Nottingham Law School

Centre for Business and Insolvency Law

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This edition of the Insolvency Bulletin reads rather like a World Cup fixture list in light of the number of jurisdictions referred to in the cases. In *Fibria Celulose* the court was asked by a Korean administrator to restrain the service of a notice terminating an English law contract that had been entered into by a Korean and a Brazilian company (it could not). The anti-deprivation principle was not in issue as a matter of English law (following the Supreme Court decision in *Belmont*) although the termination provisions would have been invalid as a matter of Korean law as an *ipso facto* clause.

There are four cases on schemes of arrangement under the Companies Act 2006 which have been reported in chronological order. In *Zlomrex,* a French company deliberately transferred its place of business to London (as did a Dutch company in *Magyar*) simply to establish a sufficient connection with England for a scheme to be pursued. The rules on jurisdiction are gradually becoming more defined, particularly as to the test for sufficient connection and the practical effect of sanctioning such schemes (which boils down to whether they will be recognised in the other relevant jurisdictions).

For anyone interested in writing in this area, please note that the Nottingham Insolvency and Business Law e-Journal would be pleased to receive manuscripts for its next issue. Submissions on insolvency, business and related areas of law, and which will be refereed, should be sent in the first instance to the Editor, Professor Paul Omar, at paul.omar@ntu.ac.uk.

Wishing you all a relaxing summer break.

Paula

Paula Moffatt

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CROSS-BORDER

Fibria Celulose SA v Pan Ocean Co. Ltd (1) and Mr You Sik Kim (2) EWHC 2124 (Ch)

Executive summary

The service of a notice to terminate a contract did not amount to "the commencement or continuation of individual actions or individual proceedings" under Article 21(1) (a) of the Cross-Border Insolvency Regulations 2006 ("CBIR") and so the English court had no power to restrain the service of such a termination notice.

Facts

Pan Ocean Co Ltd (the "Company") was a shipping company incorporated under the laws of the Republic of Korea. In June 2013, it became cash flow (but not balance sheet) insolvent and the Company applied to the Seoul Central District Court to enter into rehabilitation, a Korean insolvency process that is broadly similar to English law administration. Later that month, the rehabilitation proceedings were recognised by the English Companies Court as a foreign main proceeding under the CBIR.

The Company had a long term shipping contract with Fibria Celulose SA ("Fibria"). Fibria was a Brazilian company that was a large producer of wood pulp. The contract between the Company and Fibria was governed by English law. Fibria regarded the contract as onerous, whereas the Korean administrator (the "Administrator") of the Company considered that the contract was very valuable and wished it to continue to assist with the Company's rehabilitation.

The contract expressly gave Fibria the right to terminate the contract in the event of the Company entering into the Korean insolvency process. These terms were enforceable under English law. The Administrator contended that, as a matter of Korean law, the contract was a "bilateral executory contract" which the Administrator was entitled to elect to continue or to terminate. Under Korean law, the termination provisions would be invalidated as they constituted an *ipso facto* clause. Alternatively, their operation could be restricted until the rehabilitation proceedings had been concluded.

As a practical matter, the Company's rights under the contract had been assigned by way of security to ABN Amro Bank NV, as Security Agent. In the event of the termination of the contract by Fibria, the Security Agent had the option to "Step in" and run the contract or terminate it.

The Administrator and Fibria had each applied to the Companies Court under the CBIR. The Administrator sought an order that the Companies Court grant him relief under Article 21, including an order that Fibria did not exercise its right to terminate the contract. Fibria contended that the Companies Court did not have the power to do this or, that if it did, it should not exercise it.

It was accepted that the terms of the contract were not struck down by the anti-deprivation rule, following the Supreme Court decision in *Belmont Park Investments Pty v BNY Corporate Trustee Services Ltd* [2012] AC 383. Essentially, as commercially justifiable contractual provisions, they would not offend the anti-deprivation rule as a matter of English law.

Decision

The judge held that the service of a notice to terminate the contract did not amount to "the commencement or continuation of individual actions or individual proceedings"

under Article 21(1)(a) of the CBIR and, therefore, that the English court did not have the power to restrain Fibria from serving a termination notice.

Even if such a power had existed, the judge would not have exercised it on the grounds that it would not have been "appropriate" relief.

