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Case No: CR-2017-005571

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 09/11/2017

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

IN THE MATTER OF AGROKOR DD
AND IN THE MATTER OF THE CROSS-BORDER
INSOLVENCY REGULATIONS 2006

- -
- -

Tom Smith QC and William Willson (instructed by **Kirkland & Ellis International LLP**) for the **Applicant**
David Allison QC and Adam Al-Attar (instructed by **Linklaters LLP**) for the **Respondent**

Hearing dates: 23-26 October 2017

- -

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.

.....

HHJ PAUL MATTHEWS (SITTING AS A JUDGE OF THE HIGH COURT)

HHJ Paul Matthews :

Introductory

1. This is my judgment on an application dated 27 (but issued by the court on 28) July 2017, by Ante Ramljak. He is the "foreign representative" within article 2(j) of Schedule 1 to the Cross-Border Insolvency Regulations 2006 ("CBIR") of Agrokor DD ("the company"), a company incorporated under the laws of Croatia. The application is for recognition in Great Britain (*ie* England, Wales and Scotland) under the CBIR of what are called "extraordinary administration proceedings" in Croatia as a "foreign proceeding" within article 2(i) of Schedule 1 to the CBIR. It is opposed by Sberbank, a Russian bank, who is accepted to be a creditor of the company. That bank claims to be owed in excess of €1 billion. The application was argued before me on 23-26 October 2017, by Tom Smith QC and William Willson, instructed by Kirkland & Ellis International LLP, for the applicant, and by David Allison QC and Adam Al-Attar, instructed by Linklaters LLP, for the respondent.

Background

2. The background to this matter is as follows. The company is the holding company of a group of companies specialising in agriculture, food production and related activities in Croatia. It is said to be the largest privately owned company in that country, with annual revenue of about €6.5 billion, amounting to approximately 15% of Croatia's gross domestic product, increasing to 30% if supply chains are included. Like many other large businesses, in recent times it has encountered financial difficulties. Because of its size, however, these difficulties appear to have prompted the enactment by the Croatian legislature of new legislation intended to facilitate the restructuring of the company and its subsidiaries and affiliates and to preserve their businesses as going concerns. Such restructuring apparently could not be carried out pursuant to the existing Croatian Bankruptcy Law 2015 ("the Bankruptcy Law"), replacing an earlier law (several times amended) of 1996.

3. This new law, the Law on Extraordinary Administration Proceeding in Companies of Systemic Importance for the Republic of Croatia ("the Extraordinary Administration Law"), was passed by the Croatian Parliament on 6 April 2017. The legislation was drafted and passed in a hurry. The drafting itself shows signs of haste. The next day, the company made an application to the Croatian court for the commencement of extraordinary administration. On 10 April 2017 the Croatian court made such an order. The order states that the company and 50 affiliates are companies of systemic importance and that it was satisfied that the grounds for pre-bankruptcy under article 4 of the Bankruptcy Law had been satisfied. The commencement of extraordinary administration has several consequences, one of which is to prohibit the bringing or conducting of civil or enforcement proceedings against the company and its controlled and affiliated companies (with limited exceptions): see art 41 of the Extraordinary Administration Law. In effect, there is a moratorium on claims pending the restructuring.

4. But this was an order of the Croatian court, pursuant to Croatian law. The company might have assets outside Croatia, and might be amenable to the jurisdiction of court or tribunals outside the country. Some of the company's debt obligations, for example, are governed by English law and subject to the jurisdiction of the English

courts. Although the respondent bank as a creditor has submitted proofs of debt in the extraordinary administration (indeed, it is a member of the provisional creditors' committee), it has also taken steps in other countries in relation to its claims. This includes court applications in neighbouring Serbia and Slovenia. In addition, in early July 2017 the respondent commenced two arbitrations in London under the rules of the LCIA. Those arbitrations are however currently stayed by consent, pending the determination of this application.

5. It does not follow automatically that the order of the Croatian court will be recognised and, if need be, enforced, outside Croatia. The recognition and enforcement in this country of orders of foreign courts is a part of that branch of our law known as private international law. Some such orders are enforceable at common law. Others are enforceable only pursuant to a special statutory regime. Some such regimes are specific, and relate only to particular kinds of orders. Others are more general, and cover a wide variety. Perhaps the most well-known of such regimes known today in this country are those created under the auspices of the European Union, such as the Brussels I Regulation, dealing with litigation in civil and commercial matters. There is of course an EU Regulation dealing with jurisdiction and recognition of judgments in insolvency proceedings (Council Regulation (EC) No 848/2015, replacing Regulation (EC) No 1346/2000). But that does not assist here, and is not the focus of the present case. The regime which *is* claimed to be relevant in the present case, and under which recognition is sought, is however not an EU regulation. Instead, it is that created by the CBIR.

The Cross-Border Insolvency Regulations

6. The CBIR were made under the Insolvency Act 2000, section 14. This section enabled the model law drafted by the 30th session of the United Nations Commission on International Trade Law ("UNCITRAL") relating to cross-border insolvency to "have the force of law in Great Britain", that is England, Wales and Scotland. This model law had been drafted to deal with the increasing problem that insolvencies in one country created in other countries in an increasingly globalised world. The insolvency procedures set up in one country were not, or not always, recognised in another, and certainly not in a predictable way. Whereas the EU insolvency regulation was designed to regulate insolvencies between member states of the European Union, and is therefore reciprocal between them, this model law was intended for use in the wider world. But, unlike the insolvency regulation, the model law does not require reciprocity from other countries in order for the enacting state to be obliged to recognise foreign insolvency procedures. (That said, some states – though not the UK – have in fact enacted it in a form which requires reciprocity.)

7. In an *Explanatory Memorandum* on the CBIR prepared by the UK Government's Insolvency Service, the authors described the attitude of the British government as follows:

> "7.2. The British Government has a commitment to the promotion of a rescue culture and supports the Model Law as an appropriate legislative tool to support this objective and the wider international stage. In addition, implementation of the Model Law will be beneficial in serving the cause of fairness towards creditors who may be located anywhere in the world. We hope that it may also provide an example to other countries of our readiness to engage in a genuine process of

> cooperation in international insolvency matters and that our actions will encourage other countries to implement the Model Law. In this way, insolvency officeholders in Great Britain should be able to enjoy, progressively, the same benefits abroad as their international counterparts, and be able to reduce administrative costs incurred in recovering assets from overseas. As a result funds available for distribution to creditors, wherever they are located, should increase.
>
> […]
>
> 7.18. The Model Law is a legislative text that is recommended to countries for incorporation into their national law. In Great Britain, we have tried [to] follow UNCITRAL's exhortation to stay as close as possible to the original drafting in order to ensure consistency, certainty and harmonisation with other countries enacting the Model Law.
>
> 7.19. The language of the Model Law is similar to that used in international treaties and conventions and will almost certainly be approached by the courts in that way, i.e. it will be interpreted purposively. Accordingly the UNCITRAL Guide to Enactment will be a useful tool in interpreting the text."

8. The 2000 Act enabled the Model Law to be enacted in Great Britain with modifications. Regulation 2(1) of the CBIR provides that the UNCITRAL Model Law

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

9. Regulation 2(2) provides that:

> "Without prejudice to any practice of the courts as to the matters which may be considered apart from this paragraph, the following documents may be considered in ascertaining the meaning or effect of any provision in the UNCITRAL Model Law as set out in schedule 1 to these Regulations –
>
> (a) the UNCITRAL Model Law;
>
> (b) any documents of the United Nations Commission on International Trade Law and its working group relating to the preparation of the UNCITRAL Model Law; and
>
> (c) the guide to enactment of the UNCITRAL Model Law (UNCITRAL document A/CN.9/442) prepared at the request of the United Nations Commission on International Trade Law made in May 1997."

10. As already stated, the CBIR apply only to Great Britain. Although it is not relevant in this case, similar provision has also been made for Northern Ireland. The Insolvency (Northern Ireland) Order, SI 2002/3152, art 11, enabled the making of the Cross-Border Insolvency Regulations (Northern Ireland) 2007. These regulations enacted the Model Law in a form modified differently from Great Britain, but appropriate for Northern Ireland.

11. The effect of recognition under the CBIR is the same in scope and effect as if the company "had been made the subject of a winding-up order under the Insolvency Act 1986": CBIR, Sch 1, art 20(2). In other words, there will be a moratorium on proceedings and on the enforcement of orders by way of execution on the company's assets, and the right to dispose of or encumber the company's assets will be suspended: CBIR, Sch 1, art 20(1). In the light of the arbitrations started in England, it can be seen why the company, even in the absence of assets here, should seek recognition of the extraordinary administration, and equally why the respondent should oppose it.

12. In addition to the provisions of regulation 2, referred to above, schedule 1 to the CBIR relevantly provides as follows:

> "2. For the purposes of this Law—
>
> (f) "foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding;
>
> (g) "foreign main proceeding" means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;
>
> (h) "foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of sub-paragraph (e) of this article;
>
> (i) "foreign proceeding" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation;
>
> (j) "foreign representative" means a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;"
>
> […]
>
> 6. Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of Great Britain or any part of it.
>
> […]
>
> 8. In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.
>
> […]
>
> 17.1. Subject to article 6, a foreign proceeding shall be recognised if –

(a) it is a foreign proceeding within the meaning of subparagraph (i) of article 2;

(b) the foreign representative applying for recognition is a person or body within the meaning of subparagraph (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.

17.2. 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 interests; or

(b) as a foreign non-main proceeding if the debtor has an establishment within the meaning of subparagraph (e) of article 2 in the foreign State.

[…].

20.1. 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

20.2. The stay and suspension referred to in paragraph 1 of this article shall be –

(a) the same in scope and effect as if the debtor, in the case of an individual, had been adjudged bankrupt under the Insolvency Act 1986 or had his estate sequestrated under the Bankruptcy (Scotland) Act 1985, or, in the case of a debtor other than an individual, had been made the subject of a winding up order under the Insolvency Act 1986; and

(b) subject to the same powers of the court and the same prohibitions, limitations, exceptions and conditions as would apply under the law of Great Britain in such a case,

and the provisions of paragraph 1 of this article shall be interpreted accordingly.

[…]

20.6. 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.
>
> […]"

13. So far as concerns the provisions of article 17 above, there is no dispute between the parties that the company has its centre of main interests in Croatia. Accordingly, if the foreign proceeding is recognised, under article 17.2 it shall be recognised as a foreign main proceeding.

14. So far as concerns the provisions of article 20 set out above, it is important to notice that in this case no application has been made under paragraph 6 of that article for any modification of the stay and suspension referred to in paragraph 1 of that article. The only application is that by the foreign representative for recognition of the extraordinary administration proceeding in Croatia as a foreign main proceeding in respect of the company.

15. Schedule 2 to the CBIR relevantly provides as follows:

> "25. (1) At the hearing of the application, the applicant and any of the following persons (not being the applicant) may appear or be represented –
>
> (a) the foreign representative;
>
> (b) the debtor and, in the case of any debtor other than an individual, any one or more directors or other officers of the debtor…
>
> […]
>
> (j) with the permission of the court, any other person who appears to have an interest justifying his appearance.
>
> […]
>
> 30. (1) The CPR and the practice and procedure of the High Court (including any practice direction) shall apply to proceedings under these Regulations in the High Court with such modifications as may be necessary for the purpose of giving effect to the provisions of these Regulations and in the case of any conflict between any provision of the CPR and the provisions of these Regulations, the latter shall prevail.
>
> (2) All proceedings under these Regulations shall be allocated to the multi-track for which CPR Part 29 (the multi-track) makes provision, and accordingly those provisions of the CPR which provide for allocation questionnaires and track allocation shall not apply."

16. The respondent in the present case does not fall within any of the categories in paragraph 25(1) other than subparagraph (j). Accordingly, it requires not only an interest justifying its appearance, but also the permission of the court, in order to be heard. In fact, the applicant does not oppose the grant of permission to the respondent. But it was suggested that the fact that Mr Justice Barling had made an order by consent on 3 August 2017 directing sequential filing of evidence, including evidence

from the respondent, impliedly gave permission to the respondent to appear. I certainly do not say that it is impossible that permission could be given impliedly by an order of this kind. However, in order for the court to be in a position to make up its mind whether or not to give permission, evidence would have to be filed, in order to show (if possible) an interest justifying appearance. So the mere fact of being directed to file evidence would not, I think, be conclusive. But the point was not actually argued, and there is no need to reach a decided view.

