Neutral Citation Number: [2016] EWHC 25 (Ch)

Case No: 5091 of 2015

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

IN THE MATTER OF OGX PETRÓLEO E GÁS S.A.
AND
IN THE MATTER OF THE CROSS-BORDER INSOLVENCY REGULATIONS 2006

Royal Courts of Justice
Rolls Building, Fetter Lane
London, EC4A 1NL
Date: 12 January 2016

Before :

MR JUSTICE SNOWDEN

- -

(1) NORDIC TRUSTEE A.S.A.
(2) OSX 3 LEASING B.V.

Applicants

And

(1) OGX PETRÓLEO E GÁS S.A. (EM RECUPERAÇÃO JUDICIAL)
(2) PEDRO MORAES BORBA, PAULO NARCELIO AMARAL and JULIO ALFREDO KLEIN JR

Respondents

- -

Andreas Gledhill QC and **Andrew Scott** (instructed by **Akin Gump LLP**) for the **Applicants**
Martin Pascoe QC and **Richard Fisher** (instructed by **SC Andrews LLP**) for the **Respondents**

Hearing date: 2 October 2015

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APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

MR JUSTICE SNOWDEN

MR JUSTICE SNOWDEN:

Introduction

1. This case raises important questions about applications for recognition of foreign insolvency proceedings under the UNCITRAL Model Law on Cross-Border Insolvency ("the Model Law") as incorporated into English law by the Cross-Border Insolvency Regulations 2006 (S.I. 2006 No. 1030) ("the CBIR"). The main issue is whether an applicant for recognition of a foreign insolvency proceeding must make full and frank disclosure to the Court in relation to the effect that such recognition might have on third parties.

The facts

2. The First Respondent, OGX Petróleo e Gás SA ("OGX") is an oil and gas company incorporated in Brazil. The Second Respondents are the members of the Board of Directors of OGX.

3. OSX 3 Leasing BV ("Leasing") is a company which is incorporated in the Netherlands. In July 2011, Leasing contracted with a Japanese shipyard for a floating production, storage and offloading vessel, known as the OSX 3. Construction was part financed by a US$500m secured bond issue in favour of a Norwegian company, Nordic Trustee ASA ("Nordic"), as trustee for the bond holders.

4. On 6 March 2012, Leasing concluded a bare boat charter agreement in relation to the OSX 3 with OGX as charterer (the "Original Charter"). The charter period was 20 years. On 26 March 2012, Leasing assigned its rights under the Original Charter to Nordic.

5. In October 2013, OGX ran into financial difficulties. On 30 October 2013, OGX and its parent petitioned for judicial reorganisation under chapter III (Articles 47 et seq.) of the Brazilian bankruptcy law (No. 11,101/05) (the "Brazilian Bankruptcy Law"). Thereafter OGX prepared a reorganisation plan for submission to the Fourth Corporate Court of Rio de Janeiro ("the Bankruptcy Court"). In March 2014, and while OGX's plan was still in gestation, OGX asked Leasing to agree a reduction in the daily charter rates payable under the Original Charter. This led to a renegotiation which proceeded in parallel to the judicial reorganisation.

6. OGX's reorganisation plan (the "Plan") was approved by its creditors on 3 June 2014, and by the Bankruptcy Court on 13 June 2014. The "Credits" that were affected by the Plan were defined therein as "Credits and obligations, whether materialised or contingent, net or illiquid, existing on the Filing Date". The "Creditors Affected by the Plan" were defined in the Plan as "Creditors whose Credits and rights can be changed by the Plan, as set forth in the Brazilian Bankruptcy Law". In that regard, the relevant provision of the Brazilian Bankruptcy Law is Article 49 which provides,

> "All claims existing on the date of the petition are subject to the judicial reorganization, even if not yet due".

7. Although claims under the Original Charter might have been subject to the judicial reorganisation, the Plan expressly reflected the fact that a renegotiation of the Original Charter was still continuing between OGX and Leasing and it was envisaged that any new charter entered into as a result of those renegotiations would not be subject to the restructuring to be effected by the Plan. To that end the Plan expressly ratified any agreements that might be entered into between OGX and Leasing which set out new terms and conditions for the chartering and operation of the OSX 3 vessel. Accordingly, neither Leasing nor Nordic were included on the list of creditors of OGX for the purposes of the Plan and they were not entitled to attend the meeting of creditors on 3 June 2014 or vote on the Plan.

8. The renegotiation between Leasing and OGX concluded three months after the Plan was approved, with the execution on 12 September 2014 of a Charter Amendment Agreement (the "Charter Amendment Agreement"), and an Amended and Restated Bare Boat Charter Agreement (the "New Charter"). Under the latter, the daily charter rate for the OSX 3 was reduced from the US$410,837 payable under the Original Charter to US$250,000 initially and US$265,000 after 31 January 2015.