Comment
Had the *Belmont* case had to be decided as a matter of US law, the outcome would have been entirely different. Judge Peck in the US Bankruptcy Court in the Southern District of New York had made a declaration that the contractual provisions in question in *Belmont* amounted to an *ipso facto* clause and so breached the US Bankruptcy Code. It is hardly surprising that these two opposing interpretations of the anti-deprivation principle have re-surfaced in another cross-border case: as the judge in the present case observed, the English law judgments in *Belmont* did not have to deal with an application under article 21 of the CBIR for an order restraining any party from relying upon contractual provisions which were effective in English law, but ineffective under the US Bankruptcy Code.

Article 21 requires the court to grant relief "where necessary to protect the assets or the debtor or the interests of the creditors" and the court is able to grant "any appropriate relief". The judge began by considering whether the service of a termination notice under a contract fell within the remit of Article 21 at all. He concluded that it did not. He relied on *Bristol Airport plc v Powdrill* [1990] Ch 744 and *Re Olympia & York Canary Wharf Ltd* [1993] BCC 154 as authority for interpreting the phrase "the commencement or continuation of individual actions or individual proceedings" according to its ordinary and well understood meaning. Applying this approach, the service of a termination notice did not amount to an individual action or individual proceedings.

He then went on to consider the scope of the term "any appropriate relief" as well as its derivation. He concluded that the reports of the working group on the Model Law gave no indication that such relief was ever intended to go beyond the relief that the court would grant in relation to a domestic insolvency. Having reviewed the cases, he determined that *Rubin v Eurofinance SA* [2013] 1AC 236 supported the principle that the relief under Article 21 was of a procedural, rather than a substantive nature. On the facts, the implications for Fibria of not being allowed to terminate the contract went far beyond the simply procedural, as the rights and obligations of the parties under the contract were affected. He did not, therefore, consider it to be appropriate relief to make an order restraining Fibria from terminating the contract.

As it turned out, the issue of the *ipso facto* clause was something of a red herring, it simply being acknowledged that different jurisdictions adopt different approaches to the matter. In this case, the judge considered it entirely appropriate for the English court to apply English law. The parties, who were Korean and Brazilian, had deliberately chosen English law to govern the contract and this should be given effect.
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In the matter of ARM Asset Backed Securities SA [2014] EWHC 1097 Ch

Executive summary
An application for liquidation proceedings under Luxembourg Securitisation Law brought by the Luxembourg public prosecutor in respect of the Company (which was in provisional liquidation in England) was subject to the automatic stay on actions and proceedings against the Company under section 130(2) of the Insolvency Act 1986 (the "1986 Act").

Facts
ARM Asset Backed Securities SA (the "Company") was incorporated in Luxembourg. It raised funds through bond issues which were governed by Luxembourg law. The funds were invested in US insurance policies. The policies were held in a trust governed by Delaware law which paid the premiums and collected sums due under the policies. The proceeds from the policies were paid to the Company to enable it to repay the bonds issued.

The Company had unsuccessfully applied for a licence from the Luxembourg regulator. It had not issued bonds since 2009, but still held £22 million. The issue remained as to whom the £22 million should be paid. The UK Financial Conduct Authority took the view that it should be repaid to investors.

The day to day conduct of the Company's business was carried out by agents based in England. The Company's directors were based in England, Northern Ireland and the Republic of Ireland. Telephone meetings were generally held and some meetings were held in Luxembourg.

After the Company's application for a licence failed, the Luxembourg regulator requested that the Luxembourg public prosecutor bring liquidation proceedings in Luxembourg against the Company under the Luxembourg Securitisation Law.

Shortly afterwards, the directors of the Company had applied to the court for an order that the Company could be put into provisional liquidation in England. Although the Company was unlikely to have sufficient funds to be able to repay its bondholders in full, the terms of the bonds provided only for limited recourse for the bondholders, so that they were only entitled to recover sums due to the extent that the Company had available funds. Nonetheless, the directors were of the view that it would be beneficial for the Company to be put into the hands of third party office holders to ensure an orderly realisation of assets and distribution to creditors.

The winding up petition was therefore sought on the grounds that it was just and equitable for the Company to be wound up rather than on the grounds of the Company's inability to pay its debts.