17. This is because, having read the material filed, it seems to me that the respondent has demonstrated a sufficient interest to justify appearance. This is, at a minimum, an economic or other significant interest to protect (*eg* the debts it claims from the company) coupled with an argument which is sufficiently cogent to deserve to be put and adjudicated upon as to whether or not the foreign proceeding should indeed be recognised. The respondent passes this low threshold easily. Accordingly, at the outset of the hearing before me, I formally gave permission to the respondent to appear on this application. For the sake of completeness, I add, however, that I was told on behalf of the applicant that other creditors support the application, and that in this respect the respondent is "out on a limb".

18. I should just record that I was not addressed on the extent of any duty of full and frank disclosure in relation to this kind of application. An application for recognition may have effects on third parties not before the court. In the present case, of course, the application is opposed by the respondent, who has played a full part in the application, and so the need to consider any such duty does not arise in practice. I have been treated to very full arguments on each side.

19. In *Re Transfield ER Cape Ltd* [2010] EWHC 2851 (Ch), Warren J said (at [1])

> "As has been said elsewhere, the court's function on recognition is something of a 'tick box' exercise. The presumption is that the registered office of the company is the centre of main interests and case law establishes that that would be displaced only where the contrary evidence is objective and based on ascertainable factors."

This case, however, is anything but a 'tick-box' exercise. I bear in mind that, even though much of the argument put to me was why the applicant should fail, the burden of proof is upon the applicant to show that the application should be granted. However, I accept that not much is needed on certain points to raise a prima facie case, and thereby push the evidential burden onto the respondent.

The arguments in summary

20. The respondent argues:

1. that the extraordinary administration proceeding pending in Croatia is not a "foreign proceeding" within article 2(i) of Schedule 1 to the CBIR, because (i) the extraordinary administration law is not a "law relating to insolvency", (ii) that law was not one passed for the purpose of reorganisation, (iii) the proceeding is not a "collective proceeding", (iv) it is not "subject to control or supervision by a foreign court", in each case within the meaning of that provision; and (v) it is a *single* group

proceeding in respect of *both* the holding company and all its controlled companies and affiliates, outside the scope of article 2(i).

2. that, even if it were such a "foreign proceeding", recognition of that proceeding would be manifestly contrary to English legal public policy, because the legislation is manifestly contrary to fundamental principles designed to ensure a fair insolvency proceeding, including the right to practical and effective access to a legal remedy and the right to private property.

Witnesses

21. In considering this application, I have had the benefit of the following factual evidence in writing:

1. The first affidavit of the applicant, Ante Ramljak, originally dated 27 July 2017, but sworn in error before a person who should not have administered the oath, and therefore re-sworn correctly on 28 August 2017;

2. The affidavit of Bruce Bell, a partner in Linklaters LLP, acting for the respondent, dated 31 July 2017;

3. The affidavit of Sergei Volk, managing director of the respondent, dated 17 August 2017;

4. The second affidavit of the applicant, dated 7 September 2017.

22. The parties agreed that none of these witnesses need be tendered for cross-examination, and hence none of them gave oral evidence before me. That of course means that there are limits on how far I can decline to accept a statement of this kind as true. The general rule is that the court is not entitled to reject any written evidence as being untrue, *unless* on the basis of all the evidence before the Court the Court considers that that written evidence is simply incredible: see *eg Long v Farrer & Co* [2004] BPIR 1218, [57]-[61], applied in *Shierson v Vlieland-Boddy* [2005] 1 WLR 3966, CA, [56], *Coyne v DRC Distribution Ltd* [2008] EWCA Civ 488, [58]. At the hearing, I was not invited to disregard any of the written evidence on that basis.

23. In addition, I had the benefit of opinion evidence on the relevant law of Croatia from two witnesses tendered as experts in that field, namely Judge Andrija Erakovic (for the applicant) and Professor Alan Uzelac (for the respondent). Mr Justice Barling gave the relevant permission under CPR Part 35 in his order of 3 August 2017. Each expert gave evidence in the form of a written report, and then a written joint statement identifying the areas of agreement and disagreement between them. I also had the benefit of seeing them give evidence in person on the first and second days of the hearing. Here I will briefly describe each of them.

24. Judge Erakovic graduated in law at the University of Zagreb in 1970, and passed the Croatian bar examination in 1975. From 1980 to 1987 he was a judge of the commercial court of Rijeka, sitting at first instance, and dealing with (amongst other things) bankruptcy proceedings. From 1987 to 2002 he was a judge of the high commercial court of Croatia in Zagreb, sitting on appeal from first instance decisions of the commercial courts. This also included sitting on appeal from decisions in

bankruptcy proceedings. From 2002 to 2015 (when he retired) he was a judge of the Supreme Court of the Republic of Croatia, sitting in the civil department, covering civil and commercial disputes. He has written four books on commercial and insolvency law, including one on bankruptcy law in 1997 and one on company law in 2008. He has also written more than 150 articles and papers in the areas of commercial, contractual and civil procedural law, most referring also to insolvency law. He now sits as an arbitrator in the arbitration court of the Croatian Chamber of Commerce.

25. Prof Uzelac is a Professor and Head of the Department of Civil Procedure in the Faculty of Law at the University of Zagreb. The Department carries out research and teaching in litigation, enforcement, non-contentious proceedings, bankruptcy and the organisation of the judiciary. Prof Uzelac holds graduate degrees in law, philosophy and comparative literature from the University of Zagreb, as well as the degrees of Master of Law and Doctor of Law from the same university. He has written several books and a large number of papers on national and comparative civil procedure, evidence and procedural human rights. He has worked for a number of international organisations, and been active as a national delegate in organisations such as UNCITRAL and the Council of Europe. He has been one of the draughtsman of a number of Croatian procedural laws, including the Code of Civil Procedure, the Enforcement Act and the Legal Aid Act. He has been invited to give legal opinions on various issues of procedural and insolvency legislation by various national bodies, including the Constitutional Court of Croatia. From 2011 to 2015 he was a member of the State Judicial Council, which is the supreme body for the appointment, discipline and removal of judges. From 2013 to 2016 he was an examiner in the State Judicial Examination in relation to the part concerning civil procedure.

26. The applicant has criticised Prof Uzelac as

> "an academic specialising in procedural law based at the University of Zagreb … who appears to have little if any relevant expertise of insolvency and/or restructuring."

In my view the criticism is misplaced. It must be borne in mind that professors of civil law who specialise in the law of civil procedure will normally cover the whole of Part III of the scheme of the Roman law scholar Gaius set out in his *Institutes*, that is, the law of actions, *including bankruptcy*. So these are the professors who can be expected to know about bankruptcy. As is well known, in civil law countries the role of university professors in contributing to the practising legal community is for largely historical reasons both more central and more pronounced than it is in common law ones. And Croatia is a civil law jurisdiction.

27. But in any event I do not think that, even if (which is not the case) Prof Uzelac had only a small amount of relevant bankruptcy expertise, it would mean that he was not an expert for the purposes of giving opinion evidence on Croatian law. On the other hand, that might go to weight, especially where there is a conflict between the opinions of the two experts. Judge Erakovic appears to have more experience of insolvency law, and certainly more *practical* experience of the application of insolvency law, than Prof Uzelac.

28. Having seen them both in the witness box, my impressions of these two witnesses are as follows. Judge Erakovic was a solemn and careful witness, who took time to think before answering. He plainly has had very significant experience in this field. He gave his evidence through an interpreter, because his English was not strong enough. This slowed matters down somewhat, and made it a little more difficult for the cross examiner. But nevertheless I have no hesitation in accepting what he said as his best attempt to assist the court. His evidence was not shaken in any material particular by cross-examination.

29. Prof Uzelac is a generation younger than Judge Erakovic. As befits the generational change, he spoke fluent English and had no difficulty expressing his ideas to me. He was very knowledgeable, but of course had less practical experience of how judges decide cases, especially novel ones. This was exposed in cross-examination. He was also apt sometimes to wander from the point. I attributed this to his undoubted intellectual curiosity. I am sure he was doing his best to assist the court. On the whole, on practical matters of how courts would actually cope with bankruptcy situations, I usually preferred the approach of Judge Erakovic to that of Prof Uzelac. But I took his evidence into account in all cases.

The Extraordinary Administration Law

30. The Extraordinary Administration Law of Croatia was said to have been based, at least in part, on the Italian *Legge Marzano*, specifically enacted in relation to the collapse of the Parmalat group (see Ramljak 2, [15(a)]). But it is accepted that the present Law is different from that Law in significant ways, and I do not rely on it. The present law is also different from other administration laws elsewhere, and a large number of its terms were specifically referred to before me.

31. I therefore set out here the relevant provisions of the Law (in the English translation provided to me):

> "1. (1) This Law is passed for the purpose of protection of sustainability of operations of the companies of systemic importance for the Republic of Croatia which with its operations individually or together with its controlled or affiliated companies affect the entire economic, social and financial stability of the Republic of Croatia.
>
> (2) The level of protection achieved by this Law is necessary, appropriate and proportionate to the interest of the Republic of Croatia to conduct a fast and effective preventive restructuring procedure of companies of systemic importance for the Republic of Croatia to secure liquidity, sustainability and stability of business operations.
>
> 2. This Law governs the extraordinary administration measure for companies of systemic importance for the Republic of Croatia, responsible bodies in the extraordinary administration proceeding and other relevant issues.
>
> 3. (1) the extraordinary administration measure from article 2 above shall be exercised in a special proceeding governed by this Law, the following being particularly detailed:

1 prerequisites for the opening of the extraordinary administration proceeding

2 conducting of the extraordinary administration proceeding and

3 legal consequences of the opening and conduct of the extraordinary administration proceeding.

(2) the relationship between the debtor and the creditors to whom this law relates, is governed by the introduction of the extraordinary administration measure defined in article 2 above with simultaneous commensurate observance of the interests of other participants.

4(1) The extraordinary administration proceeding shall apply to the debtor's joint-stock company (hereinafter debtor) and all his affiliated and controlled companies if any of the reasons for bankruptcy exist in terms of article 5 of the Bankruptcy Act (Official Gazette, no 71/15, hereafter: Bankruptcy Act) or pre-bankruptcy reasons from article 4 of the Bankruptcy Act in relation to the debtor as a controlling company and which company individually or jointly with its controlled or affiliated companies is of systemic importance for the Republic of Croatia.

(2) A company of systemic importance for the Republic of Croatia is the one which individually or together with its controlled or affiliated companies cumulatively fulfils the following requirements:

- in the calendar year preceding the year of filing of the petition for the opening of the extraordinary administration proceeding individually or together with its controlled or affiliated companies employs on average more than 5000 employees and

- the existing balance sheet liabilities individually or together with its controlled or affiliated companies exceed HRK 7,500,000,000, i.e. in the event of balance sheet liabilities denominated in other currencies, if they exceed the counter value of HRK 7,500,000,000 calculated on the date of the filing of the petition for the opening of the extraordinary administration proceeding.

(3) This Law shall not apply to credit institutions as defined in article 4, paragraph 1, item 1 of the regulation (EU) number 575/2013 and financial institutions as defined in article 4, paragraph 1, item 26 of the regulation (EU) number 575/2013.

5. (1) Extraordinary administration proceeding shall also be conducted against a company not fulfilling the requirements from article 4, paragraphs 1 and 2 of this law, provided that it is regarded a controlled company in the meaning of article 475 of the Companies Act (Official Gazette, nos 11/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08, 137/09, 125/11, 111/12, 168/13, 110/15, hereinafter: Companies Act) or an affiliated company (the debtor is a company which holds in another company a majority share or voting majority, a controlled or controlling company, concern company or a company mutually holding shares under the Companies Act) where the controlling company independently or jointly with its

controlled or affiliated companies fulfils the requirements from article 4 of this Law.

(2) In the meaning of this Law affiliated and controlled companies are companies having their principal place of business in the Republic of Croatia which are existing and operating under Croatian law, in which the company from article 4 of this Law holds at least 25% share.