9. Importantly for present purposes, the Charter Amendment Agreement expressly substituted the New Charter for the Original Charter. It provided that, "with effect on and from ... the Effective Date ... the Original Charter Contract shall cease to have any force or effect". The New Charter also included detailed representations and warranties by OGX going to the enforceability of the obligations assumed by OGX under it, notwithstanding its bankruptcy proceedings. OGX could not have given those representations and warranties had its obligations under the New Charter been subject to the terms of the Plan.

10. The obvious and intended consequence of these provisions was that any claims of Leasing against OGX under the New Charter would not be claims "existing on the petition date" in respect of OGX's Plan within the meaning of Article 49 of the Brazilian Bankruptcy Law and would not be subject to the restructuring of debts under the Plan.

11. Further, the New Charter contained an express provision under which the parties agreed that all disputes between them in relation to the agreement should be finally settled by arbitration in accordance with the rules of the London Court of Arbitration (LCIA), with the seat and place of arbitration being London. Accordingly, subject to an express right to apply to the Brazilian courts for "provisional and urgent measures", arbitration in London represented the parties' agreed dispute resolution mechanism under the New Charter.

12. On 12 September 2014 Leasing gave notice to OGX that Leasing's rights under the New Charter had been assigned to Nordic, and OGX acknowledged receipt of that notice.

13. The first invoice under the New Charter (for US$71.5 million) was paid by OGX on about 17 September 2014. After that, OGX continued to use the OSX 3 vessel but only made one more payment under the New Charter. By mid-August 2015 invoices totalling some US$78.73m were outstanding.

14. On 18 December 2014, and without notice to Nordic or Leasing, OGX sought and obtained a provisional injunction from the Bankruptcy Court in Rio de Janeiro, unilaterally reducing the daily charter payable under the New Charter from US$250,000 to US$130,000 (the "Brazilian Injunction"). The basis for the decision was apparently articles 317 and 478 of the Brazilian Civil Code, which OGX contended empowered the Bankruptcy Court to revise the New Charter on the basis that there had been "an alteration in the objective basis of the business deal". This was said by OGX to have been the result of an unforeseen fall in the price of oil. On 16 January 2015, OGX issued substantive proceedings (the "Substantive Claim"), seeking final injunctive relief pursuant to those provisions of the Brazilian Civil Code.

15. Nordic and Leasing sought to set aside the Brazilian Injunction, and on 28 May 2015 the Fourteenth Civil Panel of the Court of Appeals of Rio de Janeiro declared the Brazilian Injunction to be null and void on the basis that the Bankruptcy Court had had no jurisdiction to make such an order. The Court of Appeals noted that the New Charter and OGX's obligation to pay charter rates under it were entered into after the filing of OGX's judicial reorganisation, so that by reason of the terms of Article 49 of the Brazilian Bankruptcy Law, those obligations were not subject to the Plan which was approved by the Bankruptcy Court. The Court of Appeals cited with approval an opinion from the State Attorney's office, which stated that the Bankruptcy Court only had jurisdiction in relation to, "claims involving creditors subject to the effects of the judicial recovery plan and the management of the assets in connection to said plan". The Court of Appeals consequently remitted OGX's application for a reduction of the daily charter rate under the New Charter to a different civil court for determination, subject to determination of a further request by OGX for clarification/permission to appeal against the Court of Appeals' decision.

16. On 22 June 2015, Nordic and Leasing submitted a request for arbitration pursuant to the New Charter and the LCIA rules ("the Arbitration"). Among the relief sought by them "as a preliminary or urgent matter" was an order, "requiring OGX to take all necessary steps to withdraw or discontinue both its request for the Brazilian Injunction and its Substantive Claim; and to cease, desist and refrain until further order from commencing or prosecuting ... proceedings in any court or tribunal in Brazil, or in any other court or tribunal other than arbitration in London …".

17. Faced with that relief in the Arbitration and the challenge to OGX's attempts to obtain a reduction in the rates payable under the New Charter, the Board of Directors of OGX decided to try to prevent the Arbitration from proceeding. It did this by applying for an order for recognition in England of the Brazilian Plan as a foreign main proceeding with a view to taking advantage of the automatic stay of proceedings that would follow such recognition.

18. To that end, on 24 July 2015 the Board of Directors of OGX issued an application for recognition of the Plan under Article 15 of the Model law, as incorporated into English law by the CBIR. Article 15 provides,

> "1. A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed.

2. An application for recognition shall be accompanied by—

(a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or

(b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or

(c) in the absence of evidence referred to in sub-paragraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

3. An application for recognition shall also be accompanied by a statement identifying all foreign proceedings, proceedings under British insolvency law and section 426 requests in respect of the debtor that are known to the foreign representative."

