

Applying foreign law under the UNCITRAL Model Law on Cross-Border Insolvency

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KEY POINTS

- The Cross-Border Insolvency Regulations 2006 ('CBIR') permits discretionary relief in the form of applying foreign insolvency law.
- There is no convincing common-law objection to the application of foreign law.
- The ability to apply foreign law pursuant to the CBIR is consistent with Chapter 15 of the US Bankruptcy Code and faithful to the philosophical underpinnings of the UNCITRAL Model Law on Cross-Border Insolvency.

Look Chan Ho seeks to demonstrate that granting relief under foreign insolvency law pursuant to the Cross-Border Insolvency Regulations 2006 ('CBIR') comports with the letter and spirit of the CBIR.

Cross-border insolvency regimes in essence concern whether the court in one jurisdiction will recognise and assist the insolvency representatives appointed in another jurisdiction where the debtor is subject to insolvency proceedings. If the recognising court agrees to assist the insolvency representatives, the assistance may take the form of relief under *lex fori* (the law of the forum) or foreign law (for instance, the insolvency law of the jurisdiction in which the insolvency representatives are appointed, *lex concursus*).

Assistance under *lex fori* is entirely orthodox. But assistance under foreign law has tended to generate debate about the recognising courts' powers.

In England, the debate about the court's power to assist foreign insolvency representatives using *lex concursus* is live, in the context of the CBIR which enacted the UNCITRAL Model Law on Cross-Border Insolvency ('Model Law'). Recent examples include *Perpetual Trustee v BNY Corporate Trustee Services* [2009] EWHC 1912 (Ch); [2009] 2 BCLC 400 and *D/S Norden A/S v Samsun Logix Corporation* [2009] EWHC 2304 (Ch).

This article attempts to demonstrate that administering foreign law should be as orthodox as applying *lex fori* and that the current debate about the English court's power to apply *lex concursus* pursuant to the CBIR is misconceived. A debate about the applicable choice of law rule would have been far more fruitful.

THE STATUTORY CONTEXT AND FACTUAL SCENARIOS

The CBIR mandates the English court to recognise two types of foreign insolvency proceeding, namely a foreign main proceeding and a foreign non-main proceeding. A 'foreign main proceeding' is a foreign insolvency proceeding taking place in the State where the debtor has its centre of main interests (Art. 2(g) of Schedule 1 to the CBIR); a 'foreign non-main proceeding' is a foreign insolvency proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment – that is, any place of operations where the debtor carries out a non-transitory economic activity with human means and assets or services (Arts. 2(e) and (h) of Schedule 1 to the CBIR).

Upon recognition of a foreign main proceeding, certain automatic relief ensues, including a stay of individual creditors' actions against the debtor, a stay of execution against the debtor's assets, and a suspension of the debtor's right to transfer or encumber its assets (Art. 20 of Schedule 1 to the CBIR).

In addition, upon recognition of either a foreign main proceeding or a foreign non-main proceeding, the court is empowered to grant discretionary relief to assist the

foreign insolvency representatives. The scope of the discretionary relief is widely expressed as ‘any appropriate relief’ including any relief available to a British insolvency officeholder under the law of Great Britain (Art. 21(1)(g) of Schedule 1 to the CBIR).

A question thus arises whether the English court may grant relief under Article 21 that amounts to a direct application of foreign law (such as the *lex concursus*). The cases of *Perpetual Trustee* and *Samsun* supply the factual scenarios in which this question of applying foreign law arises.

Perpetual Trustee

This case concerns the enforceability of the subordination of a swap counterparty in the following circumstances. Perpetual Trustee Company Limited (‘Noteholder’) is the holder of credit-linked synthetic notes issued by special purpose vehicles formed by a Lehman entity. Each series of notes is linked to a credit default swap agreement (governed by English law) between the note issuer and Lehman Brothers Special Financing Inc (‘LBSF’), as the swap counterparty. The note issuer’s obligations to the Noteholder and LBSF were secured by the same assets (‘Collateral’) charged to BNY Corporate Trustee Services Limited (‘Trustee’) to hold for the benefit of various creditors of the note issuer, including the Noteholder and LBSF (as the swap counterparty).

A trust deed set out the priority ranking in respect of entitlement to the Collateral. LBSF’s interest in the Collateral would rank above the Noteholder’s interest, unless an event of default occurred in relation to LBSF. If an event of default occurred in relation to LBSF, the priorities would be reversed and the Noteholder would rank above LBSF.