6. (1) In the extraordinary administration proceeding the exclusive jurisdiction has the Commercial Court of Zagreb (hereinafter: the Court), regardless of the registered seat of the debtor and affiliated companies to which this Law applies and regardless of the registered seat of his controlled and/or affiliated companies.

(2) In the extraordinary administration proceeding, the lower court proceeding is conducted by a sole judge, unless otherwise ordered for by this Law.

(3) In the extraordinary administration proceeding, the senior court represented by a council of three judges decides about the appeal.

(4) The extraordinary administration proceeding is urgent.

7. (1) During the extraordinary administration proceeding it is not admissible to institute liquidation proceeding against the debtor.

(2) If the extraordinary administration proceeding has been instituted, before its closing it is not admissible to institute prebankruptcy i.e. bankruptcy proceedings.

8. Unless this Law defines otherwise, to the extraordinary administration proceeding accordingly apply procedural rules from a special law governing bankruptcy.

9. The bodies of the extraordinary administration proceeding are the Court, extraordinary commissioner, advisory body and creditors' committee.

10. In the extraordinary administration proceeding the Court is authorised to take any actions and pass any decisions not expressly conferred by Law into responsibility of other bodies.

11 (1) Extraordinary commissioner may be any person fulfilling the requirements for a member of the management board under the Companies Act. He is appointed by the Court on the proposal of the government of the Republic of Croatia in accordance with article 24 of this law.

(2) To responsibilities of the extraordinary commissioner accordingly apply the provisions of articles 92 and 93 of the Bankruptcy Act.

12. (1) The extraordinary commissioner has rights and obligations of a debtor's organ.

(2) The extraordinary commissioner represents the debtor solely and independently.

(3) The extraordinary commissioner exercises any and all rights arising from the debtor's ownership share in the affiliated and controlled companies in accordance with the current laws.

(4) The extraordinary commissioner shall act conscientiously and with due care, shall respect the periods set by this Law and perform transactions conferred on him by this Law.

[…]

(6) The extraordinary commissioner's deputies, on the proposal of the Government of the Republic of Croatia, shall be appointed by the decision of the Court within 5 working days from the receipt of a written proposal of the Government of the Republic of Croatia.

(7) The extraordinary commissioner shall manage debtor's operations independently and perform any and all transactions in the Proceeding conferred on him …

(8) The extraordinary commissioner may not without approval of the creditors committee pass decisions or take any actions to dispose of debtor's real property, shares or shares held in the controlled and other companies or to transfer parts of the undertaking, if the value is exceeding HRK 3,500,000.

(9) The extraordinary commissioner shall from the appointment, each month until adoption of the settlement agreement submit reports to the central authority of the government administration responsible for economic operations (hereinafter: Ministry), advisory body, the Court and the creditors committee about the economic and financial status of the debtor and about implementation of the measures contemplated by this Law.

[…]

(11) The extraordinary commissioner shall within 30 days from his appointment elect a restructuring adviser and, as necessary, auditors, legal and other advisers specialised in certain areas. … For appointment of the advisers by the extraordinary commissioner prior approval of the Ministry is required.

(12) The extraordinary commissioner has also other rights and obligations explicitly conferred on him under this Law, and to him applied subordinately the provisions of the Bankruptcy Act governing bankruptcy receiver.

[…]

14. The Court is exclusively competent to supervise the work of the extraordinary commissioner.

15. The Court may remove the extraordinary commissioner and appoint a new one at any time on the proposal of the government of the Republic of Croatia.

16. (1) The head of the Ministry appoints the advisory body within 15 days from the appointment of the extraordinary commissioner.

[…]

17. (1) The advisory body gives opinions about decisions and actions of the extraordinary commissioner in cases contemplated by the Law if so requested by the Ministry or the Court.

[…]

18. (1) The creditors' committee has up to 9 members and consists of the representatives of the creditors…

19. (1) From its constitution until the closing of the extraordinary administration proceeding the creditors' committee has the right to be informed about the condition of the debtor and his controlled and affiliated companies.

(2) The creditors' committee shall participate in the name of the creditors in preparation and drawing up of the settlement agreement and gives approval to the extraordinary commissioner for the final text of the settlement agreement.

[…]

21. (1) The petition for the opening of the extraordinary administration proceeding may be filed by:

- the debtor fulfilling the requirements from article 4 of this Law or

- a creditor of the debtor and/or debtor's controlled or affiliated companies, subject to debtor's approval.

[…]

(3) If the petition for the opening of the extraordinary administration proceeding is not filed jointly by all persons authorised to represent the debtor by law or all members of the management board or board of directors of the joint-stock company, the petition is admissible if the petitioner makes it credible that a prebankruptcy reason from article 4 of the Bankruptcy Act exists i.e. any bankruptcy reason from article 5 of the Bankruptcy Act in respect of the debtor.

[…]

(5) From the filing of the petition for the opening of the extraordinary administration proceeding until issuance of an order to refuse the petition i.e. issuance of an order to open the extraordinary administration proceeding the debtor may not dispose of his assets, save for dispositions made in the course of ordinary operations or unless provided for otherwise by this law.

[…]

24. (1) The Court shall inform the Government of the Republic of Croatia and the Ministry about the petition filed for the opening of the extraordinary administration proceeding on the same day upon receipt of the petition.

(2) Within two working days from the receipt of the notification of the Court regarding the opening of the extraordinary administration proceeding the Government of the Republic of Croatia shall on the proposal of the Ministry decide about the proposal for the appointment of the extraordinary commissioner and shall deliver the decision to the Court without undue delay.

(3) The Court shall immediately, but not later than two working days from the receipt of Government' decision about the proposal for the appointment of the extraordinary commissioner, issue order to open the extraordinary administration proceeding and shall pass a decision on the appointment of the extraordinary commissioner in accordance with the proposal of the Government of the Republic of Croatia, except that from the documents and petitioner's statements provided it establishes that any of the requirements from article 4 of this Law is not met.

[…]

26. (1) Entitled to file appeal against the order opening the extraordinary administration proceeding are the Ministry and the petitioner who filed the petition for the opening of the extraordinary administration proceeding and the debtor.

[…]

29. (1) The creditors in the extraordinary administration proceeding are personal creditors who at the time of the opening of the extraordinary administration proceeding have property claims on the debtor and/or affiliated and controlled companies.

(2) The creditors from paragraph 1 above shall be classified by their claims into categories.

(3) The rights of creditors from paragraph 1 above may vary if so provided for by this Law.

[…]

30. (1) Within five days from the pronouncement of the decision from article 33, paragraph 3 of this Law, the extraordinary commissioner shall by invitation in the Official Gazette invite the creditors whose claims have been recognised to inform the extraordinary commissioner and the Court within 30 days about the members of the creditors' committee.

[…]

(6) The creditors' committee shall be deemed duly constituted if a simple majority of all special categories of creditors duly elects its members in the creditors' committee and informs about it the extraordinary commissioner…

[…]

31. (1) The Court shall, for the purpose of protection of the interests of the creditors in the extraordinary administration proceeding, by its decision constitute a provisional creditors' committee.

[…]

(5) The provisional creditors' committee shall have the same rights, powers and obligations defined by this Law for the creditors committee and shall assume and perform the functions of the creditors' committee until constitution of the creditors' committee pursuant to article 30 of this Law.

39. (1) The extraordinary commissioner, with prior approval of the creditors' committee, may assume new debt in the name and for the account of the debtor where it is necessary for the reduction of the system risk, continuation of business activities, preservation of assets or if it concerns settlement of the claims from the ordinary operations which will have priority in satisfaction over other claims of the creditors, save for claims of employees and former employees.

[…]

41. (1) From the opening of the extraordinary administration until its closing it is not permitted to bring civil or enforcement proceedings, or proceedings securing the claims or out-of-court collection proceeding and exercise rights to separate satisfaction against the debtor, his controlled and affiliated companies, save for proceedings relating to employment.

[…]

43. (1) Within 12 months from the opening of the extraordinary administration proceeding, the extraordinary commissioner, with approval of the creditors' committee may propose satisfaction of the creditors by the settlement agreement.

(2) The 12 month period from paragraph 1 of this article shall be prolonged by three additional months by the court at the request of the extraordinary commissioner. The period of three months is calculated from the expiration of the period of 12 months.

(3) The extraordinary commissioner shall propose a settlement agreement to the creditors' committee and the creditors if in his opinion the determination of relations of the creditors and the debtor by a settlement agreement is reasonable taking into account all circumstances of this particular case.

(4) In the name of the creditors in preparation of this settlement agreement participates the creditors' committee.

(5) By the settlement agreement it is, inter alia, possible:

– to transfer a part or all assets of the debtor to one or more already existing persons or persons to be constituted, with exclusion of application of the general rule of adherence to debt in the case of take over of a property unit from the law governing contractual relations and duty to give a statement on nonexistence of debts from the law governing the procedure in the court register

– to leave to the debtor all assets or part of his assets for the purpose of continuation of debtor's operations

– to merge the debtor with another entity or entities by takeover or amalgamation company

– to sell all assets part of assets of the debtor, distribute all assets or part of assets of the debtor among the creditors

– reduce or postpone payment of debtor's obligations

– to convert debtor's obligations into credit or loan i.e. equity of the debtor or some of his controlled or affiliated companies i.e. into equity of newly founded companies

– to assume guarantee or give another security for fulfilment of debtor's obligations

– to determine the responsibility of the debtor after the settlement agreement.

(6) In the extraordinary administration proceeding conducted against the debtor and affiliated and controlled companies a single proposal of the settlement agreement shall be made.

(7) Upon agreeing the text of the settlement agreement between the extraordinary commissioner and the creditors' committee, extraordinary commissioner shall deliver the proposal of the settlement agreement to all creditors through its publication on the web page of the court.

[…]

(9) The creditors vote at the hearing scheduled by the court in a period of not less than five and not more than 15 days from the receipt by the court of the notification of the extraordinary commissioner and the creditors committee that they agree about the contents of the settlement agreement to be proposed to the creditors.

(10) At the request of the extraordinary commissioner the court shall determine the list of creditors and voting rights pertaining to them at the hearing.

[…]

(14) The settlement agreement shall be deemed adopted if a simple majority of all creditors voted for it and if in each category of the sum of claims of creditors who voted for the settlement agreement exceeds the sum of claims of the creditors who voted against the acceptance of settlement agreement. Exceptionally, it shall be deemed that the creditors accepted the settlement agreement if the total sum of claims of the creditors who voted for the settlement agreement amounts at least two thirds of the total claims.

> (15) The settlement agreement which is accepted by the creditors shall be confirmed by the court by its order confirming the settlement agreement. Such order has the force of an enforceable deed.
>
> (16) the court shall ex officio withhold the confirmation of the settlement agreement:
>
> 1. if the regulations governing the contents of the settlement agreement and the procedure for its preparation and adoption as well as acceptance by the creditors have been grossly violated except that these defects can be removed or
>
> 2. if the acceptance of the settlement agreement has been obtained in an inadmissible way.
>
> […]
>
> (18) The settlement agreement is effective from the issuance of the order confirming the settlement agreement in relation to all creditors including the creditors who have not and who have participated in the proceeding and whose contested claims have been later determined.
>
> […]
>
> (21) To the relations not governed by the provisions of this article adequately apply the provisions of the Bankruptcy Act governing the bankruptcy plan.
>
> […]
>
> 45. (1) At any time during the course of the extraordinary administration proceeding the court may at the request of the extraordinary commissioner, with prior approval of the creditors committee decide that the extraordinary administration proceeding be terminated and that a bankruptcy proceeding be opened if it establishes that the circumstances have occurred due to which no probability exist for the restoration of economic balance and continuation of operations of the debtor on a permanent basis and it establishes that any of the bankruptcy reasons exists pursuant to article 5 of the Bankruptcy Act.
>
> (2) Prior to the filing of the petition from paragraph 1 of this article the extraordinary commissioner shall obtain prior approval of the Ministry.
>
> […]"

32. I should just add a word here in relation to article 29(1), to which counsel specifically drew my attention. This provision defines the creditors for the purpose of the extraordinary administration proceeding as "personal creditors who … have property claims on the debtor". To a common lawyer this phrase looks odd. The main problem is that it is not possible to find satisfactory translations into English of all the words used in the original Croatian, many of which are in fact technical legal words. As Judge Erakovic confirmed during his expert evidence, Croatia was formerly part of the Austro-Hungarian Empire and subject to the Imperial Austrian Civil Code of 1811. Indeed, the judge told me that, despite the breakup of the Empire after the First

World War and the creation of Yugoslavia (which in turn broke up in the 1990s), in substance, he was applying Austrian civil law well into the 1970s.