19. The Board of Directors of OGX contended that the Plan was a foreign proceeding as defined in Article 2(i) of the Model Law and that the Board of Directors qualified as a foreign representative of OGX within the meaning of Article 2(j) of the Model Law. Those definitions are as follows,

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

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

20. Article 17 of the Model Law states:

"1. Subject to article 6, a foreign proceeding shall be recognised if-

(a) it is a foreign proceeding within the meaning of sub-paragraph (i) of article 2;

(b) the foreign representative applying for a recognition is a person or body within the meaning of sub-paragraph (j) of article 2;

(c) the application meets the requirements of paragraphs 2 and 3 of article 15; and

(d) the application has been submitted to the court referred to in article 4.

2. The foreign proceeding shall be recognised -

(a) as a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interest…"

21. In addition to an order for recognition, the proposed order included a provision specifically setting out that the consequences of recognition under Article 20(1) of the Model Law would be that the continuation of any proceedings against OGX in Great Britain would be stayed. As incorporated into English law by the CBIR, and insofar as is relevant, Article 20 provides,

"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 … 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.

…

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."

The evidence on the application

22. The evidence in support of the Board of Directors' application was provided by the Chief Executive Officer of OGX, Mr. Paulo Amaral. He stated that it had not previously been thought that recognition in England of OGX's judicial reorganisation would be necessary because the company had not anticipated the need for any protection in England. He said, however, that the position had changed as the result of the Arbitration commenced in London by Nordic and Leasing.

23. The evidence also sought to address the requirements of recognition under the Model Law. In that regard, in seeking to show that the Plan to which OGX was subject under the Brazilian Bankruptcy Law was a foreign proceeding, Mr. Amaral's witness statement stated that,

> "Judicial reorganisation in this context contemplates the restructuring, collecting and distributing the debtor's assets to creditors pursuant to an approved and Court endorsed plan, in this instance OGX's Judicial Reorganisation Plan".

24. Mr. Amaral then continued, "In this regard, the following provisions of the Bankruptcy Law apply." He then set out, verbatim, the provisions of Articles 47-53 of the Brazilian Bankruptcy Law, except that Article 49 was omitted entirely. His statement did not, however, draw attention to that omission. Still less was any explanation provided for it.

25. The evidence in support of the application then went on to address the question of whether OGX's Board of Directors constituted a "foreign representative" for the purposes of the Model Law, and argued that it did. Reference was then made to the Original Charter, the 2012 assignment of Leasing's rights under the Original Charter to Nordic, and the Charter Amendment Agreement. Mr. Amaral asserted that Nordic "consequently became an OGX creditor". The witness statement then continued,

> "However, OGX, due to the crisis that afflicted the oil sector, was unable to pay certain instalments under the charter party. [Nordic] then filed for enforcement of an extrajudicial title before the State Court of Rio de Janeiro, requiring the provisional attachment of certain assets of [OGX] in order to secure recovery of the credit.
>
> OGX filed a motion for stay of enforcement in which, amongst other reasons, it stated that the enforceability of the [claims of] creditors arising out of the charter party had been suspended by means of an order granted by the [Bankruptcy Court]. The application for provisional attachment was rejected.
>
> By request dated 22 June 2015 [Nordic and Leasing] commenced an arbitration against OGX pursuant to Article 21.3 of the Bareboat Charter Party Agreement.
>
> Recognition by the English court of the Brazilian judicial proceedings will assist progress in the OGX Group judicial reorganisation, in accordance with article 20 of the UNCITRAL Model Law there will be a stay of enforcement against the company and of rights to encumber any of the Company's assets."

26. Accordingly, whilst referring to Nordic as "an OGX creditor", the witness statement failed to draw attention to the fact that the New Charter under which Nordic and Leasing had instituted the Arbitration had been entered into after the relevant date for the purposes of the Brazilian judicial reorganisation. Nor did Mr. Amaral's evidence mention that only two months earlier, the Rio de Janeiro Court of Appeals had specifically determined (subject to any clarification or further appeal), as against OGX, that the Bankruptcy Court had no jurisdiction to vary the charter rates under the New Charter, because the obligations under that agreement were not subject to the Plan. Nor did the evidence disclose (still less make it clear) that the Arbitration upon which the automatic stay under Article 20 of the Model Law would bite was an arbitration of claims under the New Charter which were not subject to the Plan for which recognition was sought.

