Workshop 2

Cross border issues in arbitration and insolvency

Problem

"***A conflict of near polar extremes: bankruptcy policy exerts an inexorable pull towards centralization while arbitration policy advocates a decentralized approach towards dispute resolution."***[1]

Amazing Hotels Limited (**Hotels)**, incorporated under the laws of the BVI, is the holding company of a group which owns 5-star hotels worldwide. Hotels is ultimately owned by Hilton Paris **(HP)** who is also a director of Hotels together with three associates. Hotels engages Amazing Management Limited, (**Management**), to operate and manage the hotels it owns pursuant to a Hotel Management Agreement (**HMA**).

Hotels entered into two loans, each for $200m, with The Royal Bank of London to fund new acquisitions, the UK Loan and BVI Loan. The Royal Bank of London is incorporated in England and based in London.

The UK Loan agreement is governed by English law and contains an arbitration clause:

"Any dispute arising under, out of or in connection with this agreement or under, out of or in connection with the services to be provided by this agreement shall be resolved by arbitration. The language of the arbitration shall be English and shall take place in London pursuant to the rules of the ICC."

The BVI Loan agreement is governed by BVI law and also contains an arbitration clause:

"Any dispute arising under, out of or in connection with this agreement or under, out of or in connection with the services to be provided by the agreement shall be resolved by arbitration. The language of the arbitration shall be English and shall take place in the BVI pursuant to the rules of the ICC."

The Royal Bank of London considers that Hotels is in default of both loans and wishes to present a petition to wind up Hotels. The Bank is concerned that HP and his associates may have been diverting funds out of Hotels to Management prior to default by the payment of inflated management fees and bonuses.

In correspondence with the Bank to date Hotels has indicated two reasons why it is not in default of the loans. First, Hotels alleges that there was an oral agreement at a meeting of the Bank to defer the payments under the loan falling due. There is no documentation to support the existence of that agreement and notes of meetings between the Bank and Hotels do not refer to such an agreement. Second, Hotels allege that the Bank exercised a right in the loan agreements to convert the loan debt into a 10% equity stake in Hotels. Hotels rely on a letter sent by the Bank referring to the right to convert debt into equity. The issue of whether that letter constituted an exercise of the conversion

[1] *Re United States Lines Inc* 197 F.3D 631 at 640.

right is a matter of construction of the loan agreements. The Bank considers that these alleged defences are plainly lacking in merit and are merely devices to delay enforcement processes.

The Bank wants to present a petition against Hotels and to apply for the appointment of a provisional liquidator and seeks advice on the relevance, if any, of the arbitration clause in the loan agreements.

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Assume that in due course a winding-up order is made against Hotels by the BVI High Court. The liquidators discover that 3 weeks prior to the presentation of the petition but after the due repayment date of the loans had passed, Hotels paid US$5,000,000 to Management in discharge of management fees Mr Paris alleges were owed to Management under the HMA. The liquidators seek your advice on whether there is any right to recover this sum and, if yes, whether the arbitration clause has any relevance. The liquidators also seek your advice on the relevance, if any, of the arbitration clause to the claim to recover the monies diverted to Management.

Incredible Software Limited **(ISL)**, an IT and Systems provider registered in England, claims to be a creditor of Hotels. ISL claims that it is owed US$100,000 for IT services. Hotels had, prior to the liquidation, disputed this sum. The agreement between Hotels and ISL contains an arbitration clause which provides:

"all and any disputes arising under this agreement shall be subject to binding arbitration in London by a single arbitrator appointed by the LCIA."

ISL has referred the dispute to arbitration in London. The liquidator seeks your advice.

Case Digest

ENGLISH CASES

When is a dispute not a dispute for the purposes of an arbitration clause?

Salford Estates (No.2) Ltd v Altomart Ltd [2014] EWCA Civ 1575
Court of Appeal

Summary: Where a number of disputes concerning liability for the payment of service charges and insurance rent were referred to arbitration under the provisions of a lease, the Arbitration Act 1996 s.9 did not apply to a winding-up petition presented by the lessor based on the lessee company's inability to pay its debts, because the substance of the dispute was the existence of a particular debt mentioned in the petition.

Facts: The appellant lessor (S) appealed against an order staying a winding-up petition it had presented against the respondent lessee (X) in respect of debts allegedly arising out of an underlease of commercial premises.
The underlease, which contained an arbitration clause, provided for X to pay an annual service charge. By cl.3(2), S entered into covenants regarding the insurance of the premises. The underlease also provided that X would pay an amount equal to the insurance premium by way of rent. A number of disputes concerning the service charge and insurance rent were referred to arbitration. The arbitrator held that the total arrears of service charge and insurance rent due to S amounted to £64,431. When X did not immediately pay the sums due, S issued a winding-up petition stating the sums due as being £64,431 plus other amounts. X disputed the other amounts claimed and applied to strike out or stay the petition, claiming that S had failed to comply with cl.3(2). The judge concluded that X had failed to raise a substantial dispute in good faith and on substantial grounds, but regarded himself as bound by Rusant Ltd v Traxys Far East Ltd [2013] EWHC 4083 (Comm) and Halki Shipping Corp v Sopex Oils Ltd [1998] 1 W.L.R. 726 and stayed the petition on that basis.
S argued that a winding-up petition based on an unpaid debt should not be stayed pursuant to an arbitration agreement unless the debt was bona fide disputed on substantial grounds because, unlike an ordinary money claim, a winding-up petition was not a claim for payment and therefore did not fall within the Arbitration Act 1996 s.9.

Held: Appeal dismissed.
(1) Section 9(1) did not apply to a winding-up petition which was based on a company's inability to pay its debts where what was in dispute was the existence of a particular debt mentioned in the petition. In the instant case, S was relying on non-payment of the specific debt mentioned in the