An event of default in relation to LBSF occurred on 15 September 2008 when Lehman Brothers Holdings Inc filed bankruptcy. In May 2009, the Noteholder commenced an action against the Trustee in England seeking a declaration that the Trustee was required to make payment to the Noteholder in priority to LBSF.

LBSF did not accept the Noteholder's claim for priority. In May 2009, LBSF issued a complaint in the US bankruptcy court contending that the priority-reversal provisions on which the Noteholder relied were forbidden by the US Bankruptcy Code in that they modified the interest of a debtor in a contract because of a bankruptcy filing.

LBSF also intervened in the action commenced by the Noteholder against the Trustee in England. LBSF argued that the priority-reversal provisions were invalid under English law as they were contrary to the principle against divestiture and sought a stay of the Noteholder's action pending resolution of the proceedings between LBSF and the Trustee in the US bankruptcy court. LBSF's grounds for a stay included future assistance to be afforded to LBSF under the CBIR. The Noteholder responded that there was no assistance which the US bankruptcy court might request the English court to give which it would be entitled to give. The Noteholder argued that the English court was not entitled under the CBIR to grant any relief that applied foreign law, in this case US bankruptcy law. LBSF argued that the English court could apply foreign law pursuant to Article 21 of Schedule 1 to the CBIR.

The court held that the priority-reversal provisions did not violate the English principle against divestiture and that it was premature to rule on the ability of the English court to apply US bankruptcy law under the CBIR in the absence of a specific request by a foreign representative, thereby maintaining the status quo. LBSF would be free to request the English court to apply US bankruptcy law if it subsequently obtained a US court order that the priority-reversal provisions were contrary to the Bankruptcy Code.

Samsun

In March 2009, the Korean rehabilitation proceeding of Samsun Logix Corporation, a Korean shipping conglomerate, was recognised by the English court as a 'foreign main proceeding' under the CBIR. In addition to the automatic relief under Article 20 of Schedule 1 to the CBIR, the English court gave additional relief under Article 21 of Schedule 1 to the CBIR such that, except with the consent of Samsun's receiver or the permission of the English court, (i) no step could be taken to enforce security over the company's property; (ii) no step could be taken to repossess goods in the company's

possession under a hire purchase agreement; and (iii) no legal process could be instituted or continued against the company; see *Re Samsun Logix Corporation* [2009] EWHC 576 (Ch). For further information on the use of the Model Law by Samsun in other jurisdictions, see Look Chan Ho, 'Smoothing cross-border insolvency by synchronising the UNCITRAL Model Law: *In re Samsun Logix Corporation* [2009] 7 JIBFL 395.

A ship owner, Norden, who had a lien over the ship in respect of unpaid charter hire sought the English court's permission to enforce the lien. Samsun's receiver then applied to have Norden's application dismissed under Article 21(1)(g) of Schedule 1 to the CBIR.

In the meantime, Samsun's receiver presented a petition to the Korean court to set aside Norden's lien.

One of the matters the English court had to consider was the effect of a Korean court order if it set aside Norden's lien. Samsun's receiver argued that he could obtain relief giving effect to a Korean court order in his favour pursuant to the CBIR. Norden argued that there was no prospect of an English court granting relief to give effect to a Korean decision invalidating Norden's security in circumstances where the security would not be vulnerable to challenge under English domestic law.

The court ordered a continued stay on Norden's enforcement of security, subject to certain conditions. Adopting the approach in *Perpetual Trustee*, the court did not rule on the ability of the English court to apply Korean law to set aside the lien pursuant to the CBIR on the ground that 'questions as to the extent, if any, to which a Korean decision in the receiver's favour could be enforced in England, would ... be best addressed if and when the Korean court has so ruled' (*Samsun* at [15]), thereby maintaining the status quo. Samsun's receiver would be free to request the English court to apply Korean insolvency law if he subsequently obtained a Korean court order setting aside the lien.

GRANTING RELIEF UNDER THE CBIR BY WAY OF APPLICATION OF FOREIGN LAW

We now consider if the English court may apply foreign insolvency law when granting discretionary relief under the CBIR, for instance applying US bankruptcy law to strike down the subordination of LBSF in *Perpetual Trustee* and applying Korean insolvency law to set aside Norden's lien in *Samsun*.