The hearing of the application

27. OGX's recognition application came before Mann J. without notice to Nordic or Leasing in the final week of the Trinity term, on Tuesday 28 July 2015. The Board of Directors of OGX was represented before Mann J. by junior counsel, whose skeleton argument stated that the Board of Directors applied for recognition of the Plan and repeated that it had not been thought necessary to apply for such recognition until Nordic and Leasing commenced the Arbitration in England. Counsel submitted that the Board of Directors of OGX now applied for recognition, "in order to obtain the benefit of the automatic stay under Article 20, which prevents the continuation of actions and proceedings without the Court's permission."

28. The effect of the automatic stay upon the Arbitration was thus very much at the forefront of Mann J.'s mind when he embarked upon the hearing of the application on 28 July 2015. That much is evident from the following exchange that took place close to the start of the hearing,

> "MR JUSTICE MANN: Normally, at the end but I will ask it now, I ask the question that on the footing that you are, as it were, unopposed, and you owe the usual duties to the court--
>
> COUNSEL: Yes
>
> MR JUSTICE MANN: -- are there any matters to which my attention needs to be drawn which might point away from the making of this application [sic], were there an opponent, for example, the person who wants to initiate the arbitration … which needs to be drawn to my attention which hasn't already been drawn to my attention in the skeleton argument?
>
> COUNSEL: The one unusual fact of which I am aware, which I have drawn attention to in the skeleton argument, is that there is this judicial administrator or supervisor who's been appointed in reserve of his position as being addressed by [inaudible] on the evidence that, presumably proceedings are in the nature of debtor in possession proceedings rather than [overspeaking] where the existing Board remain in position."

29. There was a further exchange towards the end of the hearing,

> "MR JUSTICE MANN: And unless there is anything which you need to draw to my attention – you say there isn't – then I'm minded to make the order. The only person who's likely to be really affected by this is the counterparty to the arbitration and I don't know whether – do I have the draft order in here?
>
> COUNSEL: The draft order is at tab 4, I've got copies. Certainly, of course, [several inaudible words] if they consider that there are proper grounds for [the] arbitration to continue but that obviously is something that will have to be dealt with in the usual way.
>
> MR JUSTICE MANN: Yes, I was wondering whether they should have liberty to apply under this order but they probably don't need it, do they, because they can always apply, in any event, and several [overspeaking].
>
> COUNSEL: Well, absolutely, it's only if they were – I'm assuming that if they wanted to continue the arbitration, they could apply for permission. I think if your Lordship is postulating this now, in a way, instead of doing that perhaps as well [overspeaking] sets outs this order.

MR JUSTICE MANN: I was, yes.

COUNSEL: There would be nothing to stop them from making that application.

MR JUSTICE MANN: Because they may take the view that despite the fact that you and I seem to have got to the bottom of the technicalities that, in fact, we haven't and there are other technicalities and for some reason or other Brazilian insolvency shouldn't be recognised, that they would be able to do that, in any event, wouldn't they? Person affected under rule 7.47?

COUNSEL: Absolutely. They [inaudible] rules in that regard apply.

MR JUSTICE MANN: Yes."

30. Crucially, at no time during the hearing was Mann J. told that the New Charter pursuant to which the Arbitration was taking place was not subject to the Brazilian judicial reorganisation (the Plan) for which recognition was being sought.

31. Mann J. then gave a short judgment dealing with the point that had been raised as to whether the Board of Directors qualified as the foreign representative of OGX. He concluded,

> "I am satisfied that all the other requirements and conditions have been fulfilled and, in the circumstances, I shall make the order. I add the following. The reason that recognition is sought is that an arbitration has been commenced, or is sought to be commenced in this jurisdiction and the companies wish to have the opportunity of having that arbitration stayed. The effect of my order is that there will be a stay but the counterparty to the arbitration may apply to have the stay lifted. Any such application will be heard on its merits. I also record that, in my view, the counterparty would also have the right to challenge the recognition order that I have made…"

32. Mann J.'s Order ("the Order") provided for the recognition of the Plan as a foreign main proceeding and then expressly stated that,

> "(i) commencement or continuation of individual actions or individual proceedings concerning the Company's assets, rights, obligations or liabilities is stayed;
>
> (ii) execution against the Company's assets is stayed;"

The practice of spelling out in the order the consequences of recognition originated in cases such as Samsung Logix Corporation v DEF [2009] EWHC 576 (Ch) and was commended by Norris J. in Pan Oceanic Maritime Inc [2010] EWHC 1734 (Ch).

Nordic and Leasing apply for the Order to be set aside or modified

33. After the Order had been served upon them, Nordic and Leasing immediately protested and made an urgent application pursuant to the inherent jurisdiction of the court and/or Article 20(6) of the Model Law for the Order to be set aside in part or varied so as to permit the Arbitration to proceed. Nordic and Leasing contended that Mann J. had been misled, or at very least that the Order had been obtained by a material non-disclosure of the fact that the Plan for which recognition was sought did not apply to the claims in the Arbitration under the New Charter.