petition as evidence that X was unable to pay its debts as they fell due within the Insolvency Act 1986 s.123(1)(e); therefore, the ground for invoking the exercise of the court's jurisdiction to wind up in s.122(1)(f) was satisfied. However, if only some of the alleged debts stated in the winding-up petition as evidence of the company's inability to pay arose out of a transaction containing an arbitration agreement, the concept of a non-discretionary "stay" pursuant to s.9(1) and s.9(4) of the 1996 Act made no sense. In those circumstances, there was no basis for staying the petition itself; and, if the petition proceeded, there could be no reference to arbitration of any of the debts because the making of a winding-up order brought into effect the statutory scheme for proof of debts which superseded any arbitration agreement. Moreover, it seemed highly improbable that Parliament intended s.9 of the 1996 Act to confer on a debtor the right to a non-discretionary order striking at the heart of the jurisdiction and discretionary power of the court to wind up companies in the public interest where they were unable to pay their debts. An issue on a winding-up petition which was essential to the foundation of the petition did not become a claim falling within s.9 of the 1996 Act, Fulham Football Club (1987) Ltd v Richards [2011] EWCA Civ 855, [2012] Ch. 333 considered, Rusant doubted (see paras 26, 31-38 of judgment). (2) The court had to exercise its discretionary power to wind up a company under s.122(1) consistently with the legislative policy embodied in the 1996 Act. Since the debt mentioned in the petition fell within the very wide terms of the arbitration clause[2] in the underlease and was not admitted, that was sufficient to constitute a dispute within the 1996 Act, irrespective of the substantive merits of any defence, and to trigger the automatic stay provision in s.9(1), Halki followed. In the exercise of the discretion under s.122(1)(f) of the 1986 Act, it was right for the court either to dismiss or to stay the petition so as to compel the parties to resolve their dispute over the debt by their chosen method of dispute resolution rather than require the court to investigate whether or not the debt was bona fide disputed on substantial grounds. In the instant case it would have been better to have dismissed the petition rather than to stay it in the absence of any evidence that there was another creditor of X who was willing to be substituted as petitioner; however, that was not a point taken by S on the appeal (paras 39-42).

Re Eco Measure Market Exchange Ltd [2015] EWHC 1797 (Ch)
Alan Steinfeld QC (sitting as a Deputy Judge of the Chancery Division)

Summary: Following the guidance in Salford Estates (No.2) Ltd v Altomart Ltd [2014] EWCA Civ 1575, [2015] Ch. 589, it was appropriate to dismiss a winding-up petition where the debt on which the petition was based arose out of a contract containing an arbitration agreement. The company against whom the petition was brought was entitled to have the petition dismissed and to have the dispute referred to an arbitrator without having to show that the debt claimed was bona fide disputed on substantial grounds.

[2] "Any dispute or difference arising between the Lessor and the Lessee as to their respective rights duties or obligations or as to any other matter arising out of or in connection with this Underlease shall be referred to a single arbitrator provided the parties are able to agree on one or otherwise to two arbitrators one to be appointed by each party or their umpire in accordance with and subject to the provisions of the Arbitration Act 1950 or any statutory modification or re-enactment thereof for the time being in force"

Held: The guidance in Salford Estates (No.2) Ltd made it clear that the court should, save in very exceptional circumstances, exercise its discretion under the Insolvency Act 1986 s.122(1) to dismiss any winding-up petition where the alleged debt on which the petition was based arose out of a contract containing an arbitration agreement. In such cases, it was sufficient for the party against whom the petition was brought to show that the debt was disputed, namely not admitted, in order for the petition to be dismissed, and it did not have to show that the debt claimed was bona fide disputed on substantial grounds, Salford Estates followed. Following that guidance, it was appropriate to dismiss the petition brought against E. There was undoubtedly a dispute between the parties which it was appropriate for the arbitrator, and not the instant court, to determine. The points raised by Q were arguments which could be made to the arbitrator, and it would be wrong for the instant court to cast any view on the merits of such arguments when they were properly to be left to the arbitrator, Salford Estates followed.

Philpott v Lycee Français Charles De Gaulle School, [2015] EWHC 1797
HHJ Purle QC

Summary: Where insolvency proceedings are already on foot and a dispute arises which is subject to an arbitration agreement, such dispute will likely be referred to arbitration rather than determined in the insolvency. Here, the liquidators of the company applied to the Court for directions as to how they should calculate a final account of the defendant's claim in the liquidation. The defendant applied to the Court for those proceedings to be stayed under s.9 of the AA 1996 on the basis that there was an arbitration clause in the agreement which applied to the dispute. The Court confirmed that any proceedings brought by the liquidators in order to ascertain the sum claimed should be stayed as a result of s.9 of the AA 1996. Purle HHJ noted that: despite his
"scepticism as to whether or not arbitration really is the speedy and relatively economical alternative that it is made out to be, Parliament has clearly chosen to strengthen the impact of arbitration clauses and this case does not come within any of the limited statutory exceptions".

To Anti-suit (Or not)?

AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC [2013] UKSC 35

Supreme Court

Summary**:** The English courts had power under the Senior Courts Act 1981 s.37 to injunct the commencement or continuation of proceedings brought in a forum outside the Brussels/Lugano regime where an arbitration agreement existed. The Arbitration Act 1996 was not inconsistent with that power, and there was no support for the proposition that the negative aspect of an arbitration agreement was enforceable only when an arbitration was on foot or proposed.

Facts: The appellant company (U) appealed against a decision of the Court of Appeal ([2011] EWCA Civ 647, [2012] 1 W.L.R. 920) upholding a judge's decision to grant the respondent company (H) an anti-suit injunction under the Senior Courts Act 1981 s.37 preventing U from bringing proceedings in Kazakhstan.

H was the current grantee and lessee of a concession entitling it to operate an energy-producing hydroelectric plant in Kazakhstan. U was the current owner and grantor of the concession. The concession agreement was governed by Kazakh law but contained a London arbitration clause. That clause provided that disputes should be settled by arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, with the arbitration to be conducted in London. U brought proceedings against H in a Kazakh court, alleging that H had failed to supply information concerning concession assets pursuant to a request duly made under the concession agreement. H obtained an interim anti-suit injunction in the English Commercial Court and that injunction was later made final. The Kazakh courts rejected H's attempts to rely on the interim injunction. The issue was whether the English courts had the power to injunct the commencement or continuation of proceedings brought in a forum outside the Brussels/Lugano regime where an arbitration agreement existed.

Held: Appeal dismissed.