Any such discretionary relief can only be granted under Article 21 of Schedule 1 to the CBIR. Article 21(1)(g) provides the most direct route which allows any relief that may be available to a British insolvency officeholder 'under the law of Great Britain'. The Guide to Enactment of the Model Law (at paras 154 and 159) states:

‘[T]he court is not restricted unnecessarily in its ability to grant any type of relief that is available under the law of the enacting State... The proviso ‘under the law of [the] enacting 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 consequences envisaged by the law of the enacting State.’

Accordingly, although Article 21(1)(g) does not mean that foreign insolvency law must be given extraterritorial effect in England, it equally does not preclude the English courts from giving effect to foreign insolvency law. The Model Law is meant to be neutral in relation to choice of law issues in this respect. Choice of law issues are left to the courts of the enacting State. See Jenny Clift, ‘The UNCITRAL Model Law on Cross-Border Insolvency – A Legislative Framework to Facilitate Coordination and Cooperation in Cross-Border Insolvency’ (2004) 12 Tul J Int'l & Comp L 307, 324.

That applying foreign law is permissible under the CBIR is supported by Article 2(1)(q) of Schedule 1 to the CBIR which provides that references to the law of Great Britain include a reference to the law of either part of Great Britain (including its rules of private international law). Article 2(1)(q) thus amounts to an express permission for the English court to apply English choice of law rules to determine the applicable law

when granting relief. Accordingly, an English court applying English choice of law rules may legitimately apply foreign law to grant a relief sought by the foreign representative (cf *Re Television Trade Rentals* [2002] BPIR 859 at [17] for the significance of the reference to ‘rules of private international law’ in section 426 of the Insolvency Act 1986 (‘IA 1986’)).

For example, the English court may conceivably apply foreign avoidance provisions to reverse a transaction at an undervalue. Indeed the Model Law leaves open these choice of law issues and the possibility of national courts applying foreign law to an avoidance action; see Guide to Enactment of the Model Law, para 166 and Andre J Berends, ‘The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview’ (1998) 6 Tul J Int’l & Comp L 309, 377. For attempts to map out the choice of law rules, see Jay Lawrence Westbrook, ‘Choice of Avoidance Law in Global Insolvencies’ (1991) 17 Brook J Int’l L 499; Jay Lawrence Westbrook, ‘Universalism and Choice of Law’ (2005) 23 Penn St Int’l L Rev 625; Jay Lawrence Westbrook, ‘Avoidance of Pre-Bankruptcy Transactions in Multinational Bankruptcy Cases’ (2007) 42 Tex Int’l LJ 899; Look Chan Ho, ‘Conflict of Laws in Insolvency Transaction Avoidance’ (2008) 20 Singapore Academy of Law Journal 343.

The ability to apply foreign law in appropriate circumstances is also consistent with the philosophical underpinnings of the Model Law. A concrete example will help prove the point. Imagine the following scenario: (i) a shipping conglomerate needs to restructure its debts using the US Chapter 11 proceedings; (ii) its centre of main interests is in the US; (iii) many of its charterparties are governed by English law which contain termination clauses on grounds of insolvency; (iv) many ship owners are resident in England. Accordingly, if the shipping conglomerate is to have a successful restructuring, it needs to make sure that the ship owners do not terminate the charterparties upon the US bankruptcy filing. The US Bankruptcy Code prohibits termination of executory contracts on grounds of insolvency. However, the English ship owners may not be amenable to the US jurisdiction and might disregard the US prohibition. In these circumstances, the US foreign representative may conceivably apply for recognition and assistance under the CBIR with a view to obtaining relief under Article 21 which replicates the US prohibition on termination of the charterparties, although as a matter of domestic English law such termination is

permitted. It would be unfortunate if the English court could not grant the relief simply because the English court could not apply US bankruptcy law. This would also go against the CBIR's letter and spirit.

COMPARATIVE ANALYSIS – CHAPTER 15 OF THE US BANKRUPTCY CODE

As the Model Law is not a treaty, its operation depends on how it is enacted locally. The common thread uniting all local enactments is Article 8 of the Model Law which provides that in the interpretation of the Model Law, 'regard is to be had to its international origin and to the need to promote uniformity in its application'. Although more than a dozen countries have enacted the Model Law since its promulgation in 1997, all the principal judicial developments occur in the United States which enacted the Model Law in the form of Chapter 15 of the US Bankruptcy Code.