34. The application was adjourned on 13 August 2015 on terms that permitted the tribunal to be constituted for the Arbitration in London and for evidence to be filed, including evidence from OGX on the question of whether Mann J had been misled or whether there had been material non-disclosure.

35. Importantly, when that evidence was filed, OGX's evidence (including its expert evidence) accepted that because the claims of Nordic and Leasing under the New Charter arose post-petition, they were not subject to the Plan by reason of Article 49 of the Brazilian Bankruptcy Law.

36. However, OGX's evidence maintained that the use of the OSX 3 vessel was of great importance if OGX was to comply with the Plan, but that the charter rate agreed under the New Charter had become "unrealistic and commercially unviable given the drastic and unforeseen fall in the price of oil" since the rate had been agreed. OGX contended that the Bankruptcy Court had jurisdiction over any assets considered essential to its activities, and hence that it could order a reduction in the amounts payable under the New Charter. OGX further submitted that this meant that the Arbitration in which Nordic and Leasing were seeking to prevent OGX seeking such relief in Brazil should be stayed.

37. OGX's evidence as regards the allegations of material non-disclosure to Mann J. was supplied by a witness statement from its solicitor. He asserted that the evidence filed by OGX had been sufficient for the purposes of complying with Articles 15 and 17 of the Model Law and that when the Article 17 requirements had been met, recognition was required leading to an automatic stay without the exercise of any discretion under Article 20. The witness statement continued,

> "The evidence filed on behalf of OGX did not therefore address matters potentially relevant to whether or not the automatic stay imposed by virtue of Article 20 should be modified in any way in relation to Nordic's arbitration proceedings. It did not do so on the basis that such matters were not relevant to the requirements for recognition, and would have to be addressed in due course if an application was made to modify the stay."

38. The witness statement then addressed the question of what had occurred at the hearing, drawing attention to the latter of the two exchanges between Mann J. and Counsel to which I have referred above, and then asserting that because the requirements for recognition are set out in the Model Law and a stay follows automatically under Article 20(1), "it is not accepted that the matters relied upon by Nordic should have been drawn to the Court's attention."

39. The witness statement concluded,

> "In the event that the Court concludes that there are matters that ought to have been drawn to the attention of Mann J., and were not, I apologise on behalf of OGX. Any such failure will be a consequence of a mistaken approach adopted by OGX … as to what was relevant to the application, rather than a deliberate attempt by OGX to keep relevant information from the Court."

40. When the matter came back before me on 2 October 2015, matters had moved on. OGX's application for permission to appeal the determination of the Brazilian Court of Appeals that the Bankruptcy Court had no jurisdiction to order a reduction of the amounts payable under the New Charter had been dismissed by the Brazilian Superior Court of Justice. In light of that, and the acceptance on all sides that the claims under the New Charter were not subject to the Plan, the parties had agreed a draft consent order under which the automatic stay was to be lifted to permit the Arbitration to continue. In addition, OGX had agreed to pay the costs of Nordic and Leasing in relation to the application to modify Mann J.'s Order, with an interim payment on account of costs of £215,000 to be paid within 21 days. The draft consent order provided that if such payment was made, the costs would be assessed on the standard basis, but that if it was not, then the costs would be assessed on the indemnity basis.

41. Although I had reservations about making an order by consent that left Mann J.'s order for recognition of the Plan in place for no obvious purpose, and in circumstances in which I had doubts about whether it should have been granted in the first place (see below), in the end I was persuaded that I should abide by the agreement that the parties had reached.

42. Mr. Andreas Gledhill QC, for Nordic and Leasing, also told me that in light of the draft consent order that had been agreed, his clients had no desire to pursue their allegations of material non-disclosure. That was doubtless a pragmatic commercial decision taken in light of the fact that Nordic and Leasing had obtained permission to pursue the Arbitration together with an order for payment of their costs and a substantial payment on account.

43. I was not, however, satisfied by OGX's explanation of its approach to the application for recognition or as to the disclosure to Mann J. I therefore heard submissions from Mr. Martin Pascoe QC, on behalf of OGX, as to those matters, and I indicated that I would give a judgment concerning them because of the wider importance of these

issues for applications of this type. I should make it clear that neither Mr. Pascoe QC nor his junior, Mr. Fisher, had appeared before Mann J.

Analysis

44. I accept that, in the ordinary case, recognition of a foreign proceeding within the meaning of that expression in Article 2(i) of the Model Law is intended to follow if the applicant can satisfy the requirements of Articles 15 and 17 of the Model Law. Article 17 provides that if the requirements are satisfied, the foreign proceeding "shall" be recognised. Further, although Article 17 is subject to Article 6, which provides that the court can refuse to take any action which would be "manifestly contrary to the public policy of Great Britain or any part of it", it is clear that this public policy exception is intended to be restrictively interpreted.