33. The Austrian law, as is well known, is a codification of rules of law based on Roman law. I know from my own comparative law research and teaching that Austrian law even today distinguishes between (a) claims to property which exclude any claims of other creditors (so-called *real* property rights, meaning claims to the thing itself, rather than land in the common law sense) and (b) claims to property of the debtor which can ultimately be made good only in competition with other creditors (*ie* what we would call claims in personam, which in the Austrian code are called *personal* property rights, but again not using that word in the common law sense): see article 307 of the ABGB. Article 29(1) is clearly referring to the latter kind of claim.

The court's role

34. The English court's role is to decide whether the proceeding the subject of the application fulfils the criteria for recognition under the CBIR. Those regulations are a part of English law and hence this is a question of English law. The *characteristics* of the proceeding are however a matter for Croatian law, which is the law that gives it existence. But by the rules of the English court (which is the forum to decide the application) questions of foreign law are questions of *fact*, to be decided (mainly) on the basis of evidence of appropriate experts as to what that law is. I have been fortunate enough to receive such evidence, as already described above. But I am not bound by the way in which Croatian law itself categorises the proceeding or the law in question, nor by the way in which the experts do so. Indeed, I consider that evidence of how Croatian law would categorise the proceeding, or the law, is in fact irrelevant, because the question is what *English* law thinks, and the experts are not experts in English law (and expert evidence of *English* law could not be received by the court in any event). Whether in Croatian terms the proceeding is a foreign proceeding or the law an insolvency law is irrelevant.

35. All that said, it would be wrong to construe the CBIR as if I were construing an ordinary piece of domestic UK legislation. The CBIR are, as I have already stated, the British adaptation of a non-national model law, itself the product of an international convention procedure. Sch 1 (at least) of the CBIR should not be construed by reference to any national system of law: see *eg* CBIR, Sch 1, art 8 (enjoining me to have regard to "its international origin and to the need to promote uniformity in its application"); *Re Stanford International Bank Ltd* [2011] Ch 33, [6], [9], [23].

36. Nor should I slavishly follow the decisions of other countries' courts where they are based on different adaptations of the Model Law or do not accord with the preparatory materials (reports of working groups) that led to the CBIR. In *Fibria Cellulose S/A v Pan Ocean Co Ltd* [2014] EWHC 2124 (Ch), Morgan J was asked to grant specific relief under (in particular) article 21 of the CBIR in a case where a Korean company was in an insolvency proceeding already recognised by the English court. The judge examined US authority but concluded that the words "any appropriate relief" in article 21 were not to be construed in the way that authority indicated.

37. Morgan J said:

> "107. I am directed by reg. 2 of the CBIR to consider the documents relating to the working group on the Model Law. On my reading of the reports of the working group, it was not intended that 'any appropriate relief' would allow the recognising court to go beyond the relief it would grant in relation to a domestic insolvency. I do not think that there is sufficient in the discussion in those reports which would allow me to conclude (as the court concluded in *Re Condor Insurance Co Ltd*) that the words 'any appropriate relief' were intended to replicate the position under section 304 of the former US Bankruptcy Code. I also note that whenever the legal position under article 21 has been described in an English case or in a textbook on the CBIR, the discussion proceeds on the basis that 'any appropriate relief' allows the court to grant the same sort of relief as it would grant in relation to a domestic insolvency.
>
> 108. Accordingly, I am not persuaded that that the words 'any appropriate relief' allow me to grant relief which would not be available to the court when dealing with a domestic insolvency."

I bear in mind these precepts in construing the relevant words in the CBIR in what follows.

The arguments in detail

38. I now turn to consider the arguments in some detail. The first series of points considers whether the extraordinary administration proceeding in Croatia is a "foreign proceeding" within regulation 2(i) of Sch 1 of the CBIR.

Group proceeding outside the scope of the CBIR?

39. The first of these is whether the proceeding is a *group* proceeding outside the scope of the CBIR. Unlike the other points raised as to the compatibility of the proceeding with the CBIR, which raise questions as to specific words or phrases in the definition, this question turns on something which is not made express in the regulations. The evidence in the present case is that the proceeding in Croatia is a single group proceeding against the company as a debtor *and* against all its affiliated and controlled companies, that is, the whole group of companies. The application for recognition before me, however, is one in respect only of *the company itself*, and not the controlled or affiliated companies.

40. The question in this part of the case therefore is this: do the CBIR make it possible to recognise in England a foreign proceeding which is expressly brought in a foreign court in respect of a *group* of companies, even though recognition here is sought only in relation to *one specific company* which is identified in the application? The applicant says yes; the respondent says no.

41. In his closing written submission, the applicant summarises it this way.

> "Neither the Model Law nor the CBIR provide that where a debtor is part of a group of companies or subject to a group proceeding, the proceeding cannot be recognised in relation to that debtor. There is no textbook or case law to support this and no basis for reading down the legislation in this way (on the contrary)."

42. The respondent summarises the argument in its skeleton argument in this way:

> "The Model Law is, as such, premised upon a proceeding in respect of a single debtor, whether natural or individual. It is in this sense that a proceeding must be collective to fall within the Model Law. It has to be between a debtor and its creditors, not between a debtor and another's creditors."

43. Regulation 2(2) of the CBIR, as already mentioned, enables the court to have regard to certain interpretive materials. These include the Guide to Enactment of the Model Law, and any documents of UNCITRAL and its working group relating to the preparation of the Model Law. Indeed, in the *Pan Ocean* case (see at [36] above), Morgan J not only looked at various working group reports, he also reached a conclusion on the meaning of the CBIR which differed from that reached in certain American cases.

44. The Guide to Enactment makes plain at various points that what is generally being considered in the creation of the Model Law is the case of the *individual* debtor company which undergoes an insolvency procedure. The position of *groups as such* is generally ignored.

45. In the UNCITRAL Legislative Guide on Insolvency Law, Part 3, chapter III "Addressing the insolvency of enterprise groups: international issues", it says (at page 84):

> "3. In the international context, the models that have been created to address cross-border insolvency issues have always stopped short of dealing satisfactorily with enterprise groups. When the House of Lords of the United Kingdom of Great Britain and Northern Ireland considered whether the United Kingdom should subscribe to the European Convention on insolvency proceedings, the relevant committee commented on the failure of the convention to deal with groups of companies – the most common form of business model. When the convention became European Council (EC) regulation number 1346/2000 of 29th of May 2000 on insolvency proceedings, it still did not address the issue. When the text of what became the UNCITRAL Model Law was debated, groups were regarded as 'a stage too far'."

46. The same is true of the working group reports. They emphasise that the Model Law is concerned with individual debtor companies. Yet another UNCITRAL publication, "The UNCITRAL Model Law on Cross-Border Insolvency: the Judicial Perspective", says the same thing in chapter III, "Interpretation and application of the UNCITRAL Model Law."

47. At paragraph 68 (page 24) it says:

> "A number of the decided cases that considered the meaning of 'foreign proceeding', 'foreign main proceeding' and 'foreign non-main proceeding' have involved members of enterprise groups. For the purposes of the model law, the focus is on each and every member of an enterprise group as a distinct legal entity. It may be that the centre of main interests of each individual group member is found to lie in the same jurisdiction, in which case the insolvency of those group members can be addressed together, but there is no scope for

addressing the centre of main interests of the enterprise group as such under the Model Law".

48. In my judgment, this passage is important. Reference is made to cases decided in relation to individual members of groups of companies. Regardless of whether those cases can be said to be correctly decided, the commentators do not complain in any of these materials that the judges have misunderstood the Model Law by applying it to single companies within groups. Instead the focus is on each individual member of the group *as a distinct legal entity*, even though it is also a member of a wider group.

49. The cases which are referred to are two American cases, *Re Rede Energia SA* 515 BR 69 (SDNY 2014) and *Re OAS SA* 533 BR 83 (SDNY 2015). Rede was the parent company of a group of companies operating in the energy sector in Brazil. Five of the companies were debtors in Brazilian bankruptcy proceedings. Other members of the group were not. Pursuant to those proceedings a reorganisation plan was approved by creditors and confirmed by the court. The foreign representative of Rede applied for and obtained recognition of the Brazilian proceedings under the US Bankruptcy Code, Chapter 15 (the Model Law). The reorganisation plan was very contentious. The foreign representative sought an order that the reorganisation plan confirmation order be enforced in the US. This was granted, the court specifically holding that it was not "manifestly contrary to United States public policy".

50. In the second case, OAS was the Brazilian holding company of a group of companies carrying on an infrastructure construction business, both in Brazil and elsewhere in Latin America, the Caribbean and Africa. Some of the companies were based outside Brazil. The group got into difficulties following dealings with the Brazilian oil company Petrobras. In March 2015 several of the companies in the group started Brazilian bankruptcy proceedings, seeking a reorganisation. Three of those companies each presented an individual petition to the US court under Chapter 15, seeking recognition of the proceedings as foreign main proceedings. The petitions were granted, again despite opposition and in particular an argument that recognition would violate US public policy.

51. In neither of the two cases, however, was there any express consideration given by the court to the issue whether the Model Law enables an application to be made for recognition on behalf of a single company forming part of a larger group proceeding. So they are only helpful on this point in the sense that those taking part (including those vigorously opposing the relief sought, and also the judges) did not think it necessary to draw attention to what (if the respondent is right) would be an immediate and complete disqualification for recognition.

52. There is nothing in the language of article 2 of schedule 1 of the CBIR to compel a decision either way. The effect of recognition, as shown by article 20 and 21 of schedule 1, is on the particular debtor and the particular debtor's position, so there would be no problem in itself in recognising a foreign proceeding in relation to a particular debtor. As I have said above, the Guide, the working group reports and the Judicial Perspective Paper all show that the focus is on the individual debtor and not on groups. It is clear that a group proceeding cannot be recognised as such. But the materials do not say that it is impossible to recognise a group proceeding as a proceeding *in respect of a particular debtor*, if it otherwise meets all the relevant

criteria. On the contrary, the Judicial Perspective Paper at [64] assumes that this is possible. So do the American cases of *Rede* and *OAS*.

53. Given the problems that are or might be caused by attempting to recognise group proceedings as such, it may well have been a good idea not to provide for this in the Model Law. But at the same time it would be sensible to allow for the recognition of the position of individual debtors caught up in a group insolvency procedure. Since such groups are today very common, not to do so would leave a significant hole in the range of possible options for international recognition. Whenever there were insolvency proceedings involving a group of companies as such, it would not be possible to recognise those proceedings *in relation to any debtor*. That would be going much further than refusing to recognise the group proceedings as a group. And in my judgment it is not the law.

54. Of course there may then arise a further question, which is how to decide what is an insolvency involving a group of companies. There was some debate before me as to whether an appropriate test would be whether there was simply procedural consolidation of the proceedings involving different companies, so that the distinct proceedings were heard simultaneously by the same judge and using the same materials, or whether it was necessary to have substantive consolidation of those proceedings, so that the estates were merged. But it is not necessary for me now to resolve any of these questions. The important point is simply this. There is nothing in the CBIR to prevent a foreign proceeding being recognised, which in the foreign court involves a group of companies, but the recognition is sought in this country in relation only to a particular individual debtor. In my judgment, the respondent's objection here is without foundation.

Law relating to insolvency

55. The next point is whether the Extraordinary Administration Law of Croatia is a "law relating to insolvency" within article 2(i) of Schedule 1 to the CBIR. The applicant says it is. The respondent says it is not. The Guide to Enactment says ([73]):

> "liquidation and reorganisation might be conducted under law that is not labelled as insolvency law (*eg* company law), but which nevertheless deals with or addresses insolvency or severe financial distress."