(1) U had argued that the negative aspect of an arbitration agreement was enforceable only when an arbitration was on foot or proposed, but there was no support in the case law for that proposition. Both before and after the Arbitration Act 1996, the negative aspect was well recognised, and it was well established that the English courts would give effect to it, where necessary by injuncting foreign proceedings brought in breach of either an arbitration agreement or an exclusive choice-of-court clause. Further, such relief was treated as the counterpart of the statutory power to grant a stay of domestic proceedings to give effect to an arbitration agreement. A stay was not made conditional on arbitration being on foot, proposed or brought. If there was power under s.37 to injunct the

commencement or continuation of foreign proceedings, no reason was evident why the exercise of that power should depend on such a condition. The power to grant an anti-suit injunction of the type made by the judge was not inconsistent with the 1996 Act. It was inconceivable that the Act intended or should be treated sub silentio as effectively abrogating the protection enjoyed under s.37 in respect of their negative rights under an arbitration agreement by those who stipulated for an arbitration with an English seat. In some cases where foreign proceedings were brought in breach of an arbitration clause or exclusive choice-of-court agreement, the appropriate course would be to leave it to the foreign court to recognise and enforce the parties' agreement on forum, but in this case the foreign court had refused to do so. There was therefore every reason for the English courts to intervene to protect H's prima facie right to enforce the negative aspect of its arbitration agreement with U. It followed that the judge had jurisdiction under s.37 to make the order that he did and that there was nothing wrong in principle with the exercise of his power to do so (see paras 22-23, 60-62 of judgment). (2) As to the service of H's claim on U, the CPR r.62.2 and r.62.5 were wide enough to embrace a claim under s.37 to restrain foreign proceedings in breach of the negative aspect of an arbitration agreement (paras 49-50).

Bannai v Erez (no 1) [2013] EWHC 3689 (Comm);
Burton J

Summary: Substantial insolvency proceedings in Israel involving one party to an arbitration agreement governed by English law did not amount to a sufficiently good reason for the court to set aside ex parte anti-suit injunctions obtained by the other party to the agreement in respect of matters falling within the scope of that agreement.

Facts: The applicant trustee in bankruptcy (T) applied to set aside ex parte anti-suit injunctions granted to the respondent (B) restraining commencement or pursuance of legal proceedings in Israel in respect of matters falling within the scope of an arbitration agreement.
T was the trustee in insolvency proceedings in Israel, which were recognised by the English courts as cross-border insolvency proceedings pursuant to Regulation 1346/2000. The arbitration clause was contained in a joint venture agreement governed by English law between B and the bankrupt (R). T's claims in the Israeli proceedings arose from allegations that there had been a transaction at an undervalue between B and R and that B had breached the joint venture agreement by failing to account to R for assets under the joint venture agreement, and income derived from those assets, in various jurisdictions. T alleged that B had defrauded R and should restore the assets and income to R's estate. B relied on the arbitration clause to assert that any claims against him could only be pursued insofar as they fell within that clause. The Israeli court refused to stay the insolvency proceedings pending arbitration. The original injunction was granted on the basis that the continuation of the claim in the insolvency proceedings for an account meant that there was an imminent breach of the arbitration agreement. The injunction was extended to include proceedings in relation to B's son and a number of companies until after a final award in any arbitration proceedings. The issues were

whether (i) the English courts had properly exercised their discretion; (ii) the injunctions should be set aside on the basis of B's non-disclosure in the applications; (iii) the court had had jurisdiction to extend the injunction, as B's son and the companies were not parties to the arbitration agreement or the proceedings.

Held: Application refused.

(1) B had sought to rely on the arbitration clause from the start of the claim in the Israeli insolvency proceedings, and it was clear that a claimant seeking to restrain proceedings brought against him in breach of an arbitration clause did not need to contemplate or intend the bringing of arbitration proceedings himself; he would simply be entitled to restrain proceedings being brought against him otherwise than by arbitration. The Israeli proceedings did not amount to a sufficiently good reason for the English court not granting, or not continuing, an anti-suit injunction. At best, T was asking to be allowed to take the chance of applying to the Israeli court to override the arbitration clause on the basis that it amounted to an onerous asset capable of being disclaimed. However, it was not clear why the provision for arbitration would be an onerous asset capable of being disclaimed, and there was no reason why the issues between B and R should not be adjudicated in arbitration. The result of the arbitration proceedings, which could be concluded relatively speedily, could then inform the outcome of the insolvency proceedings. That was what would occur in the instant jurisdiction, by reference to the Insolvency Act 1986 s.349A, which applied where a bankrupt was party to a contract containing an arbitration agreement, before the commencement of his bankruptcy. (2) The original injunction would be continued until further order. There had been sufficient disclosure of the Israeli proceedings to the judge considering B's application. It was unfortunate that T had not been given sufficient notice to attend or instruct counsel, but that would not have made any difference to the outcome. (3) There was no real issue regarding the inclusion of B's son in the injunction, as the arbitration clause provided for disputes involving the parties' family members. The dispute really related to the companies. However, there was jurisdiction to make such an order to avoid the arbitration clause being frustrated and circumvented. If no such order had been made, the Israeli proceedings would continue against the companies in parallel, for the relief T sought in relation to transfers of ownership and declarations of interest in the assets, leading to oppressive litigation on two fronts and to no purpose. The second injunction did not prevent any interlocutory relief capable of being obtained in any relevant jurisdiction in support of the arbitration proceedings, by order either of the arbitrators or of the instant court as the court supervising the arbitration. It also did not prevent any proceedings against those who were not party to the arbitration clause, once the arbitration was concluded. The injunctions would be continued.

Ecobank Transnational Inc v Tanoh [2015] EWCA Civ 1309
Court of Appeal

Summary: Applicants for anti-enforcement injunctions had to make their applications promptly: the longer the foreign proceedings continued without any application to restrain them, the less likely the

court would be to grant an injunction. While the notion of comity was of reduced importance where there was an arbitration agreement or exclusive jurisdiction clause, it was not irrelevant.

Facts: A bank appealed against the High Court's refusal ([2015] EWHC 1874 (Comm)) to continue an injunction restraining the respondent employee from enforcing judgments obtained in Togo and Cote d'Ivoire.

The bank was based in Togo and the employee was a national of Cote d'Ivoire. The contract of employment was expressly governed by English law, contained an exclusive jurisdiction clause, and provided for disputes to be settled by London arbitration. When the bank purported to terminate the employee's employment from 12 March 2014, he began proceedings in Togo, claiming that the termination was unfair and a breach of Togolese law. In May 2014 he began defamation proceedings in Cote d'Ivoire, complaining about comments made about him by the bank in the financial media. The bank unsuccessfully contested jurisdiction in both sets of proceedings, and each court made substantive orders in the employee's favour. In December 2014, the bank began arbitration proceedings in London, and in April 2015 it obtained an interim anti-enforcement injunction from the High Court. On the return date, the judge discharged that injunction, holding that the bank had left it too late to apply for injunctive relief.

The issues were (1) whether the African claims were within the scope of the arbitration clause; (2) if so, whether the bank had submitted to the African courts' jurisdiction by entering a plea to the merits in the Ivorian proceedings and seeking an extension of time to do the same in the Togolese proceedings; (3) the relevance of comity and the bank's delay in applying for injunctive relief.