45. The Guide to Enactment of the Model Law explains this at paragraphs 29-30,

> "29. One of the key objectives of the Model Law is to establish simplified procedures for recognition of qualifying foreign proceedings that would avoid time-consuming legalization or other processes and provide certainty with respect to the decision to recognize. The Model Law is not intended to accord recognition to all foreign insolvency proceedings. Article 17 provides that, subject to article 6, when the specified requirements of article 2 concerning the nature of the foreign proceeding (i.e. that the foreign proceeding is, as a matter of course, a collective proceeding for the purposes of liquidation or reorganization under the control or supervision of the court) and the foreign representative are met and the evidence required by article 15 has been provided, the court should recognize the foreign proceeding without further requirement. The process of application and recognition is aided by the presumptions provided in article 16 that enable the court in the enacting State to presume the authenticity and validity of the certificates and documents, originating in the foreign State, that are required by article 15.
>
> 30. Article 6 allows recognition to be refused where it would be "manifestly contrary to the public policy" of the State in which recognition is sought. This may be a preliminary question to be considered on an application for recognition. No definition of what constitutes public policy is attempted as notions vary from State to State. However, the intention is that the exception be interpreted restrictively and that article 6 be used only in exceptional and limited circumstances (see paras. 101-104). Differences in insolvency schemes do not themselves justify a finding that enforcing one State's laws would violate the public policy of another State."

46. I also accept that if a foreign proceeding is recognised as a foreign main proceeding under Article 17, the stay under Article 20(1) operates automatically. However, as is apparent from Article 20(2), the stay only applies to the extent that a stay would apply if a winding up order had been made in relation to the company in England. It is therefore important to understand the scope and purpose of the stay that would apply if the company were being wound up in England.

47. The stay that comes into force upon the making of a winding up order in England is set out in section 130(2) of the Insolvency Act 1986:

> "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."

48. The general scope and purpose of this provision has been well-settled since the nineteenth century. In re David Lloyd & Co. (1877) 6 Ch D 339 at 344, James LJ said,

> "These sections in the Companies Act, and the corresponding legislation with regard to bankrupts, enabling the Court to interfere with actions, were intended, not for the purpose of harassing, or impeding, or injuring third persons, but for the purpose of preserving the limited assets of the company or bankrupt in the best way for distribution among all the persons who have claims upon them. There being only a small fund or a limited fund to be divided among a great number of persons, it would be monstrous that one or more of them should be harassing the company with actions and incurring costs which would increase the claims against the company and diminish the assets which ought to be divided among all the creditors. But that has really nothing to do with the case of a man who for the present purpose is to be considered as entirely outside the company, who is merely seeking to enforce a claim, not against the company, but his own property."

49. Further, in Re Aro Limited [1980] Ch 196, the Court of Appeal considered section 231 of the Companies Act 1948 which was in the same terms as section 130(2) of the Insolvency 1986 Act. Brightman LJ said, at pages 203-204,

> "This case is directly concerned only with section 231 of the Companies Act 1948, but it will be convenient to consider the statutory provisions in greater breadth. The basic scheme of the companies legislation is that the unsecured creditors of an insolvent company are to rank *pari passu* (subject to statutory provisions as to preferential payments) … In order to achieve

> this result, there are provisions which restrict the right of a creditor to make use of procedures outside the liquidation…
>
> Section 228 (1) of the Act provides that where a company is being wound up by the court, any attachment, sequestration, distress or execution "put in force" against the estate or effects of the company after the commencement of the winding up shall be void to all intents. "Put in force" means, for example, seizure by the sheriff as distinct from a sale by him. The date of the commencement of the winding up is the date of the presentation of the petition or of a preceding resolution for a voluntary winding up. This section, though absolute in terms, has been held to be subject by implication to the court's dispensing power which is spelt out by section 231. This is the section with which we are primarily concerned. It reads in full:
>
> > "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 except by leave of the court and subject to such terms as the court may impose."
>
> Sections 228 and 231 apply to secured as well as to unsecured creditors. But a secured creditor is in a position where he can justly claim that he is independent of the liquidation, since he is enforcing a right, not against the company, but to his own property: see In re David Lloyd & Co. (1877) 6 Ch.D. 339, a case under the predecessor of section 231."

50. It can therefore be seen that the purpose of the automatic stay under section 130(2) is to preserve the *pari passu* ranking of unsecured creditors in a winding up and to prevent any individual unsecured creditor from obtaining an illegitimate advantage over other unsecured creditors in the collective process of winding up. The obvious assumption that underlies the operation of section 130(2) is that the party against whom a stay should operate is a creditor whose claims against the debtor company are subject to the collective insolvency proceeding. So, for example, if the party is a secured creditor, he will be regarded as standing outside the collective process, and the automatic stay under section 130(2) will invariably be lifted to enable him to enforce his security.

