OUTER HOUSE, COURT OF SESSION

[2021] CSOH 94

P439/21

OPINION OF LORD ERICHT

In the petition

CHANG CHIN FEN

for recognition of a foreign proceeding
under the Cross-Border Insolvency Regulations 2006
in relation to PROSAFE SE

Petitioner

against

COSCO SHIPPING (QIDONG) OFFSHORE LTD

Respondent

Petitioner: Delibegovic-Broome QC; Brodies LLP
Respondent: Keen QC; Morton Fraser LLP

24 September 2021

Introduction

[1] This is one of two related petitions seeking recognition of a Moratorium in Singapore under the Cross-Border Insolvency Regulations 2006 (the "Regulations"). This petition seeks recognition in relation to Prosafe SE ("Prosafe") as a foreign non-main proceeding. The other petition ([2021] CSOH 95) seeks recognition in relation to Prosafe Rigs Pte Ltd ("PRPL") as a foreign main proceeding. This opinion covers both petitions.

[2] Both petitions are opposed by Cosco (Qidong) Offshore Co Ltd ("Cosco"). Cosco is a creditor of both Prosafe and PRPL. The main ground of its opposition is that the liabilities of Prosafe and PRPL to Cosco being governed by English law, the liabilities stand outside the collective insolvency process of which the Moratorium is an integral part.

[3] Prosafe and PRPL are members of the same group of companies. Prosafe is incorporated under the laws of Norway and has its centre of main interest in Norway. PRPL is incorporated under the laws of Singapore. PRPL is a subsidiary of Prosafe. The Petitioner in both petitions is Director of Finance for Prosafe and its group. By orders dated 27 May 2021 and set out below, the High Court of Singapore designated the Petitioner as the Foreign Representative of PRPL and Prosafe in terms of the UNICTRAL Model Law on Cross-border Insolvency and authorised the Petitioner to apply for a suitable order to effectuate the terms of the application to the Singapore court for moratoria, and such other additional relief and/or assistance in any Model Law jurisdiction as appropriate.

The Seller's Credit

[4] The Prosafe group of companies owns and operates semi-submersible accommodation, safety and support vessels known as "rigs" which are used as adjuncts to offshore oil and gas installations.

[5] In 2013 PRPL entered into a shipbuilding contract with Cosco for the building by Cosco of a semi-submersible accommodation rig named "Safe Notos." Part of the consideration for the construction of the rig was deferred. The contractual documentation in respect of the deferred consideration has gone through a number of amendments and for present purposes is to be found in a Promissory Note by PRPL in favour of Cosco dated 15 August 2016 (the "Seller's Credit"). The Seller's Credit provides that it is to be governed

by and construed in accordance with the law of England and Wales (cl 9) and all disputes arising under it are to be referred to arbitration in London (cl 10). The amount currently outstanding under the Seller's Credit is $18.8million.

[6] The payment of the deferred consideration by PRPL to Cosco was guaranteed by Prosafe in terms of a parent guarantee dated 27 January 2016 (the "Guarantee"). The Guarantee provides that it is to be governed by English law and any disputes arising under it are to be resolved by arbitration in London.

[7] Payment of the Seller's Credit was secured by a second priority mortgage over the Safe Notos rig. The ranking of the securities was governed by a Deed of Coordination dated 4 December 2016 among (1) PRPL (2) Prosafe (3) the various banks who had made secured loans (the "Senior Creditor Parties") (4) Nordea Bank Norge ASA ("Nordea Bank") as security agent for the Senior Creditor Parties and (5) Cosco (the "Junior Mortgagee"). The Deed of Coordination provided *inter alia* that Cosco shall not, without first obtaining the consent of the Senior Mortgagee, demand or receive payment of the Seller's Credit (except for certain permitted payments) (clause 4.1). It further provided that Cosco will not without the prior written consent of the Senior Mortgagee take any step to exercise or enforce any right or remedy under or in connection with the Seller's Credit (clause 6.2). The Deed was governed by English law (clause 10.1) and the English courts have exclusive jurisdiction (clause 10.2).

[8] On 3 December 2020 Cosco served a Default Notice under the Seller's Credit. In its response dated 6 January 2021, PRPL explained that the sum due could not be paid without the consent of the Senior Mortgagee, and stated that "as evidenced by the numerous letters we have sent to the Senior Mortgagee, please be assured that Prosafe has taken payment of

the Due Sum with the proper seriousness and remain of the opinion that such Due Sums should be paid."

[9] Cosco has raised an action against Nordea Bank in the English High Court. The action is against Nordea Bank in its capacity as security agent. The action is concerned with whether and when Nordea Bank should have consented under the terms of the Deed of Coordination to the payment of the sum due under the Seller's Credit. I was informed that a mediation to resolve the court action was currently in progress, and Cosco anticipated the matter being resolved soon, either by the mediation or by the English High Court. Parties agreed that neither the action nor the mediation would be caught by the orders sought in the Petitions. If the action is resolved in Cosco's favour, Cosco intends to seek payment of the sums due from PRPL and/or from Prosafe as guarantor.

[10] I was informed that there is also a dispute between Nordea and Cosco about whether Nordea has the power under the Deed of Coordination to issue a direction to Cosco to vote in favour of the Singapore Scheme and lodge a proof of debt in it. Cosco's position is that Nordea has no power to do so as Cosco is not a party to the Scheme. Neither party to the current Petitions addressed me in any detail on the legal issues arising under this dispute so I note it merely by way of background.

The Singapore Schemes of Arrangement

[11] The Prosafe group of companies is in financial difficulty. Since 2019 it has been in discussions with its lenders regarding restructuring. I was advised by Senior Counsel for the Petitioner that although the Seller's Credit is secured under a subordinated security, there is not enough money to pay the prior ranking securities so Cosco are in effect unsecured creditors.

[12] PRPL and Prosafe are seeking to effect a restructuring by means of Schemes of Arrangement under section 210(1) of the Singapore Companies Act (the "Singapore Schemes"). The Singapore Court has granted orders for Secured and Unsecured Creditor's Scheme Meetings in respect of both PRPL and Prosafe to be held on 28 September 2021. The restructuring proposes to turn the Seller's Credit into equity (Prosafe Norwegian Stock Exchange Announcement dated 4 June 2021). That proposal is not acceptable to Cosco. As the restructuring is acceptable to the majority of creditors, the Petitioner is relying on the "cram down" provisions of the Singapore Companies Act to impose the debt for equity swap on Cosco. Cosco has not submitted to the jurisdiction of the Singapore Court in respect of the restructuring. Its position is that because the debts to Cosco are governed by English law they stand outside the Singapore restructuring process and any purported debt for equity swap will be ineffective to extinguish the debt.

The Singapore Moratorium

[13] Section 64 of the Singapore *Insolvency Reconstruction and Dissolution Act 2018* (IRDA) provides that where a company proposes, or intends to propose, a compromise or arrangement between the company and its creditors or any class of its creditors, the court may make certain orders which have the effect of a moratorium.

