Regulations 2006, Sch 1, art 21(1): see post, appendix.

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event, the parties had chosen English law as the governing law of the contract, and that being so, it was appropriate to apply English law to the substantive issue of whether the charterer was entitled to terminate the contract; and that, accordingly, even if the court had jurisdiction pursuant to the words "any appropriate relief" in article 21 to grant the administrator relief which would be available to him in the Korean court, it would not be appropriate to exercise it (post, paras 75, 79, 105, 107, 108, 109–113).

Bristol Airport plc v Powdrill [1990] Ch 744, CA and *In re Olympia & York Canary Wharf Ltd* [1993] BCLC 453 considered.

The following cases are referred to in the judgment:

Allied Domecq (Holdings) plc v Trustee of Jinro Co Ltd 6 September 2007, Korean Sup Ct

Atlas Bulk Shipping A/S, In re [2011] EWHC 878 (Ch); [2012] Bus LR 1124

Atlas Shipping A/S, In re (2009) 404 BR 726, US Bankruptcy Ct, Southern District of New York

AWB (Geneva) SA v North America Steamships Ltd [2007] EWHC 1167 (Comm); [2007] 1 CLC 749; [2007] EWCA Civ 739; [2007] 2 Lloyd's Rep 315, CA

Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd (Revenue and Customs Comrs intervening) [2011] UKSC 38; [2012] 1 AC 383; [2011] 3 WLR 521; [2011] Bus LR 1266; [2012] 1 All ER 505, SC(E)

Bristol Airport plc v Powdrill [1990] Ch 744; [1990] 2 WLR 1362; [1990] 2 All ER 493, CA

Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc [2006] UKPC 26; [2007] 1 AC 508; [2006] 3 WLR 689; [2006] 3 All ER 829; [2006] 2 All ER (Comm) 695, PC

Condor Insurance Ltd, In re (2010) 601 F 3d 319, US Ct of Appeals, Fifth Circuit

Doman Industries, In re 2003 BCSC 376; 41 CBR (4th) 29, Sup Ct of British Columbia

Gandi Innovations Holdings LLC, In re (unreported) 5 June 2009, US Bankruptcy Ct, Western District of Texas

Hartford Computer Hardware Inc, In re 2012 ONSC 964; 94 CBR (5th) 20, Ontario Sup Ct

Korea Real Estate Investment & Trust Co Ltd v Receiver of Poonglim Co Ltd 17 July 2013, Korean Ct

Lehman Bros Holdings Inc, In re (2010) 422 BR 407, US Bankruptcy Ct, Southern District of New York

Metcalfe & Mansfield Alternative Investments, In re (2010) 421 BR 685, US Bankruptcy Ct, Southern District of New York

Metzeler, In re (1987) 78 BR 674, US Bankruptcy Ct, Southern District of New York

Norcen Energy Resources Ltd v Oakwood Petroleums Ltd (1988) 72 CBR (2d) 1, Alberta Ct of Queen's Bench

Olympia & York Canary Wharf Ltd, In re [1993] BCLC 453

Playdium Entertainment Corpn, In re (2001) 31 CBR (4th) 302, Ontario Sup Ct

Radcliff Corpn v Receiver of Samsun Logix, 11 January 2010, Korean Ct

Rubin v Eurofinance SA [2012] UKSC 46; [2013] 1 AC 236; [2012] 3 WLR 1019; [2013] Bus LR 1; [2013] 1 All ER 521; [2013] 1 All ER (Comm) 513; [2012] 2 Lloyd's Rep 615, SC(E)

Sino-Forest Corpn, In re (2013) 501 BR 655, US Bankruptcy Ct, Southern District of New York

T Eaton Co, In re (1997) 46 CBR (3d) 293, Ontario Sup Ct

Toft, In re (2011) 453 BR 186, US Bankruptcy Ct, Southern District of New York

Tongyang Networks Co Ltd (Trustee of) v Standard Chartered Bank Ltd 24 January 2014, Korean Ct

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A The following additional cases were cited in argument:

Adams v National Bank of Greece SA [1961] AC 255; [1960] 3 WLR 8; [1960] 2 All ER 421, HL(E)
ARO Co Ltd, In re [1980] Ch 196; [1980] 2 WLR 453; [1980] 1 All ER 1067, CA
Banque Indosuez SA v Ferromet Rescources Inc [1993] BCLC 112
Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd, In re (2007) 374 BR 122, US Bankruptcy Ct, Southern District of New York; (2008) 389 BR
B 325, US District Ct, Southern District of New York
Canon (Scotland) Business Machines Ltd v GA Business Systems Ltd [1993] BCLC 1194
Chesterfield United Inc, In re [2012] EWHC 244 (Ch); [2013] 1 BCLC 709
Cosco Bulk Carrier Co Ltd v Armada Shipping SA [2011] EWHC 216 (Ch); [2011] 2 All ER (Comm) 481
D/S Norden A/S v Samsun Logix Corpn [2009] EWHC 2304 (Ch); [2009] BPIR 1367
C *Exchange Securities & Commodities Ltd, In re* [1983] BCLC 186
Firswood v Petra Bank [1996] CLC 608, CA
Gibbs (Antony) & Sons v La Société Industrielle et Commerciale des Métaux (1890) 25 QBD 399, CA
Global Distressed Alpha Fund 1 Ltd Partnership v PT Bakrie Investindo [2011] EWHC 256 (Comm); [2011] 1 WLR 2038; [2011] Bus LR 970; [2011] 2 All ER (Comm) 385
D *HIH Casualty and General Insurance Ltd, In re* [2008] UKHL 21; [2008] Bus LR 905; [2008] 1 WLR 852; [2008] 3 All ER 869, HL(E)
Independent Insurance Co Ltd, In re [2005] NSWSC 587
Joint Administrators of Heritable Bank plc v Winding Up Board of Landsbanki Islands HF [2013] UKSC 13; [2013] 1 WLR 725; [2013] 2 All ER 355; [2013] 1 All ER (Comm) 1257, SC(Sc)
JSC BTA Bank, In re (2010) 434 BR 334, US Bankruptcy Ct, Southern District of
E New York
Larsen v Navios International Inc [2011] EWHC 878 (Ch); [2012] Bus LR 1124
Lornamead Acquisitions Ltd v Kaupthing Bank HF [2011] EWHC 2611 (Comm); [2013] 1 BCLC 73
Lightsquared LP, In re 2012 ONSC 2994; CBR (5th) 321, Superior Ct of Ontario
McCarthy (J) & Sons of Prescott Ltd, In re (1916) 32 DLR 441
National Bank of Greece and Athens SA v Metliss [1958] AC 509; [1957] 3 WLR 1056; [1957] 3 All ER 608, HL(E)
F *O'Sullivan v Loy; Loy, In re* (2010) 432 BR 551, US District Ct, Eastern District of Virginia
OT Africa Line Ltd v Magic Sportswear Corpn [2005] EWCA Civ 710; [2006] 1 All ER (Comm) 32; [2005] 2 Lloyd's Rep 170, CA
T & N Ltd, In re [2004] EWHC 2878 (Ch), [2005] BCC 982
United Drug (UK) Holdings Ltd v Bilcare Singapore Pte Ltd [2013] EWHC 4335 (Ch)
G *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277; [1939] 1 All ER 513, PC
WC Wood Corpn Ltd, In re Case No 09–11893 (KG) (unreported) 1 June 2009, US Bankruptcy Ct, Delaware

APPLICATIONS

H On 25 June 2013 Warren J made an order recognising Korean rehabilitation proceedings in respect of the applicant shipowner, Pan Ocean Co Ltd, as the "foreign main proceeding" for the purposes of the Cross-Border Insolvency Regulations 2006 (SI 2006/1030). By an application notice issued on 15 August 2013 in the Companies Court, the charterer, Fibria Celulose S/A, sought permission to commence an arbitration against the shipowner in London, seeking a declaration that it was entitled to rely on

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an insolvency termination clause to terminate its contract with the shipower. By an application notice dated 10 February 2014, the shipowner's administrator, Mr You Sik Kim, sought relief under article 21(1) of Schedule 1 to the Cross-Border Insolvency Regulations 2006 in the form of an order restraining the charterer from relying on the insolvency termination clause in England and Wales, since it was void and unenforceable as a matter of Korean insolvency law.

The facts are stated in the judgment.

Matthew Collings QC and *Alexander Winter* (instructed by *Thomas Cooper LLP*) for the charterer.

Mark Phillips QC and *Stephen Robins* (instructed by *DLA Piper UK LLP*) for the company shipowner and the administrator.

The court took time for consideration.

30 June 2014. **MORGAN J** handed down the following judgment.

Introduction

1 This case involves the interpretation and application of the Cross-Border Insolvency Regulations 2006 ("the CBIR"). In particular, it concerns the scope of the relief that may be granted by the Companies Court on recognition of a foreign insolvency proceeding. For convenience, I have set out the relevant provisions of the CBIR in an appendix to this judgment.

2 Pan Ocean Co Ltd ("the company") is a shipping company, incorporated under the laws of the Republic of Korea on 28 May 1996. The company is undergoing an insolvency process, described as rehabilitation, in Korea. That process has been recognised by the Companies Court under the CBIR as a foreign main proceeding.

3 The company has the benefit of a long-term shipping contract with Fibria Celulose S/A ("Fibria"). Fibria is a Brazilian company described in the evidence before me as the world's largest producer of wood pulp. The administrator regards that contract as likely to be very profitable for the company and its continued existence as being important to the rehabilitation of the company. Conversely, Fibria regards the contract as onerous to it.

4 The contract is governed by English law. The express terms of the contract confer on Fibria the right to terminate it by reason of the Korean insolvency process in relation to the company. Those terms are valid and enforceable in English law. The administrator of the company contends that those terms are not valid and enforceable under Korean insolvency law. Fibria contends that the administrator is not right about that but, in any event, the position under Korean insolvency law is irrelevant.

5 Both the administrator and Fibria have made applications to the Companies Court under the CBIR. The administrator contends that the Companies Court has power to grant him relief which includes an order that Fibria must not exercise its right to terminate the contract. Fibria counters by saying that the Companies Court has no such power, alternatively that it should not exercise any such power.

6 Mr Collings QC and Mr Winter appeared on behalf of Fibria and Mr Phillips QC and Mr Robins appeared on behalf of the administrator and the company.

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The contract

7 On 31 August 2011, the company and Fibria entered into four separate contracts, on similar terms. Prior to the hearing before me, the administrator of the company elected to terminate three of those contracts and it is accepted that those three contracts have been effectively terminated. The administrator does not wish to terminate the remaining contract which is the relevant contract for present purposes. This contract was described as "contract of affreightment no 1" but as it is now the only relevant contract, I will simply refer to it as "the contract".

8 The contract was made on 31 August 2011 between Fibria as "the charterers" and the company as "the owners". By clause 2, Fibria undertook to provide for the shipment of, and the company undertook to carry, the cargoes identified in the contract. The company was to provide newly constructed vessels to enable it to perform the contract. The period of the contract was defined by reference to the dates on which the vessels were delivered; the contract was a long-term contract which was to continue for 25 years from the date on which the last such vessel was delivered from the relevant construction shipyard. The contract identified the intended loading ports as two ports in South America and it identified the intended discharging ports as various ports in the United States of America and in the Far East (one of which was in South Korea). The contract fixed the freight rates payable by Fibria to the company. Either party could assign the contract in the circumstances therein set out.