Accordingly, given that the US jurisprudence represents the clear frontier, it makes it imperative for the English court to consider the operation of Chapter 15.

For present purposes, we should consider to what extent Chapter 15 permits the US bankruptcy court to apply foreign law when granting relief to foreign insolvency representatives.

Equivalent to Article 21 of Schedule 1 to the CBIR is section 1521 of the US Bankruptcy Code. It is important to note that section 1521(a)(7) provides that upon recognition of a foreign proceeding, the court may grant any appropriate relief except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a) dealing with avoidance of antecedent transactions. Section 1523 grants a foreign representative standing to initiate an avoidance action if the debtor is subject to a full bankruptcy case under another chapter of the Bankruptcy Code (eg Chapter 7 or Chapter 11). This is in contrast to Article 23 of Schedule 1 to the CBIR which provides a foreign representative with standing to commence avoidance actions under IA 1986 even if the debtor is not subject to any English insolvency proceedings.

Three recent Chapter 15 cases require consideration, namely *In re Condor Insurance Limited*, 411 BR 314 (SD Miss 2009), *In re Atlas Shipping A/S*, 404 BR 726 (Bankr SDNY 2009) and *In re Gandi Innovations Holdings, LLC*, 2009 Bankr LEXIS 2751 (Bankr WD Texas June 5, 2009).

In *Condor Insurance*, the debtor was an insurance company organised under the laws of Nevis and was wound up by the Nevis court in May 2007. In August 2007, the Nevis liquidation was recognised as a foreign main proceeding under Chapter 15. The foreign representatives contended that over \$313 million in assets belonging to the debtor were fraudulently transferred to the defendants and that many of the assets were located in the United States. The foreign representatives thus sought to recover the assets by seeking relief under section 1521 of the Bankruptcy Code. The causes of action were all governed by Nevis law, namely knowing receipt of property transferred in breach of fiduciary duty, dishonest assistance in transferring property in breach of fiduciary duty, fraudulent conveyance under the Statute of Elizabeth 1571 and void disposition of property after a winding-up petition under the Nevis insolvency legislation. The US bankruptcy court held that it had no subject-matter jurisdiction over the foreign representatives' action because 'Section 1521(a)(7) and Section 1523 are intended to exclude all of the avoidance powers specified, under either United States or foreign law, unless a Chapter 7 or 11 bankruptcy proceeding is instituted' (411 BR 314, 319 (SD Miss 2009)).

In *Atlas Shipping*, the debtors were Danish companies which became subject to Danish bankruptcy proceedings in December 2008. Shortly before and after the Danish bankruptcy proceedings, the debtors' funds located in the US were subject to maritime attachments obtained by the debtors' creditors. The attachments were void under Danish bankruptcy law. In February 2009, the US bankruptcy court recognised the Danish bankruptcy proceedings as foreign main proceedings under Chapter 15. The foreign representatives then sought relief under section 1521 that the attachments be vacated so that funds would be turned over to the foreign representatives. Relying on *Condor Insurance*, the creditors argued that the relief sought could only be granted if the foreign representatives also commenced a case under Chapters 7 or 11. But the bankruptcy court ruled in favour of the foreign representatives and reasoned that *Condor Insurance* was inapplicable for the following reason:

‘Ordering entrustment of the previously garnished funds to the foreign representative does not fall within the ambit of the avoidance action carve-out in §§ 1521(a)(7) and 1523, because ... it is properly considered turnover relief under §§ 1521(a)(5) and 1521(b). A judgment in an avoidance action results in an order that the creditor may not retain an interest in debtor’s property. See 11 U.S.C. § 551 (avoided transfers are retained for the benefit of the estate)... The Court does not make such a determination here’ (*In re Atlas Shipping A/S*, 404 BR 726, 746 (Bankr SDNY 2009)).