Moreover, the phrase uses the words "relating to". These are wide words of connection. The law concerned certainly does not have to be a law *confined* to insolvency.

56. In *Re Stanford International Bank Limited* [2011] Ch 33, a company was ordered to be wound up in Antigua on the just and equitable ground (corresponding to the equivalent English law), but in so deciding the court relied on the obvious insolvency of the company. An application was made for the Antiguan proceeding to be recognised in England. At first instance, Lewison J said:

> "94. It is, in my judgment, clear from the court's order and the judgment of Harris J that it was not basing the order on section 300 alone. It made the order because, having considered the evidence, it concluded that it was just and equitable that SIB be wound up. An important part of the evidence was that SIB was insolvent

> and could not be reorganised via the receivership. In my judgment at least one of the reasons why Harris J made the order that he did was that he was satisfied that SIB was insolvent.
>
> 95. I hold, therefore, that the liquidators were appointed pursuant to a law relating to insolvency and that they are entitled to be recognised as foreign representatives of a foreign proceeding."

57. The Court of Appeal affirmed the decision of Lewison J. Sir Andrew Morritt C (with whom Arden and Hughes LJJ agreed on this point) said:

> "15. In my view Lewison J was right to conclude that the Antiguan liquidation was a foreign proceeding as defined. Part 4 of the relevant Act provided for the winding up of corporations incorporated in Antigua for the purpose of carrying on an international trade or business on just and equitable grounds, which include insolvency, as well as infringements of regulatory requirements. The combination of that part of the Act and the order of the court made provision for the collection of all the assets of SIB and their application in satisfaction of all its obligations in the order of priority for which the law provided. That process was expressly subject to the supervision of the High Court of Antigua and Barbuda. Creditors and others were obliged to seek their remedy in the liquidation because individual proceedings were stayed or prohibited. The ultimate purpose of the process was the liquidation, in the sense of dissolution of SIB. Such a process satisfies all the conditions for the application of the definition because it is collective, judicial and pursuant to law relating to insolvency."

58. In *Re Betcorp Ltd*, 400 BR 266 (2009), an Australian company resolved to go into members' voluntary winding up, and a liquidator was appointed, pursuant to the Corporations Act, the relevant Australian statute law. There were no court proceedings as such. Nor was there any assertion or allegation that the company was insolvent. Indeed, the members averred solvency, so as to bring the company within the members' voluntary model of winding-up. The liquidator applied to the United States Bankruptcy Court for the winding up to be recognised as a "foreign main proceeding" within chapter 15 of the US Bankruptcy Code, enacting the Model Law.

59. Judge Bruce A Markell said:

> "5. For Betcorp's winding up to qualify as a foreign proceeding, the winding up must be authorised or conducted under a law related to insolvency or the adjustment of debts. Importantly, this element does not require the company to be either insolvent or to be contemplating using provisions of Australian law to adjust any debts. Two facts favor a finding that Betcorp's winding up satisfies this fifth criterion: (1) the unified structure of the external administration provisions of the Corporations Act; and (2) the Australian Parliament's own interpretation that Australia's company laws qualify under the Model Law.
>
> As explained above, the Corporations Act regulates the whole of the corporate life-cycle of an Australian corporation. In this regard several subparts of chapter 5 contain provisions that deal with corporate insolvency and allow for the adjustment of debts … These facts, combined with statutory ability to shift among various forms of dissolution given changing circumstances, demonstrate

> that winding up is achieved under a law relating to insolvency or the adjustment of debts.
>
> Additionally, the court finds persuasive the Australian legislature's interpretation of its Corporations Act, published in connection with Australia's adoption of the Model Law … Accordingly, based upon the Australian legislature's interpretation of the UNCITRAL Model Law and Australian domestic law, a company engaged in a voluntary winding up is being administered under a law relating to insolvency. This evidence supports the court's determination that Betcorp's winding up satisfies the 'law relating to insolvency' criterion of section 101 (23). Therefore, the court finds that this element of section 101 (23) is satisfied."

60. In *Re Chow Cho Poon (Private) Limited* [2011] NSWSC 300, 80 NSWLR 507, a Singaporean company was ordered to be wound up by the Singapore court on the just and equitable ground. The liquidator subsequently sought to realise assets of the company in New South Wales. The recognition of his appointment in Australia was sought, not under the Model Law, but under the provisions in the local bankruptcy legislation requiring the Australian courts to act in aid of other foreign courts. However, these provisions were "trumped" by the provisions of the Model Law, so that it was necessary for the court to consider whether the Model Law applied.

61. Barrett J considered the *Stanford International Bank* case and said:

> "47. The ground for winding up was thus confined to regulatory misbehaviour. Insolvency was, in the particular case, a factor relevant to the court's discretion to make a winding up order. As the English Court of Appeal observed, however, the law allowing winding up on the regulatory ground was a law comprehending several grounds, including insolvency, so that it was correct to characterise it as a law relating to insolvency."

62. The judge also considered the *Betcorp* case, and another American case called *Re ABC Learning Centres Ltd* 2010 WL 5439808 (Bkrtcy D Del), and then said:

> "51. These English and American decisions point to a clear basis on which the whole of the *Singapore Companies Act* or, at the least, the whole of its winding up provisions might be classified as "a law relating to insolvency", even though the particular winding up was ordered on the just and equitable ground alone and, so far as this court has been told, without any finding (express or implied) of insolvency."

63. From these authorities and guides to interpretation, it is clear that the requirement that the law under which the proceeding is brought be "an insolvency law" is satisfied if insolvency is one of the grounds on which the proceeding can be commenced, even if (as in *Re Betcorp*) insolvency could not actually be demonstrated, and there was another basis for commencing the proceeding. The matter is obviously all the clearer if insolvency can indeed be demonstrated.

64. The Extraordinary Administration Law of Croatia by article 4 provides that there shall be an extraordinary administration proceeding in relation to a company (and in relation to all affiliated and controlled companies) "if any of the reasons for bankruptcy exist in terms of article 5 of the Bankruptcy Act … or prebankruptcy

reasons from article 4 of the Bankruptcy Act in relation to the debtor as a controlling company," as long as the company, individually or together with the controlled or affiliated companies, is of systemic importance.

65. Article 5 of the Bankruptcy Law provides that:

> "(1) Bankruptcy proceedings may be opened if the court establishes the existence of the grounds for bankruptcy.
>
> (2) The bankruptcy grounds shall be insolvency and over indebtedness."

The concept of insolvency is further explained in article 6, and that of over-indebtedness in article 7.

66. Article 4 of the Bankruptcy Law provides in part that:

> "(1) Prebankruptcy proceedings may be opened if the court establishes the existence of impending insolvency. Impending insolvency shall be deemed to exist if the court is of the conviction that the debtor will not be able to meet its existing obligations as they become due."

Article 4(2) deems an impending insolvency to exist in certain cases of failure to make payment of some kinds of debts or taxes. These include cases where one or more of the debtor's bank accounts has been blocked by the Croatian Financial Agency in order to secure the payment of debts, and a debt has still not been paid.

67. Article 22(2) of the Extraordinary Administration Law provides that, where the petition for the opening of the proceeding is filed by the company itself, the company can demonstrate its inability to make payment of imminent liabilities if it submits an excerpt from its accounting records "proving the existence of creditors' claims due and outstanding". I will have to return to the significance of this provision later.

68. It is thus clear that the extraordinary administration proceeding in Croatia is begun on grounds *either* of insolvency *or* of impending insolvency, whether proved or deemed. Unlike the cases of just and equitable winding up, it is not possible to start an extraordinary administration proceeding on other grounds.

69. As a matter of fact, the unchallenged evidence of the applicant (in Ramljak 2) was that:

> "19. … As at April 2017 Agrokor and the wider group was in a state of serious financial distress. Indeed, the evidence that was considered by the Croatian court when the proceedings were commenced on 10 April 2017 clearly demonstrated that the requirements in article 4 of the Bankruptcy Law for the opening of prebankruptcy proceedings were satisfied in relation to Agrokor and the group more widely.
>
> […]
>
> 24. FINA [the Financial Agency] is a state governed financial mediation company which provides, amongst other services, a centralised platform for the enforcement of debts pursuant to the Funds Enforcement Law 2012 and which,

> under its statutory powers, is able to freeze the relevant debtor's bank accounts and perform a daily cash sweep from them in order to satisfy creditors' claims. Under article 4(2)(a) of the Bankruptcy Law, a debtor is deemed imminently insolvent if it has one or more unsettled Registered Claims. A spreadsheet prepared by the Treasury department of Agrokor shows that the total amount of Registered Claims in relation to 15 key group entities as at 7 April 2017 was in excess of HRK 3 billion … and that 15 bank accounts have been frozen by FINA. I understand from the Treasury department that these 15 core companies accounted for a very significant proportion of the group's revenue…"

70. It is agreed by the experts in the present case that, whatever the position for the company itself (Agrokor), there is no requirement in the Extraordinary Administration Law that any of the affiliated or controlled companies should be insolvent or facing insolvency before they can be brought into this proceeding. That view was supported by certain decisions of the Croatian courts. But recent decisions of the courts of Belgrade in Serbia and in Montenegro say that, because there is no insolvency criterion relating to the affiliated and controlled companies, the Law is *therefore* not a law relating to insolvency for the purposes of the Model Law. (I was told that both Serbia and Montenegro have enacted legislation incorporating the Model Law.)

71. Thus, the Belgrade court judgment of 28 August 2017 says this (at pages 12 to 13 of the English translation supplied):

> "Since the cited provisions of the Law on Extraordinary Administration in Companies of Systemic Importance for the Republic of Croatia stipulate that an extraordinary administration procedure is also conducted against the companies for the existence of a bankruptcy or a prebankruptcy condition as referred to in the Bankruptcy Law was not determined, therefore implying that the aforementioned Law does not represent a regulation governing insolvency within the meaning of article 174 (2) of the Bankruptcy Law. Namely, the Law stipulates that extraordinary administration procedures also apply to affiliate and subsidiary companies not meeting any of the insolvency conditions within the meaning of the existence of a bankruptcy condition as referred to in the Bankruptcy Law in a holding company that independently or in conjunction with its solvent affiliates or subsidiaries bears a systemic importance for the Republic of Croatia. Therefore, the aforementioned Law does not represent a regulation governing insolvency within the meaning of article 174 (2) of the Bankruptcy Law, but rather a regulation prescribing one and the same extraordinary administration procedure for solvent and insolvent companies alike, depending on whether the companies are of fundamental importance for the Republic of Croatia, which by no means represents a condition for a prebankruptcy procedure as referred to in the Bankruptcy Law of the Republic of Serbia and the Bankruptcy Law of the Republic of Croatia, despite the petitioner's claim from the request dated 26/7/2017 that the said procedure represented a foreign bankruptcy procedure."

72. The decision of the Commercial Court of Montenegro says this (at page 12 of the English translation provided):

> "Based on the above, it follows that the extraordinary administration proceeding is also carried out against companies in relation to which the existence of insolvency grounds from the Insolvency Act of the Republic of Croatia have not

> been established; therefore, the Extraordinary Administration in Companies with Systemic Importance for the Republic of Croatia Act is not a regulation that governs insolvency, and therefore the present extraordinary administration proceeding, whose recognition is sought, does not have the character of a foreign proceeding. Namely, the above Act provides for an extraordinary administration proceeding also against affiliates and subsidiaries that are not insolvent, and are without any insolvency grounds; consequently, the extraordinary administration proceeding can also include solvent companies if they are connected with the governing company, which ultimately does not make this Act a regulation that governs insolvency within the meaning of article 178 paragraph 2 of the Insolvency Act".

73. It is clear that the test applied in these decisions for a law relating to insolvency is whether under the law concerned there must *necessarily* be insolvency shown in relation to *all* the companies concerned. That is far from the test applied in the "common law" cases discussed above, where it was accepted that a law could be a law relating to insolvency if insolvency was one of the grounds on which a proceeding could be brought. Indeed, in the *Betcorp* case, the evidence was that the company subject to members' voluntary winding up was in fact solvent. But insolvency would have been a basis for such a winding up, as it was in *Re Stanford International Bank*. In my judgment I should not reject the wider approach of those common law cases in favour of the narrower one adopted by the courts of Belgrade and Montenegro. But I further say, contrary to the decisions in Belgrade and Montenegro, that the mere fact that a subsidiary or affiliate company or companies not subject to any threat of insolvency on its own may be joined in the same (foreign) proceeding as a holding or other group company subject to such a threat does not mean that the proceeding is not brought under the law relating to insolvency. It is in fact the insolvency, actual or threatened, of one company which triggers the proceeding, and the law under which the proceeding is brought is accordingly in principle a law relating to insolvency for this purpose.