9 Clause 28 of the contract included the following provisions:

"28. *Termination for default*

"28.1 A party (the 'non-defaulting party') shall be entitled to terminate this contract with immediate effect on notice in writing to the other party (the 'defaulting party') if any of the following events shall occur:

(a) a defaulting party is in material breach of its material obligations pursuant to this contract and that breach has not been remedied by the defaulting party within a period of 60 days after the non-defaulting party first notified the defaulting party in writing of that breach; or

(b) a defaulting party is in material breach of its material obligations pursuant to this contract three times (whether consecutively or not), during any period of six months; or

(c) a defaulting party ceases wholly or substantially to carry on its business;

(d) a defaulting party becomes unable (or reasonably appears to the non-defaulting party to become unable) to pay its debts as they fall due;

(e) any formal declaration of bankruptcy or any formal statement to the effect that a defaulting party is insolvent or likely to become insolvent is made by that defaulting party or by its directors or, in any proceedings, by a lawyer acting for that defaulting party; or

(f) an administrator is appointed (whether by a court or otherwise) in respect of a defaulting party otherwise than for the purpose of a reconstruction or amalgamation without insolvency previously approved by the non-defaulting party (which approval shall not be unreasonably withheld). Whilst any application to appoint an administrator is pending or following the giving or filing of an administration notice the defaulting party must (to the extent that it may lawfully do so and it would not be in

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breach of any contractual restriction by which it is then bound) continue to carry on its business without disruption; or

(g) a provisional liquidator is appointed in respect of a defaulting party or a winding up order is made in relation to a defaulting party; or

(h) a resolution is passed, an administration notice is given or filed, an application or petition to a court is made or presented or any other step is taken by or on behalf of a defaulting party for or with a view to the winding up of a defaulting party or for the appointment of a provisional liquidator or administrator in respect of a defaulting party otherwise than for the purpose of a reconstruction or amalgamation without insolvency previously approved by the non-defaulting party (which approval shall not be unreasonably withheld); or

(i) an administration notice is given or filed, an application or petition to a court is made or presented or any other step is taken by a creditor of a defaulting party for the winding up of that defaulting party or the appointment of a provisional liquidator or administrator in respect of that defaulting party unless the proposed winding up, appointment of a provisional liquidator or an administrator is being contested in good faith with the aim to have any application or petition dismissed or withdrawn within 90 days of being presented or within 90 days of the administration notice being filed or given or other steps or actions being taken to ensure that no administration will take place and (in either such case) the party carries on its business without disruption; or

(j) an event analogous to any of the events referred to in paragraphs (b)–(i) (inclusive) occurs under the laws of any applicable jurisdiction in relation to the defaulting party."

10 By clause 32 of the contract it was agreed:

"32. *Law and arbitration*

"This contract and any non-contractual obligations arising out of or in connection with it, shall be governed by and construed in accordance with English law. Any dispute arising out of or in connection with this contract shall be referred to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this clause.

"The arbitration shall be conducted in accordance with the London Maritime Arbitrators Association ("LMAA") Terms current at the time when the arbitration proceedings are commenced . . ."

The effect of clause 28 in English law

11 Clause 28.1 may be invoked by either party to the contract if the other party is a "defaulting party". The first three events specified in the clause, in sub-paragraphs (a), (b) or (c), do not turn on the insolvency of the defaulting party. The remaining sub-paragraphs of clause 28.1, to a greater or lesser extent, define the relevant event by reference to the fact of insolvency or to the taking of some step in an insolvency process.

12 In some jurisdictions, a clause which allows a party to a contract to terminate the contract by reason of the insolvency of the counterparty is called an ipso facto clause. In certain jurisdictions in the United States of America such clauses are automatically invalid. In Canada, the court has

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power to stay the exercise of rights under such clauses. Later in this judgment, I will consider how such clauses are treated under Korean insolvency law.

13 There was no dispute before me as to the efficacy in English law of the provisions in clause 28.1 of the contract which allow termination by reason of an insolvency event. It was accepted that those provisions are valid in English law. In particular, it was accepted that the rule of insolvency law, known as the anti-deprivation rule, does not strike down those provisions.

14 Although there was no argument as to the approach of an English court to the insolvency provisions in clause 28.1 of the contract, it is helpful for present purposes to understand why those provisions do not infringe the anti-deprivation rule or any other rule of English insolvency law. The scope of the anti-deprivation rule has been considered recently by the Supreme Court in *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd (Revenue and Customs Comrs intervening)* [2011] Bus LR 1266; [2012] 1 AC 383. There were some differences in the approach taken by Lord Collins of Mapesbury (with whom Lord Phillips of Worth Matravers PSC, Lord Hope of Craighead DPSC, Lord Walker of Gestingthorpe, Baroness Hale of Richmond and Lord Clarke of Stone-cum-Ebony JJSC agreed) and Lord Mance JSC, but no difference which is relevant for present purposes.

15 Lord Collins expressed his conclusions as to the anti-deprivation rule, at paras 102–106:

> "102. It would go well beyond the proper province of the judicial function to discard 200 years of authority, and to attempt to re-write the case law in the light of modern statutory developments. The anti-deprivation rule is too well-established to be discarded despite the detailed provisions set out in modern insolvency legislation, all of which must be taken to have been enacted against the background of the rule.
>
> "103. As has been seen, commercial sense and absence of intention to evade insolvency laws have been highly relevant factors in the application of the anti-deprivation rule. Despite statutory inroads, party autonomy is at the heart of English commercial law. Plainly there are limits to party autonomy in the field with which this appeal is concerned, not least because the interests of third party creditors will be involved. But, as Lord Neuberger stressed [2010] Ch 347, para 58, it is desirable that, so far as possible, the courts give effect to contractual terms which parties have agreed. And there is a particularly strong case for autonomy in cases of complex financial instruments such as those involved in this appeal.
>
> "104. No doubt that is why, except in the case of a blatant attempt to deprive a party of property in the event of liquidation (*Folgate London Market Ltd v Chaucer Insurance plc* [2011] EWCA Civ 328; The Times, 13 April 2011), the modern tendency has been to uphold commercially justifiable contractual provisions which have been said to offend the anti-deprivation rule: *Money Markets International Stockbrokers Ltd v London Stock Exchange Ltd* [2002] 1 WLR 1150; *Lomas v JFB Firth Rixson Inc* [2011] 2 BCLC 120; and the judgments of Sir Andrew Morritt C and the Court of Appeal in these proceedings. The policy behind the anti-deprivation rule is clear, that the parties cannot, on

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bankruptcy, deprive the bankrupt of property which would otherwise be available for creditors. It is possible to give that policy a common sense application which prevents its application to bona fide commercial transactions which do not have as their predominant purpose, or one of their main purposes, the deprivation of the property of one of the parties on bankruptcy.

"105. Except in the case of well-established categories such as leases and licences, it is the substance rather than the form which should be determinant. Nor does the fact that the provision for divestment has been in the documentation from the beginning give the answer, nor that the rights in property in question terminate on bankruptcy, as opposed to being divested. Nor can the answer be found in categorising or characterising the property as 'property subject to divestment on bankruptcy'.

"106. If the anti-deprivation principle is essentially directed to intentional or inevitable evasion of the principle that the debtor's property is part of the insolvent estate, and is applied in a commercially sensitive manner, taking into account the policy of party autonomy and the upholding of proper commercial bargains, these conclusions on the present appeal follow."

16 Lord Mance said, at para 177:

"However, [counsel] advanced propositions which would mean that any provision for termination on bankruptcy, which would deprive the trustee or liquidator of the opportunity of continuing the contract and so the bankrupt estate of future potential advantage, would infringe the principle. There is in my opinion no basis for any such rule. Where a contract provides for the performance in the future of reciprocal obligations, the performance of each of which is the quid pro quo of the other, I see nothing objectionable or evasive about a provision entitling one party to terminate if the other becomes bankrupt. That is particularly so, having regard to the purpose and character of the present transaction, viewed rather more broadly than the Court of Appeal did in its detailed reasoning."

17 *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd (Revenue and Customs Comrs intervening)* [2011] Bus LR 1266 is of further interest in the present case for the following reason. The contractual provisions which were under review in that case were triggered by the relevant company filing for Chapter 11 protection in the United States Bankruptcy Court. Judge Peck sitting in the US Bankruptcy Court for the Southern District of New York made a declaration that the contractual provisions in question were ineffective because they were in breach of the United States Bankruptcy Code: see *In re Lehman Bros Holdings Inc* (2010) 422 BR 407. None the less, the contractual provisions were governed by English law and the English courts held that they were effective under English law although the relief granted was confined to declaratory relief; the position is explained by Lord Collins, at paras 30–35, and by Lord Mance JSC, at paras 173–174. The judgments in the English courts did not have to deal with any application under article 21 of the CBIR for an order

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A restraining any party from relying on the contractual provisions which were effective in English law but ineffective under the US Bankruptcy Code.

The assignment

18 On 30 December 2011, the company assigned absolutely to certain Marshall Islands companies, controlled by the company, all its rights, title
B and interest in and to, and all benefits accruing to it under, the contract and on the same day, those Marshall Islands companies assigned to ABN AMRO Bank NV all of their rights, title and interest in and to, and all benefits accruing to it under, the contract (which had just been assigned to them by the company). Copies of these assignments were not in the evidence before me.

19 Also on 30 December 2011, the company (and the Marshall Islands
C companies) gave written notice to Fibria of the assignments referred to above. In this notice, the company was referred to as the "bareboat charterer", the Marshall Islands companies were referred to as the "registered owners" and ABN AMRO Bank NV was referred to as the "security agent". By this notice, the company and the registered owners requested Fibria to acknowledge the assignments. Fibria was asked to note
D (amongst other things): (1) until Fibria received notice to the contrary from the security agent, it was to pay all sums due under the contract to the company; (2) following notice from the security agent to do so, Fibria was to pay all sums due under the contract to the security agent; (3) the company remained liable to perform all present and future obligations assumed by it under the contract.

20 The notice of assignment contained the following further provisions
E (the reference to the "COA" is to the contract):

> "Further:
>
> "1. We, the bareboat charterer, the registered owners and the security agent refer to the COA and hereby request, if you intend to exercise any right to cancel, rescind or otherwise terminate the COA, in whole or in part, that you notify the security agent in writing at its address above
F stated . . . and that by such notice you grant the security agent the option to either maintain the COA (the 'step-in option') or to agree to the cancellation, rescission or termination of the COA in whole or in part (the 'termination option'). Following receipt of such notice the security agent may elect by notice in writing to you (an "election notice") at your address above . . . within sixty (60) days of receipt of your notice, to
G either maintain the COA or agree to the cancellation, rescission or termination of the COA in each case in whole or in part and, if in part, with a pro rata reduction in the cargo quantities to be shipped pursuant to the COA and the number of vessels required to service the same.
>
> "2. If the security agent elects to maintain the COA, the security agent shall have the right to either remedy the breach by the bareboat charterer which gave rise to the aforesaid cancellation, rescission or termination
H rights within 60 days of the date of the election notice or to replace the bareboat charterer as the disponent owner of the vessel and replace the same with a company (the 'substitute disponent owner') to assume the bareboat charterer's rights and obligations under the COA and so as to be substituted for the bareboat charterer under the COA by way of a transfer

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or novation of the COA in favour of such substitute disponent owner or by entry into of a new contract of affreightment on materially the same terms and conditions, mutatis mutandis, as the COA. Any such substitute disponent owner shall be subject to your prior written approval but such approval shall not be unreasonably withheld or delayed, provided that your rights and obligations under the COA (as transferred or novated) or under any new contract or affreightment entered into shall be on materially the same terms and conditions, mutatis mutandis, as the COA, except as may be otherwise expressly agreed by you. For the avoidance of doubt, if the proposed substitute disponent owner, or any company that is to provide in your favour a guarantee of the obligations of such substitute disponent owner on terms acceptable to you, is not (in your reasonable opinion) of similar (or better) financial standing, market reputation and of similar (or better) operational, technical, logistical and commercial capabilities as the bareboat charterer, any refusal by you to accept it as a substitute disponent owner under this provision shall be deemed reasonable.