51. That analysis is entirely consistent with the fact that the Model Law applies only to collective proceedings, and of the purpose of the automatic stay under Article 20. In that regard, paragraph 69 of the Guide to Enactment of the Model Law explains the importance of the collective nature of insolvency proceedings,

> "For a proceeding to qualify for relief under the Model Law, it must be a collective proceeding because the Model Law is intended to provide a tool for achieving a coordinated, global solution for all stakeholders of an insolvency proceeding. It is

> not intended that the Model Law be used merely as a collection device for a particular creditor or group of creditors who might have initiated a collection proceeding in another State. Nor is it intended that the Model Law serve as a tool for gathering up assets in a winding up or conservation proceeding that does not also include provision for addressing the claims of creditors."

52. In relation to the stay under Article 20(1), paragraphs 37-38 of the Guide to Enactment emphasise that the stay applies to prevent action by individual creditors, and indicate that exceptions from the stay under national laws are likely to include, in particular, secured claims and the execution of rights *in rem*,

> "37. Key elements of the relief accorded upon recognition of a foreign "main" proceeding include a stay of actions of individual creditors against the debtor or a stay of enforcement proceedings concerning the assets of the debtor…
>
> 38. Exceptions and limitations to the scope of the stay and suspension (e.g. exceptions for secured claims, payments by the debtor made in the ordinary course of business, set-off, execution of rights *in rem*) and the possibility of modifying or terminating the stay or suspension are determined by provisions governing comparable stays and suspensions in insolvency proceedings under the laws of the enacting State (article 20, paragraph 2)."

See also per Briggs J in Cosco Bulk Carriers v Armada Shipping SA [2011] EWHC 216 (Ch) at paragraphs 46-49.

53. Given these considerations, I do not think that the stay which is intended to operate upon recognition of a collective foreign proceeding under the Model Law is intended to prevent persons whose claims are not subject to that collective proceeding from being able to pursue their claims against the company. Such persons stand outside the collective process, and it would not be appropriate to utilise the stay under Article 20(1) to prevent them from pursuing their ordinary remedies against the company.

54. The case of OGX presents this issue in a more extreme way, because the only purpose for which recognition of the Plan was sought under the Model Law was in order to obtain a stay under Article 20(1) so as to prevent the Arbitration. The application for recognition had nothing to do with protecting the Brazilian reorganisation proceedings from action by an individual creditor who was subject to those collective proceedings. Instead, its sole purpose was to obtain a stay to frustrate an arbitration proceeding under a contract that OGX had freely entered into after approval of the Plan, where the claims in question under the New Charter were not subject to the Plan. That aim was, in my judgment, inconsistent with the structure and purpose of the Model Law, and was an abuse of the process for recognition of a foreign proceeding.

55. Further, OGX plainly proceeded upon the basis that it was only required to inform the English court of the matters necessary to obtain recognition, and that it could then

simply rely upon the stay coming into effect automatically under Article 20(1), irrespective of whether or not the stay might be upheld if subsequently challenged. This led to Mr. Amaral's evidence being framed so as to avoid any mention of the fact that the obligations under the New Charter were not subject to the Plan; a decision was obviously taken to omit any reference to Article 49 in the extract from the Brazilian Bankruptcy Law that was otherwise set out verbatim in his witness statement; and the section of the witness statement dealing with legal proceedings was drafted so as to omit any mention of the decision of the Brazilian Court of Appeals.

56. This approach also seems to have followed through into the answers given to Mann J at the hearing on 28 July 2015 when the Judge referred to the "usual duties to the court" owed by a party making a without notice application and asked whether there were any points that Nordic and Leasing might have wished to draw to his attention had they been at the hearing. The answers given drew attention a point concerning satisfaction of the requirements for recognition, but made no reference to the obvious point that could have been raised by Nordic and Leasing that their claims under the New Charter were not subject to the Plan and that (at very least) the automatic stay should be modified or varied from the outset by the court of its own motion so as to permit the Arbitration to proceed.

57. In my judgment, quite apart from the fact that the Board of Directors of OGX were seeking recognition under Article 17 and an automatic stay under Article 20 for a purpose for which those provisions of the Model Law were not intended, the approach by OGX to the formulation of the evidence which it placed before the court was wrong, and the disclosure made to Mann J. at the hearing on 28 July 2015 was wholly inadequate.