At a hearing in October 2013, Mr Justice David Richards had held that Company's centre of main interests ("COMI") was in England and that the English provisional liquidation would be the main proceeding under Article 3(1) of EC Regulation 1346/2000 (the "Insolvency Regulation").

The Luxembourg public prosecutor and the Luxembourg regulator were both notified that the English provisional liquidation would be the main proceedings. The Luxembourg regulator was notified of the automatic stay (under section 130(2) of the 1986 Act and Article 17 of the Insolvency Regulation) in respect of the Securitisation Law liquidation proceedings, but responded by stating that these proceedings did not amount to insolvency proceedings under the Insolvency Regulation, as they were not listed in Annex B to the Insolvency Regulation.

The provisional liquidators replied to the Luxembourg regulator, stating that the contention was irrelevant. Although they agreed that the Luxembourg proceedings would not be insolvency proceedings for the purpose of the Insolvency Regulation, they considered that to commence such proceedings without the permission of the English Court would still be in breach of section 130(2) of the 1986 Act. Alternatively, if the Luxembourg proceedings were to be considered insolvency proceedings under the Insolvency Regulation, they could not be commenced in Luxembourg because the

Company's COMI was in England. They could not be secondary proceedings either, because the Company had no establishment in Luxembourg.
In February 2014, the Luxembourg public prosecutor applied to the court for the commencement of the liquidation of the Company, in Luxembourg, under the Luxembourg Securitisation Law.

The provisional liquidators submitted that the Luxembourg public prosecutor's application was a violation of the section 130(2) stay. They also contended that a parallel Luxembourg proceeding would be unnecessarily costly and complicate matters.

Decision
The judge held that the effect of section 130(2) of the 1986 Act was to require leave of the English court before proceedings could be brought in Luxembourg. The term "action or proceeding" had a wide meaning and the proceedings initiated by the Luxembourg prosecutor clearly fell within them.

Comment
This is a relatively straightforward decision. The full text of section 130(2) reads as follows: "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 leave of the court and subject to such terms as the court may impose". As the judge pointed out, the phrase "action or proceeding" has been widely construed and been held to include criminal and quasi-criminal proceedings (*Re Briton Medical & General Life Assurance Association (1886) 32 Ch D 503)* as well as proceedings on indictment (*R v Dickson [1991] BCC 719).* In the judge's view, the Luxembourg proceedings clearly fell within the scope of the section and so were automatically stayed.
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Joint official liquidators of SAAD Investments Company Limited, Saad Investments Company Limited (in liquidation) v Samba Financial Group [2014] EWHC 540 (Ch)

Executive summary
Proceedings under section 127 of the Insolvency Act 1986 (the "1986 Act") were stayed on the grounds that the courts of Saudi Arabia were clearly and distinctly a more appropriate forum.

Facts
Samba Financial Group ("SFC") applied to the court for a stay of the insolvency proceedings in respect of SAAD Investments Company Limited ("SICL"). The application was made under Part 11 of the Civil Procedure Rules on the grounds that the courts of the Kingdom of Saudi Arabia, rather than the courts of England and Wales, were the appropriate forum for the determination of the claim.

The Liquidators of SICL had brought a claim, under section 127 of the 1986 Act, that the transfer of shares in five Saudi Arabian companies to SFC by SICL was a void disposition. At the date of transfer, the shares were stated to have been worth US$318 million and were alleged to have been held on trust for SICL by Mr Al Sanea (who had effected the transfer) under Cayman Islands law. The Liquidators claimed that the trust had been created as a result of seven transactions that had taken place between 1998 and 2008.

SICL was a company incorporated under the law of the Cayman Islands and had been wound up by order of the Cayman Islands Grand Court September 2009. The Liquidators were appointed by the same order. Recognition orders made under the Cross-Border Insolvency Regulations 2006 (the "CBIR") recognised the Cayman insolvency proceedings as foreign main insolvency proceedings in accordance with the UNCITRAL Model Law on Cross-Border Insolvency and recognised the Liquidators as foreign representatives in the foreign main proceedings.

Regulation 3(1) of the CBIR provides that British insolvency law will apply with such modifications as the context will require for the purpose of giving effect to the provisions of the CBIR. Article 20 provides that once the foreign main proceedings are recognised, the debtor's right to dispose of or encumber property is suspended and that this suspension has the same scope and effect as if the debtor was subject to a 1986 Act winding up order.