"3. If the security agent elects to agree to the cancellation, rescission or termination of the COA in part, the COA shall remain otherwise in full force and effect with a pro rata reduction in the cargo quantities to be shipped pursuant to the COA and the number of vessels required to service the same and we request your confirmation of your agreement thereto."

21 The notice of assignment stated that the assignments of the benefit of the contract (first to the Marshall Islands companies and then to the security agent) were by way of security only. The notice further stated that the notice and any acknowledgment of it given by Fibria and any non-contractual obligations arising from or in connection therewith should be governed by and construed in accordance with the law of England and Wales.

22 On 17 January 2012, Fibria wrote to the company, and to the registered owners and the security agent, acknowledging the notice of the assignments, as requested. In particular, by its acknowledgment Fibria undertook and confirmed: (1) that Fibria agreed to comply with the instructions in the notice of assignment; (2) that Fibria agreed to the provisions in the notice of assignment which included those relating to the step-in option and the termination option and further agreed to enter into a transfer or novation agreement in relation to the contract or a new contract of affreightment on materially the same terms and conditions, mutatis mutandis, as the contract to give effect to any election by the security agent to exercise the step-in option, subject to paragraph 2 of the notice of assignment; (3) that the assignments were by way of security only.

23 The parties before me accepted that the terms of the acknowledgement were valid and enforceable in English law.

Further facts

24 By June 2013, the company had become insolvent on a cash-flow basis although it continued to be solvent on a balance sheet basis as a going concern. On 7 June 2013, the company presented a petition to the Bankruptcy Court (Fifth Division) of the Seoul Central District Court for the

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commencement of rehabilitation proceedings. The company did not seek or obtain Fibria's consent to the making of this application.

25 On 12 June 2013, Fibria wrote to the security agent referring to the contract, the assignments, the notice of assignment and the acknowledgment referred to above. Fibria stated in its letter that it was entitled to terminate the contract. It set out the text of sub-clauses (h) to (j) of clause 28.1 of the contract. It wrongly referred to the text of clause 28.1(j) as being in clause 28.1(i). By the letter, Fibria gave formal notice to the security agent: (1) of the company's application on 7 June 2013 to the Seoul Central District Court; (2) of Fibria's belief that it was entitled to terminate the contract under clauses 28.1(h) and (i) (the letter probably intended to refer to clause 28.1(j)) and/or any other application clause; (3) that Fibria granted to the security agent the step-in option and the termination option; (4) that Fibria awaited an election notice from the security agent.

26 Also on 12 June 2013, Fibria notified the company of the notice it had sent to the security agent.

27 Shortly after 12 June 2013, the company replied to Fibria stating that Korean courts did not recognise the validity of the provisions relied on by Fibria (the company's letter specified clauses 28.1(h) and (i)) and that Fibria was not entitled to terminate the contract by reason of the company's application in the rehabilitation proceedings. The company further stated that under article 119 of the Debtor Rehabilitation and Bankruptcy Act of Korea ("the DRBA") it was the custodian of the company who would have the option to elect to terminate or maintain the contract and that the custodian would certainly elect to perform the contract.

28 On 17 June 2013, the Korean court made an order commencing rehabilitation proceedings in relation to the company and appointed joint administrators. (There is now only one administrator, Mr You Sik Kim, who became the sole administrator following the resignation of the former joint administrator on or about 7 November 2013.) Mr Kim has stated that a rehabilitation process in Korea is broadly comparable to an English administration coupled with a scheme of arrangement or company voluntary arrangement. This categorisation was not the subject of any further analysis or dispute at the hearing before me.

29 On 18 June 2013, the security agent responded to Fibria's notice to it of 12 June 2013 and suggested that discussions should take place.

30 On 21 June 2013, the administrator of the company applied in the Companies Court in London for the Korean rehabilitation proceedings to be recognised as foreign main proceedings under article 17 of Schedule 1 to the CBIR.

31 On 25 June 2013, the Companies Court (Warren J) made an order under the CBIR recognising the Korean rehabilitation proceedings as foreign main proceedings in respect of the company. Warren J made further orders pursuant to articles 20(6) and 21(1)(g) of the CBIR. These orders provided that there was to be: (1) no enforcement of securities; (2) no repossession of goods; (3) no legal process against the company or its property; (4) no appointment of an administrative receiver; and (5) no winding up petition. In some cases, the prohibited matters could proceed with the consent of the administrator or of the Companies Court. At the hearing before me, it was stressed that the orders made by Warren J were not confined to the automatic effects of recognition of a foreign main proceeding which are

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provided for by article 20 of the CBIR. However, it does not seem to me to matter whether the orders simply gave effect to article 20 or modified it under article 20(6) and added relief under article 21. There was nothing in those orders which prevented the administrator applying subsequently for further relief under article 21, as the administrator has now done. Around the same time as orders were made in the Companies Court, the company obtained broadly similar recognition orders in a number of other countries.

32 On 2 July 2013, the company wrote to Fibria. The letter directly concerned another contract of affreightment which has since been terminated. However, what was said in relation to that other contract was also relevant to the contract with which I am concerned. The letter stated that Fibria was not entitled to terminate such a contract. The letter enclosed a letter of advice, dated 1 July 2013, from attorneys in Seoul. The attorneys advised that the contract was, in Korean law, a "bilateral executory contract" and the administrator of the company was entitled to elect to terminate or to continue the contract. If the administrator elected to continue the contract, the counterparty would be entitled to receive full payment or other benefit under the contract without any impairment of its position by reason of the rehabilitation. The attorneys further advised that clause 28 or parts of it were to be regarded as an ipso facto clause and that the Supreme Court of Korea had held that there may be circumstances in which such a clause might be invalidated or, at least, its operation might be restricted until the conclusion of the rehabilitation proceedings. They then advised that it was highly likely that the ipso facto clause would be deemed ineffective in Korea. Finally, they said that by reason of the rules as to cross-border insolvency, the clause would also be invalid under Brazilian law.

33 On 11 July 2013, Fibria wrote again to the security agent, without prejudice to its earlier notice of 12 June 2013. In its letter, Fibria referred to the company's application to the Korean court of 7 June 2013 and the order of the Korean court on 17 June 2013. Fibria stated that the company was unable (and/or it reasonably appeared to Fibria that the company was unable) to pay its debts as they fell due and that Fibria intended to terminate the contract pursuant to clauses 28.1(d), (f), (h) and (j) thereof. Fibria notified the security agent that Fibria granted it the step-in option and the termination option and awaited the security agents' election notice.

34 On 16 July 2013, solicitors for Fibria requested permission from the administrator of the company for Fibria to commence arbitration proceedings against the company under the contract. Such permission has not since been forthcoming.

35 On 14 August 2013, the solicitors for the administrator sent to Fibria a copy of the administrator's notice dated 13 August 2013 confirming, pursuant to article 119 of the DRBA, that the company would continue to perform the contract as an executory contract.

36 The administrator was not obliged to apply to the Korean court for its approval of his decision to elect to perform the contract but he did so apply and, on 1 October 2013, that court approved that decision.

37 On 22 November 2013, a rehabilitation plan in relation to the company was approved by the company's creditors and by the Korean court. In a witness statement dated 10 February 2014, the administrator has stated that the income and profits generated for the company under the contract are crucial to the ability of the company to perform the rehabilitation plan.

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The applications

38 On 15 August 2013, Fibria applied in the Companies Court for permission pursuant to article 20(6) of the CBIR and/or paragraph 2(3) of the order of Warren J of 25 June 2013 to commence and prosecute an arbitration against the company seeking declaratory relief as to Fibria's entitlement to terminate the contract. The evidence in support of the application drew attention to a statement made by the administrator, in his application for recognition, to the effect that the company was unable to pay its debts as they fell due and Fibria reserved its right to serve a further notice under clause 28.1 of the contract relying on clause 28.1(e). The administrator's evidence in opposition to this application included evidence that the contract is highly profitable to the company and that the administrator wishes to preserve the contract and to perform it in the interests of the company and its creditors. The administrator says that Fibria will not suffer any prejudice as a result of the insolvency process in relation to the company in that Fibria's rights under the contract will not be affected in any way by that insolvency process.

39 On 10 February 2014, the administrator of the company applied in the Companies Court for relief under article 21 of the CBIR directing that Fibria is not entitled to exercise any right of termination under clauses 28 of the contract and/or such further or other relief as the court thought fit. The administrator filed evidence in support of its application and that evidence provided detailed information as to the ongoing process of restructuring of the company.

40 On 24 March 2014, the administrator of the company applied in the Companies Court under articles 21, 25 and 27 of the CBIR for relief in the form of the Companies Court issuing a letter of request to the Korean court. An attached draft letter of request asked the Korean court to exercise its powers under article 641 of the DRBA to give its opinion to the English court as to whether clause 28 of the contract was void and unenforceable pursuant to Korean insolvency law.

41 At the hearing of these applications, the administrator put forward a draft order setting out the relief which he sought. The draft order defined clause 28 of the contract as "the insolvency termination clause". The draft order then sought a declaration as to the position under the insolvency termination clause on the assumption that that clause was void and unenforceable as a matter of Korean insolvency law. The position contended for by the administrator was that the Companies Court had jurisdiction under article 21(1) of the CBIR to make an order restraining Fibria from relying on the insolvency termination clause in England and Wales and that it would be a proper exercise of discretion for the Companies Court of make such an order. The draft order also provided for a letter of request to be issued to the Korean court in accordance with the application made on 24 March 2014. The draft order continued by seeking an order that the application dated 10 February 2014 for relief under article 21 of the CBIR be adjourned to be restored when the Korean court had responded to the letter of request. Finally, the draft order suggested that Fibria's application for permission to commence arbitration proceedings be adjourned.

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The position of the security agent

42 The security agent has not been made a party to the above applications. I was told that representatives of the security agent were present in court during the hearing before me but they took no part in that hearing. I inquired of the parties as to the position of the security agent in the light of the relief sought by the applications. As explained earlier, Fibria has given notice to the security agent pursuant to the acknowledgement of the notice of assignment. On the face of it, the result of Fibria's notice is that the security agent has a right to elect either to maintain the contract or to agree to its termination. If the security agent were to elect to maintain the contract, then the security agent would be entitled to replace the company with a substitute disponent owner by way of a transfer or novation of the contract or by the entry into a new contract. In such cases, Fibria would not be entitled to take further steps to terminate the contract with the company.

43 I was told by counsel for the administrator and for Fibria that, notwithstanding the position under the acknowledgement of the notice of assignment, it remained relevant to determine the position in relation to Fibria's ability to serve notice of termination under clause 28.1 of the contract. I was told that the security agent supported the company's attempt at restructuring and the company's stance that Fibria was not entitled to terminate the contract under clause 28.1. The security agent therefore wanted to know whether Fibria did have the ability to terminate the contract under clause 28.1. On the assumption that it is held that Fibria did not have the ability to terminate the contract under clause 28.1, then the security agent would not feel it necessary to elect to maintain the contract nor would it wish to agree to the termination of the contract but it would simply not respond to the notice served on it by Fibria. If Fibria later attempted to terminate the contract under clause 28.1, the security agent would be able to rely on the fact that (on this assumption) that Fibria was not able so to act.

44 Conversely, if it were held that Fibria was entitled to terminate the contract under clause 28.1, then the security agent would have to consider its position further and make its election under the acknowledgement of the notice of assignment. I understand that Fibria has agreed to extend the time within which the security agent is to makes its election under the acknowledgment of the notice of assignment so that the time for its election is suspended while the present applications are pending.