[14] Each of PRPL and Prosafe applied for an order under section 64. On 27 May 2021 the Singapore High Court granted orders in respect of both applications. The Prosafe order was in the following terms and the PRPL order was in identical terms *mutatis mutandis*:

> "UPON THE EXPARTE APPLICATION of the Applicant ….coming on for hearing on 27 May 2021, and UPON READING the 1st Affidavit of Chang Chin Fen dated 30 April 2021, the 1st Affidavit of Chang Chin Fen dated 30 April 2021 ….. and the 2nd Affidavit of Chang Chin Fen dated 19 May 2021, and UPON HEARING counsel for the Applicant and counsel for the facility agent under the syndicated senior

secured term and revolving credit facilities agreement originally dated 6 February 2015 (the '1300 Facility') and the syndicated senior secured terms credit facility agreement originally dated 27 May 2014 (the '288 Facility'),

1. Pursuant to Section 64 of the Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) ('IRDA'):

a. That for a period of five (5) months from the date of this Application (i.e. 30 April 2021) or for such further period as the Court thinks fit or until further orders are made:

i. no resolution for the winding up of the Applicant shall be passed;
ii. no appointment of a receiver or manager over any property or undertaking of the Applicant shall be made;
iii. no proceedings (other than proceedings under Section 210 or 212 of the Companies Act, or Sections 64, 66, 69 or 70 of the IRDA) whether before a court, arbitral tribunal, administrative agency or otherwise, and whether current, pending or threatened against the Applicant shall be commenced or continued, except with the leave of the Court and subject to such terms as the Court imposes;
iv. no execution, distress or other legal process shall be commenced, continued or levied against any property of the Applicant, except with the leave of the Court and subject to such terms as the Court imposes;
v. no step shall be taken to enforce any security over any property of the Applicant, or to repossess any goods held by the Applicant under any chattels leasing agreement, hire purchase agreement, or retention of title agreement, except with the leave of the Court and subject to such terms as the Court imposes; and Sections 64, 66, 69 or 70 of the IRDA) whether before a court, arbitral tribunal, administrative agency or otherwise, and whether current, pending or threatened against the Applicant shall be commenced or continued, except with the leave of the Court and subject to such terms as the Court imposes;
iv. no execution, distress or other legal process shall be commenced, continued or levied against any property of the Applicant, except with the leave of the Court and subject to such terms as the Court imposes;
v. no step shall be taken to enforce any security over any property of the Applicant, or to repossess any goods held by the Applicant under any chattels leasing agreement, hire purchase agreement, or retention of title agreement, except with the leave of the Court and subject to such terms as the Court imposes; and
vi. no right of re-entry or forfeiture under any lease in respect of any premises occupied by the Applicant shall be enforced (including pursuant to Sections 18 or 18A of the Conveyancing and Law of Property Act (Cap. 61)), except with the leave of the Court and subject to such terms as the Court imposes;

…….

2. That the order at paragraph 1(a) shall apply to any act of any person in Singapore, or within the jurisdiction of this Honourable Court, whether the act takes place in Singapore or elsewhere;

3. Chang Chin Fen (NRIC No. S7368996A) be designated as the Applicant's Foreign Representative within the meaning of Section 101(24) of the United States Bankruptcy Code (or any jurisdiction which adopts or incorporates the UNCITRAL Model Law on Cross Border Insolvency ('Model Law')) and be authorised to apply for a suitable order to effectuate the terms of the application herein and such other additional relief and/or assistance in the United States of America or any other Model Law jurisdiction as appropriate;

…….

5. That the Applicant submits to the Court monthly management accounts and a 13week cash flow forecast as prepared by its financial advisor and updated on a fortnightly basis, such documents to be submitted monthly.

In addition, if the Applicant acquires or disposes of any property or grants security over any property, the Applicant is to submit information relating to the acquisition, disposal or grant of security to the Court not later than 14 days after the date of the acquisition, disposal or grant of security."

[15] On 13 September 2021 the Singapore Court extended the period of the Moratoria to 31 January 2022.

[16] The purpose of the applications for moratoria was set out by the Petitioner in the affidavits referred to in the orders. In her affidavit dated 30 April 2021 for the Prosafe application, the Petitioner stated (emphasis added):

"B. OUTLINE OF THIS AFFIDAVIT

The Application is an integral part of the overall restructuring

9. The Application is an integral part of a wider restructuring transaction of the Group (the 'Restructuring').

10. The Restructuring is urgently needed in light of:

(a) impending maturity dates under the Group's key financing arrangements…;

(b) deteriorating cash generation in light of challenging market conditions driven by the low oil price environment, several years of low activity across the oil and gas industry, a shift in the way the industry operates which impacts vessel utilisation and day rates (key metrics for the Group) including reduced spending and deferment of deployment of vessels for agreement contracts through 2020 due to COVID-19….;

(c) the potential for hostile creditor enforcement action and the need to bind minority (and likely dissenting) creditors given the overall level of support from key financial creditors; and
(d) the fact that the Group's current debt levels are both unsustainable and not able to be refinanced on market terms, leads to the necessity of a substantial balance sheet restructuring in order to secure the ongoing future of the Group.

11. The Restructuring, which is at an advanced stage of negotiation, is described in detail in Part G below.

12. In summary:

(a) the Group initiated restructuring discussions with its lenders in December 2019;
(b) productive discussions continued throughout 2020 and the early part of 2021. As at the date of swearing this affidavit, the parties have achieved the following key milestones in relation to the Restructuring:

(i) broad in-principle agreement on a detailed term sheet, setting out the terms of the Restructuring (the 'Term Sheet') between the Parent [ie Prosafe] , its key subsidiaries and a majority of the Group's key financial creditors (comprising 93.9% of the Group's overall outstanding debt that would be the subject of the scheme of arrangement); and
(ii) broad in-principle agreement on a Restructuring Agreement (subject to relevant credit approvals) to implement the terms of the Term Sheet (the 'RSA') between the Parent, its key subsidiaries and the majority creditors.

……

The need for the moratorium

14. The Company makes this Application for moratorium protection (and its subsidiary Prosafe Rigs Pte Ltd ('PRPL') has made an identical and simultaneous application for moratorium relief) for three key reasons:

(a) while the Group has secured support from creditors representing 93.9% of the Group's overall outstanding debt that would be the subject of the scheme of arrangement, being its key financial creditors who have agreed in-principle to the RSA, it does not yet have either unanimous consent from the creditors who are required to be bound by the Restructuring for it to become effective;
(b) the Parent considers there to be a material risk that two particular creditors may object to the Restructuring and/or seek to take enforcement steps to disrupt the Restructuring. The two creditors of concern are:

(i) Westcon Yard AS ('Westcon'), who as of 19 April 2021 has obtained a Norwegian Court judgment against PRPL in the amount of approximately USD 56 million (the 'Westcon Judgment'). As noted above, PRPL is making its own moratorium application for reasons including that (as 8 explained in more detail further below) PRPL holds title to five (5) rigs, each of which are Singapore flagged. Any steps taken to enforce against PRPL, or assets owned by it (including bank accounts in Singapore) will significantly derail the overall restructuring and risk the ongoing viability of the Group as a whole. I understand that efforts have and will be made to engage with Westcon on the Restructuring, however, the outcome of any such discussions remains uncertain at the present time; and

