Case No: 3933 of 2010

Neutral Citation Number: [2011] EWHC 216 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/02/2011

Before :

MR JUSTICE BRIGGS

- -

Between :

IN THE MATTER OF ARMADA SHIPPING SA AND IN THE MATTER OF THE CROSS-BORDER INSOLVENCY REGULATIONS 2006

COSCO BULK CARRIER CO LTD	**Applicant**
- and -	
(1) ARMADA SHIPPING SA	
(2) STX PAN OCEAN CO LTD	**Respondents**

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Mr Stephen Robins (instructed by **Holman Fenwick Willan LLP, Friary Court, 65 Crutched Friars, London EC3N 2AL**) for Cosco Bulk Carrier
Mr Timothy Young QC & Mr Christopher Boardman (instructed by **Squire Sanders & Dempsey (UK) LLP, Tower 42, International Finance Centre, 25 Old Broad Street, London EC2N 1HQ)** for Armada Shipping
Mr David Allison (instructed by **Clyde & Co, 51 Eastcheap, London EC3M 1JP**) for STX Pan Ocean

Hearing date: 4th February 2011

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Judgment

Mr Justice Briggs :

INTRODUCTION

1. There are before the court cross-applications under the Cross-Border Insolvency Regulations 2006 ("the Regulations") arising from a Recognition order made under article 17 of the UNCITRAL Model Law on Cross-Border Insolvency ("the Model Law") on 19th May 2010 whereby the bankruptcy order pronounced by the Civil Court of the District of La Sarine, Switzerland, in respect of Armada Shipping SA ("Armada") on 11th January 2010 was recognised as a foreign main proceeding.

2. Armada was, at the time of the bankruptcy order, the charterer of a vessel called the Spar Sirius ("the Vessel") from Cosco Bulk Carrier Co Ltd ("Cosco") as disponent owner under a time charter on substantially the NYPE 93 Form ("the time charter"). Armada had sub-chartered the Vessel to STX Pan Ocean Co Ltd ("STX"), also on NYPE 93 terms ("the sub-charter"). Both the time charter and the sub-charter contained London arbitration clauses, and provided that any dispute arising thereunder should be governed by English law.

3. The time charter contained an owner's lien upon sub-freights and/or sub-hire for any amounts due under the time charter. Armada defaulted in hire payments due to Cosco, and Cosco exercised its lien over sub-hire due by STX to Armada under the sub-charter.

4. A dispute has arisen, in substance (albeit not in form) between Cosco and Armada, as to entitlement to the sub-hire due from STX under the sub-charter. Cosco has sought to pursue its claim by commencing a London arbitration against STX. Although in substance neutral, STX has in order to avoid double jeopardy commenced a separate London arbitration against Armada and, in the meantime, has deposited an amount representing the sub-charter hire which it acknowledges is due either to Cosco or to Armada into an escrow account.

5. The effect of the cross-applications under the Model Law is to enable the court to decide whether (as Cosco claims) its dispute with Armada should be resolved by London arbitration, or whether (as Armada's Swiss office-holder claims) the dispute should be resolved in Switzerland, before the Swiss court having bankruptcy jurisdiction in relation to Armada. Certain intermediate solutions between those two were, in addition, canvassed during the hearing.

THE FACTS

6. The primary facts, which are not significantly disputed, may be summarised as follows. Having itself chartered the Vessel from Spar Shipping, Cosco chartered her to Armada on 3rd September 2009 on NYPE 93 Form at a daily hire rate of US$20,000 (including overtime) less commissions from delivery until 15th January/26th February 2010 (at Armada's option). Hire was payable every fifteen days in advance in the net amount of US$288,750.

7. By clauses 7 and 9, the time charter required Armada to provide and pay for all bunkers. Clause 18 permitted Armada to sublet the Vessel. Clause 23 provided for a lien on sub-freights and/or sub-hire in the following terms:

> "The Owners shall have a lien upon all cargoes and all sub-freights and/or sub-hire for any amounts due under this Charter Party, including general average contributions, and the Charterers shall have a lien on the Vessel for all money paid in advance and not earned, and any overpaid hire or excess deposit to be returned at once…."

Clause 45 provided for London arbitration in the following terms:

> "(b) LONDON
>
> All disputes arising out of this contract shall be arbitrated at London and, unless the parties agree forthwith on a single Arbitrator, be referred to the final arbitrament of two Arbitrators carrying on business in London who shall be members of the Baltic Mercantile & Shipping Exchange and engaged in Shipping. One to be appointed by each of the parties, with power to such Arbitrators to appoint an Umpire. No award shall be questioned or invalidated on the ground that any of the Arbitrators is not qualified as above, unless objection to his action be taken before the award is made. Any dispute arising hereunder shall be governed by English Law."