45 Accordingly, both Fibria and the administrator of the company ask the court to deal with the applications which have been made to it and, in particular, to decide the scope of the powers of the court to grant relief under article 21 of the CBIR.

Korean law

46 The parties did not agree on the relevant principles of Korean insolvency law. I heard expert evidence as to Korean insolvency law from two Korean lawyers. The administrator called Mr Eunjai Lee and Fibria called Mr Duk-Kyou Hyun. I have concluded that I should not myself decide the dispute between these two experts and so I do not need to describe the witnesses in greater detail nor need I set out the detailed points which divided them. I will however summarise the positions they adopted as to the relevant principles of Korean insolvency law.

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A **47** Mr Lee relied on article 119 of the DRBA. He also referred in passing to article 32–2 of that Act because that article was referred to in one of the cases to which he drew my attention. However, his view was essentially based on article 119. Article 119 does not apply to all contracts but only to certain unperformed bilateral contracts. It did not appear to be in dispute that the contract in the present case comes within the type of unperformed bilateral contract which is governed by article 119.

B **48** Under article 119, the custodian of a company undergoing rehabilitation may choose to cancel or terminate an unperformed bilateral contract. Further, article 119 appears to allow the custodian to require the other party to fulfil its obligations under such a contract. It is said that it would be inconsistent with that right for the counterparty to be able to terminate the contract by reason of the fact of the rehabilitation.

C **49** The statutory predecessor of article 119 was considered in *Allied Domecq (Holdings) plc v Trustee of Jinro Co Ltd*, 6 September 2007, Korean Supreme Court. Mr Lee accepted that parts of the reasoning in that decision were not wholly clear in relation to the impact of article 119 on an insolvency termination clause. The Supreme Court held that, in a case not governed by article 119, an insolvency termination clause would be valid. The Supreme Court then considered the type of contract which came within

D article 119 and referred to the nature of the obligations under the particular unperformed bilateral contract in that case. It then held that the contract in that case was not governed by article 119.

50 Article 119 was further considered in *Radcliff Corpn v Receiver of Samsun Logix* 11 January 2010. In that case, Samsun Logix ("Samsun") chartered a vessel under a time charterparty which was governed by English

E law. It then entered rehabilitation and the owner of the vessel asserted that Samsun had no intention of performing the charterparty and had repudiated it, giving the owner the right to treat the charterparty as at an end and to claim damages. The court held that the effect of article 119 was that the owner was not entitled to terminate the charterparty on the grounds of Samsum's repudiation of it because that would infringe the receiver's option to terminate, or to continue, the unperformed bilateral contract.

F **51** In *Korea Real Estate Investment & Trust Co Ltd v Receiver of Poonglim Co Ltd* 17 July 2013 it was held that article 119 and article 32-2 prevented a counterparty of the debtor company relying on an insolvency termination clause to terminate a building contract under which the debtor company was to build an apartment building. The court appeared to hold that such was the automatic effect of article 119 in relation to an

G unperformed bilateral contract.

52 The most recent decision as to the operation of article 119 is *Trustee of Tongyang Networks Co Ltd v Standard Chartered Bank Ltd* 24 January 2014. That case concerned a contract under which the debtor company was to provide services to the bank. The contract contained an insolvency termination clause and the bank gave, or purported to give, notice to terminate pursuant to that clause. The trustee of the debtor company argued

H that the bank's right to terminate should be considered null and void by reason of article 119 or, alternatively, the bank should refrain from terminating the contract at least during the period of the rehabilitation. The court considered the earlier decision in the *Allied Domecq* case and held that to achieve a proper balance between the purpose of rehabilitation and the

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principle of freedom of contract and the counterparty's need to be able to trust the debtor company, it was necessary to look at all the circumstances, such as the nature of the contract, the necessity to protect the debtor and the counterparty and other relevant factors. The court then conducted a detailed examination of what it regarded as the relevant factors and held that article 119 did not render the insolvency termination clause null and void. I was told that the trustee has appealed that decision to a higher court.

53 Mr Lee's view was that the decision in the *Standard Chartered Bank* case was simply wrong and that in the case of an unperformed bilateral contract which is within article 119, an insolvency termination clause is null and void and cannot be exercised by the counterparty of the debtor company. Mr Hyun relied on the decision in the *Standard Chartered Bank* case and said that the effect of article 119 would not be automatic in this case but would require the Korean court to consider all the circumstances. I suggested to Mr Hyun that if one carried out in the present case a similar exercise to that carried out in the *Standard Chartered Bank* case, then the result was likely to be that the Korean court would hold that the insolvency termination provisions in clause 28.1 of the contract were null and void or unenforceable. Mr Hyun suggested that, in the present case, the Korean court would be influenced by the fact that the contract was an international shipping contract governed by English law and that Korean court would not wish to damage Korea's position as a trading nation.

54 In the event, I do not think that it is necessary for the purposes of the present applications for me to determine the disputes as to the operation of Korean law. It is sufficient for me to say that there is a good arguable case that the insolvency termination provisions in clause 28.1 of the contract are automatically void by reason of article 119. Further, even if the insolvency termination provisions in clause 28.1 are not automatically void, there is a good arguable case that they would in fact be held to be void after a Korean court considered all of the relevant circumstances.

55 Having reached those conclusions, I note that there are potential points of Korean law which were not explained by the experts. The precise operation of article 119 is unclear. Does it make the insolvency termination clause null and void or only render it unenforceable during the rehabilitation? What if the counterparty serves a termination notice before the Korean court gives a ruling on the enforceability of the insolvency termination clause? On my own reading of the Korean decisions, it seems to me to be likely that the counterparty would not be able to rely on that notice as effective if the Korean court were later to hold that the insolvency termination clause was null and void or even just unenforceable.

56 I also note that the experts confined themselves to discussing the effect of article 119 on clause 28.1 of the contract without regard to the later arrangements which were brought into existence by the acknowledgment of the notice of assignment. I consider that it might be very relevant indeed, and it might even be determinative, in Korea to assess the position by reference to the later arrangements and not by reference to clause 28.1 alone. I can see how it might be argued that if clause 28.1, or parts of it, were invalid or unenforceable, then the later provisions which were premised on the enforceability of clause 28.1 did not have effect. However, I could also see force in an argument that whatever Korean insolvency law might make of clause 28.1, if it stood alone, it would have to evaluate the later

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A arrangements separately. The position of the company and its creditors is quite different in a case where clause 28.1 is relied on by Fibria to terminate the contract at its option and a case where clause 28.1 is relied on by Fibria and the consequence is either that the security agent exercises the step-in option so that the contract is transferred or novated or, if the contract is terminated, then it is terminated at the option of the security agent rather than at the option of Fibria.
B

The submissions for the parties

57 Mr Phillips's approach, on behalf of the administrator, was to focus on the relief which might be ordered by the court under article 21(1) of the CBIR. He concentrated on the power conferred by article 21(1) to grant "any appropriate relief". He submitted that the court was entitled to grant
C any relief which it considered to be appropriate in all the circumstances. Mr Phillips addressed me in great detail and relied on an extensive citation of decided cases in various jurisdictions, and many other materials, which he submitted were valuable when considering the meaning of "any appropriate relief" in article 21(1) and when deciding what relief was appropriate in this case. In the alternative to these submissions, he put forward a narrower
D submission that the court had power pursuant to article 21(1)(a) of CBIR to stay proceedings and that included a power to restrain Fibria from serving a termination notice under clause 28.1 of the contract. I pay tribute to the thoroughness and quality of Mr Phillips's submissions. It is not necessary for me to attempt to summarise everything which was said in the course of these wide ranging submissions as I consider that I can identify the essential
E points which were made when I discuss my approach to the issues which arise.

58 Mr Collings, for Fibria, submitted that its rights to terminate the contract were governed by English law, as to which there was no dispute. Korean insolvency law was irrelevant, certainly in the Companies Court. He submitted that the power conferred by article 21(1)(a) to grant a stay of proceedings could not be interpreted to extend to an order restraining Fibria
F from serving a notice pursuant to clause 28.1 of the contract. He further submitted that the power of the court to grant "any appropriate relief" did not permit the court to give relief in accordance with Korean insolvency law and, in any event, the relief sought was not appropriate.

Discussion: preliminary remarks

G 59 The administrator's primary object at the hearing of these applications was to obtain the determinations set out in his draft order as to the court's jurisdiction and discretion under article 21 of the CBIR in relation to clause 28.1 of the contract (or, at any rate, those parts of clause 28.1 which deal with various insolvency events). The determinations set out in the draft order are expressly on the assumption that clause 28.1 is
H void and unenforceable as a matter of Korean insolvency law. I have already described the rival opinions as to the relevant Korean insolvency law and my conclusion that the administrator has a good arguable case that the insolvency termination provisions in clause 28.1 of the contract are automatically void by reason of article 119 or, if not automatically void, he has a good arguable case that they would in fact be held to be void after a

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Korean court considered all of the relevant circumstances. Accordingly, for the sake of the following analysis, I will assume that a Korean court would regard (at least) those parts of clause 28.1 which provide for termination by notice following an insolvency event in Korea, as being inoperative or (at least) in suspense during the Korean insolvency.

60 The administrator relied, principally, on the power of the recognising court, pursuant to article 21(1), to grant "any appropriate relief" and, in the alternative, on the power, pursuant to article 21(1)(a), to order a stay of proceedings. Before dealing with the specific points which arise in relation to these two ways of putting the case, I should comment briefly on other points which are referred to in articles 21 and 22 but which were not examined at the hearing.

61 Article 21 allows the court to grant relief "where necessary to protect the assets of the debtor or the interests of the creditors". The meaning of the phrase "the assets of the debtor", and how that phrase might apply to the contract in this case, was not really explored at the hearing before me. It seemed to me that there might have been two issues in that respect. The first was as to whether the benefit of the contract had ceased to be an asset of the debtor because it had been assigned to the Marshall Islands companies and then to the security agent. If the point had been raised, it may be that the answer would have been that because the assignments were by way of security only, the company retained a right to redeem the security and it was that right (rather than the benefit of the contract) which was an asset of the debtor. However, as the point was not raised and the assignments were not put in evidence, I will say no more about that subject. The second possible question might have been whether the relevant asset of the debtor in this case is in relation to a contract which is not subject to termination (pursuant to the insolvency termination provisions in clause 28.1) or whether the asset of the debtor was the contract subject to the possibility of such termination. If the asset of the debtor was the latter, then an order of the court which prevented Fibria exercising its contractual rights under clause 28.1 would not merely "protect" the assets of the debtor but would enhance the assets of the debtor. However, as this point was not argued, I will not deal with it further. In any case, I note that article 21 allows relief to be granted to protect "the interests of the creditors", seemingly as an alternative to it being granted to protect the assets of the debtor.

62 Further, there was no real examination of the possible application of article 22 in this case. Article 22(1) provides that the court must be satisfied, when granting or denying relief under article 21, that the interests of the creditors and other interested persons must be adequately protected. It may be that it could be said that Fibria would be "adequately" protected if it were able to enjoy the benefit of the contract in all other respects even though it was prevented from taking advantage (pursuant to clause 28.1) of the insolvency of the company to free itself of a contract which was onerous from its point of view.

Article 21(1)(a) of the Cross-Border Insolvency Regulations 2006

63 Although the administrator relied on article 21(1)(a) as an alternative to his argument based on the words "any appropriate relief" in article 21(1), it is more logical for me first to consider the specific relief which is referred to in article 21(1)(a).