The Liquidators, as foreign representatives, sought to take advantage of the CBIR and section 127 of the 1986 Act, claiming that there had been a disposition of SICL's property (the shares) made after the date of recognition which had rendered it void. SFC had a presence in Britain and the Liquidators sought action in that jurisdiction, believing that SFC would not submit to the jurisdiction of the Cayman Islands as it had no presence there and that any judgment obtained there would be difficult to enforce. SFC contended that the seven transactions had been governed by the law of Saudi Arabia and the law of Bahrain and that no separate beneficial interest (and therefore no trust) was recognised under the laws of these jurisdictions.

The issue was, therefore, to determine which law governed whether or not SICL had a proprietary interest in the shares at the date at which they were transferred.

Decision
The judge held that, on the facts, the proceedings should be stayed as the courts of Saudi Arabia were clearly and distinctly a more appropriate forum than those of England. The law of Saudi Arabia was the correct governing law both under common law conflict of laws principles and under the Recognition of Trusts Act 1987 (the "1987 Act", which gives effect in English law to the Hague Trusts Convention (the "Convention")). Following *Macmillan Inc v Bishopsgate investment Trust plc (No 3)* 1996 1 WLR 387, the ownership of shares is determined by the law of the place in which they are situated. In this case, the shares were in companies incorporated in Saudi Arabia and the shareholders were registered there either with the Saudi Arabian Securities Depository Centre operated by the Saudi Arabian stock exchange, or in the relevant register of shareholders. Section 127 of the 1986 Act was only relevant if, at the date of the transfer, SICL had a proprietary interest in the shares (which it did not).

Comment
The principles for a stay were not in dispute. These are, broadly, that the court has a discretion to stay proceedings in the English court if there is another, more appropriate, forum. This is determined by considering the forum with which the issue in the proceedings have the most real, or substantial, connection. Factors to be considered include the governing law of the relevant transactions, the places where the parties operate, the convenience of witness and the location of evidence (*Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460). If another forum is determined to be more appropriate, then English proceedings will be stayed unless it can be objectively established that justice will not be done in that other forum.

The facts of this case were interesting in that they turned on whether or not SICL could be deemed to have an equitable proprietary interest in the disputed shares under a Cayman Islands trust. The "seven transactions" referred to in the judgment had, according to the Liquidators, evidenced the trust. As the judge explained: "the claimant's case was that the effect of the seven transactions was to vest beneficial entitlement to the Disputed Shares in SICL and to remove it from the legal owner" (para 63). In the judge's view, this would have meant that the transaction would have fallen within the expression "transfer of title to property" under Article 15(d) of the Convention. There was, however, nothing in the Convention that precluded the common law rule that the law governing title to shares was the *lex situs*, which, in this case was the law of Saudi Arabia.

The judge considered the possibility that the seven transactions had the effect of creating a beneficial interest rather than transferring title to a beneficial interest. He concluded that the consequences would have been the same. Article 7 of the Convention

provides that where no applicable law is chosen for a trust, it will be governed by the law with which it is most closely connected. In this case, it was the law of Saudi Arabia. It was also the case that the law of Saudi Arabia does not recognise the type of trust where there is a division between legal and beneficial ownership. This meant that Article 6 of the Convention was not applicable. Article 6 otherwise enables the settlor to choose the governing law of a trust.

It is interesting to note that, whilst Saudi Arabian law does not recognise the trust as it is understood as a matter of English law, it does recognise an arrangement, the "amaana" under which one person entrusts property to another (the "amin"). Under this arrangement, the amin cannot assert ownership of the property and the amin's family cannot assert that it forms part of the amin's estate on the amin's death. The amaana is similar to the English law concept of bailment, where no separate property interest is created, but a duty of care is imposed.
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2.
CROSS-BORDER: SCHEMES OF ARRANGEMENT
In the matter of Zlomrex International Finance SA and in the matter of the Companies Act 2006 [2013] EWHC 4605 (Ch)

Executive summary
The court was satisfied that a French company had a sufficiently close connection with England for the purpose of making orders in anticipation of a sanctioning of a Scheme of Arrangement under section 895 Companies Act 2006.