In dicta, the court also criticised *Condor Insurance*:

‘While the parties relied extensively on *Condor* in briefing, the Court concludes that its reasoning is open to question and it is in any event inapplicable to this case since the foreign representative has not commenced an avoidance action under U.S. or foreign law. The *Condor* court’s conclusion that Congress intended to prevent a foreign representative from bringing avoidance actions based on foreign law is not supported by anything specifically in the legislative history. The court also ignores cases decided under § 304. See, e.g., *In re Metzeler*, 78 BR 674, 677 (Bankr SDNY 1987) (holding “that a foreign representative may assert, under § 304, only those avoiding powers vested in him by the law applicable to the foreign estate”). As the court in *Metzeler* stated, Congress is presumed not to have overturned precedent when amending the Bankruptcy Code. *Id.* at 679. [Footnote: In addition, Congress also expected courts to look at § 304 case-law in interpreting chapter 15.] The court also noted that “Congress intended that foreign preference and fraudulent transfer actions seeking to recover property located here are a sufficient basis on which to ground a § 304 petition” *Id.* at 680. 15 Similarly here, absent a clear statutory directive, it is unclear whether chapter 15’s replacement of § 304 precludes a foreign representative from bringing an avoidance action under foreign law’ (*In re Atlas Shipping A/S*, 404 BR 726, 744 (Bankr SDNY 2009)).

Therefore the current case-law status is that section 1521 might allow a foreign representative to commence avoidance actions using foreign insolvency law, though the position has not yet been conclusively settled.

Leaving aside the peculiar interplay between section 1521(a)(7) and section 1523 in relation to avoidance actions, it seems settled that Chapter 15 permits the US bankruptcy court to apply foreign law when granting relief, as evidenced in *Gandi Innovations*. The debtors there were subject to Canadian insolvency proceedings in May 2009 under the Canadian Companies' Creditors Arrangement Act, RSC 1985, C. C-36, as amended. The Canadian court order commencing the proceedings ('CCAA Order') contained a lengthy list of relief (such as the prohibition against termination of various executory contracts). In addition to seeking recognition under Chapter 15, the foreign representative sought relief pursuant to section 1521 requesting the US bankruptcy court to adopt as its own order the CCAA Order. The US bankruptcy court determined that it was necessary to effectuate the purposes of Chapter 15 and to protect the assets of the debtors and the interests of creditors by granting appropriate relief in the form of the adoption of the CCAA Order. Accordingly, when recognising the Canadian insolvency proceedings as foreign main proceedings, the order of recognition provided that 'The CCAA Order (and any further amendments or extensions thereof as may be granted from time to time by the Ontario Court) is hereby given full force and effect in the United States'.

Although the CCAA Order was based on Canadian law, the US bankruptcy court had no hesitation adopting it as its own order, thereby applying Canadian law to the fullest extent.

The Chapter 15 jurisprudence thus offers comparative support for the proposition that the English court may apply foreign law when granting relief under Article 21 of Schedule 1 to the CBIR.

A COMMON LAW OBJECTION TO THE APPLICATION OF FOREIGN LAW?

Some might object to the English court applying foreign law pursuant to the CBIR on two grounds. First, it might be said that unless the statute expressly permits the

application of foreign law (such as section 426 of IA 1986), then the English court has no power to apply foreign insolvency law. Second, in the context of granting common law assistance to foreign insolvency representatives, the Privy Council said ‘it is doubtful whether assistance could take the form of applying provisions of the foreign insolvency law which form no part of the domestic system’ (*Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings* [2006] UKPC 26; [2007] 1 AC 508 at [22]).

In this commentator’s view, the above objection is unconvincing and is inapplicable to the CBIR anyhow, for the following reasons.

First, it is important to note that the Privy Council’s actual decision in *Navigator* did apply foreign law, ie US bankruptcy law. In *Navigator* a group of insolvent Isle of Man companies went into voluntary Chapter 11 proceedings. The Chapter 11 plan of reorganisation provided for the group’s assets to be transferred to the creditors. As these assets were ultimately owned by a Manx parent company, the Chapter 11 plan also purported to vest the shares in the Manx parent in the creditors’ representatives. The Privy Council agreed to assist the US bankruptcy court by giving effect to the Chapter 11 plan, reasoning that as a matter of common law ‘the court has power to declare that the Chapter 11 plan should be carried into effect’ (*Navigator* at [23]). Although the same result could be achieved by means of a scheme of arrangement, the Privy Council said that was not necessary because the Chapter 11 plan could be given direct effect, ie applying US bankruptcy law.

Second, where English insolvency proceedings are ancillary to foreign insolvency proceedings, the application of the otherwise mandatory English insolvency provisions seems subject to a choice of law analysis as a matter of common law (see *Re HIH Insurance* [2008] UKHL 21; [2008] 1 WLR 852 at [25]). If a choice of law analysis may disapply English insolvency law, it may also logically apply foreign insolvency law.