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A **64** Article 21(1)(a) allows the recognising court to grant a stay on "the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities". The administrator contended that the service by Fibria of a notice to terminate under clause 28.1 would be within this wording in article 21(1)(a). Article 21(1)(a) allows the court to grant such a stay "to the extent [that] B they have not been stayed under paragraph (1)(a) of article 20". The administrator accepted that the service of such a notice had not already been stayed under article 20(1)(a). Article 20(1)(a) also refers to the "commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities". However, article 20(2) provides that the stay which is automatically imposed by article 20(1)(a) is to be "the same in scope and effect" as if the C debtor (in the case of a company) had been the subject of a winding up order under the Insolvency Act 1986. It is agreed that the scope and extent of a stay, in the case of a company ordered to be wound up, is to be found in section 130(2) of the Insolvency Act 1986. Section 130(2) provides that "no action or proceeding shall be proceeded with or commenced against the company or its property" except with the leave of the court. Accordingly, in D order for the administrator in the present case to rely on article 21(1)(a), he has to accept that he cannot rely on article 20(1)(a) and that must be because the scope of article 20(1)(a) is not wider than the scope of section 130(2) of the 1986 Act and, further, that the service of a notice to terminate under clause 28.1 of the contract does not involve an "action or proceeding [being] proceeded with or commenced against the company or its property" within the meaning of section 130(2) of the 1986 Act. Thus, the administrator is in E effect submitting that although the service of a notice to terminate pursuant to clause 28.1 of the contract is not "an action or proceeding" within the meaning of section 130(2) of the 1986 Act, it is "an individual action" or "an individual proceeding" within article 21(1)(a) of the UNCITRAL Model Law on Cross-border Insolvency (1997).

65 I can accept the words "action" and "proceeding" in article 21 need F not have the same meaning as those words in section 130(2) of the 1986 Act. I therefore need to look at the Model Law and any matters which assist me in construing it, together with any authorities which might be relevant.

66 The first thing to note is that article 21(1)(b) refers to "execution against the debtor's assets"; this suggests that the draftsman of the Model Law considered that some forms of execution against the debtor's assets G would not involve the commencement or continuation or individual actions or individual proceedings. Further, article 21(1)(g) allows the court to grant any relief of the kind provided under paragraph 43 of Schedule B1 to the Insolvency Act 1986. Paragraph 43 of Schedule B1 creates a moratorium in relation to different kinds of legal process. In particular, paragraph 43(6) provides that there may be no legal process instituted or continued against the company or the property of the company except with the consent of the H administrator or the permission of court. Article 21(1)(g) refers to relief under paragraph 43 of Schedule B1 as being "additional relief", that is, additional to the relief specified in sub-paragraphs (a) to (f) of article 21(1). However, these textual points on their own do not offer much guidance as to the scope of article 21(1)(a).

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67 I have considered the UNCITRAL *Guide to Enactment* which deals with the relevant wording in articles 20 and 21 at paras 145, 146 and 155. Para 145 indicates that the reference to "an action" will cover "actions before an arbitral tribunal". Para 146 suggests that the word "proceedings" can extend to "enforcement measures initiated by creditors outside the court system". The *Guide to Enactment* does not further describe the measures it had in mind save to say that, in some states, creditors were allowed to take such "measures".

68 The provision formerly contained in section 11 of the Insolvency Act 1986, imposing a moratorium in the case of an administration of a company, referred in section 11(3)(c) to "steps" to enforce a security or to repossess goods and in section 11(3)(d) to "no other proceedings and no execution or other legal process" being "commenced or continued". These provisions were construed by the Court of Appeal in *Bristol Airport plc v Powdrill* [1990] Ch 744 and by Millett J in *In re Olympia & York Canary Wharf Ltd* [1993] BCLC 453. In the second of these cases, it was held that a notice given by a party to a contract in order to make time of the essence of the other party's contractual obligation and a notice accepting a repudiatory breach as terminating the contract were not "proceedings" or "other legal process" within section 11(3)(d).

69 In *Bristol Airport plc v Powdrill* [1990] Ch 744, 765 Sir Nicolas Browne-Wilkinson V-C said:

> "the natural meaning of the words 'no other proceedings . . . may be commenced or continued' is that the proceedings in question are either legal proceedings or quasi-legal proceedings such as arbitration . . . the reference to the 'commencement' and 'continuation' of proceedings indicates that what Parliament had in mind was legal proceedings. The use of the word 'proceedings' in the plural together with the words 'commence' and 'continue' are far more appropriate to legal proceedings (which are normally so described) than to the doing of some act of a more general nature."

70 In *In re Olympia & York Canary Wharf Ltd* [1993] BCLC 453, 457, Millett J said:

> "It is not necessary in this case to consider where the line is to be drawn between the commencement or continuation of 'proceedings' on the one hand or of 'legal process' on the other. But in my judgment both concepts are well known. Together they embrace all steps in legal proceedings from the issue of initiating process, to their final termination in the process of execution or other means of enforcement of a judgment such as the appointment of a receiver by way of equitable execution or the making of a charging order or other steps for the enforcement of the court's judgment without execution. But the phrase is not apt to describe the taking of non-judicial steps such as the service of a contractual notice in order to crystallise the liability of the party on whom the notice is served.
>
> "In my judgment, support for that conclusion can be derived from the use of the words 'commenced or continued' in section 11(3)(d) of the 1986 Act. If the service of a contractual notice is part of a legal process, I am unable to understand what legal process it is supposed to commence

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A or continue. The words 'commence or continue' indicate a process which has an independent existence of its own apart from the step by which it is commenced or continued; a process which either continues after or was in existence before the taking of the relevant step.

"Further support for my conclusion, if it were needed, may be derived from a consideration of the legislative purpose for which sections 10 and 11 were enacted. They are intended to impose a moratorium upon the B creditors of the company in order to assist the administrator in his attempts to achieve the statutory purpose for which he was appointed. They are couched in procedural terms and are designed to prevent creditors from depriving the administrator of the possession of property which may be required by him for the purpose of the administration."

C 71 Both these cases construed the particular provisions of section 11(3)(d) having regard to the other language used in section 11 and the purpose of that section. The language of article 21 is certainly not the same as the language of section 11. These two decisions of the English courts cannot therefore be determinative of the meaning of article 21(1)(a). None the less, the discussion in those cases, and particularly in the second case, is helpful in elucidating the general concepts normally involved in the D words "actions or proceedings", particularly when coupled with the words "commencement or continuation".

72 Mr Phillips did not refer me to any English authority which assisted his argument as to the meaning of article 21(1)(a). However, he referred to Canadian decisions as to section 11(4) of the Companies' Creditors Arrangement Act (RSC 1985, c C-36) ("the CCAA"), a Canadian statute. Part IV of the CCAA implemented in Canada, with modifications, the Model E Law but section 11(4) is not in Part IV. Accordingly, the Canadian decisions dealing with section 11(4) do not directly deal with the meaning of article 21 of the Model Law. The position in Canada, pursuant to section 11(4) of the CCAA, became relevant in the English case of *AWB (Geneva) SA v North America Steamships Ltd* [2007] 1 CLC 749, Field J and [2007] 2 Lloyd's Rep 315, CA. In the *AWB* case, the claimants had entered into contracts with a F Canadian company which had then entered a process of insolvency governed by the CCAA. The claimants contended that the Canadian company had committed certain events of default and, pursuant to the express terms of the contract, the claimants were not obliged to perform certain obligations otherwise imposed on them by the contracts. The office holder in the Canadian insolvency applied to the Canadian court under section 11(4) of the CCAA for an order preventing the claimants relying on G the events of default as producing the result, in accordance with the contractual provisions, that the claimants did not have to perform the contracts.

73 Section 11(4) of the CCAA gave the court power, in particular, to restrain "proceedings taken or that might be taken in respect of the company" and "the commencement of or proceeding with any other action, H suit or proceeding against the company". In *AWB*, Field J heard expert evidence as to Canadian law and he summarised the matter in this way, at paras 11 to 14:

"11. . . . in broad terms, the CCAA provides a regime that corresponds to the combined effect of the provisions of UK insolvency law relating to

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administrations (Schedule B1 of the Insolvency Act 1986) and compromises or schemes of arrangement (Part 1 of the 1986 Act providing for company voluntary arrangements, and section 425 of the Companies Act 1985).

"12. Section 11(4) of the CCAA empowers the court to make an order staying 'proceedings' taken or that might be taken in respect of the company. 'Proceedings' has been construed to include extra-judicial conduct that could impair the ability of the debtor company to continue in business. In *Norcen Energy Resources Ltd v Oakwood Petroleums Ltd* (1988) 72 CBR (2d) 1, the court restrained a joint venture party of a debtor company from relying on the insolvency of the debtor company to replace it as the operator under a petroleum operating agreement. In *In re T Eaton Co* (1997) 46 CBR (3d) 293, the court restrained tenants in shopping centres from terminating leases on the basis of co-tenancy clauses requiring the debtor company's store to stay open. And in *In re Playdium Entertainment Corpn* (2001) 31 CBR (4th) 302, the court restrained a party from relying on its contractual right to object to an assignment.

"13. In *In re Doman Industries* (2003) 41 CBR (4th) 29 Tysoe J explained the purpose of such stays in these terms: 'In my view, there are numerous purposes of stays under section 11 of the CCAA. One of the purposes is to maintain the status quo among creditors while a debtor company endeavours to reorganise or restructure its financial affairs. Another purpose is to prevent creditors and other parties from acting on the insolvency of the debtor company or other contractual breaches caused by the insolvency to terminate contracts or accelerate the repayment of the indebtedness owing by the debtor company when it would interfere with the ability of the debtor company to reorganise or restructure its financial affairs . . . [A] further purpose is to prevent the frustration of the reorganisation or restructuring plan after its implementation on the basis of events of default or breaches which existed prior to or during the restructuring period.'

"14. It is clear from the evidence of the trustee's expert on Canadian insolvency law, the Hon James M Farley QC, a former Justice of the Superior Court of Ontario, that stays are commonly granted under section 11(4) of the CCAA to restrain counterparties to contracts with the debtor company from relying on any pre-CCAA plan breaches of those contracts committed by the debtor company that would allow those counterparties to exercise remedies against the debtor company. Mr Farley gives examples of such orders in his report. In two of these the order provided that no person who is a party to any contract or lease to which the debtor company is a party may accelerate, terminate, rescind, refuse to perform or otherwise repudiate its obligations thereunder by reason of any defaults or events of default arising out of the insolvency of the applicant."

74 Mr Phillips provided me with copies of *Norcen Energy Resources Ltd v Oakwood Petroleums Ltd* (1988) 72 CBR (2d) 1, *In re T Eaton Co* (1997) 46 CBR (3d) 293, *In re Playdium Entertainment Corpn* (2001) 31 CBR (4th) 302 and *In re Doman Industries* 2003 BCSC 376. So far as I could see, the judges in those cases did not discuss the meaning of the word

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A "proceedings", much less did they attempt to define it. Accordingly, I find that any persuasive force which these decisions might otherwise have had is greatly diminished.

75 Having considered the material relied on by the parties, I conclude that I am considerably assisted by the discussion in *Bristol Airport plc v Powdrill* [1990] Ch 744 and *In re Olympia & York Canary Wharf Ltd* [1993] BCLC 453 as to the ordinary and well understood meaning of a B phrase such as "the commencement or continuation of individual actions or individual proceedings" (the wording used in article 21(1)(a)). Applying that meaning, I consider that the service of a notice to terminate under clause 28.1 of the contract is not the commencement or continuation of an individual action or proceeding within article 21(1)(a). Accordingly, I reject the argument for the administrator that the court has power C under article 21(1)(a) to restrain Fibria from serving a termination notice under clause 28.1.