Held: Appeal dismissed.

(1) It was highly probable that both African claims fell within the arbitration clause. The bank had been established by an Ordinance by virtue of which its articles of association were intended to take precedence over Togolese law. The articles empowered the bank's directors to determine the terms of the employee's employment, and they had determined that disputes should be referred to London arbitration. Under the CJJA section 32, the English court was bound not to enforce the Togolese judgment unless the arbitration clause was illegal, void or unenforceable. It was none of those things, Vita Food Products Inc v Unus Shipping Co Ltd (In Liquidation) [1939] A.C. 277 and OT Africa Line Ltd v Magic Sportswear Corp [2005] EWCA Civ 710, [2006] 1 All E.R. (Comm) 32 considered. As long as the bank had not submitted to the Togolese jurisdiction, the judgment of that court would automatically not be recognised. Even if the bank had submitted, it would not be appropriate to recognise the judgment: it did not deal with the primacy of the articles of association, and the arbitration clause was enforceable under English law The defamation alleged in the Ivorian proceedings related to the employee's performance of his functions and thus had a sufficiently close connection with the employment contract to engage the arbitration clause.

(2) The bank had not submitted to the jurisdiction of either African court. Togolese law had required it to plead to the merits, and it had done so while making it plain that it objected to the jurisdiction.

Where a foreign court required a party to plead to the merits, and that party did so while making it plain that it objected to the jurisdiction, it was not appropriate to treat it as having submitted to the jurisdiction, similarly, it was at least highly probable that the bank had not submitted to the jurisdiction of the Ivorian court.
(3) The bank's position was that delay was not a bar to an anti-enforcement injunction in the absence of detrimental reliance by the respondent, and that the role of comity was simply to ensure that the parties' arbitration agreement was respected. However, while comity was less important where there was an arbitration agreement or exclusive jurisdiction clause, it was not irrelevant. Delay and comity were related, and it was relevant to consider whether the applicant had acted with appropriate speed. Although the employee had known the bank's position on jurisdiction from an early stage, that was not a reason for disregarding any prejudice caused to him by the delay in seeking anti-suit relief. He did not have to establish detrimental reliance, and the court was entitled to be reluctant to restrain that which the bank had allowed to continue for some time. Applicants for anti-enforcement injunctions should act promptly and should not wait to see what the foreign court decided. The longer foreign proceedings continued without any application to restrain them, the less likely the court would be to grant an injunction, and considerations of comity had greater force. The judge had not erred in refusing relief where the bank had not made its application until months after the African judgments when it could have applied for relief upon the commencement of the proceedings

Stay or no stay?

United Drug (UK) Holdings Ltd v Bilcare Singapore Pte Ltd [2013] EWHC 4335 (Ch)
Morgan J

Summary: A stay of proceedings against a Singaporean company which was in an insolvency process would be lifted to allow arbitration proceedings to be commenced. The arbitration would enable the company's alleged creditor to have rights and obligations determined, and allow it to proceed against a solvent company in the insolvent company's group.

Facts: The applicant (U) applied for a stay of proceedings against the first respondent Singaporean company (B), which was in an insolvency process, to be modified.

Office holders had been appointed in respect of B in the Singapore insolvency process. U sought to commence arbitration proceedings against B and another company (C) in B's group. B's office holders successfully applied in England for recognition of the Singapore insolvency process and a stay of proceedings concerning its assets, rights, obligations and liabilities. U applied for the stay to be lifted so as to allow it to continue with the arbitration proceedings and have rights and obligations determined, while accepting that no award that it might obtain could be enforced against B in England without the court's permission.
U argued that although it did not expect to receive a substantial payout from B, it could proceed with the arbitration against C, and if it won it would have a solvent party against which to enforce its claim.

B's office holders argued that to allow the arbitration to proceed would be unduly burdensome and that there was not long to go before a Singaporean court hearing at which B was expected to be either put in a more permanent form of insolvency or brought out of insolvency.

Held: Application granted.
U's objectives in seeking to proceed with the arbitration were entirely legitimate. There was very little for the court to go on as to what the burdens on B's office holders might amount to. If there was no defence to U's case, then dealing with it should not be burdensome. If the office holders felt that they could not concede liability without an elaborate assessment, they could leave it to C to run the defence and "piggyback" on C's defence, minimising the burden on themselves. It could not be said for certain what would happen at the Singapore court hearing: matters could be put off and further time would have to pass. In any case, given U's legitimate reasons for wishing to remove the stay, and the lack of evidence enabling the court to measure the burden on the office holders, the balance came down squarely in favour of lifting the stay

Re: Pan Ocean Co Ltd, [2014] EWHC 2124 (Ch)
Morgan J

Summary: A notice terminating an English law contract on the insolvency of a Korean company was not "the commencement or continuation of individual actions or individual proceedings" which could be stayed by the court under art 21(1)(a) CBIR. The court's power under art.21(1) to grant "any appropriate relief" did not extend to relief which would not be available to the court in a domestic insolvency.

Facts: The applicant Brazilian company (F) applied for an order permitting it to commence an arbitration seeking declaratory relief as to its entitlement to terminate a contract of affreightment with the first respondent Korean shipping company (P), and P's administrator, the second respondent, applied for an order that F should not exercise its contractual right to terminate.

F was a producer of wood pulp and entered into the contract as charterer. It undertook to provide, and P undertook to carry, the cargoes identified in the contract. The contract was a long-term contract. It 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. That provision was valid as a matter of English law. The contract permitted assignment and P had assigned the benefits under it to certain Marshall Islands companies it controlled and they in turn had assigned to a bank as security agent. F had been given notice of the assignments. F became unable to pay its debts as they fell due and applied to the Korean bankruptcy court for the commencement of rehabilitation proceedings. The Korean court made the order sought and the administrator was appointed. On the administrator's application the English court recognised the Korean rehabilitation proceedings as foreign main proceedings under the UNCITRAL Model Law in the CBIR Sched 1. F considered the

contract onerous and sought to terminate it under cl.28. The administrator considered the contract profitable and gave notice to F pursuant to the Korean bankruptcy statute that P would continue to perform it.
The administrator submitted that the provision for termination on insolvency under cl.28 was invalid under Korean bankruptcy law, and that the English court could and should make an order restraining F from relying on the clause by way of a stay of proceedings under art.21(1)(a) of Sch.1 to the Regulations or pursuant to the court's power under art.21(1) to grant "any appropriate relief" to protect the assets of the debtor.