8. Armada sub-chartered the Vessel on 4th December 2009, again in NYPE 93 Form, for a 60 day Without Guarantee trip at a gross daily hire of US$28,750 (including overtime) less commissions. Hire was, as under the time charter, payable every fifteen days in advance, but at the higher net rate of $US415,078.12.

9. Clause 96 of the sub-charter provided as follows:

> "Neither Owners nor Charterers may assign the benefit of this contract or the benefit of any rights arising out of this contract in whole or in part without the prior consent in writing of the other party. The party who is named as Owner and the party who is named as Charterers in this contract shall always remain fully responsible for the due fulfilment of all the terms of this contract."

The sub-charter contained a London arbitration clause in identical terms to those in the time charter.

10. On 28th December 2009 Armada made a voluntarily filing for liquidation with the court of Fribourg in Switzerland. By then, the Vessel had taken on bunkers at Gibraltar and was on passage to Suez where, in due course, either she or the bunkers (the evidence does not make clear which) were arrested for non-payment of bunkers at Gibraltar. Cosco obtained the release of the Vessel by paying for the bunkers itself.

11. On 30th December 2009 solicitors for Cosco sought to exercise its lien over sub-hire by fax to STX, referring to the time charter and clause 23 in particular, the sub-charter, and to a sum then alleged to be owing by Armada to Cosco of US$285,000 odd. The fax (which was copied to Armada) continued:

> "Kindly take this message as notice, in exercise of Owners' rights under the said clause 23 of the Time Charter, that all and any sub-hire which is or will become payable by you pursuant to the Sub-Charter must not be paid to or as directed by Armada, or its agent or nominee, but to Owners.
>
> …
>
> This means that Armada or any such other person cannot give you a good receipt for any payment of hire."

12. On 11th January 2010 a bankruptcy order was made by the Civil Court of the district of La Sarine in Switzerland. It had broadly the same effect in relation to Armada as an English winding-up order. The Cantonal Bankruptcy Office in Fribourg was thereby appointed as Armada's office-holder, with powers broadly comparable to those of an English liquidator.

13. By further notices faxed to STX and copied to Armada on the 15th, 19th, and 28th January 2010 Cosco sought to exercise its lien in relation to increased amounts alleged to be due from Armada. In particular, the notice on 19th January included, as a claim against Armada, the amount which Cosco had paid to release the Vessel from arrest at Suez. The final amount claimed by the notice dated 28th January was US$1,204,514.89.

14. On 4th February Cosco and STX made a written escrow agreement providing for US$915,119.27 to be placed in an escrow account. The agreement, expressed to be governed by English law, provided at clause 2 that:

> "The sums held in the Escrow Account will be held pending the final resolution of the Liened Sum Dispute between Cosbulk and STX Pan Ocean (and as the case may be Armada Shipping if applicable), either by written agreement or by arbitration in London pursuant to the terms of the STX Pan Ocean Charter or by judgment of the English High Court of Justice on appeal therefrom."

The Escrow Agreement contained its own London arbitration clause.

15. It is apparent from the Escrow Agreement (and elsewhere) that it was from the outset common ground as between Cosco and STX that any dispute between them as to Cosco's claim to the sub-hire due under the sub-charter fell to be resolved by arbitration under the arbitration clause in the sub-charter. Cosco's case was that the lien on sub-hire operated as an equitable charge, so that it could enforce as security assignee Armada's right to sub-hire under the sub-charter. To that end Cosco appointed its arbitrator Mr Baker-Harber on 10th February 2010. For its part STX appointed its own arbitrator Mr Tim Marshall in the Cosco v. STX arbitration, and then commenced a separate arbitration against Armada, pursuant to which on 3rd March it appointed the same Mr Baker-Harber as its arbitrator in the STX v. Armada arbitration. I shall refer to them as the first and second arbitrations respectively.

16. As appears from its Statement of Case dated 15th March, Cosco's claim against STX was for US$1,178,216.21 plus interest. STX's claim against Armada in the second arbitration was for a declaration of non-liability. Nonetheless STX defended Cosco's claim in the first arbitration by advancing for its own protection all those arguments which it conceived that Armada might assert in the second arbitration.

