



PENNINGTONS
MANCHES

AIJA CONFERENCE PRAGUE 2014

Alex Fox



- 1 . Cross-border Insolvency Regulations vs Jurisdiction Clauses
- 2. Arbitration clauses vs Insolvency Proceedings



Cross-border Insolvency Regulations vs Jurisdiction Clauses

- *Fibria Celulose S/A v Pan Ocean Co Ltd [2014] EWHC 2124 (Ch)*
 - South Korean shipping company (POCL)
 - English Jurisdiction
 - Ipso Facto Clause
- Cross-Border Insolvency Regulations 2006 Sch.1 (CBIR) A21.1(a)



Re: Pan Ocean

- Contract for carriage of goods
- Contract subject to English law (inc. Ipso Facto clause)
- POCL placed under insolvency proceedings
- A.17 CIBR – Order for Rep of Korea as Foreign Main Proceedings
- A.20 – Administrator (A) awarded stay in ‘Proceedings’
- Fibra looked to terminate the contract
- A claimed Ipso facto void under Korean law



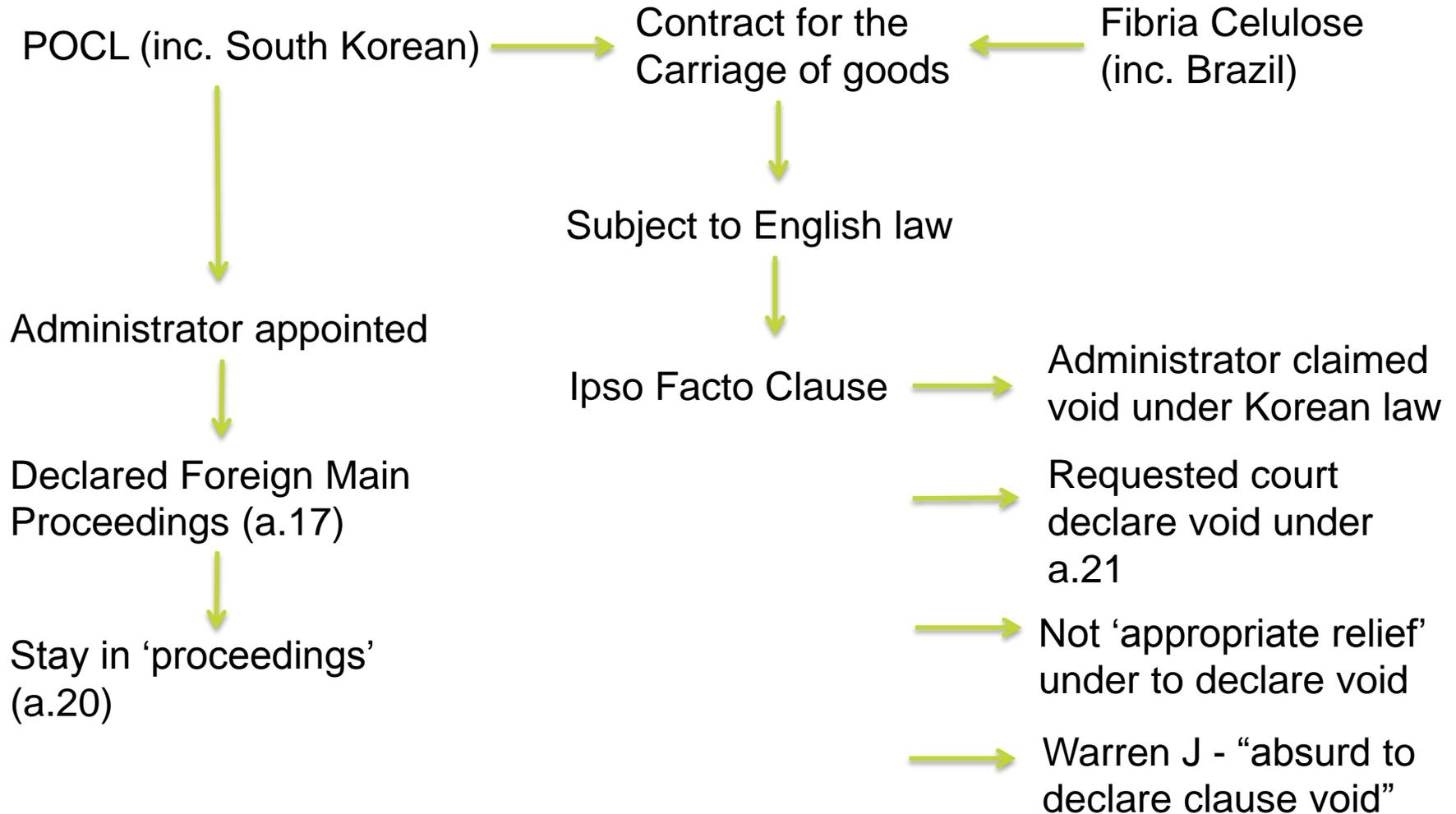
Cross-Border Insolvency Regulations 2006, Schedule 1

- Art 21(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...