Held: (1) The administrator had a good arguable case that the insolvency termination provisions in cl.28 of the contract were automatically void by reason of Korean bankruptcy law or, if not automatically void, would be held to be void after a Korean court considered all of the relevant circumstances (see para.59 of judgment). (2) The court did not have power under art.21(1)(a) to restrain F from serving a termination notice under cl.28 because serving such a notice was not "the commencement or continuation of individual actions or individual proceedings" which could be stayed under art.21(1)(a) (3) The non-exhaustive words "any appropriate relief" were capable of being given a wide literal meaning. However, the very width of their literal meaning and consideration of art.21(1)(g) in particular led to the conclusion that it was not intended that they should be given such a wide literal meaning. The court was directed by reg.2 of the Regulations to consider the documents relating to the working group on the Model Law and it appeared from the reports of the working group that 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. The court declined to follow the United States decision in Re Condor Insurance Co Ltd (2010) 601 F 3d 319 which supported 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, Condor Insurance considered. The words "any appropriate relief" did not allow the court to grant relief which would not be available when dealing with a domestic insolvency. The court would not have granted the administrator relief even if it had the power to do so under art.21(1). The relief available under art.21(1) was of a procedural nature, Rubin v Eurofinance SA [2012] UKSC 46, [2013] 1 A.C. 236 followed. The difference between F being entitled to terminate the contract and not being so entitled went well beyond matters of procedure and affected the substance of the parties' rights and obligations. The parties might be 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. The enforceability of clauses such as cl.28 had been reviewed by the Supreme Court taking full account of the policy considerations, Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd [2011] UKSC 38, [2012] 1 A.C. 383 considered. The English court should not prefer the policy choice made in Korean law (paras 105-113).

American Energy Group Ltd v Hycarbex Asia Pte Ltd (In Liquidation) [2014] EWHC 1091 (Ch)
Arnold J

Summary: Despite the court's recognition of a winding up order made by the High Court of Singapore, the resulting automatic stay of ICC arbitration proceedings was lifted as the arbitration claim was ready for hearing imminently, and the liquidators' application for recognition had been made extremely late.

Facts: The applicant liquidators (L) applied for recognition of a winding up order made by the High Court of Singapore in order to obtain a stay of arbitration proceedings brought against Hycarbex Asia (H) by American Energy Group (AEG). If the winding up order were to be recognised, AEG applied for the automatic stay to be lifted so that the arbitration claim could proceed.
AEG had been the parent company of a wholly-owned company (HAE). Under a stock purchase agreement, it sold its shares in HAE to a company (T) in consideration of a right to royalty payments linked to the production of gas and other hydrocarbons. H later acquired the shares from T, assuming and reaffirming the obligations owed to AEG under the original agreement. AEG claimed to have received some royalty payments, but that thereafter no payments were made. HAE informed it that the payments had been suspended and AEG alleged that it had been induced to enter into the agreement through fraudulent misrepresentation. It commenced arbitration proceedings against HAE, T and H. AEG contended that those proceedings remained in place despite an order for H's winding up made by the High Court of Singapore. The issues for determination were: (i) whether the requirements for recognition set out in CBIR Sch.1 art.17 had been satisfied including whether art.4 imposed a threshold jurisdictional requirement; (ii) if the winding up order was recognised, whether the stay should be lifted to enable the arbitration claim to proceed.

Held: Applications granted.
(1) The Singapore liquidation was a "foreign proceeding" under art.2(i) as L were foreign representatives as defined by art.2(j), and their affidavit complied with art.15(3). Further, it was clear that, on its true construction, art.4 did not impose a threshold jurisdictional requirement. Rather, it specified the courts which were competent to perform the functions relating to recognition of foreign proceedings and co-operation with foreign courts and it allocated jurisdiction as between the courts of England and Wales and those of Scotland. Accordingly, all of the requirements of art.17(1) had been satisfied. The evidence established that H's centre of main interests was in Singapore and accordingly, the foreign proceedings would be recognised as foreign main proceedings in accordance with art.17(2) (see paras 3-4, 6, 13-15 of judgment). (2) The court had a free hand to do what was right and fair according to the circumstances of each case. However, prima facie, the proof of debt procedure ought to be followed unless there was a good reason not to follow it, United Drug (UK) Holdings Ltd v Bilcare

Singapore Pte Ltd [2013] EWHC 4335 (Ch) applied. The instant case was a proper one in which to lift the stay. AEG's claim was inherently more suitable for investigation and determination by a court or arbitral tribunal than it was through the proof of debt process. It was a complicated claim involving allegations of fraudulent misrepresentation, a number of parties and a claim for rescission of a share purchase agreement with potentially significant financial ramifications. Furthermore, the claim was ready for hearing imminently and the L's application for recognition had been made extremely late: L had been appointed nearly a year ago when the arbitration proceedings were already underway. Absent evidence as to what approach the Singaporean court would take to an appeal brought by AEG should it be required to submit its claim by way of proof of debt and L decide to reject the claim, the court was not satisfied that the proof of debt procedure was a satisfactory alternative. Having obtained an award in its favour, AEG would be able use that as the foundation for a proof of debt application to L. If L rejected that proof of debt, they would have to provide some objective reason for going behind the arbitral tribunal's award. In default of such a reason being provided, AEG would have a good prospect on appeal to the Singaporean court. Accordingly, the better course was that the arbitration claim should be allowed to proceed to its natural conclusion (paras 18, 52-53, 55-57).

Procedural Considerations: full and frank disclosure

Re: OGX Petroleo E Gas SA, (aka Nordic Trustee ASA v OGX Petroleo E Gas SA) [2016] EWHC 25 (Ch); [2016] Bus. L.R. 121

Snowden J

Summary: An applicant for recognition of a foreign insolvency proceeding had to make full and frank disclosure to the English court in relation to the effect that such recognition might have on third parties. In particular, it had to inform the court of any points that could be raised in relation to the modification or termination of the automatic stay of proceedings under the Model Law on Cross-Border Insolvency.

Facts: The applicant charterers applied to set aside an order recognising a judgment of the Brazilian bankruptcy court.