17. Also on 15th March Cosco invited Armada's office-holder either to concede Cosco's claim against STX or to join in the first arbitration. The office-holder's response, two days later, took the form of a letter from its Swiss lawyers to Messrs Baker-Harber and Marshall requesting a stay of the first arbitration, and an invitation to STX to pay outstanding sub-hire due under the sub-charter into a special account opened by the office-holder in Fribourg for the purposes of the bankruptcy. The office-holder relied in support of its request for a stay upon provisions for the automatic stay of civil proceedings involving a bankrupt provided by Article 207 of the Swiss Federal Statute on Debt Enforcement and Bankruptcy.

18. On the same day Cosco wrote to the arbitrators in the first arbitration asserting that Swiss law was irrelevant to the dispute, and repeating its invitation that Armada's office-holder should join in the reference as a second respondent. On 19th March the arbitrators resolved to continue with the first arbitration.

19. On 24th March STX set out its position in an open email to the arbitrators and the other parties. Its substance was to assert STX's neutrality in the dispute between Cosco and Armada, to invite Armada's office-holder to join in the first arbitration, thereby allowing STX to "drop out of the picture" or alternatively to invite the office-holder to obtain an order under the Model Law "having the effect of staying the arbitration". Neither choice having in the meantime been adopted by the office-holder, STX filed its defence in the first arbitration on 29th April.

20. The office-holder eventually decided to take the second of the courses alternatively proposed by STX, seeking a Recognition order on 13th May, and obtaining one on 19th May. None of the types of additional relief, beyond recognition itself, available under article 21.1 of the Model Law, were either sought or obtained. It appears that those advising the office-holder took the view that recognition itself would, pursuant to article 20.1(a), effect an automatic stay of both arbitrations.

21. It appears (and for good reason) to have been common ground that the Recognition order, without more, achieved an automatic stay of the second arbitration. Those advising Armada and STX appear to have taken the same view in relation to the first arbitration, but this view was challenged by Cosco which, on 11th October 2010, applied to this court for an order confirming that the first arbitration had not been stayed, or alternatively for an order lifting the stay in respect of that arbitration.

22. For its part, the office-holder applied to this court on 9th December 2010 for an order confirming that the first arbitration had been stayed by the Recognition order, alternatively that a stay of the first arbitration be now imposed.

THE ISSUES

23. It will be apparent from the foregoing summary of the facts that there are in reality two disputes between the parties. The first is the underlying dispute, essentially

between Cosco and Armada, as to which of them is entitled to sub-hire due from STX under the sub-charter and (if it is to be shared) in what proportions. The second dispute, affecting all three parties, is as to the procedure by which the underlying dispute should now be resolved, having regard in particular to Armada's Swiss bankruptcy, and its recognition in this jurisdiction. It is convenient to identify, as far as possible, the parameters of the underlying dispute first. I say as far as possible, because Armada has yet to plead a statement of case of its own in relation to that dispute. Nonetheless, and with the considerable assistance of Mr Timothy Young QC, who appeared for Armada in an unfamiliar forum to make submissions about what he described as "the shipping aspects" of the matter, it is possible to identify the gist of the underlying dispute with sufficient accuracy for present purposes.

24. The underlying dispute has thrown up the following five issues:

(1) The juridical nature and effect of an owner's lien on sub-hire.

(2) The effect of the prohibition on assignment in the sub-charter.

(3) Whether the lien was exercised for an excessive amount and, if so, with what consequence.

(4) Whether Cosco can rely upon the lien in respect of its claim to an indemnity for its payment for bunkers.

(5) The consequences in terms of priority in Armada's bankruptcy.

25. Although the parties appeared to have prepared, ahead of the hearing before me, to argue issues (1) and (5) in full, none of them invited me to determine them there and then. The other three issues were little more than mentioned in the parties' submissions. For reasons which will become clear, I do not consider it necessary, convenient or appropriate to determine any of the underlying issues at this stage. It is however necessary to say a little more about them.

26. The juridical nature of a lien on sub-hire (or sub-freight) is, at least at the academic level and at all levels above (perhaps) first instance, a well known and long-unresolved problem. In the present context it is clearly to be determined in accordance with English law. A series of first instance decisions, following on from an *obiter dictum* of Lord Russell in Federal Commerce & Navigation Ltd v. Molena Alfa Inc. (The Nanfri) [1979] 1 Lloyd's Rep 201 at 210, have concluded that an owner's lien on sub-freights created by contract in a charterparty operates as an equitable charge on what is due from the shipper to the charterer. The first instance decisions include Re Welsh Irish Ferries Ltd (The Ugland Trailer) [1986] Ch 471, Annangel Glory Compania Naviera SA v. M Golodetz Ltd (The Annangel Glory) [1988] 1 Lloyd's Rep 45, G&N Angelikis Shipping Co SA v. Compagnie National Algerienne de Navigation (The Attika Hope) [1988] 1 Lloyd's Rep 439, and Itex Itagrani Exports SA v. Care Shipping Corporation (The Cebu) (No 2) [1990] 2 Lloyd's Rep 316.