74. But there is a further matter with which I must deal before I can conclude whether the Extraordinary Administration Law is a law relating to insolvency. This is that, pursuant to article 22 (2) of that Law, where the debtor company presents the petition to begin this proceeding, based on its own insolvency or impending insolvency, the state of actual or impending insolvency is proved by the use of a presumption. The company has only to submit an excerpt from its accounting records "proving the existence of creditors claims due and outstanding", and it will be deemed that the debtor company has proved its imminent inability to make payments of debts. The respondent's expert, Prof Uzelac, says that the presumption is irrebuttable, and therefore amounts to a rule of law. He says that the applicant's expert, Judge Erakovic, agrees. The respondent says that, since the threshold condition of actual or impending insolvency can be so easily demonstrated by the debtor company, merely by showing that a debt is outstanding even for a single day, and even if the company otherwise enjoyed an entirely solvent position, this is not a law relating to insolvency within the meaning of the Model Law.

75. I see the force of the submission. But applications for recognition of a foreign proceeding on the basis of an irrebuttable presumption of insolvency where the presumption gives a false impression, because the company concerned is obviously

not insolvent at all, can be dealt with as and when they arise. It may be, for example (though without deciding) that such applications would fail on some other ground, such as being manifestly contrary to public policy. The fact is that in the present case the respondent does not say that the company does not satisfy the insolvency criteria. On the unchallenged evidence before me (see [69] above), it plainly does.

76. I proceed on the basis that presumptions are used in many parts of the law, including the (UK) Insolvency Act, for example in section 123 (1) (a). Even if the presumption is irrebuttable, that in itself makes no difference. The legislature has made a policy decision to proceed on a certain basis when certain other facts are shown, and is unwilling to contemplate litigation over whether it is in fact true or not. The legislative policy is to choke off unnecessary disputes on a point of fact where the known circumstances otherwise point towards that fact. This is a common policy indeed, in England as elsewhere. But in any event the presumption applies in the Croatian law only where the petition is presented by the debtor company itself. It does not apply if the petition is presented by anyone else. And, at the end of the day, the basis of which the law intervenes *is* that of insolvency, even if the insolvency can be proved more easily than might be the case in another country. I do not lose sight of the fact that I am construing legislation which will (to a greater or lesser extent) apply in other legal systems and therefore expressions used must mean the same so far as possible in all such systems. Matters of evidence and proof should as a general rule be left to the individual systems to decide upon, subject of course to questions of public policy.

77. Accordingly, for these reasons, I conclude that the Croatian Extraordinary Administration Law is a law relating to insolvency for the purposes of the CBIR.

Subject to the control or supervision of the court

78. In order to qualify as a foreign proceeding under the CBIR, that proceeding must be such that "the assets and affairs of the debtor are subject to control or supervision by a foreign court". The applicant says that the Croatian proceeding satisfies this requirement, whereas the respondent says it does not.

79. In the Guide to Enactment, there is the following discussion of this criterion:

> "The Model Law specifies neither the level of control or supervision required to satisfy this aspect of the definition nor the time at which that control or supervision should arise. Although it is intended that the control or supervision required under subparagraph (a) should be formal in nature, it may be potential rather than actual. As noted in paragraph 71, a proceeding in which the debtor retains some measure of control over its assets, albeit under court supervision, such as a debtor in possession would satisfy this requirement. Control or supervision may be exercised not only directly by the court and also by an insolvency representative where, for example, the insolvency representative is subject to control or supervision by the court. Mere supervision of an insolvency representative by a licensing authority would not be sufficient."

From this it is clear that the control or supervision required can not only be potential rather than actual, but can also be indirect rather than direct.

80. In the American case of *Re Ashapura Minechem Ltd*, 480 BR 129 (2012), a foreign representative of an Indian company successfully petitioned for recognition of insolvency proceedings started voluntarily by the company in India as a foreign main proceeding, and the Bankruptcy Court granted a stay against an order enforcing a creditor's arbitration award against the company. The creditor appealed, but the appeal failed. One of the points dealt with by the court was whether the company's assets and affairs were subject to the control or supervision of a foreign court.

81. The US District Court hearing the appeal said (at p 138)

> "Supervision or control of the company's affairs is not a demanding standard. The foreign court need not control the day to day operations of the debtor. It is sufficient, for instance, that the body monitor compliance with the repayment plan negotiated between the debtor and creditors. One court has held that the mere fact that a commission was granted authority from a Spanish court to recover a set off from an arbitration proceeding for distribution to creditors 'plainly demonstrate[d] that the [court] maintains control of [both the debtor's] assets and affairs'. By contrast, the fact that actions in a foreign court related to the proceeding are typically initiated by interested parties and that liquidators proceed with most of their duties without court involvement was found 'not [to] undermine the … court's supervisory role."

82. Having considered the facts in the case, the court concluded (at p 144)

> "Given the low legal standard for supervision over a debtor's affairs, I conclude that Ashapura did meet its burden of proving that the BIFR had supervision or control over Ashapura's affairs and assets."

83. In the present case Judge Erakovic says that the procedure is under the control of the Croatian court. The respondent's expert, Prof Uzelac, accepted (day 2/114/21 – 24) that the assets and affairs of the debtor were effectively in the control of the extraordinary administrator, and also that the court has certain powers over the extraordinary administrator. They include powers to impose liability on the extraordinary administrator for breach of duty under articles 92 and 93 of the Bankruptcy Law (under article 11 (2) of the Extraordinary Administration Law), and (at least) to check the extraordinary administrator's compliance with the law, under article 14 of the Law.

84. Judge Erakovic gave evidence that under article 76 (3) of the Bankruptcy Law, as applied by article 12 (2) of the Extraordinary Administration Law the court had power to give directions to the extraordinary administrator, and this was not challenged in cross examination. Prof Uzelac takes a different view. However, to my mind it makes sense in the structure of the Extraordinary Administration Law to take over from the Bankruptcy Law the power of the court to give directions to the representative of the debtor company. It seems to me that, where article 92 of the Bankruptcy Law contemplates liability for failure to comply with the court's directions, article 11 (2) of the Extraordinary Administration Law carries over that liability, thus reinforcing the idea that the power to give directions applies just as much to the Extraordinary Administration Law as to the Bankruptcy Law.

85. It is also clear that the court has various powers in relation to the settlement agreement which may ultimately be made between the creditors and the debtor. These also contribute to the degree of control and supervision which the court exercises in relation to the proceeding. First of all, the court is to confirm the settlement agreement accepted by the creditors, under article 43 (15), except that it must withhold confirmation in circumstances stated in article 43 (16). This is similar to the position under the Bankruptcy Law, article 336.

86. However, there is a difference between each of these two provisions. In article 336, paragraph 2 reads:

> "if the bankruptcy plan was adopted in an illicit way, especially by placing certain creditors in a more favourable position."

On the other hand, in article 43 (16), paragraph 2 reads:

> "if the acceptance of the settlement agreement has been obtained in an inadmissible way."

87. Having looked at the original Croatian texts of these two provisions, it seems to me that, in the original, the words used in the first part of paragraph 2 in article 336 are identical with those in paragraph 2 of article 43(16), with the exception of the words "stecajnoga plana" in article 336 and "nagodbe" in article 43(16). These may stand for "bankruptcy plan" and "settlement agreement" respectively. I do not know. But whether one looks at the Croatian or the English, it seems to me that, in substance at least, the first half of paragraph 2 of article 336 and paragraph 2 of article 43(16) are saying the same thing. The question is whether it makes a difference that, in article 336, paragraph 2 ends with the words "especially by placing certain creditors in a more favourable position". The applicant says it does not, because this is simply an example of the "illicit way" referred to in the first half of the paragraph. So its omission does not change the sense. Whatever it included before, it continues to include. But the respondent says that the omission is significant, because it means expressly to remove the principle of pari passu as necessary for a valid settlement agreement.

88. In my judgment, the applicant is right as a matter of logic. But he is also right because it seems to me implausible that, if the legislator had wished to remove the principle of minimum protection he would have done it in such an ambiguous way. It is too important a principle to be removed by equivocal language. The natural meaning of paragraph 2 of article 43 (16) is to include everything that is done in an "inadmissible way". Violation of the principle of minimum protection is clearly within the scope of that phrase, especially considering the explanation given in article 336, paragraph 2.

89. As to the principle of equal (that is, rateable) treatment of creditors, Judge Erakovic confirmed that in his opinion it applied to the settlement agreement. Prof Uzelac would only go so far as to say that this was possible, but not probable (day 2/139/4 – 7). Again, I regard this is too important to have been dislodged by a side wind. The concept of the settlement agreement is taken over from the idea of the bankruptcy plan in the bankruptcy legislation, and the principle is deeply embedded there. I am comforted in the conclusions to which I have come, in relation to these two principles, by the knowledge that the applicant himself has said (in his second affidavit, at [60])

that he will apply the principles of equal treatment and minimum protection in any event.

90. The respondent complains that the government controls too much in the extraordinary administration proceeding. It is the government's decision to make or consent to the choice of the extraordinary administrator (article 24 (2)), his deputies (article 12 (6)), his advisory committee (articles 16(1), 20(3)) and his advisers (article 12(11)). The court is unable to remove the extraordinary administrator or to end the extraordinary administration proceeding without the consent of the government. Many of these powers are given under the bankruptcy legislation to the creditors' committee.

91. The fact that the structure of the Extraordinary Administration Law gives significant powers to the government of Croatia is both hardly surprising, and nothing to the point. It is hardly surprising, because this law is concerned with companies of strategic importance to the economy of Croatia that get into financial difficulty, and the government has a role to play in such cases. It is after all the government's job – or one of them – to look after the economy of a country. The ordinary rules of insolvency as between creditor and debtor, although a useful starting point, may well not be enough. The applicant cited the Banking Act 2009 as an example of a similar phenomenon in English law. There the Bank of England (as regulator) has considerable powers in the winding up of a bank.

92. It is nothing to the point because the test which I am to apply is whether the proceeding is subject to the control or supervision of the court, and not whether the government has any particular power in relation to it. If I conclude (taking account of the roles and powers of the various actors) that overall the proceeding *is* subject to the control and supervision of the court, it is irrelevant that the government also has powers in relation to it.

93. In my judgment, given the powers and provisions set out above, it is quite clear that, once the proceeding has been commenced, and for so long as it lasts, it is under the control or supervision of the court, through the medium of the extraordinary administrator. Accordingly, this limb of the definition is also satisfied.

Collective proceeding

94. The Model Law and the CBIR require that the proceeding in order to be recognised should be a "collective proceeding". The Guide to Enactment puts the matter this way:

> "69. 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…
>
> 70. In evaluating whether a given proceeding is collective for the purpose of the Model Law, a key consideration is whether substantially all of the assets and

> liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors. A proceeding should not be considered to fail the test of collectivity purely because a class of creditors' rights is unaffected by it…"

95. In the *Stanford International Bank* case, at first instance, Lewison J said this ([2009] EWHC 1441 (Ch), [39]:

> "I was not referred to any English authority on the nature of collective proceedings, but I was shown the decision of Judge Markell in the U.S. Bankruptcy Court for Nevada in *Re Betcorp Ltd* 400 BR 266. He said (page 281):
>
> > 'A collective proceeding is one that considers the rights and obligations of all creditors. This is in contrast to a receivership remedy instigated at the request and for the benefit of a single secured creditor'."

In the Court of Appeal, the decision of Lewison J was affirmed on this point by Sir Andrew Morritt C, with whom Arden and Hughes LJJ agreed.