76 It was not said that the service of a termination notice under clause 28.1 came within any other sub-paragraph of article 21(1). In particular, it was not said that the claimed jurisdiction was conferred by article 21(1)(g) which refers to additional relief (including relief under paragraph 43 of Schedule B1 to the Insolvency Act 1986) that might be D available to a British insolvency office holder under the law of Great Britain.

Appropriate relief

77 The principal way in which the administrator put his case in relation to article 21 was to contend that the Companies Court had jurisdiction to make an order restraining Fibria from relying on clause 28.1 pursuant to the E court's power to grant "any appropriate relief". It was submitted that the words "any appropriate relief" were not defined and that the words should be given their ordinary meaning. For the order sought to come within those words, the order must be such that it could properly be described as the grant of "relief". If it could be so described, then the court had to decide whether that relief was "appropriate". It was said that these words F deliberately gave the court very wide powers to do what it thought fit. If the court thought it was appropriate to order relief which would be available to the administrator in the Korean court applying Korean insolvency law, then the English court could grant that relief. In so doing, the English court was not applying Korean law. Article 21 of CBIR was part of English law and it was English law which was being applied when the English court granted the same sort of relief as would be available in the Korean court under Korean G insolvency law.

78 It was submitted that the phrase "any appropriate relief" was not cut down by the heads of relief specified in paragraphs (a) to (g) of article 21(1) because article 21(1) stated that any appropriate relief "included" those heads of relief; this showed that "any appropriate relief" was wider than the specified heads and that the specified heads were not intended to be an exhaustive statement of what could be ordered by way of appropriate relief. H

79 The administrator is right that the words "appropriate relief", taken on their own, are wide words. Although the argument in the present case focused on the appropriateness of the English court granting the sort of relief which a Korean court would grant, applying Korean insolvency law, it is only right to acknowledge that if the administrator is right in his approach to

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article 21, then the English court has power to grant any relief which it thinks fit, whether that relief would be available under the law of the state of the foreign proceedings or under English law or, indeed, under some other system of law. On this basis, the English court would have power to reflect the fact that Fibria is a Brazilian company and to apply Brazilian law, if the English court thought that relief under Brazilian law was appropriate. Indeed, the English court could express approval for the insolvency laws which apply in some entirely different jurisdiction and persuade itself that it was appropriate that such laws should be applied in the case before it. Further, if the court has power to do what it thinks is appropriate, it may not be necessary to find that the relief which is sought is relief which is available under any current system of law anywhere. If there were a pending proposal, for example from the Law Commission, to reform English insolvency law, then on the administrator's approach, the English court would have power to anticipate that reform and to hold that granting relief in accordance with the proposed reform would be "appropriate". Whilst some of these examples are more fanciful than others, they do indicate that the administrator's submissions result in the English court having the widest possible power to do whatever it thinks fit, whether its order is in accordance with the law of the foreign insolvency proceedings or not.

80 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 in 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.

81 Having made these comments on the possible literal readings of article 21, I ought not to construe article 21 without regard to the other matters which I am able to consider when determining its meaning. In that regard, regulation 2 of the CBIR provides that, for the purpose of ascertaining the meaning and effect of the CBIR, the court may consider certain documents, in particular, the UNCITRAL Model Law, the documents of the working group relating to the preparation of the Model Law and the *Guide to Enactment of the Model Law*.

82 As regards the documents of the working group relating to the preparation of the Model Law, I was asked by Mr Phillips to consider the note *Possible issues relating to judicial cooperation and access and recognition in cases of cross-border insolvency* (A/CN.9/WG.V/WP.42) dated 26 September 1995 which was prepared in advance of a meeting of the working group in October and November 1995. Para 6 of this note stated

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that it was intended to set out possible solutions that might be adopted in relation to various problems. Paras 42 to 54 of the note are material as background to the present issue. In relation to setting out the effects of recognition of a foreign proceeding, one approach was to provide a detailed and exhaustive list of all the consequences which would follow from recognition: see para 42. A second possible approach was to specify that the effect of recognition would be determined by the application of the law of one of the two countries involved. Here there could be two variants. Variant 1 would involve, essentially, the application of the law of the state in which the foreign proceedings were opened. Variant 2 would involve, essentially, the application of the law of the recognising state. The note identified earlier legislative examples of one or other of these variants being adopted. It was suggested that variant 1 could be justified from a dogmatic point of view whereas variant 2 would be more easily applied in practice. An alternative would be for the two systems of law to be applied in combination: see para 52. It was then stated at para 53 that the choice of law could be left to the recognising state and section 426(5) of the Insolvency Act 1986 was given as an example of this possibility. Finally, at para 54, it was stated that the effects of recognition could be left to judicial discretion and reference was made to section 304 of the United States Bankruptcy Code where the court was empowered to order "other appropriate relief".

83 Having met in October and November 1995, the working group reported on 1 December 1995 (*Report of the Working Group on Insolvency Law on the Work of the Eighteenth Session* (Vienna, 30 October–10 November 1995) (A/CN.9/419)). The possible legislative approaches to the effects of recognition were discussed at paras 46 to 59. The arguments for and against the application of the law of the recognising state or the application of the law of the state in which the foreign proceedings were opened were described, as was a possible approach leaving it to the recognising court to choose between the two systems of law. The report appeared to favour a list of automatic consequences of recognition followed by a power for a judge to specify additional effects of recognition involving factors which would be familiar to judges in different legal systems: see paras 56, 59. At para 134, the report set out a draft provision dealing with the effects of recognition. By para (1)(e) of that draft, a foreign representative was able to ask the recognising court to grant "other appropriate relief" under the law of the state in which the foreign proceeding was opened (unless forbidden by local law); this draft was subject to a possible further qualification which referred to the law of the jurisdiction in which a limited proceeding has been commenced. This part of the draft was then discussed at paras 154 to 166. The discussion identified competing arguments as to the law which should be available to the recognising court. Para 165 referred to the law of the foreign proceeding but subject to limitations based on the law of the recognising state. However, para 165 ended by saying that the matter needed to be returned to later.

84 Although Mr Phillips took me to these reports of the working group, no one at the hearing referred to two further reports of the working group which were dated 24 October 1996 (A/CN.9/433) and 19 February 1997 (A/CN.9/435). I find that these two later reports are more helpful as regards the final adopted version of the Model Law. The report of 24 October 1996 referred to a draft article (then numbered article 12) which identified the

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relief which could be granted by the recognising court. Article 12(2)(b) permitted the recognising court to grant "any appropriate relief including" certain specified heads of relief. Article 12(2)(b)(v) referred to "other relief which may be available under the laws of the state of the foreign proceeding or under the laws of the enacting state". This draft provision was discussed at para 133 of the report where it was stated that the provision referring to relief under the laws of the state of the foreign proceeding was widely thought to be unrealistic and so that the reference to foreign law should be deleted, although the wording might be retained as an option which the enacting state might choose to implement.

85 The report dated 19 February 1997 referred to a draft article (then numbered article 17) which came very close to the final adopted form of the Model Law. The earlier reference to the relief which was available under the laws of the state of the foreign proceeding had been removed so that the relevant provision referred only to relief available under the laws of the recognising state. At paras 51 to 52 of the report, there was discussion as to whether the draft article 17 should be amended by the addition of words such as "under the conditions of the law of this state" at appropriate places. This suggestion was objected to on the ground that it was implicit by virtue of the discretionary nature of the relief available under article 17 that the court would have regard to its own law. The report also stated that the court should not be prevented from granting relief if that was found to be useful and fair. At para 57, commenting on the provision which became article 21(1)(g), the report stated that the working group accepted the proposal to restrict the relief to that available to the insolvency administrator in the enacting state.

86 The Model Law was adopted by the United Nations General Assembly on 15 December 1997. Article 21 of the Model Law, as adopted, referred to "any appropriate relief, including" and sub-paragraph (g) of article 21(1) referred to: "(g) Granting any additional relief that may be available to [the office holder] under the laws of this state".

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".

88 I was referred to two versions of the *Guide to Enactment*, one published in 1999 and the other in 2014. It was submitted that the 1999 version was the one referred to in regulation 2 of CBIR. I will refer to that version but, in any event, the following passages from the 1999 Guide are essentially repeated in the 2014 Guide. Paras 20(b) and 154 of the 1999 Guide state:

> "20. With its scope limited to some procedural aspects of cross-border insolvency cases, the Model Law is intended to operate as an integral part of the existing insolvency law in the enacting state. This is manifested in several ways . . . (b) The Model Law presents to enacting states the possibility of aligning the relief resulting from recognition of a foreign proceeding with the relief available in a comparable proceeding in national law . . ."

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A "154. Post recognition relief under article 21 is discretionary, as is pre-recognition relief under article 19. The types of relief listed in article 21, paragraph 1, are typical or most frequent 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."

B

89 Turning to more general matters, I note that what can be called the common law of recognition proceeds on the basis that the recognising court applies its own law and not the law of the state in which the foreign proceedings were opened: see *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508, para 22. This is to be contrasted with the position under C section 426(5) of the Insolvency Act 1986 and article 4 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p 1). In those two cases, the applicable law is clearly defined so that it is not restricted to (in the case of section 426(5)) or is not (in the case of article 4) the law of the state which is asked to grant relief. The working group referred to section 426(5) and an earlier draft of Council D Regulation No 1346/2000 but did not adopt language which is comparable to those legislative precedents.

90 The scope of article 21 of the CBIR was one of the issues raised in *Rubin v Eurofinance SA* [2013] 1 AC 236. In that case it was suggested that a judgment of a New York court should be recognised in England pursuant to article 21. I note that counsel who submitted that the judgment could be recognised under article 21 said that under the CBIR the court could grant E "appropriate relief including any type of relief which is available under the law of the enacting state". At para 28, Lord Collins of Mapesbury referred to para 20(b) of the UNCITRAL *Guide to Enactment* and stated that enacting states could make available "the type of relief which would be available in the case of a domestic insolvency". Lord Collins dealt further with the CBIR at paras 133–144 and he said, at paras 141–143:

F "141. The respondents say that (a) the power under article 21 is to grant any type of relief that is available under the law of the relevant state, and that 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; (b) the recognition and enforcement of the judgments of a foreign court is the G paradigm means of co-operation with that court; and (c) the examples of co-operation in article 27 are merely examples and are not exhaustive.

"142. But the CBIR (and the Model Law) say nothing about the enforcement of foreign judgments against third parties. As Lord Mance pointed out in argument, recognition and enforcement are fundamental in international cases. Recognition and enforcement of judgments in civil and commercial matters (but not in insolvency matters) have been the H subject of intense international negotiations at the Hague Conference on Private International Law, which ultimately failed because of inability to agree on recognised international bases of jurisdiction.

"143. It would be surprising if the Model Law was intended to deal with judgments in insolvency matters by implication. Articles 21, 25 and

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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."

91 *In re Atlas Bulk Shipping A/S* [2012] Bus LR 1124 is an interesting example of the Companies Court granting relief under article 21(1)(g) but no issue arose in that case of the court granting a type of relief which was not available in the case of a domestic insolvency: see at p 1131G.

92 The textbooks appear to favour a limitation on the relief which might be granted under article 21 to relief which would be available under domestic law in relation to a domestic insolvency: see *Fletcher on Insolvency in Private International Law*, 2nd ed (2012), para 8.38 and *Sheldon on Cross Border Insolvency*, 3rd ed (2007), paras 3.91 to 3.100.

93 Mr Phillips cited a number of decisions of courts in the United States and Canada. Mr Collings did not make submissions to me in relation to those cases but I obviously need to consider them. Before doing so, I will refer to the relevant statutory provisions in the United States and in Canada.