27. The contrary argument, originally propounded by Dr Fidelis Oditah in his article "The Juridical Nature of a Lien on Sub-freights" [1989] LMCLQ 191, and enthusiastically endorsed by Lord Millett, giving the judgment of the Judicial Committee of the Privy

Council in Agnew v. Commissioners of Inland Revenue [2001] 2 AC 710, at paragraphs 38 to 41, is that the owner's lien on sub-freights is a personal contractual right of interception analogous to an unpaid seller's right of stoppage in transit, and not a charge or proprietary right at all.

28. Despite Mr Robins' valiant attempts to describe the alternative view as no more than a one-off *obiter dictum* from Lord Millett who had failed, when at the bar, to persuade Nourse J to the same view in the Ugland Trailer, I have to bear in mind that Lord Millett's judgment in Agnew expressed (albeit *obiter*) a view of a committee which included Lords Bingham, Nicholls, Hoffmann and Hobhouse and that the general thrust of the reasoning in Agnew (albeit not, at least expressly, the passage about the lien on sub-freights) was central to the later decision of the House of Lords in Re Spectrum Plus Ltd [2005] 2 AC 680, when overruling the longstanding authority of Siebe Gorman & Co Ltd v. Barclays Bank Ltd [1979] 2 Lloyd's Rep 142 and the later decision of Re New Bullas Trading Ltd [1994] 1 BCLC 485 (CA) on the question whether debenture security over book debts constituted a fixed or floating charge.

29. It is perhaps surprising that this formidable dissent from what had otherwise been a conventional view has yet to be adjudicated upon in an English case but, as Gross J concluded in Samsun Logix Corp v. Oceantrade [2008] 1 Lloyd's Rep 450, at 457, the answer to the question may not generally make any difference to priority issues arising from the charterer's insolvency.

30. The second issue, which arises only if the lien operates by way of security assignment, as a charge rather than a purely personal right, is whether it is invalidated by the prohibition on assignment in clause 96 of the sub-charter. Again, it is a question governed by English law. Although largely a matter of interpretation and application of the sub-charter, it may raise fact intensive issues, such as the knowledge or otherwise of STX of the lien on sub-freights in the time charter. There is likely in addition to be a question whether it is open to Armada to rely upon it, in circumstances where STX has pleaded it not in its own interests, but merely in order to avoid the risk that Armada might successfully make use of it in pursuing its own claim against STX for the sub-hire.

31. The third and fourth issues are inextricably bound up, and both are again subject to English law. They are largely matters of interpretation but may have a possible factual element, both in terms of quantum and on the question whether the circumstances in which Cosco procured the release of the Vessel from arrest were such as to make a refund of its bunkers payment by Armada a liability arising under the time charter.

32. The final issue is essentially a question of priority, and is bound up with the first issue. On any view, and in particular after Spectrum Plus, the lien on sub-hire in the present case can, if a charge at all, only have been a floating rather than a fixed charge, since it plainly permitted STX to continue to pay, and Armada to receive, sub-hire pending any exercise of the lien. The sub-hire was plainly not permanently appropriated by way of security to the discharge of Armada's liabilities to Cosco under the time charter.

33. If the lien operates as a floating charge, then both English and Swiss insolvency law provide that it confers less than absolute priority on the chargee. In England the

floating charge holder's rights are subordinated both to limited claims of preferential creditors, and to the appropriate part of the office-holder's expenses. It appears from limited available evidence that some form of postponement to the office-holder's expenses is also conferred under Swiss law, in relation to charges generally.

34. There is a large dispute between Cosco and Armada's office-holder as to whether English or Swiss insolvency law, or neither of them, is applicable to Cosco's lien. Furthermore, questions may arise in relation to the date of exercise of the lien, when it is borne in mind that all four exercise notices followed Armada's application for bankruptcy, and three of them followed the bankruptcy order itself.

THE PROCEDURAL DISPUTE

35. In a nutshell, this dispute is, simply, how and before which tribunal or tribunals should the issues in the underlying dispute be resolved. More specifically, Armada maintains, but Cosco denies, that the Recognition order has, of itself, stayed the first arbitration. All the parties acknowledge however that, whether or not the first arbitration has been automatically stayed, the court has a discretion under the Model Law, as incorporated into English law by the Regulations, either to continue or lift the existing stay, or to impose a stay if the Recognition order did not have that effect.