Background



Principles to take from Re: Pan Ocean

- Court will uphold Ipsos Facto clauses under CBIR
- Importance of jurisdiction clause
 - As the parties had chosen English law as the governing law, it was deemed that the parties intended English law to take precedence over other national law



2. ARBITRATION vs INSOLVENCY

- Can a company reply to a winding-up petition simply by claiming that *'the debt is disputed and covered by an arbitration agreement'* so as to get the court to restrain the petition?



Overview...

- Arbitration Act 1996 (“AA 1996”)
 - S6(1) AA1996
 - *“an agreement to submit to arbitration present or future disputes (whether they are contractual or not)”*
 - S9 AA 1996
 - (1) “A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter...”
 - (4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.”



Dispute?

- ‘Dispute’ for the purposes of the AA 1996 is widely interpreted
- *“Dispute’ in an arbitration clause should be given its ordinary meaning... the fact that a person has no arguable grounds for disputing something does not mean in ordinary language that he is not disputing it” (Halki Shipping Corp v Sopex Oils Ltd (The Halki) [1998] citing Saville J in Hayter v Nelson & Home Insurance Company [1990])*



Hayter v Nelson & Home Insurance Company [1990] 2 Lloyd's Rep 265

- There need not be a genuine dispute
 - Who won the Boat Race?
 - Oxford?
 - ...LET'S ARBITRATE!



Is there a test?

- Where there is a dispute relating to a debt in response to a petition (or the threat of a petition) it must generally be shown that the dispute is:
 - Genuine; and
 - Substantial
- Ordinarily the Court must stay the proceedings under s.9 Arbitration Act 1996 at the request of the defendant where an arbitration agreement exists



Halki Shipping Corp v Sopex Oils Ltd (The Halki) [1998]

- *Halki Shipping*
 - *“Any dispute, controversy or claim arising in connection with or relating to this agreement, including its interpretation, execution and effect or the breach, termination or invalidity hereof should be referred to and finally resolved by arbitration of a single arbitrator” (citing Saville J in Hayter v Nelson & Home Insurance Company [1990])*



Rusant Ltd v Traxys Far East Ltd [2013] EWHC 4083

- Respondent served Statutory Demand – Applicant denied any sum was due as parties had entered oral agreement to extend repayment
- Warren J accepted that the applicant had a “*shadowy defence*” and that were it not for the arbitration clause, he would have allowed the winding-up petition to proceed and summarily assessed and dismissed the argument re: postponed payment
- HOWEVER, the arbitration agreement trumped any decision that Warren J was minded to otherwise make



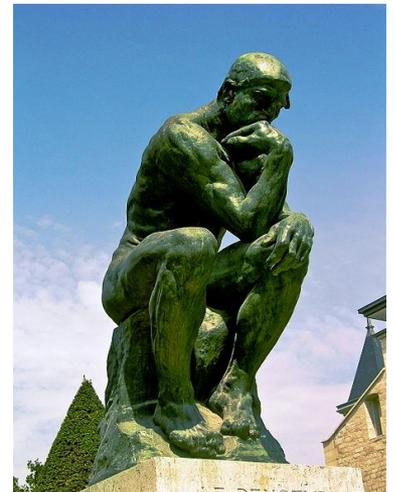
Distinguished...

- *Best Beat Ltd v Rossall [2006]*
 - S9(1) AA 1996 – “Claim or counter-claim”?
 - “winding up petition is a species of legal proceedings but it is not a claim or a counter-claim. That would appear to mean that Best Beat has no standing to invoke s 9 by making an application under the section.” Park J



POINTS TO CONSIDER...

- Section 9(2) AA 1996
- Drafting point
 - think carefully about the inclusion of an arbitration clause
 - carve out the arbitration clause for insolvency



Questions...



- Alex Fox
- Alex.fox@penningtons.co.uk
- [+44 \(0\)20 7753 7724](tel:+44(0)2077537724)





PENNINGTONS
MANCHES

LONDON
BASINGSTOKE
CAMBRIDGE
GODALMING
GUILDFORD
OXFORD
READING

www.penningtons.co.uk

Penningtons Manches LLP is a limited liability partnership registered in England and Wales with registered number 0C311575