Facts
Zlomrex International Finance SA (the "Company") was incorporated and registered in France but part of a Polish group of companies that dealt with scrap metal. All the Company's activities took place in France. It was the finance company within the group and issued loan notes (the "Notes"). The Notes were governed by New York law and any proceedings were subject to the non-exclusive jurisdiction of the New York courts. The Company used the proceeds of the Notes to make inter-company loans.The Notes were due to be repaid on 1 February 2014. The Company was, however, insolvent and unable to repay the Notes in full.

It was proposed that the noteholders (as the creditors) enter into a contractual scheme whereby they were issued with new notes to the same value as their original Notes with a repayment date set in 2020 or 2021. In view of the urgency of the situation, it was proposed that proceedings to put in place a Companies Act 2006 scheme of arrangement (the "Scheme") be run in parallel to address the possibility that a contractual agreement could not be reached in time.

The Scheme could only be effected if the Company had a sufficient connection with England. Therefore, in August 2013, the Company moved its principal place of business and its principal office to London. It took on two English directors and opened an English bank account into which it transferred all its funds. The only thing left in France was its registered office.

At the hearing in November 2013, the court was asked to consider whether it had jurisdiction in respect of the Scheme.

Decision
The judge held that there was a sufficiently close connection with England for the purposes of establishing the Scheme as the Company had assets within the jurisdiction (following the test approved by the Court of Appeal in *Re Latreefers Inc* [2001] BCC 174. Even if that test for jurisdiction were wrong, and the Centre of Main Interests ("COMI") test required by the EC Regulation 1346/2000 on Insolvency Proceedings (the "Insolvency Regulation") were relevant, the Company's COMI was in England and Wales at the commencement of the proceedings.

Comment
This just goes to illustrate what a great export the English law scheme of arrangement is. Here, there was no connection whatsoever with England at the outset, but those managing the Company and the wider group of companies, considered that it was worth moving the Company's place of business simply to be able to set up the Scheme. As the judge remarked "no attempt was made to hide that motivation" (para 6).

There were good practical reasons for this approach. First, a French restructuring was thought likely to trigger an event of default for the Company and so cause cross-defaults across the group and lead to worse recoveries than would be achieved under the Scheme. Second, a restructuring in New York was thought likely to be prohibitively expensive and that there would be the possibility of non-consenting parties causing difficulties. So the Scheme was considered to be the simplest and most cost-efficient method of restructuring the Company and binding the noteholders.

The COMI test was not relevant here as the Scheme was not an insolvency proceeding for the purposes of the Insolvency Regulation (although the judge did state that, if he had got this wrong, then the COMI test was satisfied in any event). The jurisdictional test from *Latreefers* as to whether there was "a sufficiently close connection with England usually, but not invariably, in the form of assets within the jurisdiction", was satisfied as the Company had transferred its assets to a London bank account. The judge was also satisfied that if he had to establish that the proceedings fell within the scope of the Judgments Regulation (EC 44/2001), then the requirements of Article 6 had been met, since at least one of the noteholders was domiciled in England and Wales.

The judge also considered the matter of recognition as this was necessary if the Scheme were to be given effect. The Notes were governed by New York law and so the Scheme would need to be recognised in New York. It also needed to be recognised in Poland. As a matter of Polish law, no procedural steps were necessary to procure its recognition. In view of the discretion of the Polish court, it could not be said with absolute certainty that it would be recognised as a foreign judgment, but this was the most likely outcome. As a matter of New York law, it was likely that the Scheme would be enforced under Chapter 15 of the US Bankruptcy Code (the US domestic adoption of the UNCITRAL Model Law on Cross-Border Insolvency). The most water-tight solution for the Company would have been to apply for the Scheme to be recognised formally under Chapter 15 although, in fact, the Company had retained the right to waive this condition of the Scheme. The judge was not entirely happy with the waiver, but as the hearing was not for the purpose of sanctioning the Scheme, he expressed his misgivings and suggested that the matter be dealt with at a later hearing.
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In the matter of Magyar Telecom BV, Magyar Telecom BV and in the matter of the Companies Act 2006 [2013] EWHC 3800(Ch)

Executive summary
A Companies Act 2006 scheme of arrangement in respect of a Dutch company was sanctioned by the court as the requirements for a sufficient connection with the jurisdiction and the scheme achieving its purpose were satisfied.