The charterers had chartered a vessel to the respondent company. When the company ran into financial difficulties it began to renegotiate the charter and petitioned for judicial reorganisation under Brazilian bankruptcy law. When it submitted its reorganisation plan to the Brazilian court, the charter renegotiation was ongoing. The plan therefore envisaged that any new charter would not be subject to the planned debt restructuring, and the charterers were not included on the list of the company's creditors. After the court had approved the plan, a new charter was entered into. It provided that any claims would be settled by London arbitration. When the company fell into arrears with its payments under the new charter, the charterers submitted a request for arbitration. The company successfully

applied, without notice, for recognition of the Brazilian judicial reorganisation under the Model Law on Cross-Border Insolvency, and the arbitration was automatically stayed under art.20(1) of the Model Law. Before granting recognition, the judge asked the company to disclose anything adverse to its application. It did not disclose that the new charter or the claims in the arbitration were subject to the plan for which it sought recognition.
The charterers submitted that the judge had been misled or had granted recognition on the basis of material non-disclosure. The company argued that it had adduced sufficient evidence for compliance with the Model Law, and that evidence relating to whether the court should modify the automatic stay was irrelevant on the question of whether recognition should be granted.

Held: Ordinarily, a foreign proceeding would be recognised upon the applicant satisfying the requirements of art.15, art.16 and art.17 of the Model Law. Following recognition, the art.20(1) stay operated automatically on existing proceedings, though only to the extent that a stay under the IA section 130 would operate following a winding-up. The purpose of a s.130(2) stay was to preserve the pari passu ranking of unsecured creditors and prevent any individual unsecured creditor from obtaining an illegitimate advantage in the collective process of winding up, David Lloyd & Co, Re (1877) 6 Ch. D. 339 and Aro Co Ltd, Re [1980] Ch. 196 applied. The Model Law applied only to collective proceedings, and the automatic stay aimed to prevent individual creditors bringing actions. Persons whose claims were not subject to the collective insolvency process stood outside that process, and it was not appropriate to use art.20(1) to prevent them pursuing their ordinary remedies against the company.

The company had sought recognition of the plan solely to obtain an automatic stay of the arbitration. That was inconsistent with the structure and purpose of the Model Law and constituted an abuse of process. The company had proceeded on the basis that it was only required to inform the English court of the matters necessary to obtain recognition, and it had framed its evidence so as to avoid mentioning that the new charter was not subject to the plan. Nor had it disclosed that fact when invited to do so. Its approach to the evidence was wrong and its disclosure was wholly inadequate.

A court hearing an application for recognition had a discretion under art.20(6) to modify the stay from the outset. Therefore, a foreign representative seeking recognition without notice had to disclose any material of which he was aware that was relevant to the exercise of that discretion. If he knew that the automatic stay would affect existing or threatened proceedings or the enforcement of security by a third party, he had to inform the court. Where there were existing proceedings, the court might grant recognition and leave the litigant to apply for the automatic stay to be lifted. Where arbitration proceedings had begun or were threatened, the decision might be more finely balanced. However, where, as in the instant case, it was known that a secured creditor wished to enforce its security, the court was likely to modify the automatic stay from the outset. In the instant case, had the judge known the true situation, he would at the very least have modified the stay to let the arbitration proceed. Even though the public policy exception in art.6 of the Model Law was to be invoked only in

exceptional circumstances, it was strongly arguable that the court could refuse recognition where the applicant was abusing the process for an illegitimate purpose. On that basis, the judge might well have been justified in rejecting the recognition application altogether. The company should have told him that the claims in the arbitration were not subject to the plan. Foreign representatives had to ensure that the recognition process was not misused. They had to make full and frank disclosure to the court in relation to the consequences that recognition might have on third parties who were not before the court. In particular, they had to disclose any points that could be raised in relation to the modification of the automatic stay.

By the time of the instant hearing, the parties had drafted a consent order under which the order for recognition would stand but the automatic stay would be lifted to enable the arbitration to proceed. Although the court had reservations about leaving the order for recognition in place when it was doubtful that it should ever have been granted, it would approve the consent order.

BVI CASES

C-Mobile Services Limited v Huawei Technologies [2015] ECCA (BVI), BVIHCMAP 2014/006 and BVIHCMAP 2014/017 (Court of Appeal)

Facts

The respondent served a statutory demand on the appellant in respect of a debt said to be due and owing to the respondent by the appellant. The appellant, relying on section 156(1) of the Insolvency Act 2003 sought to set aside the statutory demand. The appellant argued that there was a substantial dispute as to the debt because: (1) the alleged debt arose under a contract bearing an arbitration clause; (2) the alleged debt and contract was subject to the Convention on Limitation Periods in the International Sale of Goods, which has a four year limitation period, within which the respondents did not bring any proceedings relating to the contract; and the appellant and respondent had reached a global settlement relating to all monies owing to the respondent from the appellant which included the alleged debt upon which the demand was based.

At first instance the judge found that the test for disputes susceptible to be stayed in favour of arbitration in Applied Enterprises Ltd v Interisle Holdings Ltd did not apply to applications to set aside statutory demands under s.157(1) of the Act and that the correct approach was that laid down in the case of Sparkasse Bregenz Bang AG v Associated Capital Corporation, namely whether there was a genuine dispute of the debt founding the demand on substantial grounds. Applying the Sparkasse test, the appellant's request to set aside the statutory demand was denied on the basis that there was no substantial dispute as to the debt. The appellant appealed to the Court of Appeal.

Prior to that appeal coming on, the respondent applied for the appointment of liquidators over the

appellant. The appellant applied to stay that application under s.6(2) of the Arbitration Ordinance on the basis of an arbitration agreement in the underlying contract between the parties which applied to "disputes arising out of or in connection with the formation, construction and performance of this contract". The judge found that the winding up proceedings did not engage the arbitration agreement and dismissed the application. The appellant appealed that dismissal.

Held

Dismissing the appeal.

The appropriate test for an application to set aside under s.157(1) was the Sparkasse test and this was settled law. The presence of the arbitration clause in the underlying contract did not render the Applied Enterprises test applicable. The judge below had determined that there was no substantial dispute as to the debt on the basis of the evidence put to him and the Court of Appeal had no proper basis to interfere with that decision. The appellants had not applied for a discretionary stay under s.157(2) and had not tendered evidence to support any such application.

On the application under s.6(2) of the Arbitration Ordinance 1976 for a stay of the order appointing liquidators, the proceeding was a precursor to insolvency and was not a claim for the recovery of a disputed debt. The application did not engage issues within the scope of the arbitration agreement and therefore did not engage s.6(2) of the Arbitration Ordinance as the application was not "in respect of any matter agreed to be referred (to arbitration)".

Evidence that a matter had been referred to arbitration could be relevant to the exercise of the discretion to set aside a statutory demand under s.157(2). But the appellant had not relied upon that provision at the time of its application to set aside the statutory demand. Trying to engage s.6(2) now was too late.