36. Cosco's case is, as I have set out in the introduction, that the underlying dispute should be resolved in the first arbitration, with Armada permitted, and if necessary encouraged, to participate by its office-holder. The office-holder's case is that there is good reason, in terms of saving cost and time, why the underlying dispute should be resolved in Switzerland, in the first instance by the office-holder itself and, if necessary, on appeal to the appropriate Swiss bankruptcy court.

37. Mr Christopher Boardman for Armada volunteered two intermediate alternatives, either of which he submitted would be preferable to the first arbitration as the vehicle for the determination of the underlying dispute. He suggested that I might decide the first and (if necessary) fifth issues myself, although he did not encourage me to do so. Alternatively, but with more enthusiasm, he submitted that I should give directions for the determination of all or part of the underlying dispute by this court, pursuant to powers conferred by article 21.1 of the Model Law. Mr Robins for Cosco showed no interest of any kind in these alternatives and, for his part, Mr David Allison for STX doubted whether the article 21 route would be preferable to the first arbitration.

THE LAW

38. There being no reported authority on the question, the first stage is to identify what are the legal principles applicable to the exercise of discretion in relation to applications for, or to discharge, a stay under the Model Law. Paragraph 2(1) of the 2006 Regulations provides that the Model Law is to have the force of law in Great Britain in the form set out in Schedule 1, which consists of an English language version of the Model Law, incorporating certain modifications to adapt it for application in Great Britain. Paragraph 2(2) of the Regulations provides that, without prejudice to any practice of the courts as to matters which may be considered apart from that paragraph, the following documents can be considered for the purpose of ascertaining the meaning or effect of any provision of the UK version of the Model Law in Schedule 1 namely:

(a) The UNCITRAL Model Law itself (i.e. the international version of the Model Law on Cross-Border Insolvency as adopted by the UN Commission on International Trade Law in May 1997);

(b) Any of the UN Commission's *travaux preparatoire*s;

(c) the Guide to Enactment of the UNCITRAL Model Law prepared at the request of the UN Commission, also in May 1997.

39. The 2006 Regulations provide, by way of Schedule 2, a detailed set of procedural rules governing applications made under the Model Law in England and Wales, but it was not suggested that anything in those provisions was material to the matters which I have to decide. My references in the remainder of this judgment to the Model Law are references to the UK version of the UNCITRAL Model Law set out in Schedule 1 to the Regulations.

40. The provisions of the Model Law with which I am concerned appear entirely in Chapter III, headed 'Recognition of a Foreign Proceeding and Relief'. Article 15.1 provides that a foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed. For present purposes, and having regard to the definitions in article 2, the Swiss bankruptcy of Armada is a foreign proceeding, and the office-holder of Armada (as I have identified it earlier in this judgment) is the foreign representative. Before leaving the definitions, it is to be noted that "security" in the articles to which I shall shortly refer means, pursuant to Article 2(n):

> "(i) In relation to England and Wales, any mortgage, charge, lien or other security; and
>
> (ii) In relation to Scotland, any security (whether heritable or moveable), any floating charge and any right of lien or preference and any right of retention (other than a right of compensation or set-off);"

I was persuaded by Mr Robins (without opposition from counsel for the other parties) that the express reference to floating charge in the Scottish part of that definition did not mean that floating charges were excluded from the definition of security in relation to England and Wales. For the special position in Scotland in relation to floating charges see per Lord Hope in Re Spectrum Plus (*supra*) at paragraphs 48 to 51.

41. Article 20, headed 'Effects of recognition of a foreign main proceeding', provides, so far as is relevant, as follows:

> "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.

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.

…

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."

42. Article 21, headed 'Relief that may be granted upon the recognition of a foreign proceeding', provides, so far as is relevant, as follows:

> "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 creditor, 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;
>
> …
>
> (g) granting any additional relief that may be available to a British insolvency office-holder under the law of Great Britain, including any relief provided under paragraph 43 of Schedule B1 to the Insolvency Act 1986.
>
> 2. Upon recognition of a foreign proceeding, whether main or non-main, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in Great Britain to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in Great Britain are adequately protected.
>
> 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 a foreign non-main proceeding or concern information required in that proceeding."

43. Article 22, headed 'Protection of creditors and other interested persons', provides, so far as is relevant, as follows:

> "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."