Facts
The facts were very similar to those of the *Zlomrex* case, above. Magyar Telecom BV (the "Company") was incorporated and registered in the Netherlands and part of a Hungarian group of companies whose principal business was the operation of Hungarian telecommunication services. The Company was the financing company for the group and had issued loan notes governed by New York law (the "Notes").

The Company had defaulted on its interest payment obligations under the Notes in June 2013 and the directors considered that, in the absence of a restructuring, the company would have to enter formal insolvency proceedings which would destroy the value of the

group and reduce recoveries for the noteholders. In August 2013, the Company moved its centre of main interests to England.

Decision
On the facts, the requirement for the Company to have a sufficient connection with England Wales was satisfied as was the requirement that the scheme achieve its purpose (*Sompo Japan Insurance Inc v Transfercom Ltd* [2007] EWHC 146 (Ch) and *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch)). The judge also held that, in the absence of any formal insolvency proceedings, an application to sanction a scheme was a civil and commercial matter under Article 1.1 of the Judgments Regulation (EC 44/2001).

Comment
The judge noted the jurisdictional requirements in respect of a "company". Essentially, the court had jurisdiction to sanction a scheme of arrangement if the Company was one that was liable to be wound up under the Insolvency Act 1986. This is the case for a foreign-incorporated company. (This point had been addressed at an earlier hearing in respect of the Company).

In *Zlomrex*, the court was not being asked to sanction the scheme; in the present case it was. The judge observed that the fact that a foreign company would not necessarily be wound up by the English court did not prevent the court from sanctioning a scheme. It would, however, need to establish sufficient connection with the jurisdiction (*Re Drax Holdings Ltd* [2003] EWHC 2743). He stressed the importance of practical effect of such a connection: if there are assets in the jurisdiction, then this connection will give practical effect to a winding up order. He considered that the need for the scheme to have a substantial effect (and so enable it to achieve its purpose) was closely related to the question of the Company's connection with England. The connection could be established either by a company having assets in the jurisdiction or having a sufficient number of creditors who were based in England and so personally subject to the jurisdiction of the court.

As in the *Zlomrex* case, there was a scheme requirement that recognition under Chapter 15 of the US Bankruptcy Code should be obtained which was subject to the Company's right of waiver. The judge felt that as a high level of noteholder support for the scheme had been achieved and as the noteholders had approved the scheme knowing that the waiver existed, he did not consider it necessary to require its deletion. In practical terms, this meant that a low risk remained that a disaffected party could bring proceedings to enforce their original rights in the New York bankruptcy court.

Finally, the judge considered the scope of the Judgments Regulation (EC 44/2001). He held that an application to sanction a scheme was a civil and commercial matter for the purposes of Article 1.1 and, at least in the absence of formal insolvency proceedings, did not fall within the exclusion in Article 1.2 (this being the exception for bankruptcy proceedings and the winding up of insolvent companies).

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In the matter of Apcoa Parking Holdings GmbH and others and in the matter of the Companies Act 2006 [2014] EWHC 1867 (Ch)

Summary
The court was asked to sanction nine schemes of arrangement under the Companies Act 2006. Seven of the nine scheme companies were incorporated outside England and Wales and had their COMI in another country. The only connection those scheme companies had with England and Wales was derived from the governing law and jurisdiction clause in a facilities agreement under which the scheme companies had borrowed money. This had been achieved by changing the law governing those clauses to English law.

Without a restructuring, the ultimate parent company (which was a German incorporated company) would have to begin insolvency proceedings which would result in a significant loss of value to creditors.

It had been held at a previous hearing that the change of the law applicable to the governing law and jurisdiction clauses of the facilities agreement to English law had established a sufficient connection with England for the purpose of the schemes.
The judge sanctioned the schemes. He applied the same reasoning from *Drax* and *Rodenstock GmbH* as the judge did in *Magyar*: first establishing whether the company could be wound up in this jurisdiction (even if there were no intention to do so); and second whether there was sufficient connection with England.