(ii) Cosco (Qidong) Offshore Co. Ltd ('Cosco'). As explained in further detail below, Cosco are a subordinated creditor. Cosco have commenced litigation against Nordea Bank Norge ASA ('Nordea'), in its capacity as Senior Mortgagee under a Deed of Co-ordination (defined further below), in the English courts seeking an order that Nordea consent to payment by PRPL to Cosco of the final amount owing under the Notos Seller's Credit (as defined below) which it alleges Nordea wrongfully withheld in breach of the terms of the Deed of Co-ordination. **Given this litigation, the Group is of the view that it is highly unlikely Cosco will consensually agree to the Restructuring (which seeks to compromise the amounts outstanding under the Notos Seller's Credit). PRPL is the borrower under the Notos Seller's Credit and the Parent has provided a guarantee. This means a scheme of arrangement will be necessary to implement the Restructuring, given the level of support from other creditors.** I understand that efforts will be made to engage with Cosco on the Restructuring, however, the outcome of any such discussions remains uncertain at the present time;
and

(c) in light of these issues, the current critical phase of the Restructuring and the importance of the Restructuring for the Group's ongoing survival, **the moratorium is sought to ensure that any dissenting creditors cannot seek to take enforcement steps or other disruptive activity against key members of the Group (the Parent and PRPL in particular) while the Restructuring is being implemented via the use of the Singapore scheme of arrangement."**

[17] The Affidavit went on to expand on these reasons:

"H. THE NEED FOR MORATORIUM PROTECTION

53. As I have described above, the Parent (and separately PRPL) seeks moratorium protection for three key reasons:

(a) the Group does not have unanimous consent for the Restructuring;

(b) the Group considers that there is a risk of creditor enforcement or other disruptive action by certain creditors (whether in Singapore or overseas); and (c) in light of this, **moratorium protection is appropriate to ensure dissenting or other creditors to** [sic] **not take action (whether in Singapore or overseas) to disrupt the Restructuring during the period it is to be implemented via a Singapore Scheme of arrangement**.

54. I elaborate on each of these reasons further below.

Lack of unanimous consent

55. For so long as the Group does not have the unanimous consent of its lenders for the Restructuring it remains at risk of enforcement steps being taken against it.

56. As matters presently stand, there is an informal standstill on payments of principal and interest but this does not extend to all creditors.

57. At this stage of the process, the Parent considers it to be very unlikely that unanimous consent will be obtained and accordingly, **it will be necessary to implement the Restructuring to bind dissenting creditors via the use of a Singapore scheme of arrangement.**

58. In such circumstances, and given the timing pressures, the Parent considers it prudent to seek moratorium protection for the benefit of the overall body of creditors and to provide the maximum possible opportunity for the Restructuring to succeed.

Potential for dissenting creditors to take enforcement action - The Weston Litigation a trigger

[the affidavit then addressed the Weston litigation which is not relevant to the current petitions]….

Cosco

68. As noted above, given the litigation commenced by Cosco, it is unclear at this stage whether Cosco will be prepared to consent to the Restructuring. The Parent has furnished a guarantee under the Notos Seller's Credit and there is a risk that Cosco could seek to enforce this guarantee. Whether or not enforcement action will be taken is unclear but **in the absence of Cosco's consent, the Group will need time to implement the Restructuring via the use of the Singapore scheme of arrangement and requires moratorium protection as 'cover' to provide the sufficient time to do so.**

Utility of the moratorium given the cross-border features

69. The relief sought in this Application, including in relation to the extraterritorial effect of the moratorium, is absolutely critical. As explained above, there is a real risk of disparate proceedings across different jurisdictions which would jeopardize a swift and successful reorganization of the Group.

70. I am also advised and verily believe that because **the Notos Seller's Credit is governed by English law, a Singapore scheme of arrangement may not be effective to compromise Cosco's claim as a matter of English law, depending on the position it takes in the scheme of arrangement or moratorium proceedings.**

71. Nevertheless, I am advised and verily believe that the utility of a moratorium order as sought in this Application is still of great importance for the Parent and the parties seeking moratorium relief as if this Application is successful:

> (a) no step would be able to be taken against the Parent by a creditor in Singapore;
> (b) PRPL is a Singapore incorporated company having its centre of main interests ('COMI') in Singapore. Accordingly, protection from a winding up application or other enforcement related steps in Singapore, being its place of incorporation and 'home jurisdiction', will be of great importance; and
> (c) I am advised that a Singapore moratorium is capable of being recognised in the United Kingdom and Brazil, should that be necessary. This may be of significant importance particularly given the location of the vessels owned by PRPL."

Location of Prosafe/PRPL assets

[18] The Safe Notos is currently situated off the coast of Brazil. On 7 May 2021 a Brazilian court granted orders recognising the Singapore court orders under the Model law and granting moratorium protection.

[19] However, two other oil rigs owned by PRPL, Safe Boreas and Safe Zephyrus are currently situated in the North Sea near Scottish territorial waters and may require to enter Scottish waters. The Petitioner is concerned that Cosco may seek to enforce Prosafe/PRPLs debt under the Seller's Credit and Parent Guarantee against these rigs.

The current petitions

[20] The petitions narrate that the Petitioner is concerned about potential creditor action being taken in Scotland, which could prejudice the overall success of the restructuring plan, thereby adversely impacting the Group and the interests of the creditors as a whole, and that she was particularly concerned about such potential action being taken by two creditors who have not consented as yet, namely Westcon Yards AS ("Westcon") and Cosco.

[21] The Petitioner enrolled a motion in each petition for first orders for intimation and service. The motions did not provide for intimation on, or service to, either Westcon or Cosco. When the motions came before me for consideration on the papers in chambers, I was concerned that the petitioner was proposing to proceed without any intimation to Westcon or Cosco. The normal practice of the Court of Session is that petitions must be intimated or served on all interested parties. As the main purpose of the petition was to prevent Westcon or Cosco from taking action against Prosafe or PRPL, it seemed to me that Westcon and Cosco were interested parties. The motions were starred and put out for a hearing at which I could be addressed on why intimation should not be made on them. The hearing did not go ahead as, prior to the hearing, the Petitioner accepted that intimation should be made. First orders were granted 14 June 2021 on the basis that the Petitioner's solicitors would intimate the petitions to solicitors acting for Westcon and Cosco. The Petitioner's solicitors did so on 18 June 2021. Cosco lodged answers and Westcon did not.