96. Judge Erakovic gave evidence that the extraordinary administration under the Croatian law related to all the assets and liabilities of the company, and Prof Uzelac accepted this. The basic structure is that the creditors prove their claims against the company, its controlled and affiliate companies, and vote on the proposed settlement agreement, participating through the creditors committee. That committee has various powers and duties under the Extraordinary Administration Law.

97. The respondent objects that in this context "collective" must mean relating to the debtor and its own creditors, and not the debtor and creditors of others. Since the claims made will not just be against the company itself but also against other companies in the group, this is not about the relationship of the debtor and its own creditors, but instead about the debtor, its creditors, the other group companies and the creditors of those other companies.

98. Here the proceeding encompasses all the assets and liabilities of all the companies within the proceeding. The creditors may be claimants against an affiliated company. Under the Extraordinary Administration Law a creditor of one company can object to a claim against another company in the same proceeding. The extraordinary administrator will make a proposal for a single settlement agreement between the companies in the proceeding and all their creditors. But the respondent says that the fundamental nature of a collective proceeding is that you have regard to the separate legal personality of your debtor when sharing with others who have claims against the debtors. Essentially, the respondent says that in the present case the creditors of the debtor do not share the assets of the debtor only with the other creditors of the same debtor, but are obliged to share them with the creditors of other debtors as well. (Of course, this works both ways, because creditors will be able to share in the assets of other debtors as well).

99. It seems to me that the objection here is not that this proceeding is not collective enough; rather it is that it is *too* collective. The objection is that a proceeding to deal with the whole group at once cannot be fitted into the Model Law because, even taking just a single debtor focus, it allows persons who are creditors of another entity

to claim a share in the assets of the debtor. I have already dealt with the objection that a group proceeding cannot be given recognition at all, even as respects a single debtor. My answer to the respondent on the question whether this is a *collective* proceeding is that there may perhaps be other objections under the text of the Model Law to the recognition of group wide proceedings, but it cannot be said that this is not a "collective" proceeding.

For the purposes of reorganisation or liquidation

100. The Legislative Guide, Part One, Ch II (at [23]) says:

> "As a procedure designed to save a debtor or, failing that, a business, reorganisation may take one of several forms and may be more varied as to its concept, acceptance and application around the world than liquidation. For the sake of simplicity, the term 'reorganisation' is used in the guide in a broad sense to refer to the type of proceedings whose ultimate purpose is to allow the debtor to overcome its financial difficulties and resume or continue normal commercial operations (even though in some cases it may include reduction in the scope of the business, its sale as a going concern to another company or its eventual liquidation)."

So it is clear that the purpose of the proceeding must be to allow the debtor to overcome its difficulties and resume its commercial purpose.

101. The proposal for the Croatian Extraordinary Administration Law sets out in some detail why the Law was proposed and what it was meant to do. On page 3 of the English translation, reference is made to the Bankruptcy Law and the Financial Operations and Prebankruptcy Settlement Law, enabling bankruptcy and pre-bankruptcy proceedings, and payment operations and financial supervision of companies. But it says that these would be insufficient in the event of serious financial difficulties in companies and groups of companies of systemic importance for Croatia, where the uncontrolled collapse of such companies might seriously jeopardise the whole economic system. The new law was proposed to protect the sustainability of such companies "during business, financial and ownership restructuring, all this to prevent adverse consequences on the overall economic, social and financially stability of the Republic of Croatia…" (page 4).

102. The evidence of the experts was that the purposes of the law would also be set out at the beginning of the legislative text. In the present case, the Extraordinary Administration Law of Croatia in article 1 states as follows:

> "(1) This Law is passed for the purpose of protection of sustainability of operations of the companies of systemic importance for the Republic of Croatia which with its operations individually or together with its controlled or affiliated companies affect the entire economic, social and financial stability of the Republic of Croatia.
>
> (2) The level of protection achieved by this Law is necessary, appropriate and proportionate to the interest of the Republic of Croatia to conduct a fast and effective preventive restructuring procedure of companies of systemic importance

for the Republic of Croatia to secure liquidity, sustainability and stability of business operations."

103. The article is in two parts. The first deals with protecting the sustainability of the operations of companies of systemic importance. The second deals with the protection necessary to conduct an effective restructuring of such companies. In my judgment, these two purposes are not incompatible. On the contrary, the former may be achieved through the latter, in that restructuring companies in serious financial difficulty may enable them to continue commercial operations. Where companies can continue commercial operations they can continue to employ their workers and can continue to deal with their suppliers, so supporting micro businesses lower down the chain. Judge Erakovic said in his report (at [2.2]) that the objective was to enable business operations to be continued after the settlement agreement. Prof Uzelac said in his report (at [32]) that "the sole objective of the Lex Agrokor [as he termed it throughout] is therefore the protection of the going concern status of 'systemically important companies'." In cross examination (day 2/66/16 – 21), he accepted that the objectives of protecting the going concern status of companies and of reorganising their affairs were not mutually exclusive, though he considered that they could come into conflict. He did not accept that they were complementary, because for him insolvency situations were usually a "zero-sum game". There would have to be sacrifices, and the law indicated that it would protect the debtor against the creditors. At the same time, he also accepted (day 2/75/14 – 19) that where an insolvency regime put social interests in priority to creditors' rights, that would not itself mean that the proceeding was not an insolvency proceeding.

104. The respondent moreover says that an extraordinary administration proceeding could come to an end, having achieved its purpose under article 1, without a settlement agreement being concluded, and without going into bankruptcy. It argued that there might be cases where the effect of the moratorium on legal action alone, or taking on new money, or paying some debts and not others, would enable the company to get back on its feet, without any restructuring at all. So the Law was not for the purpose of reorganisation or liquidation.

105. In my judgment, the purpose of this law is clearly to protect the stability of the economic system against systemic shocks by enabling the restructuring of companies of systemic importance that get into financial difficulty. Restructuring obviously implies protection for the debtor whilst the restructuring goes ahead. It also implies reduced payments to creditors, or payments over a longer term, just as might occur in a bankruptcy. Prof Uzelac said (at [205]) that the settlement agreement was the end result of the proceeding, although he accepted in cross examination that it was also the means of achieving the restructuring of a systemically important company (see day 2/69/18 – 24). In my judgment, it is clear that this law is intended to facilitate the restructuring of certain companies in systemically important situations.

106. It is also clear that, if restructuring is not possible for any reason, then under article 45 the proceeding can be transformed into a bankruptcy proceeding, if the relevant conditions are then met. This would obviously give priority to liquidating assets and paying creditors. The fact that it would be theoretically possible to embark on a proceeding under this Law and the protection of a company's business as a going concern be achieved without either a restructuring or a bankruptcy does not mean that the sole purpose of the Law is to protect systemically important Croatian companies

at the expense of their creditors. In my judgment, it can nonetheless be described as a law for the purposes of reorganisation or liquidation within the meaning of the CBIR.

107. The respondent also argued that the Law does not respect the principle of minimum protection for creditors, *ie* they cannot be worse off than in a bankruptcy. Judge Erakovic said that the Law did respect that principle, imported from the Bankruptcy Law, article 337, into the Law by virtue of article 43(21) : day 2/10/16 – 20. Prof Uzelac denied that (Report, [217]).

108. In my judgment, Judge Erakovic is right. I have already held that article 43 (16) includes the principle of minimum protection for creditors (as made express in article 336 (2) of the Bankruptcy Law. This applies where the court is considering the confirmation of a settlement agreement ex officio. It would make no sense not to bring in the same principle where a creditor wishes to raise the same point for itself before the court. In the Bankruptcy Law it is dealt with by article 337. Unlike article 336, this is not made express in the Extraordinary Administration Law, but it is part of the relationship between creditors and debtor, so in my judgment it is brought in by article 43 (21), as Judge Erakovic says.

Manifestly contrary to English public policy

109. The question whether the recognition of the Croatian proceeding would be manifestly contrary to English public policy only arises if the respondent fails on the other arguments set out above. Such public policy clauses are common in international conventions (see for example the Hague Conventions on private international law). The form including the word "manifestly" before "contrary" or "incompatible" is well known. The inclusion of the word "manifestly" must mean something more than mere contrariness or incompatibility. So it should be harder to demonstrate that something is *manifestly* contrary to public policy than that it is simply contrary to it. What is not clear is how much harder. One view is that "manifestly" means "more serious", rather like "gross" in the phrase "gross negligence". Another view is that "manifestly" does not add any further depth to the requirement. It is still the standard of being "contrary to public policy" after all. But it does add the need for *clarity*. Where there is any doubt or any confusion as to whether it is contrary to or incompatible with public policy, there cannot be anything "manifestly" contrary to public policy.

110. I have already referred to the attitude of the British Government in enacting the Model Law, expressed in the Explanatory Memorandum of the Insolvency Service. It seeks to "to ensure consistency, certainty and harmonisation with other countries enacting the Model Law" (para 7.18). Consistently with that approach, it is clear from the Guide to Enactment and also from the US decision of *Ashapura* that the exception for manifest contrariness to public policy is to be narrowly construed. See the Guide at 29 – 30, 101 – 104 and the US decision in *Ashapura* at 139.

111. In *Re Bud-Bank Leasing SP* [2010] BCC 255, Mr Registrar Baister said:

> "27. … The fact that foreign proceedings may differ from those of this country, as they invariably do, even in relation to creditors' rights in respect of priorities, would not of itself be a reason to refuse relief (see, for example, the recent decision of the House of Lords in *McGrath v Riddell* [2008] UKHL 21)."

McGrath v Riddell is better known as *Re HIH Casualty & General Insurance Ltd*, and reported at [2008] 1 WLR 852. I deal with it further below.

112. In *Nordic Trustee ASA v OGX Petroleo e Gas SA* [2016] EWHC 25 (Ch), Snowden J said:

> "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'."

113. The backdrop against which these questions must be considered is the decision of the Court of Appeal in *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399. This represents a kind of private international law bedrock for the recognition of the effects of foreign insolvency proceedings. An English firm of merchants carrying on business in London brought an action against a French company carrying on business in Paris for non-acceptance of quantities of copper which the defendant had purchased. The contract of sale and purchase had been brokered on the London Metal Exchange, and performance on both sides was to be made in England. Between entering into the contract and the commencement of the action the defendant had gone into a form of liquidation in France, pursuant to a court order. The defendant had failed to accept part of the copper sold before that court order, but the time for delivery of the remainder fell afterwards, and the defendant had given notice that they would not accept it (and it was not tendered). The French liquidator gave notice to the plaintiffs that if they did not prove any claim they had against the defendant it would be barred and they would not share in any distribution of the company's assets. A claim was accordingly made to prove in the liquidation. The liquidator rejected that part of the claim in respect of the copper which had not been delivered, in accordance with French law. The evidence of French law filed in the present action was to the effect that no action was now maintainable against the defendant, and that no claim could be made in the liquidation in respect of copper not delivered. As to that, the contract was cancelled and no claim for damages for non-acceptance was possible.

114. Both at first instance and on appeal the plaintiffs were successful. In the Court of Appeal, Lindley LJ said (at pp 409-10):

> "The first thing to be borne in mind is that the contracts sued upon are English contracts, made and to be performed in England. The defence set up is in substance, that the defendants are a French company which is being wound up in France. Where such is the case, there is no remedy by the French law against the defendants except in the winding up proceedings. The question is whether that is a defence to an action brought here. The defendants must be considered as domiciled in France, and I will assume for a moment, though I think it doubtful, that liquidation proceedings are equivalent to bankruptcy. It is contended for the defendants that by reason of the bankruptcy law in France, in which country the defendants are domiciled, the action cannot proceed. Even if the defendants had obtained what was equivalent to a discharge in bankruptcy according to French law, I think that the proposition so contended for is wrong. There is really no authority for it."

115. Lopes LJ said shortly (at p 411):

> "Assuming that there were what is equivalent to a discharge in bankruptcy in France, of which I am very doubtful, I am of opinion that such discharge cannot operate as a discharge in respect of a contract made in England, though the defendants be domiciled in France… Consequently, there is no answer to this action."

Lord Esher MR gave judgment to similar effect, though at greater length. The consequence is that it is necessary to find something in *English* law to take away creditors' rights. In modern times, provisions in the Companies Act and in the Insolvency Act may have this effect, but it is always a matter of construction whether in fact they do so.