Comment
As the judge pointed out, this is one in a line of cases that has dealt with the "sufficient connection" point that began with *Rodenstock.* The English court appears gradually to have accepted that a connection with England may be found even if the majority of creditors are not based in England, provided that the court is satisfied that the scheme would be recognised in those jurisdictions where the other creditors are to be found.
The "novel" point in this case was that there was a change to the law of the governing law and jurisdictions clause in the facilities agreement. Expert evidence had been supplied to assure the court that this change had complied both with the law of the original agreement and English law. Legal opinions had been obtained in each jurisdiction and these confirmed that the change of law would be effective and given recognition in those jurisdictions.
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In the matter of Hibu Finance (UK) Ltd and others and in the matter of the Companies Act 2006 [2014] EWHC 370 (Ch)

Summary
The court was asked to consider whether it should make orders to convene meetings to put in place a scheme of arrangement under the Companies Act 2006 in respect of eight companies within the Hibu Group. The Group's principal business had been the publication of printed business directories in the UK, the US, Spain and parts of South America, but this was no longer viable in a digital age.

The Group was funded by a Senior Facilities Agreement (the "SFA") which was governed by English law and provided that the courts of England had non-exclusive jurisdiction to settle any disputes. Three of the scheme companies were borrowers under the SFA and were incorporated in England, the US and Spain respectively. The remaining five scheme companies were guarantors under the SFA and were all incorporated in the US.
The principal Group company was in administration and the other Group members would also have been in insolvency proceedings had the lenders under the SFA chosen to call an event of default (which they could have done). The scheme was part of a restructuring of the Group's business.

The judge considered the question of jurisdiction. First he considered whether the companies involved were liable to be wound up by the court. This was satisfied for the English company, but for the Spanish and US companies it required the court to be satisfied that there was a sufficient connection with the jurisdiction (applying *Re Drax Holdings* [2004] 1 WLR 1049 at paras 29-30).

He determined that there was sufficient connection on the grounds that the rights of the parties under the SFA were governed by English law and these were the rights of the parties that were to be altered by the scheme. He also considered that the English jurisdiction clause, which enabled the settlement of rights as between the borrowers and the lenders under the SFA, provided a sufficient connection.

He went on to consider the effect of the Judgments Regulation (EC Regulation No 44/2001) in respect of the Spanish company and held that the non-exclusive jurisdiction clause in the SFA engaged Article 23 of the Judgments Regulation and so conferred

jurisdiction to consider making the order sought (*Re Vietnam Shipbuilding Industry Group* [2013] EWHC 2476).

Finally, he sought to determine whether the scheme would be recognised in the US and Spain. He was satisfied that it would be in the US under Chapter 15 of the US Bankruptcy Code and that it would be in Spain under the provisions of the Rome Regulation (EC Regulation No 593/2008 on the law applicable to contractual obligations). The orders were approved.

Comment
The four cases above have been discussed in chronological order and the principles relating to jurisdiction have become more clearly delineated in each. What is interesting about the *Hibu* case is that Norris J followed the judgment of David Richards J in the *Vietnam Shipbuilding* case, taking the view first, that the Judgments Regulation applied to a scheme of arrangement and second, that this settled the debate on the topic at first instance (para 9).
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3.
LEGAL COSTS OF ADMINISTRATION
Joint liquidators of Hellas Telecommunications (Luxembourg) II SCA) v Slaughter & May [2014] EWHC 1390 (Ch)

Summary
The power to decide whether the costs charged by a solicitor who had been instructed by an administrator should be agreed or subject to a costs assessment lay with the responsible insolvency practitioner.

Facts
Hellas Telecommunications (Luxembourg) II SCA ("Hellas") went into administration in 2009. Hellas had few assets which meant that its subordinated loan note holders would lose most of their investment unless additional recoveries could be made. An informal committee of creditors was established to represent the interests of this group of creditors and it pressed the administrators to investigate possible claims.
The administrators appointed a firm of solicitors to advise them as to whether there were any viable claims. The solicitors ultimately concluded that there were none and applied for the administration to be concluded. Hellas subsequently went into compulsory liquidation. The solicitors were paid £2.5 million.

The liquidators applied to the court to challenge the fees paid to the solicitors under Rule 7.34 of the Insolvency Rules 1986 or under the court's inherent jurisdiction.
One invoice issued by the administrators related to a Directions Hearing. The liquidators contended that this amounted to "proceedings before the court" rather than "insolvency proceedings" and that this invoice should have been assessed by the court.
The Registrar held that the power to order assessment under Rule 7.34 could not be exercised as the administrators had agreed the relevant fees. Although the court retained an inherent jurisdiction to order assessment, it was not appropriate to do so in the present case as Parliament had left it up to insolvency practitioners to employ solicitors and agree their fees and that the court should not usurp their function.
The liquidators appealed.