[22] The petitions called before me on 9 July 2021 for discussion of further procedure. I took the view that the issues raised in the petition and answers were not straightforward and there would be benefit in giving parties an opportunity to fully plead their cases and lodge notes of argument and full lists of authorities. Further, the substantive orders which the Petitioner was now asking me to grant were different from the substantive orders sought

in the petitions and I was not prepared to grant the new orders sought until the petitions had been amended so as to set out in the prayer the orders now being sought and Cosco had had an opportunity to consider the amended petitions. I set out a timetable for amendment, adjustment and the lodging of notes of argument and authorities leading to a substantive hearing on the petition and answers on 7 September 2021. The timetable took into account the work requiring to be done by the parties and the availability of counsel and the court. I was conscious that recognition proceedings should proceed expeditiously (Article 17(3) of the Model Law), and that the Moratoria were due to end on 30 September 2021, so I gave the Petitioner an opportunity, if she wished to do so, to enrol a motion for interim orders and I set aside 15 July 2021 for the court to hear any such motion. No such motion was lodged and the petitions proceeded to the substantive hearing on 7 September.

[23] At an earlier stage in these proceedings, there had been a vigorous dispute between parties (under reference to *Nordic Trustee ASA* v *OGX* [2016] EWHC 25 (Ch)) as to the extent to which the petitioner had put Cosco's position before the court when seeking to proceed *ex parte* without intimation to Cosco. That dispute has now been superseded as the petitions did not proceed *ex parte* because I insisted on intimation on Cosco who then lodged answers. All that needs to be said in these circumstances is that the petitions and accompanying productions contained sufficient information about Cosco's position for me to refuse to allow the petitions to proceed without intimation to them.

The Orders sought

[24] The Prosafe Petition as originally lodged sought the following substantive orders:

> "5. order that the order of the General Division of the High Court of the Republic of Singapore issued on 27 May 2021 under the Insolvency, Restructuring and Dissolution Act 2018 of the Republic of Singapore be and is recognised in Scotland as

'foreign non-main proceedings' in terms of Article 17(2)(b) of the Cross-Border Insolvency Regulations 2006;

6. grant relief to Prosafe SE under Article 21(1)(a), (b) and (c) of Schedule 1 to the Cross-Border Insolvency Regulations 2006, as if Prosafe had been made the subject of a winding-up order by this Court under the Insolvency Act 1986."

[25] The orders sought in the PRPL petition were *mutatis mutandis* identical except that they sought recognition as main proceedings.

[26] The Prosafe Petition as amended now seeks the following substantive orders:

"5. order that the order of the General Division of the High Court of the Republic of Singapore issued on 27 May 2021 in relation to [Prosafe SE or PRPL depending on which Petition] (the 'Company') under the Insolvency, Restructuring and Dissolution Act 2018 of the Republic of Singapore (the 'Singapore Moratorium') be and is recognised in Scotland as a 'foreign non-main proceeding' in accordance with the UNCITRAL Model Law on Cross-Border Insolvency as set out in Schedule 1 of the Cross-Border Insolvency Regulations 2006 (S.I. 2006 No 1030) (the 'Model Law') in relation to the Company;

6. grant relief in the following terms for the period during which the Singapore Moratorium remains in place:

i. No step may be taken to enforce any mortgage, charge, lien or other security over the Company's property except with the consent of Ms Chang Chin Fen (the 'Foreign Representative') or the permission of the Court.

ii. No step may be taken to repossess goods in the Company's possession under a hire-purchase agreement (as defined in paragraph 111(1) of Schedule B1 to the Insolvency Act 1986) except with the consent of the Foreign Representative or the permission of the Court.

iii. Subject to paragraph 7(2) below, no legal process may be instituted or continued against the Company or its property except with the consent of the Foreign Representative or the permission of the Court.

iv. An administrative receiver (as defined in paragraph 111(1) of Schedule B1 to the Insolvency Act 1986) of the Company may not be appointed.

v. No winding up petition may be presented in respect of the Company except with the consent of the Foreign Representative or the permission of the Court, and no order may be made for the winding up of the Company (save as identified by paragraph 42(4) of Schedule B1 to the Insolvency Act 1986, and paragraph 42(5) of Schedule B1 to the Insolvency Act 1986 shall apply in respect of the Company).

7. confirm that:

i. for the purposes of any order made under 5 and 6 above, the term 'legal process' includes arbitrations, legal proceedings, execution, distress, diligence, and all other forms of legal process;

ii. reference to legal process in paragraph 6 (iii) above relates only to legal process against the Company and does not affect legal process by the Company against third parties;

iii. any order made under paragraph 6 above shall not affect or inhibit in any way the rights of the Company to transfer, encumber or otherwise dispose of or deal with any of its own assets to the extent permitted by Norwegian or Singapore law;.

iv. any order made by the Court applies only in Great Britain and does not have extraterritorial effect; and

iv. pursuant to Article 20(6) of the Model Law, the Court may, on the application of the Foreign Representative or a person affected by any order, or of its own motion, modify or terminate the orders made on such terms as the Court thinks fit.

[27] The orders sought in the amended PRPL petition are *mutatis mutandis* identical except that they seek recognition as main proceedings.

[28] At the hearing on 7 September Senior Counsel for the Petitioner did not insist on paragraph 7(iv) of the prayer in each petition, which is unnecessary as it merely restates the law.

[29] Contrary to the submission of Senior Counsel for the Petitioners noted below, in my opinion there is a material difference between the orders originally sought and the amended orders. The Petitions originally sought orders as if there had been a Scottish winding up (which would have meant that the companies were not allowed to trade) whereas the amended orders sought orders as if there had been an administration. Where, as here, the foreign proceeding is not a liquidation but instead is a process (eg a restructuring) from which it is hoped that the company will emerge as a going concern, the orders should reflect

a Scottish administration rather than a Scottish winding up (*OJSC International Bank of Azerbaijan* [2018] EWCA Civ 2082 at para [6]).

UNCITRAL Model Law

[30] Regulation 2(1) of the Cross-Border Insolvency Regulations 2006 (the "Regulations") provides that the UNCITRAL Model Law shall have the force of law in Great Britain in the form set out in Schedule 1 to the Regulations, which contains the UNCITRAL Model Law with certain modifications to adapt it for application in Great Britain. Regulation 7(1) provides that an order made by a court in either part of Great Britain in the exercise of jurisdiction in relation to the subject matter of these Regulations shall be enforced in the other part of Great Britain as if it were made by a court exercising the corresponding jurisdiction in that other part.

[31] Regulation 2(2) of the Regulations provides that in ascertaining the meaning or effect of any provision of the Model Law consideration may be given to the *Guide to Enactment of the UNCITRAL Model Law* prepared at the request of the United Nations Commission on International Trade Law (the "*Guide to Enactment*").

[32] The relevant Articles of the Model Law as set out in the Regulations are as follows:

> "*Article 2. Definitions*
> …
> (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;
> …
> (p) in the application of this Law to Scotland, references howsoever expressed to —
> (i) 'filing' an application or claim are to be construed as references to lodging an application or submitting a claim respectively;
> (ii) 'relief' and 'standing' are to be construed as references to 'remedy' and "title and interest" respectively; and

(iii) a 'stay' are to be construed as references to restraint, except in relation to continuation of actions or proceedings when they shall be construed as a reference to sist;

…..

Article 17. Decision to recognise a foreign proceeding

1. Subject to article 6 [public policy exception] a foreign proceeding shall be recognised if—

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

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

(c) the application meets the requirements of paragraphs 2 and 3 of article 15[which relate to the documents to be supplied with the application]; and

(d) the application has been submitted to the court referred to in article 4 [High Court or Court of Session].