Third, the case of *Banque Indosuez v Ferromet Resources* [1993] BCLC 112 helps show why applying foreign insolvency law is unobjectionable. There the court

signalled its willingness to discharge an English injunction which violated the automatic stay under the US Bankruptcy Code:

‘This court is not of course bound by the stay under United States law but will do its utmost to co-operate with the United States Bankruptcy Court and avoid any action which might disturb the orderly administration of [the debtor] under ch 11. This court has jurisdiction to make interlocutory orders for the preservation of [the debtor’s] property in this country by way of assistance to the United States Bankruptcy Court... If the United States court requires the assistance of this jurisdiction, I am sure our courts will be willing to help’ ([1993] BCLC 112, 117-118 (Hoffmann J)).

The result is not different from giving direct effect to the US automatic stay.

Fourth, even assuming the English court has no common-law power to apply foreign insolvency law, this does not control the CBIR position. It is established that the CBIR and common law operate in parallel: *Re Stanford International Bank* [2009] EWHC 1441 (Ch) at [100] and *Rubin v Eurofinance* [2009] EWHC 2129 (Ch) at [22].

Fifth, if a statutory mandate for applying foreign law is needed, Article 2(1)(q) of Schedule 1 to the CBIR supplies the mandate when it refers to private international law rules. The reference to private international law rules connotes that the English court may apply foreign insolvency law where appropriate. That also explains why Lord Hoffmann once remarked that although ordinarily one would expect a court to apply its own insolvency laws, in some cases its rules of the conflict of laws may point in a different direction (*Re HIH Insurance* [2008] UKHL 21; [2008] 1 WLR 852 at [28]).

It is therefore suggested that there is no principled objection against the application of foreign law pursuant to the CBIR. Further, the technique of applying foreign insolvency law is not alien to the English court. Provided proper choice of law rules are developed, the ability to apply foreign law may well redound to the theory of universalism – that all bankruptcy assets and claims should be administered in the debtor’s ‘home country’ under the laws of that country:

‘The emerging international rule in multinational bankruptcy cases focuses on the center of the debtor’s main interests. Up to now, that standard has been adopted primarily as a choice-of-forum rule rather than a choice-of-law rule, but it is necessary to use it for both purposes to achieve the goals of universalism’: Jay Lawrence Westbrook, ‘Universalism and Choice of Law’ 23 Penn St Int’l L Rev 625, 634 (2005).

CONCLUSION

The Model Law has thus far worked well in smoothing the management of transnational insolvencies and promoting international rescue. The management of Samsun’s rehabilitation proceeding mentioned above is a live example. It is the enactment of the Model Law that allowed the Korean receiver to seek recognition and assistance of the Korean proceeding abroad, resulting in its uniform recognition as a foreign main proceeding in the UK, US and Australia, with broadly uniform relief. Another recent instance is *Re TPC Korea Co Limited* (No 19984 of 2009) (29 October 2009) where the English court recognised the debtor’s Korean rehabilitation proceeding as a foreign main proceeding and granted additional relief in the form of an administration moratorium. (I am grateful to Stephen Robins for bringing the *TPC Korea* case to my attention.)

An as yet unresolved issue in the UK version of the Model Law is the English court’s ability to apply foreign law when granting discretionary relief. It is submitted that there exists no principled objection to the application of foreign law pursuant to the CBIR. In fact, there are principled justifications for applying foreign law in appropriate circumstances, which would also be consistent with the Chapter 15 position and better realise the Model Law’s potential. Any objection premised on the absence of express permission to apply foreign law (such as that in section 426 of IA) is unwarrantably to hamstring the English court’s mandate to assist foreign insolvency proceedings. Ceding to such objection amounts to a triumph of technicality over reason, of red tape over principle.

Some have argued that applying foreign insolvency law to challenge otherwise valid English law-governed transactions would upset the security of transactions. But such

argument about transaction security is really a proxy argument for choice of law. As such, it is not an argument against the English court's *de jure* ability to apply foreign law.

The ability to apply foreign law when assisting foreign insolvency representatives is not a sign of suppressing English law, but a sign of the confidence and strength of English international insolvency law. It would therefore be far more fruitful if the courts' attention could be directed to the formulation of choice of law rules.