Decision
The judge held that the Registrar's interpretation of the rules was correct. The power to decide whether costs should be agreed or assessed is given to the responsible insolvency practitioner. In this case, the administrators, not the liquidators had been the responsible insolvency practitioner in respect of the costs of the administration and the

judge rejected the suggestion that decisions taken by administrators in the course of administration should be undone by liquidators who are later appointed.
With regard to the Directions Hearing, as the decision to approve the invoice was made after the administration had come to an end, the administrators had no authority to approve it and, since the liquidators did not approve it, it should have been assessed.

Comment
The judgment contains something of the history of the difference between the position on costs in insolvency proceedings and in the general solicitor client relationship. In a non-insolvency situation, a client may have his or her bill assessed by the court (a right which is regulated by s70 Solicitors Act 1974). Before the Insolvency Act 1986, all the costs incurred in a bankruptcy or compulsory winding up were taxed. After it was enacted, the question of costs became governed by Rule 7.34.

At the end of his judgment, the judge summarised the difficulties for the liquidators as follows. The fees had been high, but ultimately the solicitors had been instructed by the administrators and their fees agreed. The administrators appeared to have failed to follow "desirable, but non-mandatory, processes of tendering, negotiation and monitoring of fees" (para 59), but these were faults in procedure. The correct view was that "the remedy lies against the administrators and not in overriding the statutory procedure by which the solicitors' fees were quantified" (para 59).

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4.
MEANING OF "DEBENTURE"
Fons HF (in Liquidation) v Corporal Limited (1) and Pillar Securitisation S.a.r.l [2014] EWCA Civ 304

Executive summary
The Court of Appeal unanimously approved the formulation of the term "debenture" from *Levy v Abercorris Slate and Slab Co* (1887) 37 Ch D 360 as a "document which either creates a debt or acknowledges it".

Facts
This case came to the Court of Appeal from the Chancery Division and concerned the proper interpretation of the term "Shares" as defined in a charge created by Fons HF ("Fons"), as chargor, in favour of Kaupthing Bank Luxembourg as lender (the "Chargee"). The definition of "Shares" included shares specified in a schedule as well as "other stocks, shares, debentures, bonds, warrants, coupons or other securities".

The issue arose as to whether the definition of Shares encompassed the rights of Fons under two shareholder agreements (the SLAs). Under the SLAs, Fons had entered into two unsecured loans to Corporal Limited ("Corporal"), its subsidiary. The first was for £563,500 and the second was for £1.5 million and was lent jointly with BG Holding EHF ("BG") in proportion to their respective shareholdings in Corporal, namely, Fons as to 35% and BG as to 65%. Corporal had also entered into a secured loan with Royal Bank of Scotland ("RBS") and the SLA loans were subordinated to the RBS loan. Interest under the SLA loans was set at 8% per annum and rolled up so that, in practical terms, it was payable after the RBS loan had been repaid in full.

The Chargee contended that Fons' rights under the SLAs were charged to it either as "debentures" or "other securities" within the definition of "Shares". At first instance, the judge rejected this interpretation but gave the Chargee leave to appeal.

Held
The Court of Appeal unanimously held that the rights of Fons under the SLAs were included within the scope of the Charge. The SLAs represented relatively long-term loan capital for Corporal that was not repayable before its loan facility with RBS. On an ordinary reading, the term "other securities" did not limit "debentures" to exclude the SLAs.

Comment
It was clear from a review of the case law, that whilst there is no precise definition of the term "debenture", the formulation used in *Levy v Abercorris Slate and Slab Co* (1887) 37 Ch D 360 has been generally accepted. In that case, a debenture was described as "a document which either creates a debt or acknowledges it and any document which fulfils either of these conditions is a debenture". The SLAs fell within this definition.
For practitioners, this case provides a useful reminder to take care when drafting to ensure that rights that were not intended to be charged do not, inadvertently, fall to be charged within the scope of this definition.

This case is also notable for the fact that *two* out of the three Appeal Court judges were women. Good heavens.
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