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 sub-paragraph (e) of article 2 in the foreign State.

3. An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.

……

Article 20 Effects of recognition of a foreign main proceeding

1. Upon recognition of a foreign proceeding that is a foreign main proceeding, subject to paragraph 2 of this article—

(a) commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;

(b) execution against the debtor's assets is stayed; and

(c) the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

2. The stay and suspension referred to in paragraph 1 of this article shall be—

(a) the same in scope and effect as if the debtor, …, in the case of a debtor other than an individual, had been made the subject of a winding-up order under the Insolvency Act 1986; and

(b) subject to the same powers of the court and the same prohibitions, limitations, exceptions and conditions as would apply under the law of Great Britain in such a case, and the provisions of paragraph 1 of this article shall be interpreted accordingly.

3. Without prejudice to paragraph 2 of this article, the stay and suspension referred to in paragraph 1 of this article, in particular, does not affect any right—

(a) to take any steps to enforce security over the debtor's property;

(b) to take any steps to repossess goods in the debtor's possession under a hirepurchase agreement;

(c) exercisable under or by virtue of or in connection with the provisions referred to in article 1(4) [provisions which are not applicable to these Petitions]; or

(d) of a creditor to set off its claim against a claim of the debtor, being a right which would have been exercisable if the debtor, …, in the case of a debtor other than an individual, had been made the subject of a winding-up order under the Insolvency Act 1986.

…

6. In addition to and without prejudice to any powers of the court under or by virtue of paragraph 2 of this article, the court may, on the application of the foreign representative or a person affected by the stay and suspension referred to in paragraph 1 of this article, or of its own motion, modify or terminate such stay and suspension or any part of it, either altogether or for a limited time, on such terms and conditions as the court thinks fit.

Article 21 Relief that may be granted upon recognition of a foreign proceeding

1. Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including –

(a) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1(a) of article 20;

(b) staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1(b) of article 20;

(c) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1(c) of article 20;

(d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;

(e) entrusting the administration or realisation of all or part of the debtor's assets located in Great Britain to the foreign representative or another person designated by the court;

(f) extending relief granted under paragraph 1 of article 19 [interim relief]; and

(g) granting any additional relief that may be available to a British insolvency officeholder under the law of Great Britain, including any relief provided under paragraph 43 of Schedule B1 to the Insolvency Act 1986.

…..

3. In granting relief under this article to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of Great Britain, should be administered in the foreign non-main proceeding or concerns information required in that proceeding."

…

Article 22. Protection of creditors and other interested persons

1. In granting or denying relief under article 19 [interim relief] or 21, or in modifying or terminating relief under paragraph 3 of this article or paragraph 6 of article 20, the court must be satisfied that the interests of the creditors (including any secured creditors or parties to hire-purchase agreements) and other interested persons, including if appropriate the debtor, are adequately protected.
2. The court may subject relief granted under article 19 or 21 to conditions it considers appropriate, including the provision by the foreign representative of security or caution for the proper performance of his functions.
3. The court may, at the request of the foreign representative or a person affected by relief granted under article 19 or 21, or of its own motion, modify or terminate such relief."

Submissions for the Petitioner

[33] Senior Counsel for the Petitioner emphasised that what was sought was recognition of the Singapore Moratoria, which were separate and independent from the Singapore Schemes. The Singapore Moratoria were granted to permit Prosafe and PRPL sufficient time and space to discuss restructuring with their creditors, and could do no more than that. No scheme had been sanctioned by the Singapore Court, so the restructuring was not before this court, and there was no scheme that could be recognised under the Model Law. The Singapore court orders imposing the Moratoria did not seek to compromise any creditor's rights or impose any restructuring mechanism.

[34] Counsel further submitted that recognition was "something of a tick-box exercise" (*Re Transfield ER Cape Ltd* [2010] EWHC 2851 (Ch)). The court had power to modify the automatic relief under Article 20(6) (*OJSC International Bank of Azerbaijan* at para 11). A

practice had developed in the English courts of setting out in full the exact reliefs granted: *Re OGX Petroleo* [2016] EWHC 25 (Ch) at para [32]; *Samsung Logix Corporation* v *DFX* [2009] EWHC 576 and *Pan Oceanic Maritime Inc* [2010] EWHC 1734. In line with that practice the original prayers in the current petitions were amended so as to set out in full the reliefs sought. The effect of the amended orders is the same as the original: to seek recognition of the Singapore Moratoria.

[35] Counsel drew attention to Article 21(1)(g) which provides that the court may grant "any additional relief that may be available to a British insolvency officeholder under the law of Great Britain, including any relief provided under paragraph 43 of Schedule B1 to the Insolvency Act 1986". She submitted that the relief under paragraph 43 of Schedule B1 to the Insolvency Act 1986 is the moratorium which applies in administrations under Scots law. The key feature that differentiates the administration moratorium from the position that would arise on liquidation is that the administration moratorium enables the debtor to continue trading. Such a modified relief would be appropriate in the present petitions in relation to both debtor companies.

[36] Counsel further submitted that the requirements of Article 17 having been satisfied, and there being no public policy reason not to do so, the court was obliged to recognise the Singapore orders. Where the foreign proceedings are in the nature of restructuring, as they are here, the automatic relief under Article 20(1) should be modified because it would not be appropriate to stop the debtor company from dealing with its assets (eg *Samsun Logix Corporation* v *DEF* [2009] EWHC 675(Ch), *Re Pan Oceanic Maritime Inc* [2010] EWHC 1734 (Comm).

[37] Counsel further submitted that Cosco's opposition was misplaced. The purpose of the Model Law was to protect assets (St Clair and Drummond Young *The Law of Corporate*

Insolvency in Scotland para 22-63). The Singapore Court had granted moratoria to permit the debtor companies to discuss restructuring plans with their creditors. The moratorium orders do not authorise a restructuring or approve a scheme of arrangement. The Rule in Gibbs is irrelevant to the moratoria and these proceedings. The orders sought do not oblige creditors to accept any proposals nor discharge or reduce any debt. They do nothing more than provide a "breathing space" for the companies to discuss restructuring matters with its creditors. Further, Cosco's rights and obligations under the proper law of the contract include its obligations under the Deed of Co-ordination. Counsel declined to express any view on whether the Schemes would be binding on Cosco or whether Cosco's claims stand outside the collective process of the Singapore Schemes: her position was that that was irrelevant to the current petitions.

Submissions for Cosco

[38] Senior counsel for Cosco submitted that Cosco was not subject to the jurisdiction of the Singapore Court. It was not a party to the Singapore Schemes of Arrangement and will not submit a proof of debt in the schemes. Cosco's claims under the Seller's Credit and Guarantee stand outside and will remain outside the collective process of the Singapore Schemes (*Nordic Trustee ASA* v *OGX* [2016] EWHC 25 (Ch)). In these circumstances it was not appropriate for Cosco to be prevented by any order of the Singapore court from pursuing its ordinary remedies against Prosafe and PRPL.