In any event for reasons similar to those expressed in Salford Estates the mandatory stay provisions of s.6(2) had no application to winding up proceedings. No debt is being enforced and it is a collective, class remedy. There remains a discretion under s.162 as to whether a liquidator should be appointed and the existence of an applicable arbitration clause and the parties' choice of forum can be relevant to the exercise of that discretion. But no stay was appropriate in this case.

Jinpeng Group Limited v Peak Hotels and Resorts Limited [2015] ECCA (BVI), BVIHCMAP 2014/025 (Court of Appeal)

Facts

The appellant loaned monies to the respondent to assist the acquisition of a hotel group. The loan terms contained provisions to permit the appellant to convert the debt into an equity interest. The loan was not repaid and the appellant sought the appointment of liquidators of the respondent and the appointment of provisional liquidators. The respondent's opposition to the applications was based upon an allegation that the appellant had converted the debt into equity so no debt was due and that any dispute as to the operation of the agreement fell within an arbitration agreement so that the proceedings should be stayed under s.18(1) of the Arbitration Act.

At first instance the judge struck out the applications stating that any defence other than a "hopeless" one would be a sufficient dispute to prevent the appointment of liquidators.

Held

The Court of Appeal allowed the appeal.

The test for the merits of the dispute raised by the respondent was the Sparkasse test. That test had not been applied by the court below. There was no evidence before the Court to support an allegation that the dispute was genuine and substantial.

The mandatory stay provisions of s.18(1) of the Arbitration Act were wider than those under s.6(2) of the Arbitration Ordinance. The dispute raised by the respondents did raise issues within the terms of the arbitration agreement. However an application for the appointment of liquidators was not a form of proceeding to which the Arbitration Act applied and was not a form of proceeding covered by the arbitration agreement. The Court approved the policy reasons summarised by the English Court of Appeal in *Salford Estates* as to why it was not the intention for mandatory arbitration statutory stay applications to apply to winding up proceedings.

There remained a statutory discretion under s.162 to stay the proceedings in favour of arbitration. The Court rejected the approach to this discretion suggested by *Salford Estates*. Under BVI law there was no need for a creditor to prove the existence of exceptional circumstances to defeat a request for a discretionary stay.

The Court considered the factors going to discretion and declined to stay the proceedings. The fact that the subject matter of the dispute was pending in ongoing arbitration proceedings did weigh in favour of a discretionary stay. However there was an immediate need to preserve and locate assets of the company and to investigate its affairs. Accordingly no discretionary stay would be granted and the urgent need for intervention would have been special circumstances to decline a discretionary stay even if the *Salford Estates* test was applied.

L Capital KDT Limited v Retribution Limited [2016] BVIHC(COM) 2015/0089, Farara J (Ag)

Facts

An application to appoint liquidators and an application to set aside the statutory demand upon which the application to appoint was based were listed together. The company resisted the applications on the basis that it was not indebted to the applicant or that any dispute as to the alleged debt ought to be determined by arbitration.

Held

The Court was bound by Jinpeng Group. The mandatory stay provisions of s.18 had no application to applications to set aside a statutory demand or to stay an application to appoint liquidators.

The debt was disputed on substantial grounds and that was sufficient to dispose of the applications.

Even if there was no substantial dispute then the Court would have exercised its discretion under ss.162 and s.167 of the Insolvency Act to stay the applications. There was no allegation requiring immediate investigatory or protective relief in contrast to Jinpeng Group. The parties had agreed to have disputes resolved by arbitration and the BVI had exhibited a positive policy decision to engage in modern arbitration practice, with the concomitant effect of diminishing the role of the Court. The dispute fell within the arbitration clause and the exercise of the discretion in favour of a stay would have respected that.

Anzen Ltd v Hermes One Ltd [2016] UKPC 1

Privy Council (British Virgin Islands)

Summary: Where an arbitration clause provided that any party "may" submit a dispute to arbitration, a party against whom litigation had been commenced was entitled to a stay of proceedings under the Arbitration Ordinance 1976 (British Virgin Islands) s.6(2), even where that party had not referred the matter to arbitration.

Facts: The appellant companies appealed against a decision that they were not entitled, under the Arbitration Ordinance 1976 (British Virgin Islands) s.6(2), to a stay of proceedings brought against them by the respondent, because the appellants had not commenced an arbitration.

The parties were shareholders in a British Virgin Islands company. Clause 19.5 of the shareholders' agreement provided that, in the event of an unresolved dispute, "any party may submit the dispute to binding arbitration". A dispute began. The respondent commenced litigation. The appellants sought a stay under s.6(2). The judge dismissed the stay application on the basis that cl.19.5 conferred an option upon each party to submit a dispute to arbitration; if one party commenced litigation, the option under cl.19.5 was only exercisable by the other party by referring the identical subject matter

of the dispute to arbitration; and the appellants had not done that, but merely sought a stay. The Privy Council had to determine which analysis was the correct construction of cl.19.5: analysis I, where the words "any party may submit the dispute to binding arbitration" were not only permissive, but exclusive, preventing any party from commencing litigation; analysis II, where the words were purely permissive, leaving it open to one party to commence litigation, but giving the other party the option of submitting the dispute to arbitration by commencing an arbitration, as the judge had held; analysis III, where the words were purely permissive, one party could commence litigation, but the other party had the option of submitting the dispute to arbitration either by commencing an arbitration or by making an unequivocal request to that effect or by applying for a stay, as the respondents had done.

Held: Appeal allowed.
Arbitration clauses commonly provided that disputes "should" or "shall" be submitted to arbitration. The concomitant of such clauses was that neither party would seek relief in any other forum, *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower* Plant JSC [2013] UKSC 35, [2013] 1 W.L.R. 1889 considered. Clauses depriving a party of the right to litigate should be clearly worded. There was an obvious difference between a promise that disputes shall be submitted to arbitration and a provision that "any party may submit the dispute to binding arbitration". That contrast, and the evident risk that "may" could be understood to mean that litigation was open until arbitration was chosen, led to the conclusion that analysis I should be rejected

The choice between analyses II and III depended on the meaning to be attached in cl.19.5 to the concept of submitting a dispute to arbitration. In other contexts, that might connote the actual commencement of an arbitration, but it did not always have to do so. Analysis II could give rise to incongruity. It purported to give each party a right to have a dispute submitted to arbitration. However, it not only allowed one party to commence litigation, it then only required the dispute to be arbitrated if the other party commenced an arbitration in which all it could seek would be a declaration of no liability. The party commencing arbitration might not be sufficiently interested or able to pursue arbitration in the manner prescribed by cl.19.5. Analysis II did not make commercial sense.