44. The Guide to Enactment contains, at paragraph 145, the following commentary upon the relationship between article 20 of the Model Law and arbitration proceedings:

> "145. Subparagraph 1 (*a*), by not distinguishing between various kinds of individual actions, also covers actions before an arbitral tribunal. Thus, article 20 establishes a mandatory limitation to the effectiveness of an arbitration agreement. This limitation is added to other possible limitations restricting the freedom of the parties to agree to arbitration that may exist under national law (e.g. limits as to arbitrability or as to the capacity to conclude an arbitration agreement). Such limitations are not contrary to the Convention on the recognition and Enforcement of Foreign Arbitral Awards (1958). However, bearing in mind the particularities of international arbitration, in particular its relative independence from the legal system of the State where the arbitral proceeding takes place, it might not always be possible, in practical terms, to implement the automatic stay of arbitral proceedings. For example, if the arbitration does not take place in the enacting State and perhaps also not in the State of the main proceedings, it may be difficult to enforce the stay of the arbitral proceedings. Apart from that, the interests of the parties may be a reason for allowing an arbitral proceeding to continue, a possibility that is envisaged in paragraph 2 and left to the provisions of law of the enacting State."

The references to paragraphs in that extract are to the paragraphs of article 20.

45. Paragraph 2 of article 20, which is expressed to prevail over paragraphs 1 and 3, clearly identifies the British insolvency code as the primary source of an understanding as to the effect of recognition of a foreign main proceeding both in terms of its immediate effect, and in terms of the court's powers in relation to the automatic stay prescribed by paragraph 1. Furthermore, it is to the stay which occurs on the making of a winding-up order, rather than to the moratorium which occurs upon the making of an administration order, to which reference is made, albeit that, in an appropriate case, the English court may impose a moratorium under paragraph 1(g) of article 21. In the present case, the evidence as to the applicable Swiss procedure relating to Armada's bankruptcy shows that it is analogous to a British winding-up rather than a British administration. Thus, the domestic regime for the imposition and management of a stay incorporated by paragraph 2 of article 20 is that prescribed by section 130(2) of the Insolvency Act 1986, which provides that:

> "When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company or its property, except by permission of the court and subject to such terms as the court may impose."

There is English authority both as to the meaning of that provision, and as to the way in which the court should exercise its power to give permission, to which I shall shortly refer.

46. The only provision of the Model Law framed in a way which might be thought to override article 20.2 is article 22.1, requiring the court to be satisfied that the interests of creditors, including secured creditors, and other interested persons, including if appropriate the debtor, are adequately protected. As will appear however, I consider that the principles upon which the court acts under section 130(2) of the Insolvency Act are such as fully to implement that objective.

47. There is a long line of English authority, both at first instance and in the Court of Appeal, that in considering whether to permit proceedings which would otherwise be stayed by what is now section 130(2) nonetheless to continue, the court is given "a free hand to do what is right and fair according to the circumstances of each case": see Re Grosvenor Metal Co Ltd [1950] Ch 63, at 65 per Vaisey J, Re Suidair International Airways Ltd [1951] Ch 165, Re Redman (Builders) Ltd [1964] 1 WLR 541, Re Aro Co Ltd [1980] Ch 196 at 209 (CA) and, most recently, Bourne v. Charit-Email Technology Partnership LLP [2010] 1 BCLC 210 at 212-213.

48. In the latter case, Proudman J also noted that, in a case where section 130(2) clearly imposed a stay, the starting point was that proceedings were not generally to be permitted against a company in liquidation, so that the court should, subject to the overriding objective, adopt the primary objective of achieving an orderly resolution of all matters arising in the winding-up for the benefit of the creditors as a whole. She also noted that previous authorities recognised that, in general, the resolution of disputed matters within the machinery of a liquidation was likely to be cheaper and quicker than if left to ordinary proceedings, and that the often limited resources of the office-holder meant that the court should be cautious before exposing liquidators to the burden of coping with difficult and time-consuming litigation. That was, of course, a purely domestic case. Proudman J also noted that, on the authority of Re Bank of Credit and Commerce International (No 4) [1994] 1 BCLC 419, at 426, the Companies Court is not required to investigate the merits of the underlying dispute, beyond satisfying itself that there is a genuine arguable claim, before giving permission for the commencement or continuation of proceedings which would otherwise be stayed by section 130(2).

49. Section 130(2) imposes an automatic stay only upon proceedings "against the company or its property". Article 20.1(a) is expressed, a little more broadly, in terms of staying proceedings "concerning the debtor's assets, rights, obligations or liabilities". Nonetheless it is not to have a wider scope or effect than section 130(2): see article 20.2(a). Where a company charges its property as security for a debt, then for the purposes of section 130(2) its property is not the subject matter of the charge, but only its equity of redemption in relation to it: see Re David Lloyd & Co (1887) 6 Ch D, Re Pyle Works Ltd (1890) 44 Ch D 534 and, more recently, Buchler v. Talbot

[2004] 2 AC 298 at pages 308 and 313. The result is that, by contrast with an administration, the commencement of a winding-up does not in general prevent a secured creditor from realising his security.