[39] He further submitted that the stay under Article 20(1) was not the same as a moratorium. It had the same effect as a winding up under sec 130(2) of the Insolvency Act, the purpose of which was to preserve *pari passu* ranking (*Cosco Bulk Carriers* v *Armada Shipping SA* [2011] EWHC 216 (Ch); *Nordic Trustee ASA* v *OGX* [2016] EWHC 25 (Ch)). An

order granted under Article 20 will not affect a creditor under an English law contract standing outside the process.

[40] He further submitted that the amended order now sought was under Article 21(1)(g) and was different from an order under Article 20(1) as sought under the original petitions. Before granting additional relief under Article 21(1)(g) the court must be satisfied that it is necessary to protect the interests of creditors and must be satisfied that the interests of creditors are adequately protected (Article 22). An order in terms of Article 21(1)(g) is not necessary to protect the interests of creditors who have submitted proof of debt in the Singapore Scheme. An order in terms of Article 20(2) would protect such creditors and allow the creditors who stand outside the collective process to pursue their ordinary remedies.

[41] He further submitted that in any event, the interests of Cosco would not be protected by the amended orders sought, which would be prejudicial to Cosco as its claims would be subject to a moratorium.

[42] He further submitted that in any event, a foreign insolvency process is not capable of modifying or extinguishing liabilities under a contract governed by English law (*Antony Gibbs & Sons* v *La Societe Industrielle et Commercial des Metaux* (1890) LR 25 QB 399 as reaffirmed in *OJSC International Bank of Azerbaijan)*. Cosco, a Chinese shipbuilder contracting with Norwegian and Singaporean companies had good reason to choose that the Seller's Credit and Guarantee be governed by English law. The objective of the present proceedings, as demonstrated by the Petitioner's affidavit in the Singapore Moratoria applications, was to try to bind Cosco into the Singapore Schemes.

Analysis and Decision

[43] The difficulties in these Petitions lie not so much with recognition under the Model law (paragraph 5 of the prayer) but with the remedies that are sought under paragraphs 6 and 7.

[44] I refer to these as remedies rather than reliefs. Article 2(p) provides for the translation into Scots law terminology of the English terminology used in the Model Law. Although the Model Law uses the English law term "relief" there is express provision for the use, instead of that English term, of the Scots law term "remedy" (Article 2(p)(ii)). Any order granted by this court under paragraphs 6 and 7 would use Scottish and not English terminology.

Recognition under the Model Law: para 5 of the prayer in each Petition

[45] The recognition of the orders of the Singapore Court granting the Moratoria is straightforward. The requirements of Article 17(1) are met, and recognition would not be manifestly contrary to public policy (Article 6). Article 17(1) provides that in these circumstances, a foreign proceeding "shall" be recognised. In my opinion it would be appropriate for this court, if the Petitioner wished it to do so, to grant recognition of the Singapore Court order of 27 May 2021 in respect of Prosafe as a non-main proceeding and grant recognition of the order of the same date in respect of PRPL as a main proceeding.

[46] The difficulties in these petitions arise when considering the effect of that recognition, and in particular the remedies sought by the Petitioner in paras 6 and 7 of the prayer. In order to resolve these difficulties, it is necessary to consider the scope of recognition and the relationship between recognition and the Rule in Gibbs.

The Scope of Recognition under the Model Law

[47] In *Nordic Trustee* Snowden J (as he then was) having analysed the provisions of the Model Law, the *Guide to Enactment* and English case law, came to the following conclusion:

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

I agree with that conclusion, for the reasons given by Snowden J.

The Rule in Gibbs

[48] The Rule in Gibbs is a rule of English law. It has been authoritatively stated by the English Court of Appeal in *OJSC International Bank of Azerbaijan* (endorsing the first instance judge in that case) to be as follows:

> "[27] For a modern statement of the Gibbs rule, the judge referred.. to Fletcher, The *Law of Insolvency*, fifth edition (2017), at para 30-061:
>
> > 'According to English law, a foreign liquidation – or other species of insolvency procedure whose purpose is to bring about the extinction or cancellation of a debtor's obligations – is considered to effect the discharge only of such a company's liabilities as are properly governed by the law of the country in which the liquidation takes place or, alternatively, of such as are governed by some other foreign law under which the liquidation is accorded the same effect. Consequently, whatever may be the purported effect of the liquidation according to the law of the country in which it has been conducted, the position at English law is that a debt owed to or by a dissolved company is not considered to be extinguished unless that is the effect according to the law which, in the eyes of English private international law, constitutes the proper law of the debt in question.'
>
> [28] As the judge went on to note.. there is an exception to the rule if the relevant creditor submits to the foreign insolvency proceeding. In that situation, the creditor is taken to have accepted that his contractual rights will be governed by the law of the foreign insolvency proceeding."

[49] The position under Scots law is the same as under the Rule in Gibbs. A debt under a contract whose proper law is the law of another jurisdiction may, for the purposes of Scots law, be discharged by insolvency proceedings in that other jurisdiction, but such proceedings will not, for the purposes of Scots law, discharge a debt where the proper law of the contract is not the law of the jurisdiction in which the proceedings are taking place (*Heritable Bank plc* v *Landsbanki Islands HF* 2013 SC (UKSC) 201 para [44]).

The Relationship between Recognition under the Model Law and the Rule in Gibbs

[50] In *OJSC International Bank of Azerbaijan* the Court of Appeal held that it would be wrong in principle to use the powers in article 21(1)(a) and (b), or any other provisions of the Model Law, so as to circumvent the English law rights of the English creditors under the Rule in Gibbs (para [95]).

[51] The circumstances of the *OJSC* case were broadly similar to those of the current petitions, except that the current petitions are brought before, rather than after, the end of the foreign restructuring. The purpose of the application for recognition as a foreign main proceeding in that case was to prevent the English creditors of a bank undergoing reconstruction in Azerbaijan from relying on their rights under English law to seek to enforce their claims against the bank's assets in England and Wales (para [9]). The circumstances were conveniently summarised by Henderson LJ as follows:

> "a) the foreign proceeding is not a liquidation, but a voluntary restructuring entered into between the company and its creditors, with the aim of enabling the company to survive as a going concern;
> b) the restructuring plan provides for all the company's existing debts of a specified class to be discharged in full and replaced with various entitlements;
> c) under the relevant foreign law…. the restructuring plan becomes binding on all the creditors of the relevant class once it has been approved by a specified majority of them and confirmed by the foreign court;

d) the plan is duly approved by the requisite majority and confirmed by the foreign court;
e) the relevant class of creditors includes some whose claims against the company are governed by English law ('the English creditors'), who do not participate in the restructuring or otherwise submit to the jurisdiction of the foreign court;
f) under English law as it now stands, binding on all courts below the Supreme Court, the claims of the English creditors are not discharged or otherwise affected by the foreign restructuring."