94 Before the Model Law was implemented in the United States, cases in that jurisdiction which were ancillary to foreign insolvency proceedings were dealt with under section 304 of the former Bankruptcy Code. Under section 304(b)(3) the court was able to order "other appropriate relief" and section 304(c) set out matters which should guide the court when asked to make an order under section 304(b). The Model Law was implemented in the United States by Chapter 15 of Title 11 of the Bankruptcy Code. Sections 1519, 1520 and 1521 are similar to articles 19, 20 and 21 of the CBIR. The Model Law was implemented in Canada by Part IV (sections 44 to 61) of the CCAA. Section 48 of the CCAA gives the court power to make certain orders on recognition of a foreign proceeding. Further, by section 49(1), the court may make any order "that it considers appropriate" including certain specified orders.

95 In *In re Atlas Shipping A/S* (2009) 404 BR 726 the New York court held that many of the principles underlying section 304 of the former Bankruptcy Code remained in effect in relation to Chapter 15. It was said that the jurisdiction to grant "appropriate relief" was "exceedingly broad".

96 In *In re Gandi Innovations Holdings LLC* (unreported) 5 June 2009, the Texas court recognised a foreign proceeding in Canada. The Canadian court had made an order under the CCAA prohibiting the termination of executory contracts without the leave of the court. The Texas court acting under section 1521 of the Bankruptcy Code made its own order to the same extent as the Canadian order.

97 *In re Condor Insurance Ltd* (2010) 601 F 3d 319 is a decision of the United States Court of Appeals. The case concerned a Nevis insurance company which was the subject of a winding up order in Nevis. The United States court recognised the Nevis proceedings as foreign main proceedings. The case raised the question whether there was power under section 1521 of the Bankruptcy Code to apply foreign law (Nevis Law) for the purpose of avoiding fraudulent transfers. The alternative of opening proceedings in the United States under Chapter 7 of the Bankruptcy Code was not available because the company was a foreign insurance company. Under Chapter 7,

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A the United States court would have had extensive powers to avoid fraudulent transfers. The court held that it had the power to apply Nevis law because it could grant "appropriate relief" under section 1521. The discussion in the case is complicated by a number of provisions in section 1507 and 1521 as to the bringing of avoidance claims in the United States courts but it is not necessary to refer to those matters for present purposes. The court referred to the deliberations of the UNCITRAL Working Group:

B

> "UNCITRAL's Working Group on Insolvency Law examined three potential approaches to the question of which law a recognising court should apply. The first approach would allow the recognising court to apply its own law. This was favoured by some countries concerned with the potential lack of familiarity with foreign law by recognising courts. The second approach would apply the law of the main proceeding. This
C approach was favoured by some as it 'would lead to a more consistent, harmonised result, in view of divergences among national insolvency laws' and would help 'avoid abetting debtors seeking to conceal assets behind another law that might provide a haven for those assets'. A third approach was to permit the recognising court to apply either the law of the main proceeding or its own law—a solution which might 'provide
D flexibility needed to limit insulation of assets from insolvency proceedings'. However this approach drew concern that it might raise the potential that a foreign representative 'would be enabled to exercise more powers than those that would be available to the representative under the law of the appointing jurisdiction'."

98 In the quoted passage, the United States court referred to the
E working group report dated 1 December 1995 (*Report of the Working Group on Insolvency Law on the Work of the Eighteenth Session*, paras 50–51 (A/CN.9/419)). The court did not specifically refer to the reports dated 24 October 1996 and 19 February 1997. The court then continued:

> "The final provision did not accept any of these three approaches in
F full. Rather, the Model Law permitted the recognising court to grant any appropriate relief and granted standing to the foreign representatives to bring avoidance actions under the law of the recognising state. This purposefully left open the question of which law the court should apply—in deference to the choice of law concerns expressed by the United States."

G **99** The United States court then explained that the application of foreign avoidance law in a Chapter 15 ancillary proceeding raised fewer choice of law concerns as the court was not required to create a separate bankruptcy estate. The court also stated that its decision was supported by earlier decisions as to the scope of section 304 of the former Bankruptcy Code and cited *In re Metzeler* (1987) 78 BR 674. The court added that
H Congress had intended that the case law in relation to section 304 should apply unless contradicted by Chapter 15.

100 In *In re Hartford Computer Hardware Inc* (2012) 94 CBR (5th) 20, the Canadian court recognised United States Chapter 11 proceedings. Under section 49 of the CCAA, the Canadian court was asked to recognise and make effective in Canada an order made in the United States court. It was

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pointed out that one part of the United States order could not be made by a Canadian court in relation to a Canadian insolvency under its domestic insolvency provisions: see section 11(2) of the CCAA. The Canadian court held that under section 49 of the CCAA it could make any order which it considered appropriate and it concluded that the order requested was indeed appropriate. It also held that the provisions of the CCAA which gave effect to the public policy restrictions in article 6 of the Model Law should be construed restrictively and that the order sought did not raise any public policy issues.

101 *In re Sino-Forest Corpn* (2013) 501 BR 655 concerned section 1507, rather than section 1521 of the United States Bankruptcy Code: see footnote 3 to the judgment. Section 1507 allows the United States court to provide "additional assistance" to a foreign representative. The court was asked to recognise an order made by the Canadian court in a Canadian insolvency proceeding. It was held, following, *In re Metcalfe & Mansfield Alternative Investments* (2010) 421 BR 685, that the United States court should apply its ordinary principles as to enforcement of foreign judgments and comity pursuant to Chapter 15 and it did not need to ask itself whether it could or would have made the same order if the insolvency had been proceeding before a United States court under its own Chapter 11.

102 I was also shown a number of decisions of the American and Canadian courts where the recognising court granted relief which was available under the domestic law of the recognising state in a case of a domestic insolvency. These decisions are not of any assistance as to the present debate about the scope of "appropriate relief" in article 21.

103 Mr Phillips argued that article 6 of CBIR demonstrated that the reference to "appropriate relief" must include relief that was not available under English law. It was submitted that relief which was available under English law could not be "manifestly contrary to the public policy of Great Britain or any part of it". It was then submitted that if the court held that appropriate relief under article 21(1)(a) was confined to relief which was available under English law, then article 6 could never apply and would be otiose. Therefore to prevent article 6 being otiose, the court should hold that "appropriate relief" could include relief only available under foreign law and in such a case the court could ask itself whether it would be "manifestly contrary to the public policy of Great Britain or any part of it" to give effect to foreign law.

104 This argument as to the significance of article 6 ignores the fact that article 6 is not restricted to dealing with cases which might involve the grant of "appropriate relief" within article 21(1). Article 6 deals with all of the provisions of the CBIR, which include many specific provisions. It may therefore be the case that an application is made to the court to take action under such a specific provision, where the court may have to consider whether the action in question would be contrary to public policy in English law. The operation of article 6 in this way is illustrated by *In re Toft* (2011) 453 BR 186, a decision of a New York bankruptcy court. In that case, Dr Toft was the subject of insolvency proceedings in Germany. The German court made an order permitting the administrator in the insolvency to intercept Dr Toft's postal and electronic mail. The English court granted recognition and enforcement of that order. The administrator applied in the United States for a similar order relying on the express power to order the

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A delivery of information contained in section 1521(a)(4) of the Bankruptcy Code. The New York court held that the order sought was contrary to United States public policy within section 1506 of the Bankruptcy Code (which implemented article 6 of the Model Law).

Conclusion on "any appropriate relief"

B **105** The non-exhaustive words "any appropriate relief" are capable of being given a wide literal meaning. However, the very width of their literal meaning, which is illustrated in para 79 above, makes me somewhat cautious about construing the words literally. Those considerations suggest to me that it was not intended that the words should be given such a wide literal meaning.

106 The decision in *In re Condor Insurance Ltd* 601 F 3d 319 appears to
C support an interpretation of those words which would allow the recognising court to give effect to an order of the court of the foreign proceedings even if the recognising court could not itself have made such an order in its own domestic proceedings. I recognise that article 8 of the CBIR directs the Companies Court to have regard to the need to promote uniformity in the application of the Model Law. However, I have concerns about applying
D the decision in *In re Condor Insurance Ltd* to article 21 of the CBIR for two separate reasons. The first is that, with respect to the judges in that case, I do not think that their description of the various reports of the working group on the Model Law was accurate. Secondly, their reasoning relied on the position which pertained under section 304 of the former US Bankruptcy Code before the implementation of the Model Law. I can see that if the position under section 304 of the former Code was that the US court could grant "any
E appropriate relief" and that it had been established that those words allowed the US court to apply the law of the foreign proceedings, then the same words should have the same effect in section 1521 of the Bankruptcy Code, which implemented the Model Law. However, there is no comparable legislative history in Great Britain and it is open to me to conclude that the United States have implemented the Model Law in a way which is not identical to the way
F in which it has been implemented in Great Britain.

107 I am directed by regulation 2 of the CBIR to consider the documents relating to the working group on the Model Law. On my reading of the reports of the working group, it was not intended that "any appropriate relief" would allow the recognising court to go beyond the relief it would grant in relation to a domestic insolvency. I do not think that there is sufficient in the discussion in those reports which would allow me to
G conclude (as the court concluded in *In re Condor Insurance Ltd*) that the words "any appropriate relief" were intended to replicate the position under section 304 of the former US Bankruptcy Code. I also note that whenever the legal position under article 21 has been described in an English case or in a textbook on the CBIR, the discussion proceeds on the basis that "any appropriate relief" allows the court to grant the same sort of relief as it
H would grant in relation to a domestic insolvency.

108 Accordingly, I am not persuaded that the words "any appropriate relief" allow me to grant relief which would not be available to the court when dealing with a domestic insolvency.

109 I have also considered whether I would be prepared to grant to the administrator the relief which he seeks in this case, even if I held that I had

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power to do so pursuant to the words "any appropriate relief" in article 21. I have concluded that I would not have been prepared to do so.

110 The contract in this case was made between a Korean company and a Brazilian company. The parties chose the law which was to govern their contract. They chose English law rather than Korean or Brazilian law. Under English law, in the events which have happened, if the security agent does not elect to transfer or novate the contract, then the contract can be brought to an end, either by an election to that effect on the part of the security agent, or by a termination notice given by Fibria. If the contract is brought to an end, under English law, then Fibria is not committed to the contract for the remainder of the 25-year term. If the company claims freight from Fibria, then Fibria will not be obliged to pay. Conversely, if Fibria is restrained from terminating the contract, then it will be committed to the contract for the remainder of the 25-year term and will be obliged to pay freight for that period.

111 *Rubin v Eurofinance SA* [2013] 1 AC 236 supports the view that the relief available under article 21 is of a procedural nature and that the article should be given a wide interpretation in relation to matters of procedure. There is considerable scope for argument as to whether the relief sought in a particular case is of a procedural or of a substantive nature. I will not attempt to define which matters are procedural and which are substantive. However, having explained the difference between Fibria being entitled to terminate the contract and not being so entitled, it seems to me that this difference goes well beyond matters of procedure and affects the substance of the parties' rights and obligations under the contract.

112 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 insolvency 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 *In re Atlas Bulk Shipping A/S* [2012] Bus LR 1124, para 26 and *AWB (Geneva) SA v North America Steamships Ltd* [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 a Korean court would apply Korean insolvency law to the insolvency of the company, they might have been very surprised to find that an English court would apply Korean insolvency law to the substantive rights of the parties under a contract which they had agreed should be governed by English law.