58. As indicated above, the court hearing an application for recognition has the discretionary power under Article 20(6) of the Model Law to modify, from the outset, the stay which will come into effect upon the making of its order. That discretion is often exercised either by limiting the stay, or extending it: see e.g. Pan Oceanic Maritime Inc. [2010] EWHC 1734 at paragraph 7. Accordingly, it seems to me that a foreign representative who seeks recognition without notice ought to place before the court any material of which he is aware which is relevant to the exercise of that discretion. If the foreign representative knows that recognition and the automatic stay will affect existing or threatened proceedings, or the enforcement of security by a third party, he should inform the court of that fact and of any matters that would be relevant as to whether the automatic stay should apply or not, or be modified or limited, apply in a modified form, or not apply at all. The court can then exercise its discretion whether to modify the automatic stay immediately or simply to grant recognition and to place the burden upon the third party to apply subsequently.

59. In many cases, for example where there are pre-existing court proceedings against the company, it may well be that it would be appropriate for the court simply to grant recognition and to leave it to the other litigant to apply for the automatic stay to be lifted. In other cases, for example where there are arbitration proceedings already in existence or threatened (see e.g. Cosco Bulk Carriers (supra)), the decision might be more finely balanced. Where it is known that a secured creditor wishes to enforce its security, it may be obvious that a modification to the automatic stay should be made from the outset because it would be pointless to place the onus upon the secured creditor to spend time and money making an application for the stay to be modified

which would inevitably be granted: see e.g. re David Lloyd & Co (supra) and Cosco Bulk Carriers at para 49.

60. The instant case falls squarely into the last category. I have no doubt whatsoever that had Mann J. been alerted to the fact that the claims in the Arbitration under the New Charter were not subject to the Plan that he was being asked to recognise, he would not have followed the course which he in fact took of granting recognition and permitting the automatic stay to halt the Arbitration, thereby placing the burden upon Nordic and Leasing to expend time and money applying for the stay to be lifted. I have no doubt that, if he had been properly informed, Mann J. would at very least have modified the automatic stay from the outset to permit the Arbitration to proceed. Further, and notwithstanding the clear intention that the public policy exception in Article 6 should be interpreted restrictively, I consider that it is strongly arguable that the court must have a residual discretion to refuse recognition if satisfied that the applicant is abusing that process for an illegitimate purpose. On the exceptional facts of this case I think that Mann J. might well have been justified in rejecting the application for recognition altogether.

61. As it was, a very substantial amount of costs were incurred by Nordic and Leasing in seeking a modification of the stay. Those costs were caused by OGX's abuse of process. For my part, had the parties not themselves agreed a modification of the Order that permitted the Arbitration to continue and included a provision that OGX would pay Nordic and Leasing's costs (including a significant sum on account), I would have been inclined to make an indemnity costs order against OGX.

62. Further, whatever view might have been taken as to the obligation of the Board of Directors of OGX to inform the court of all matters relevant to the exercise of discretion as to whether the automatic stay should be modified or not, it should not be overlooked that at the hearing on 28 July 2015 Mann J. expressly asked to be told of any matters that Nordic and Leasing might have raised if they had been present which might have pointed away from the court granting OGX's application. It is well understood that the duty of full and frank disclosure to which Mann J. was referring requires disclosure of all matters that might reasonably be raised by an opposing party, whether or not the party who is appearing before the court considers that such arguments would be well-founded. Given that the question was expressly asked and the Order sought expressly referred to the stay that would come into effect upon recognition, I think that it was plainly incumbent upon those advising and representing OGX to disclose that the claims in the Arbitration under the New Charter were not subject to the Brazilian reorganisation proceedings for which recognition was sought. They did not do so, and in my judgment it is clear that Mann J. did not receive the disclosure and assistance that he should have been given.

63. I have been considerably troubled by this aspect of the case, but by a narrow margin I have accepted Mr. Pascoe QC's submission that I should not seek to investigate it or take matters further. In particular, I cannot make any findings as to where responsibility for the non-disclosure at the hearing on 28 July 2015 lies without seeking to understand which (if any) of the members of the legal team present knew of the matters which had been omitted from the evidence. Pursuit of these questions would require further disclosure and would doubtless intrude into areas covered by privilege. Bearing in mind that Nordic and Leasing will be compensated for their

wasted costs and do not wish to pursue such matters, I have eventually come to the conclusion that it would not be proportionate for me to do so on my own initiative.

64. For the future, however, I think that it must be made clear that foreign representatives and their advisers must ensure that the valuable process for recognition under the Model Law and the CBIR is not misused. When seeking recognition, full and frank disclosure must be made to the court in relation to the consequences that recognition of the foreign proceeding may have upon third parties who are not before the court. In particular, the court should be told of any points that could be raised in relation to the modification or termination of the automatic stay and suspension which will come into effect upon recognition.