116. In the evidence of Mr Bell for the respondent, he makes three complaints about the extraordinary administration proceeding, which he says justify the court refusing recognition on the grounds of public policy. These are:

1. There is no right to a practical and effective access to a legal remedy, because an opposing creditor cannot appeal or otherwise seek a judicial review of the opening of the proceeding, which entails important effects including a stay on existing and new civil proceedings (see at [41]).

2. There is no protection of creditors' rights, because the settlement can be imposed on all creditors and the Croatian court has no power to review the proposed settlement (see at [42]).

3. The extraordinary administration applies to subsidiaries as well as the parent company so that there is substantive consolidation of their estates, and the assets of all companies are used to satisfy the creditors of all legal entities (see at [43]).

117. By the time this matter was argued before me, the claim under this part of the case had been refined in the skeleton argument on behalf of the respondent to a *twofold* claim:

> "164. The English legal public policy infringed in the present case is:
>
> (1) the requirement for an insolvency proceeding to accord creditors pari passu treatment within an insolvency proceeding; and
>
> (2) the requirement that creditors should have a right to object to the compromise of their rights in an insolvency proceeding."

118. As to the first point, the applicant accepts that in relation to the settlement agreement itself, the pari passu principle is not necessarily respected by the Extraordinary Administration Law. But the applicant says the pari passu principle is not critical, and relies upon the decision in *Re Bank of Credit and Commerce International SA (No 3).* [1993] BCLC 1490, CA. In that case, which was one before the enactment of the CBIR, the liquidators of the company sought the sanction of the court for two proposals. One was a "pooling agreement", whereby the company's assets and those of another company would be pooled. The other was a "contribution agreement" whereby (1) the majority shareholders of the company, a foreign government, would contribute a significant sum to the funds available to creditors, (2) there would be a mutual release of claims between the company and other companies in its group on the one hand and the foreign government and related persons on the other, and (3) that foreign government and related persons would be admitted as creditors in the liquidation, to the extent that between 20 and 25% of the foreign government's contribution would actually be returned to it or its related parties in due course.

119. At first instance, the proposals were approved by the judge. The creditors appealed on the footing that the judge lacked jurisdiction to make the order, in part on the basis that the contribution agreement infringed the pari passu principle. The appeal was dismissed. The court held that, where it was proposed to depart from the principle of pari passu distribution, the preferred solution would be to carry out the arrangement as a scheme of arrangement, under section 425 of the Companies Act 1985. However, in this case it was not feasible to call a meeting of the creditors as required by that section. In the circumstances the liquidators were entitled to exercise their compromise powers under the Insolvency Act 1986, schedule 4, paragraphs 2 and 3, and it was permissible to depart from the pari passu principle of distribution where this was ancillary to the exercise of such powers.

120. Dillon LJ (with whom Russell and Farquharson LJJ agreed) said:

> "As I see it, in a liquidation … there can be a departure from the pari passu rule if it is merely ancillary to exercise of any of the powers which are exercisable with the sanction of the court under Part I of schedule 4 to the Insolvency Act 1986.
>
> There are some things that cannot be done without a scheme of arrangement and in the normal run that would include a very large number of proposals, and indeed almost all, if not all, proposals for rearrangements of rights as between creditors of different companies or different classes of creditors. But the compromise powers within their scope are an alternative way of doing things, and I do not believe that the *British Eagle* decision [*British Eagle International Airlines Ltd v Air France* [1975] 1 WLR 758] precludes that being exercised in a way which may, in an ancillary fashion, involve the departure from the strict pari passu rule. If any compromise is dissected, it may involve elements of give and take as to who is to have what, which may make it quite impossible to fit the compromise in with the strict pari passu rule. Here the condition is that these two aspects I have mentioned are part of the scheme of the Contribution Agreement, but not negotiable."

121. On the other hand, there are the decisions in *Re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213 and *Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852, HL. In the former case, there were liquidations of the company simultaneously both in Luxembourg and in England. The English liquidators wished to release funds at their disposal to the Luxembourg liquidators for distribution among creditors worldwide pari passu. But the money once transferred to Luxembourg would be distributed according to Luxembourg insolvency law, which did not allow set-off for a debtor who was simultaneously owed money by the insolvent (unlike English law). Sir Richard Scott V-C held that, although in this case the English winding up was ancillary to the winding up of the company in the place of incorporation, that did not relieve the English court of the obligation to apply English law to the resolution of any issue arising in the winding up in the English court. There was no jurisdiction to disapply the set-off rules, but even if there were it would not be appropriate to do so. The English liquidators were therefore obliged to retain sufficient funds to make provision for the dividend that would be received in the English liquidation by net creditors entitled to take advantage of the English insolvency rules of set-off.

122. In the latter case, four Australian insurance companies carried on authorised insurance business in the UK. They became insolvent and the Supreme Court of New South Wales made winding up orders and appointed liquidators in Australia. Provisional liquidators were appointed in England by the High Court. The Australian court issued a letter of request to the High Court under section 426 of the Insolvency Act 1986, asking that the provisional liquidators be directed to remit the assets collected by them to the Australian liquidators for distribution. Although the basic principle of the Australian insolvency system was distribution pari passu, preference was given by Australian law in this case to insurance creditors of the companies to the prejudice of other creditors. The judge refused to give the direction, and the Court of Appeal dismissed an appeal. The Australian liquidators appealed to the House of Lords.

123. The House of Lords allowed the appeal, on the basis that under section 426 of the Insolvency Act 1986 English courts were required to assist the Australian courts in relation to insolvency and had a discretion to order the remission of assets situated in England to Australia. Their Lordships were divided on whether, at common law, the English court would be able to, or should, direct a remission of assets abroad which would result in a distribution which was inconsistent with the pari passu principle, but were unanimous in holding that section 426 conferred jurisdiction to do so, and that the jurisdiction should be exercised in the present case.

124. Lord Hoffmann said of the position at common law:

> "21. It would in my opinion make no sense to confine the power to direct remittal to cases in which the foreign law of distribution coincided with English law. In such cases remittal would serve no purpose, except some occasional administrative convenience. And in practice such a condition would never be satisfied. Almost all countries have their own lists of preferential creditors. These lists reflect legislative decisions for the protection of local interests, which is why the usual English practice is, when remittal to a foreign liquidator is ordered, to make provision for the retention of funds to pay English preferential creditors. But the existence of foreign preferential creditors who would have no preference in an English distribution has never inhibited the courts from ordering remittal. I think that the judge was inclined to regard these differences as de minimis variations which did not prevent the foreign rules from being in substantial compliance with the pari passu principle. But they are nevertheless foreign rules. The fact that the differences were minor might be relevant to the question of whether a court should exercise its discretion to order remittal. But any differences in the English and foreign systems of distribution must destroy the argument that an English court has absolutely no jurisdiction to order remittal because it cannot give effect to anything other than the English statutory scheme."

125. On the other side, Lord Scott said:

> "If an ancillary liquidation is being conducted in England under an insolvency scheme that does not include section 426, *eg* where the country of the principal liquidation is not a United Kingdom country and has not been designated a 'relevant country or territory'; the position seems to me quite different. The English courts have a statutory obligation in an English winding up to apply the English statutory scheme and have, in my opinion, in respectful disagreement

> with my noble and learned friend Lord Hoffmann, no inherent jurisdiction to deprive creditors proving in an English liquidation of their statutory rights under that scheme. I expressed that opinion in *In re Bank of Credit and Commerce International (No 10)* [1997] Ch 213 and remain of that opinion. Luxembourg was not a 'relevant country or territory'. Australia, however, is and, accordingly, section 426 is part of the statutory scheme applicable under the 1986 Act to these four Australian companies. I do not think it would be proper for the courts of this country, in reliance on an inherent jurisdiction, in effect to extend the benefits of section 426 to a country that had not been designated a 'relevant country or territory' by the Secretary of State, and thereby to deprive some class of creditors of statutory rights to which they would be entitled under the English statutory insolvency scheme. There is no case law that supports the proposition that the inherent jurisdiction can be used so as to bring about such deprivation."

126. The applicant accepts that in *BCCI (No 10)* the court declined to allow proceeds to be remitted abroad to foreign insolvency proceedings, where the pari passu principle was not respected, and may or may not have done so in HIH, except for the existence of section 426 (which has no application in the present case). These cases were about whether the English court would take the positive step of sending the funds out of the jurisdiction, where they would not be applied rateably. (I note in passing that *BCCI (No 10)* was not a case about public policy at all, but one about jurisdiction.) The applicant submits that this is different from the question whether the court should recognise a foreign proceeding.

127. In any event, the applicant also submits that the principle of pari passu will come in only later, when the approval of any settlement agreement is in issue. So recognition of the settlement agreement is not the real question here. That is something for the future. Such recognition will depend at that stage on other considerations, for example the submission by the creditors to the jurisdiction of the foreign proceeding. Lastly, although there is no right in the Extraordinary Administration Law for the creditors to object to the settlement agreement, there is nevertheless a right of appeal under section 339 of the Bankruptcy Law, as applied to the Extraordinary Administration Law, as Prof Uzelac accepted in cross-examination (Day 2/138/4-8).

128. The respondent also argues, at [165] of the skeleton argument, that

> "It was necessary [in the *HIH* case] that the creditors of English law debts should receive at least the same fundamental rights as they would do under English insolvency law."

The problem is that that case (*HIH*) was about set-off, so it concerned their debts towards and their rights against the company the subject of the insolvency proceeding. These are the fundamental "building bricks" of the insolvency. The question there was not (as the complaint is here) about what you do with them once you have ascertained what they are. The policy of the forum of the main proceeding may be to give priority to some creditors over others, as indeed it did in *HIH*. That is not in itself a violation of public policy.

129. The respondent also complains (skeleton, [167]) that the reconstruction provided for by the Extraordinary Administration Law involves the "arbitrary and unjustified deprivation of rights to property" and is therefore "not lawful". But it is apparent that

the phrase "not lawful" really means "in contravention of article 1 of the First Protocol to the European Convention on Human Rights". The respondent accepts that a scheme of arrangement under English law does not breach this requirement because of the requirement of "give and take", and the fact that the court will consider the overall fairness of the scheme before approving it.

130. In fact the authority cited (*Bramelid v Sweden* (1982) 29 DR 64) was not concerned with insolvency at all, let alone company restructuring. It held that a complaint that legislation allowed a 90% shareholder compulsorily to acquire the remainder of the shares at a price to be determined by arbitration was inadmissible. It does not appear to stand for the proposition stated in the skeleton argument. But in any event it cannot be said that a settlement agreement approved by the committee of creditors on the proposition of the extraordinary administrator must necessarily be either arbitrary or unjust. At the very least, it must depend on the circumstances.

131. Drawing the threads together, in my judgment there is no violation of English public policy, let alone a manifest violation, in merely recognising the extraordinary administration proceeding in Croatia as a foreign main proceeding within the CBIR. The fact that the priorities of the Croatian law in reorganising or liquidating the company are different from those which apply or would apply under English law, is simply not enough. *HIH* shows that there is no requirement that the result of a court order consigning assets to a foreign proceeding be no less favourable under the foreign law than under the English law. The fact that it may be possible in some circumstances for the pari passu principle not to be complied with in entering into a settlement agreement as the outcome of the extraordinary administration, when no such settlement agreement has yet been proposed, let alone approved, and indeed may never be, is not enough either. The principle of pari passu can be overridden in appropriate cases even under English law: see *BCCI (No 3)*. Again, I note the statement of the applicant, to the effect that he intends that the principle should apply (Ramljak 2, [60]). There is in any event therefore no evidence before the court that it will not.

Conclusion

132. Accordingly, in my judgment the evidence adduced and submissions made on this application satisfy me that the criteria for recognising the extraordinary administration proceeding in Croatia as a foreign main proceeding within the CBIR have been met in the present case, and therefore I will grant recognition as sought in the application.

133. I am very conscious that this is not a field into which I regularly venture. I therefore cannot part with the case without complimenting the advocates (and their juniors, who laboured mightily in many ways, both written and unwritten) for their unfailingly helpful submissions and interventions. I also record my gratitude for the solicitors for their meticulous preparation of the evidence (factual and expert) and other materials supplied, and their excellent presentation.