The better view was that submitting a dispute to arbitration was not inextricably linked to the actual commencement of arbitration. Section 6(2) gave the court power to order a stay pending arbitration even though neither party had submitted the dispute to arbitration, Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] A.C. 334 considered. Analysis III was to be preferred as a matter of principle. Parties to an arbitration agreement were under mutual obligations to co-operate in the pursuit of the arbitration, Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd [1981] A.C. 909 considered. The duty postulated that arbitral proceedings were already on foot, but a similar conception could influence the construction of cl.19.5, the drafting of which contemplated a consensual approach. An analysis whereby notice would trigger the mutual agreement to arbitrate appeared to fit better into a consensual scheme than one which required the artificial construction, and commencement of arbitration in respect of, a cross-claim. Analysis III allowed a party wishing for a dispute to be arbitrated either to commence an arbitration itself, or to insist on arbitration, before or after the other party commenced litigation, without itself having to

commence arbitration if it did not wish to.

CAYMAN ISLANDS CASES

Re SRT Capital SPC Ltd [2013] Foster J, unreported, 22 November 2013

Facts

The petitioner, Morgan Stanley, sought to wind up the company on the basis of a debt it alleged fell due in the course of a share swap transaction. The company resisted the petition on the basis that the debt was disputed and that the question whether or not the debt was due fell within the scope of an exclusive jurisdiction clause providing for determination by the courts of England.

Held

It was trite law that the winding up jurisdiction could not be invoked in respect of a debt that was disputed on bona fide and substantial grounds. This was common ground between the parties.

The court considered Re Times Property Holdings [2011] 1 CILR 223 and noted that in that case the court considered the merits of the disputed debt and that was the correct approach under Cayman law. The Court indicated that Times Property did not suggest that the court should not consider the merits if there was an exclusive jurisdiction clause. Only if the court was satisfied that there was a substantial dispute would it be the case that the dispute had to be resolved in the English courts. On the facts of the case the dispute as to the debt was sufficiently substantial and genuine and the petition was dismissed.

Re Cybernaut Growth Fund LP [2013] Jones J., (unreported) 23 July 2013

Facts

Limited partners applied to wind up a limited partnership on a just and equitable basis. The petition was opposed by the general partner and a limited partner connected to the general partner. The petition was opposed *inter alia* on the basis that the limited partnership agreement contained an arbitration agreement and that the issues raised on the petition should be determined by way of an arbitral reference and there should be a stay under s.4 of the Foreign Arbitral Awards Enforcement Law (1997 Revision).

Held

The application to stay was refused.

The Court considered *Fulham Football Club.* The dispute before the Court was non-arbitrable. First, a winding up order was an order in rem capable of affecting third parties whereas any arbitration could only resolve issues between the contracting parties. Second, the appointment of a liquidator is a matter involving the public interest and was a public process unsuitable for determination by an arbitral tribunal.

In re Sphinx [2015] Sir Andrew Morritt, (unreported), 24 February 2015; [2015] CICA, (unreported), 11 November 2015

Facts

Following a Scheme of Arrangement, Scheme Claimants in the estates of the SPhinX group issued a summons for a direction that the joint official liquidators should not retain any reserves in respect of claims for fees, totalling some $50m, by US attorneys engaged by the liquidators and for the payment of monies held in reserves by way of an interim dividend. The terms upon which the attorneys were engaged were governed by New York law and contained provisions for arbitration of fee disputes in New York. The attorneys applied to have the summons stayed on a mandatory basis pursuant to s.4 of the Foreign Arbitral Awards Enforcement Law (1997 Revision), or on a discretionary basis pursuant to the Court's inherent jurisdiction. The US attorneys' evidence was that they could not commence the arbitration while still acting for the liquidators for professional conduct reasons and the liquidators indicated that they did not intend to commence an arbitration.

Held (before Sir Andrew Morritt)

The stay application was granted pursuant to s.4. The application was a legal proceeding and the Scheme Claimants were claiming "through or under" the liquidators who were parties to the arbitration agreement. The subject matter in dispute in the summons included matters which the parties had agreed would be referred to arbitration.

The court rejected the submission, based in part upon Cybernaut, that the ascertainment and fixing of reserves was non-arbitrable and was exclusively to be determined by the Grand Court. First the dispute was about attorneys' fees not reserves. The fee dispute had to be determined by arbitration and only then would issues as to reserves come before the Court. Second, recent English cases made it clear that the Court could stay proceedings within its exclusive jurisdiction to allow issues arising in the court proceedings which fell within arbitration provisions to be determined by an arbitral tribunal, citing Fulham Football Club v Richards, Assaubayev v Michael Wilson Partners and Salford Estates (No 2) Limited.

Had the application to stay fallen outside of the mandatory stay provisions of s.4 the Court would have no hesitation to stay the summons pursuant to the inherent jurisdiction of the Court.
Held (before the Court of Appeal)

The Court of Appeal dismissed the appeal against the stay and affirmed the s.4 stay.

The appellants argued that the summons did not raise issues that had been agreed to be referred to arbitration because the fixing of the fee reserve did not determine the fees due to the attorneys. All that was in issue was what reserves would be retained for those fees. The appellants argued that it was for the court in the management of the liquidation and not the arbitrator to determine what level of reserve should be retained for the fee claims and that this issue, like the one in Cybernaut, was not arbitrable and could not be delegated to an arbitrator. The Court rejected these arguments.

In determining whether legal proceedings engaged matters that had been agreed to be referred to arbitration the Court could consider what questions would foreseeably arise for determination in the Court proceedings and then consider if those questions fell within the scope of the arbitration agreement. The determination of whether the fee claims were fanciful, the test in Cayman for declining to make a reserve, the Scheme Claimants would have to establish that the fee claims had no legal validity. The merits of the fee claims would be the central issue in the summons. It was obvious that any dispute as to fee claims made by the attorneys fell within the scope of the arbitration agreement and the fact that no arbitration process had been activated was no bar to a statutory stay, by reference to AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC.

The English cases, Fulham Football Club v Richards, Assaubayev v Michael Wilson Partners and Salford Estates (No 2) Limited, showed that ordering a stay was not delegating to the arbitral tribunal matters within the exclusive jurisdiction of the Court. The tribunal could determine referred matters and the Court should respect the agreement to have those matters determined by arbitration.

The order of the stay might result in delays to the administration of the estate and increased costs for the estate but that was not a reason to fail to protect the right to arbitration as required by s.4.

The correctness of Cybernaut was debatable but it was not necessary for the Court to overrule the decision.