[52] The court asked itself whether:

"the court should not exercise its power to grant a stay under [article 21], going beyond the automatic stay under article 20, where to do so:
a) would in substance prevent the English creditors from enforcing their English law rights in accordance with the Gibbs rule; and/or
b) would prolong the stay after the Azeri reconstruction has come to an end". (para [85])"

[53] Although the second question relates to the particular circumstances of the case before it, the first question is one of principle and in my opinion applies equally to the current petitions. The court answered both of these questions in favour of the English creditors and upheld the decision of the first instance judge dismissing the application for the stay.

[54] Henderson LJ drew a distinction between a liquidation and reconstruction and went on to say (para [93]) (emphasis added):

"This distinction was in my view rightly recognised by the judge, albeit in his discussion of discretion, at [158(3)], where he expressed his agreement with Morgan J in Pan Ocean at [112], helpfully adapting that paragraph to the present case as follows:

'In some cases, it can be argued that anyone who does business with a foreign company which might thereafter enter a process of insolvency, governed by the law of its country of registration, should expect that the insolvency will be governed by that law. Indeed, statements to that effect have been made in [Atlas Bulk] para 26 and *AWB (Geneva) SA* v *North America Steamships Limited* [2007] 1 CLC 749, para 31. **However, in the present case, the parties had deliberately chosen English law as the law of the contract. Whereas the parties might have expected that an [Azeri] court would apply [Azeri] insolvency law to the insolvency of the company, they might have been very surprised to find that an English court would [in effect] apply [Azeri]**

> **insolvency law to the substantive rights of the parties under a contract which they had agreed should be governed by English law.'**

[94] More generally, I also agree with the main thrust of the conclusion reached by the judge at [146] after his careful consideration of essentially the same arguments as have been addressed to us:

> 'In conclusion, in my judgment, the Pan Ocean case, following Rubin, and consistently with the Antony Gibbs case, affirms that **the Model Law and the [Regulations] do not empower the English court, in purported appliance of English law, to vary or discharge substantive rights conferred under English law by the expedient of procedural relief which as a practical matter has the same effect, and has been fashioned with the intention, of conforming the rights of English creditors with the rights which they would have under the relevant foreign law'.**"

The relevance of the Rule in Gibbs to the current Petitions

[55] There was a sharp dispute between the parties as to whether the Rule in Gibbs was relevant to the current Petitions. The Petitioner's position was that the Rule in Gibbs was irrelevant as the applications were for Moratoria and did nothing more than provide a "breathing space" for the companies to discuss restructuring matters with their creditors. Cosco's position was that because of the Rule in Gibbs the debts to Cosco stand outside the collective insolvency process of which the Moratoria are an integral part.

[56] I do not accept the Petitioner's analysis that the Moratoria can be separated from the proposed Schemes so that in considering the Petitions this Court is concerned only with the "breathing space" and the underlying restructuring is of no relevance. I accept that Singapore law deals with a moratorium and a scheme as two separate procedures: they proceed under two separate statutes and under two separate court processes with separate court orders. However it would be too formalistic to take from this that the Schemes are not relevant to this court's consideration of the Moratoria in the context of the Model Law. The

Moratoria do not stand on their own, either in terms of the statutory framework under Singapore law, the Model Law or the facts and circumstances of these Petitions.

[57] Under the law of Singapore, a moratorium is not a free standing insolvency process. It can only be granted if the company proposes, or intends to propose, a compromise or an arrangement between the company and its creditors (*IRDA* section 64).

[58] The Model Law defines a "foreign proceeding" as "a collective judicial or administrative proceeding in a foreign State …… 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**" (Article 2(i)) (emphasis added).

[59] The applications to the Singapore court for Moratoria in respect of Prosafe and PRPL were closely linked to, and dependent upon, the proposed Schemes. In her affidavit the Petitioner states that the Moratorium is an integral part of the overall restructuring (para 9 and heading thereto). The Petitioner states that it will be necessary to bind dissenting creditors such as Cosco via the use of a Singapore scheme of arrangement (para 57). She makes it clear that the reason for the Scheme was to bind Cosco to the Scheme as Cosco would not agree to the Scheme (para 14(b)(ii)). She makes it clear that the purpose of the moratorium was to ensure that Cosco and other dissenting creditors did not take action to disrupt the Restructuring during the period it was to be implemented via the Schemes (para 53(c)). Her affidavit contains an undertaking to the Singapore Court that Prosafe will as soon as practicable bring an application under section 210(1) of the Singapore Companies Act for the Court to order to be summoned a meeting of the creditor or class of creditors in relation to the compromise or arrangement proposed or intended to be proposed, or alternatively bring an application for approval as a "pre-packaged" scheme of arrangement.

[60] As the Moratoria do not stand alone from the restructuring, but instead are an integral part of it, in my view the Schemes are relevant to my consideration of whether I should grant the orders sought in the Petitions.

[61] The purpose of the Schemes is to bind dissenting creditors. That is not in itself objectionable. It is a common feature of insolvency and other company law procedures in this and other countries that a majority can, under the supervision of the court, impose the will of the majority upon a dissenting minority. However, the particular feature of these Petitions is that so far as English law is concerned, that purpose will not be achieved: the Scheme will not bind Cosco. The majority cannot, as far as English law is concerned, impose its will on Cosco under the proposed Singapore law Schemes, nor swap Cosco's debt for equity nor extinguish Cosco's rights under the Seller's Credit and Guarantee. So far as English law is concerned, the Seller's Credit and Guarantee simply fall outside the Singapore Scheme.

[62] The purpose of the Moratoria was not, as Senior Counsel for the Petitioner suggested, to provide a breathing space for discussion with creditors but was in my view to provide a breathing space to bind Cosco and other dissenting creditors through the mechanism of a scheme. Discussion with creditors was already well advanced by the time the application for the Moratoria were made to the Singapore court. On 4 June 2021, only a matter of days after the Singapore court Moratorium order dated 27 May 2021, Prosafe issued a Norwegian Stock Exchange announcement with the headline "Restructuring Plan Agreed with Lenders." The announcement stated that "to the extent that a fully consensual solution is not achievable, the intention is to implement a solution using a Singapore Scheme of Arrangement."

[63] As the purpose of the Moratoria was to provide a breathing space to bind dissenting creditors by means of the Schemes, then it is highly pertinent to the current petitions that, for the reasons set out above, as a matter of English law, Cosco will not be bound by the Schemes and the Schemes will not extinguish the liabilities of PRPL and Prosafe under the Seller's Credit and Guarantee. These liabilities do not, as far as English law is concerned, form part of the restructuring. Pursuing them will not, as far as English law is concerned, disrupt the implementation of the restructuring as they do not form part of that restructuring. Cosco is entitled to enforce its rights under English law, and is entitled to do so before or after the implementation of the Scheme.

[64] For the reasons set out above, in my opinion the liabilities under the Seller's Credit and the Guarantee stand outside the collective insolvency process of which the Moratoria are an integral part. That is sufficient for me to refuse to grant, in respect of these liabilities, the remedies sought in paragraphs 6 and 7 of the prayer in each Petition. However, for completeness I shall go on to consider whether, in any event, the test for granting these remedies is met.