50. In the present case there is of course a sharp dispute as to whether Cosco's enforcement of its lien over the sub-hire due from STX is or is not the enforcement of security by a secured creditor. Sometimes it is convenient for the court to decide that question on an application in relation to an insolvency stay, but since a conclusion that the creditor may not be secured will not of itself necessarily prevent the court granting permission for him to bring proceedings against the company, it is by no means always necessary or convenient to do so: see generally Aro Co Ltd [1980] Ch 196 at 209 E to F.

ANALYSIS

51. In the present case, much time was taken up by the protagonists, in particular in counsel's skeleton arguments, in seeking to persuade me that Cosco either was, or was not, seeking to enforce a security. To answer that question would require me substantially to determine issues 1, 2 and possibly timing questions under issue 5 in relation to the underlying dispute. I consider that it would be inappropriate for me to take that course. The juridical nature of the lien over sub-hire is plainly ripe for consideration at least by the Court of Appeal. The question whether the creation of an equitable charge by that lien was invalidated by the prohibition on assignment in the sub-charter may be fact intensive, and the timing questions arising under issue 5 are unsuitable for determination until (or at the same time as) the other issues in the underlying dispute are determined.

52. To extract the first issue as to the juridical nature of the lien from the remainder would be to expose the parties to a possibly lengthy stay of the underlying dispute while a single issue in it was litigated up to, and possibly beyond, the Court of Appeal, and all in relation to a dispute with a present value of less than £1 million. I therefore approach the matter upon the basis that it is, at least, arguable that the underlying dispute relates to property of Armada, or at least that it relates to property in relation to which Armada has an arguable claim to a beneficial interest which, pursuant to article 22.1 of the Model Law, I must be satisfied is adequately protected.

53. Since the parties accept that I have a discretion whether or not to stay the first arbitration going forward it is not necessary for me to decide whether thus far there has or has not been an automatic stay of the first arbitration by reason of the Recognition order. For the reasons given, it is not convenient to do so either. I shall therefore approach the matter as one of broad discretion, the question being which route for the resolution of the underlying dispute is likely best to serve the interests of justice, being that which is right and fair in all the circumstances.

54. In my judgment the application of that approach clearly leads to the conclusion that the underlying dispute should, if possible, be determined in the first arbitration, provided that Armada by its office-holder can without delay or significant risk as to its effectiveness, be joined as a party to that reference. My reasons follow.

55. First, the starting point is that, in my view, the true analysis of the underlying dispute is not that it is a claim by Cosco against Armada, or for that matter by Armada against

Cosco. Rather, there are two competing proprietary and/or contractual claims by Armada and Cosco in relation to a single asset, namely the chose in action which consists of STX's obligations to make payments under the sub-charter. Notwithstanding Mr Boardman's submissions to the contrary, the asset in question is not the fund in the escrow account, the creation of which occurred pursuant to an agreement to which Armada was not a party, and which the court could not require STX and Cosco to transmit to an account in Switzerland under the control of the office-holder, as if it were part of Armada's "assets located in Great Britain" within the meaning of article 21.2.

56. Secondly, Armada and Cosco have both agreed, in the time charter, that disputes about Cosco's lien are to be resolved, pursuant to English law, by arbitration in London. Furthermore, Armada's rights in relation to sub-hire are also, in the event of dispute, subject to an identical choice of law and arbitration clause in the sub-charter.

57. The case is therefore very unlike the typical claim against a company in liquidation, in relation to which the starting point may be (as Proudman J held in Bourne v. Charit-Email Technology) that the liquidator should not lightly be deprived of the cost and time advantages of having the matter determined in the liquidation. If Armada had simply been pursuing a claim under the sub-charter for alleged, disputed, arrears of hire, there could I think have been no question but that the court would have required the office-holder to pursue that claim by arbitration, as Armada had agreed to do in the sub-charter. Furthermore I ascertained upon enquiry of Mr Young that the office holder of Armada has funds in hand with which to pursue the arbitration, always assuming that such expenditure is considered to be in the best interests of Armada's unsecured creditors.