113 Different jurisdictions adopt different approaches to ipso facto clauses. I have referred earlier to the position in the United States, Canada and Korea. As it happens, the position in English law has been recently reviewed by the Supreme Court in *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd (Revenue and Customs Comrs intervening)* [2011] Bus LR 1266. The Supreme Court took full account of the policy considerations behind the choice which is to be made as to the enforceability of such provisions. If Korean law is as the administrator contends, then Korea views these policy questions differently from this jurisdiction. If I have a free hand, as the administrator contends, to do what I consider to be appropriate in this case, I am not tempted to prefer the policy choice which is made in Korean law over the policy choice recently reaffirmed by the Supreme Court in relation to English law. In this case, I consider that it is

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A appropriate for the Companies Court to apply English law and to give effect to the parties' choice of English law.

114 Even if the decision in *In re Condor Insurance Ltd* 601 F 3d 319 were a persuasive authority in this jurisdiction, it is readily distinguishable from the present case. In that case, the US court had extensive powers to set aside avoidance transactions in a domestic insolvency. The issue for the court was much more to do with matters of procedure than of substance. The present case is more to do with matters of substance than of procedure. Further, in that case, the US court was applying its established principles of comity to the order of the foreign court. There is no comparable order of the Korean court in this case.

B

The effect of my conclusion on the applications

C

115 I do not have power under article 21(1)(a) to order a "stay" in relation to Fibria's entitlement to serve a termination notice under clause 28.1 of the contract. I do not have power under article 21(1) to make an order restraining Fibria from serving such a notice; if I had such power, I would not exercise it as I would hold such an order was not "appropriate relief". In any case, if it is said that I should do what a Korean court would do in this case, then I am not persuaded that a Korean court would make an order restraining the service of a termination notice. On my understanding of the expert evidence, what the Korean court would do would be to hold that a termination notice, if served, would be ineffective to determine the contract. Thus, it is not necessary or appropriate to make an order restraining Fibria from serving a termination notice.

D

116 I have reached the above decisions on the assumptions as to Korean law contended for by the administrator. On those assumptions, I am not prepared to grant the relief sought by the administrator under article 21. Accordingly, I do not need to know the answer to the questions of Korean law that arise and I will not therefore send a request to the Korean court to give me the answers to such questions.

E

117 As to Fibria's application for permission to commence an arbitration, I raised at the hearing the question whether it was necessary for there to be an arbitration between Fibria and the company as to the enforceability of clause 28.1 in English law. I understood at the hearing there was no issue about that. It may be any question as to the enforceability of clause 28.1 in English law would also affect the various assignees of the benefit of the contract. Those persons are not parties to the present proceedings but, in any event, as they are not the subject of the Korean insolvency, and are not the subject of Warren J's order of 25 June 2013, Fibria does not need permission to bring any relevant proceedings to determine such an issue (if there is one) between Fibria and those persons.

F

G

118 I will hear counsel as to the appropriate orders to make to give effect to this judgment.

H

Appendix

1. The Cross-Border Insolvency Regulations 2006 were made pursuant to section 14 of the Insolvency Act 2000 and came into force on 4 April 2006.

2. By regulation 1(2), "the UNCITRAL Model Law" is defined to mean the Model Law on cross-border insolvency as adopted by the United Nations Commission on International Trade Law on 30 May 1997.

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3. Regulation 2 provides for the UNCITRAL Model Law to have the force of law in the following way:

"(1) The UNCITRAL Model Law shall have the force of law in Great Britain in the form set out in Schedule 1 to these Regulations (which contains the UNCITRAL Model Law with certain modifications to adapt it for application in Great Britain).

"(2) 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* (UNCITRAL document A/CN.9/442) prepared at the request of the United Nations Commission on International Trade Law made in May 1997."

4. Regulation 3 provides:

"(1) British insolvency law (as defined in article 2 of the UNCITRAL Model Law as set out in Schedule 1 to these Regulations) and Part 3 of the Insolvency Act 1986 shall apply with such modifications as the context requires for the purpose of giving effect to the provisions of these Regulations.

"(2) In the case of any conflict between any provision of British insolvency law or of Part 3 of the Insolvency Act 1986 and the provisions of these Regulations, the latter shall prevail."

5. The form of the Model Law which is given effect is set out in Schedule 1 to the Regulations.

6. By article 1(1) it is provided that the Model Law applies where assistance is sought in Great Britain by a foreign court or a foreign representative in connection with a foreign proceeding.

7. Article 2 contains relevant definitions, which include the following:

"For the purposes of this Law—

"(a) 'British insolvency law' means—"

"(i) in relation to England and Wales, provision extending to England and Wales and made by or under the Insolvency Act 1986 (with the exception of Part 3 of that Act) or by or under that Act as extended or applied by or under any other enactment (excluding these Regulations);"

"(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;"

"(q) references to the law of Great Britain include a reference to the law of either part of Great Britain (including its rules of private international law)."

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8. Articles 6, 7 and 8 provide:

"6. *Public policy exception*

"Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of Great Britain or any part of it.

"7. *Additional assistance under other laws*

"Nothing in this Law limits the power of a court or a British insolvency officeholder to provide additional assistance to a foreign representative under other laws of Great Britain.

" 8. *Interpretation*

"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."

9. Chapter II (articles 9 to 14) provides for foreign representatives and creditors to have access to courts in Great Britain.

10. Chapter III (articles 15 to 24) provides for recognition of a foreign proceeding and relief. Articles 19 to 23 provide:

"19. *Relief that may be granted on application for recognition of a foreign proceeding*

"1. From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including—

"(a) staying execution against the debtor's assets;

"(b) entrusting the administration or realisation of all or part of the debtor's assets located in Great Britain to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy; and

"(c) any relief mentioned in paragraph 1(c), (d) or (g) of article 21.

"2. Unless extended under paragraph 1(f) of article 21, the relief granted under this article terminates when the application for recognition is decided upon.

"3. The court may refuse to grant relief under this article if such relief would interfere with the administration of a foreign main proceeding.

"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 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.

"2. The stay and suspension referred to in paragraph 1 of this article shall be—

"(a) the same in scope and effect as if the debtor, in the case of an individual, had been adjudged bankrupt under the Insolvency Act 1986 or had his estate sequestrated under the Bankruptcy (Scotland) Act 1985, or, in the case of a debtor other than an individual, had been made the subject of a winding up order under the Insolvency Act 1986; 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 Great Britain in such a case, and the provisions of paragraph 1 of this article shall be interpreted accordingly.

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"3. Without prejudice to paragraph 2 of this article, the stay and suspension referred to in paragraph 1 of this article, in particular, does 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;

"(c) exercisable under or by virtue of or in connection with the provisions referred to in article 1(4); 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, in the case of an individual, had been adjudged bankrupt under the Insolvency Act 1986 or had his estate sequestrated under the Bankruptcy (Scotland) Act 1985, or, in the case of a debtor other than an individual, had been made the subject of a winding up order under the Insolvency Act 1986.

"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 British 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 referred to 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.

"21. *Relief that may be granted on 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;

"(d) 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;

"(e) entrusting the administration or realisation of all or part of the debtor's assets located in Great Britain to the foreign representative or another person designated by the court;

"(f) extending relief granted under paragraph 1 of article 19; and

"(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

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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.

"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 assets that, under the law of Great Britain, 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 shall affect 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.

"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 (including any secured creditors or parties to hire-purchase agreements) 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.

"23. *Actions to avoid acts detrimental to creditors*

"1. Subject to paragraphs 6 and 9 of this article, on recognition of a foreign proceeding, the foreign representative has standing to make an application to the court for an order under or in connection with sections 238, 239, 242, 243, 244, 245, 339, 340, 342A, 343, and 423 of the Insolvency Act 1986 and sections 34, 35, 36, 36A and 61 of the Bankruptcy (Scotland) Act 1985.

"2. Where the foreign representative makes such an application ("an article 23 application"), the sections referred to in paragraph 1 of this article and sections 240, 241, 341, 342, 342B to 342F, 424 and 425 of the Insolvency Act 1986 and sections 36B and 36C of the Bankruptcy (Scotland) Act 1985 shall apply—

"(a) whether or not the debtor, in the case of an individual, has been adjudged bankrupt or had his estate sequestrated, or, in the case of a debtor other than an individual, is being wound up or is in administration, under British insolvency law; and

"(b) with the modifications set out in paragraph 3 of this article.

"3. The modifications referred to in paragraph 2 of this article are as follows—

"(a) for the purposes of sections 241(2A)(a) and 342(2A)(a) of the Insolvency Act 1986, a person has notice of the relevant proceedings if he has notice of the opening of the relevant foreign proceeding;

"(b) for the purposes of sections 240(1) and 245(3) of that Act, the onset of insolvency shall be the date of the opening of the relevant foreign proceeding;

"(c) the periods referred to in sections 244(2), 341(1)(a) to (c) and 343(2) of that Act shall be periods ending with the date of the opening of the relevant foreign proceeding;

"(d) for the purposes of sections 242(3)(a), (3)(b) and 243(1) of that Act, the date on which the winding up of the company commences or it enters administration shall be the date of the opening of the relevant foreign proceeding; and

"(e) for the purposes of sections 34(3)(a), (3)(b), 35(1)(c), 36(1)(a) and (1)(b) and 61(2) of the Bankruptcy (Scotland) Act 1985, the date of sequestration or granting of the trust deed shall be the date of the opening of the relevant foreign proceeding.

"4. For the purposes of paragraph 3 of this article, the date of the opening of the foreign proceeding shall be determined in accordance with the law of the state

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in which the foreign proceeding is taking place, including any rule of law by virtue of which the foreign proceeding is deemed to have opened at an earlier time.

"5. When the foreign proceeding is a foreign non-main proceeding, the court must be satisfied that the article 23 application relates to assets that, under the law of Great Britain, should be administered in the foreign non-main proceeding.

"6. At any time when a proceeding under British insolvency law is taking place regarding the debtor—

"(a) the foreign representative shall not make an article 23 application except with the permission of— (i) in the case of a proceeding under British insolvency law taking place in England and Wales, the High Court; or (ii) in the case of a proceeding under British insolvency law taking place in Scotland, the Court of Session; and

"(b) references to 'the court' in paragraphs 1, 5 and 7 of this article are references to the court in which that proceeding is taking place.

"7. On making an order on an article 23 application, the court may give such directions regarding the distribution of any proceeds of the claim by the foreign representative, as it thinks fit to ensure that the interests of creditors in Great Britain are adequately protected.

"8. Nothing in this article affects the right of a British insolvency officeholder to make an application under or in connection with any of the provisions referred to in paragraph 1 of this article.

"9. Nothing in paragraph 1 of this article shall apply in respect of any preference given, floating charge created, alienation, assignment or relevant contributions (within the meaning of section 342A(5) of the Insolvency Act 1986) made or other transaction entered into before the date on which this Law comes into force."

11. Chapter IV (articles 25 to 27) provides for co-operation with foreign courts and foreign representatives. Article 25 provided:

"25. *Co-operation and direct communication between a court of Great Britain and foreign courts or foreign representatives*

"1. In matters referred to in paragraph 1 of article 1, the court may co-operate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a British insolvency officeholder.

"2. The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives."

12. Article 27 provides:

"27. *Forms of co-operation*

"Co-operation referred to in articles 25 and 26 may be implemented by any appropriate means, including—

"(a) appointment of a person to act at the direction of the court;

"(b) communication of information by any means considered appropriate by the court;

"(c) co-ordination of the administration and supervision of the debtor's assets and affairs;

"(d) approval or implementation by courts of agreements concerning the co-ordination of proceedings;

"(e) co-ordination of concurrent proceedings regarding the same debtor."

Application dismissed.

Isabella Cheevers, Barrister

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