The test for granting the remedies sought in respect of foreign non-main proceedings under paras 6 and 7 of the prayer in the Prosafe Petition

[65] The proceedings relating to Prosafe are foreign non-main proceedings. The Model Law does not provide for automatic remedies upon recognition of foreign non-main proceedings. Instead, the court has discretion under Article 21 to grant remedies, including the remedies listed in Articles 21(a) to (g).

[66] Before granting the discretionary remedies sought in paragraphs 6 and 7 of the prayer in the Prosafe petition I would have to be satisfied that:

(1) the remedy is appropriate (Article 21(1));

(2) the remedy is necessary to protect the assets of the debtor or the interests of the creditors (Article 21(1));

(3) the remedy relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding (Article 21(3)).

In addition, in granting or denying these remedies, I must be satisfied that:

(4) the interests of the creditors and other interested persons, including the debtor, are adequately protected (Article 22(1)).

[67] Given these tests, I do not accept counsel for the Petitioner's submission that the purpose of the Model Law is protection of the assets. It is clear from these tests that the protection of the assets is qualified by, and must be balanced against, protection of creditors. This is also made clear by the preamble to the Model Law, which sets out as one of its objectives "(c) Fair and efficient administration of cross-border insolvencies that protects the interests of **all** creditors and other interested persons, including the debtor" (St Clair and Drummond Young para 2.63, emphasis added).

[68] I take these tests in turn.

(1) The remedy is appropriate (Article 21(1))

[69] In my opinion this test is not met. The remedies sought are not appropriate in respect of the liabilities under the Guarantee or Seller's Credit. These liabilities stand outside the collective process. Cosco and Prosafe/PRPL chose English law to govern these liabilities. Cosco did so in order to obtain the benefits of English law, including the

protection afforded to it by the Rule in Gibbs. It would not be appropriate for Cosco now to be deprived of that protection. Prosafe/PRPL having chosen English law, it would not be appropriate for them to now avoid the consequences of that choice.

(2) the remedy is necessary to protect the assets of the debtor or the interests of the creditors (Article 21(1))

[70] In my opinion this test is not met.

[71] The test must be viewed in the context of the facts and circumstances of the case. In respect of the current petitions, it must be viewed in the context of the restructuring of which the Moratoria are an integral part. This can be seen from the *Guide to Enactment* which emphasizes the essential connection between the stay and the underlying restructuring: "The stay of actions or of enforcement proceedings is necessary to provide 'breathing space' until appropriate measures are taken for reorganization or liquidation of the assets of the debtor" (para 37). In my opinion, it is not necessary for the assets to be protected from claims made under the Seller's Credit or Guarantee as these claims fall outside the measures to be taken for the reorganisation of Cosco's assets.

[72] Nor is such protection necessary to protect the interests of creditors. Far from protecting the interests of Cosco, it is contrary to Cosco's interests. It is not necessary to protect the interests of the other creditors. The majority creditors have an interest in the Schemes, but, so far as remedies within Great Britain are concerned, this interest does not extend to matters which, according to English law, fall outside the Schemes, such as the Seller's Credit and the Guarantee.

(3) the remedy relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding (Article 21(3))

[73] In my opinion this test is not met.

[74] The *Guide to Enactment* gives the following guidance in relation to Article 21(3):

> "194. The proviso 'under the law of this State' reflects the principle underlying the Model Law that recognition of a foreign proceeding does not mean extending the effects of the foreign proceeding as they may be prescribed by the law of the foreign State. Instead, recognition of a foreign proceeding entails attaching to the foreign proceeding consequences envisaged by the law of the enacting State"

[75] It follows from that guidance that recognition should not extend the effects of the Schemes to the Seller's Credit and Guarantee: instead recognition entails attaching to the Schemes the consequences envisaged by English law, ie that the Seller's Credit and Guarantee fall outside the Scheme.

(4) the interests of the creditors and other interested persons, including the debtor, are adequately protected (Article 22(1)).

[76] This test is not met.

[77] If the remedies sought in the prayer were granted, the interests of Cosco would not be adequately protected as Cosco would be prevented from exercising their English law remedies.

[78] If the remedies sought were denied in respect of the Seller's Credit and Guarantee, the interests of the other creditors and the debtor would be adequately protected as their interest is in the Schemes, and under English law the Seller's Credit and Guarantee fall outside the Schemes.

The test for granting the remedies sought in respect of foreign main proceedings under paras 6 and 7 of the PRPL Petition

[79] Article 20 (1) provides for automatic remedies to be granted upon recognition of a foreign main proceeding. However, the court has discretion to modify these remedies (Article 20(6)). Where the insolvency process is one of restructuring rather than liquidation it is appropriate to modify these remedies so that they resemble the moratorium when a company goes into administration under Schedule B1 to the Insolvency Act 1986 (*OJSC International Bank of Azerbaijan* at para [6]). That is what is sought in the amended prayer in each Petition. It can be achieved by the granting of remedies under Article 21, which applies to main as well as non-main proceedings. The tests for granting of the remedies now sought under Article 21 are tests (1), (2) and (4) discussed above in respect of the Prosafe Petition. Test (3) does not apply to the PRPL Petition as it applies only to non-main proceedings. For the same reasons as set out above in respect of the Prosafe Petition, I find that tests (1), (2) and (4) have not been met in respect of the PRPL Petition.

Remedies sought under paras 6 and 7 of both Petitions in respect of creditors other than Cosco

[80] For these reasons, I find that the tests for the remedies sought under paras 6 and 7 of each Petition have not been met in respect of the Seller's Credit and the Guarantee.

[81] However, the position is different in respect of creditors other than Cosco. No creditor other than Cosco lodged answers. The amended prayer was intimated to Westcon's solicitors but Westcon did not take the opportunity to oppose it. On the information put before me by the Petitioner, and given that there is no opposition by Westcon, I am satisfied that the tests have been met in relation to the creditors other than Cosco. Accordingly, if the

Petitioner had wished me to do so, I would have granted the remedies sought in paragraphs 6 and 7 of the prayer in each petition in respect of creditors other than Cosco.

Orders

[82] At the end of the hearing I gave parties an opportunity to address me on what orders might be appropriate were I to find in favour of either the Petitioner or Cosco.

[83] Although Senior Counsel for Cosco's primary position was that if I were with him the petitions should be refused, he acknowledged that it might be appropriate for recognition to be granted but the orders modified so as to exclude Cosco.

[84] Counsel for the Petitioner on the other hand, submitted that her instructions were that if I were with Cosco, the petitions should be refused.

[85] It is open to this court to grant recognition and remedies but exclude specific matters from the remedies (eg *H & CS Holdings Pte Ltd* v *Glencore International* [2019] EWHC 1459). Were it not for that submission on behalf of the Petitioner, I would, in each Petition, have granted recognition under paragraph 5 of the prayer and granted the remedies sought under paragraphs 6 and 7 under exclusion of the Seller's Credit and Parent Guarantee. That would have meant that Prosafe and PRPL would have had the benefit of the protection to which they were entitled under the Model Law in respect of other creditors, including Westcon. However, I shall give effect to the Petitioner's submission and refuse both petitions. I reserve all questions of expenses in both Petitions in the meantime.