58. While I acknowledge some force in Mr Young's submission that, viewed purely from a perspective of cost and time, proceedings to resolve the underlying dispute in the Swiss bankruptcy court might be cheaper and possibly even quicker than by London arbitration, I would nonetheless regard the balance of fairness, convenience and justice as lying strongly in favour of arbitration. All the issues in the underlying dispute, save possibly for certain aspects of issue 5 (and even that is disputed), are issues of English law. They are all, save again for issue 5, questions mainly of the English shipping law, in relation to which London arbitrators of the type required by the arbitration clause in both charters are experienced and well qualified.

59. While acknowledging that, mainly for the benefit of the arbitral process and its participants, routes for appeal are restricted, I consider that issue 1 plainly raises questions of general importance in the context of charterparties, sufficient to make it likely that an appeal against a decision of the arbitrators would readily be entertained by the court. Furthermore, albeit only with the parties' and the arbitrators' consent and the court's approval, section 45 of the Arbitration Act 1996 would enable issue 1 to be determined as a preliminary point of law if, once all the issues had been identified by statements of case, it appeared that taking that course would be likely to produce a substantial saving in costs. As matters stand, and for reasons already given, I am not at present persuaded that any such saving would thereby be achieved.

60. A fair and just resolution of the underlying dispute by arbitration would of course necessitate the joinder of Armada in the first arbitration. There has for nearly a year been an open invitation to the office-holder by both Cosco and STX that Armada

should join the first arbitration. While I acknowledge that the capacity to deal with multi-party proceedings is, at present, a weakness of the arbitral process, I can conceive of no reason why in the present case the reconstitution of the first arbitration (if necessary with the appointment by Armada of a third arbitrator) should prove impossible, unwieldy, time consuming or particularly expensive. My clear impression is that, to date, the only reason why that has not occurred is because of the office-holder's preference for some other, preferably Swiss, method of dispute resolution.

61. There is in my view an air of unreality in the submission that it would either be fair, just or convenient to visit upon a Swiss bankruptcy court the adjudication of an underlying dispute which is almost entirely governed by English law, concerns shipping matters and which is already the subject of two pending arbitrations before experienced tribunals pursuant to obligations in the contracts out of which the dispute has arisen. The Swiss court would be obliged to rely for the determination of most of the matters in issue upon expert evidence as to English law (whether from a single expert or competing experts) and its own relevant experience would be limited to Swiss insolvency law, as to which, despite having many months to do so, none of the parties have identified any specific issue to be decided.

62. I have considered whether the alternative course proposed by Mr Boardman, namely to direct a stay of the arbitrations and the determination of all or some of the issues in the underlying dispute by this court, would be fairer or more likely to lead to a just and economical determination than by allowing the first arbitration to proceed upon condition that Armada is joined. In its favour is, I suppose, the reduction of the potential stages of appeal (in relation in particular to issue 1) by starting the matter in the High Court. Apart from that, I can see no other advantage in circumventing an arbitration, still less why it would be fair to do so in the light of the parties' pre-existing agreement to arbitrate all disputes relating to the charters. I bear in mind, although it is not a major factor in the balance, that the escrow agreement contemplates the determination of the dispute by arbitration or by the court on appeal from arbitration, rather than by the court in separately constituted proceedings.

63. Subject only to two matters, I am satisfied that the arbitration route will properly protect the interests of Armada, its creditors and all other interested persons, within the meaning of article 22.1 of the Model Law. My only reservations are, first, that there remains a risk, however small, that the arbitral process called for by the two charters may not be capable of adaptation to admit all three parties to the underlying dispute in a single arbitration. My second reservation is that I cannot rule out the possibility of an outcome to issues 1 to 5 that might give rise to a priority issue as between Cosco and Armada's office-holder or creditors which the arbitration process would be ill-suited to resolve.

64. In order to address those two reservations I am minded in principle to impose two conditions to the release or as the case may be non-imposition of a stay under the Model Law so as to permit the underlying dispute to be arbitrated. The first is that Armada should have liberty to apply for further relief under article 22.3 in the event that, for some as yet unexplained reason, it is unable to be effectively joined into the first arbitration, through no fault of its own. The second is that there should at this stage be a stay of enforcement or execution of any arbitral award until article 21.1(b) until, after such an award has become final, Armada has had the opportunity to restore

the matter to this court, in the event that any aspect of the interests of its creditors or office-holder have not been addressed by the arbitrators, or upon appeal.

65. I indicated at the close of oral argument my provisional view that I would be likely to give directions enabling the underlying dispute to be determined by arbitration, and that after handing down judgment I would invite submissions as to the precise form which they should take. It is for that reason that I have identified methods of addressing the two reservations which I have described only on an 'in-principle' basis at this stage.