CROSS-BORDER INSOLVENCY AND ITS IMPACT ON ARBITRATION*

The globalised and cross-jurisdictional nature of commercial business means that the effects of insolvencies are often felt across multiple jurisdictions. Further, the ubiquity of arbitration clauses in commercial contracts means that the likelihood of interaction between the traditionally distinct areas of arbitration and insolvency law is increasing. For example, what are the effects of a foreign insolvency event on arbitrations seated in Singapore? This article attempts to examine the interaction and impact of cross-border insolvencies on arbitration proceedings from a Singapore law perspective, which is timely given Singapore's continued growth as a leading arbitration and established international finance centre.

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I. Introduction

1 The interaction between the law of arbitration and cross-border insolvency laws is of particular importance given Singapore's status as both a leading arbitration centre and an established international

* This article and the proof of the article was finalised for publication before the Privy Council issued its decision in *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] WLR(D) 476; [2014] UKPC 36 on 10 November 2014. Regard should be had to the decision of the Privy Council in shedding light as to the extent to which common law assistance of foreign insolvencies may be available.

finance centre. This article will deal broadly with the impact of cross-border insolvency on arbitration proceedings from a Singapore law perspective.

2 There are a number of scenarios in which these areas of law may come into contact. One example is where arbitration proceedings are ongoing in Singapore, but insolvency proceedings are commenced before a foreign court against the respondent in the arbitration. If the foreign courts order a stay of all proceedings against the respondent, does the arbitral tribunal in Singapore stay proceedings? Who has *locus standi* to appear for the respondent? Should the tribunal continue to hear management? Or should the tribunal hear the insolvency practitioner appointed by the foreign court? What happens in the event that the foreign insolvency appointee disclaims the agreement in which the relevant arbitration clause is housed?

3 This interaction – one could almost say clash – between cross-border insolvency law and arbitration law on some of the above issues may be particularly difficult to resolve, due to the almost diametrically opposed legal philosophies underpinning both concepts. The Singapore Court of Appeal in *Larsen Oil and Gas Pte Ltd v Petroprod Ltd*[1] ("*Larsen Oil*") aptly described this tension:

> Arbitration and insolvency processes embody, to an extent, contrasting legal policies. On the one hand, arbitration embodies the principles of party autonomy and the decentralisation of private dispute resolution. On the other hand, the insolvency process is a collective statutory proceeding that involves the public centralisation of disputes so as to achieve economic efficiency and optimal returns for creditors.

4 This article aims to identify areas of interaction in a cross-border context between the two areas of law, and suggest the outcome of these interactions. The article examines the topic from the perspective of Singapore law, but some of the concepts and discussion may also be relevant to other common law jurisdictions.

II. The impact of cross-border insolvency proceedings/orders/resolutions *per se* on the substantive validity of an arbitration agreement

5 Is an arbitration agreement providing for arbitration in one jurisdiction revoked upon the occurrence of insolvency proceedings or procedures (including orders and resolutions) in a different jurisdiction? The answer depends on a number of variables, some of which are analysed in turn below.

1 [2011] 3 SLR 414 at [1].

A. Validity of an arbitration agreement under Singapore insolvency laws

6 Under Singapore law, Singapore insolvency proceedings do not *per se* affect the validity of arbitration agreements entered into prior to the commencement of the insolvency proceedings.[2] In the context of personal bankruptcy, s 148A of the Bankruptcy Act,[3] *inter alia*, gives the Official Assignee the option to either disclaim or adopt a contract containing an arbitration agreement.

7 There is no statutory equivalent of s 148A of the Bankruptcy Act in corporate insolvencies. Nevertheless, corporate insolvencies also do not *per se* invalidate arbitration agreements. Consistent with such a view, the Singapore Court of Appeal in *Larsen Oil*[4] proceeded on the basis that an arbitration agreement entered into pre-liquidation may well continue to be "observed", such as to enable arbitration of prior private *inter se* disputes (*ie*, disputes that are solely between the parties).[5] This presupposes that insolvency does not itself terminate an arbitration agreement. However, it is also open for a liquidator to disclaim certain contracts if, for example, the agreement within which the arbitration agreement is housed constitutes an "unprofitable contract".[6]

8 In the event of Singapore insolvency proceedings, a Singapore-seated arbitration tribunal would be bound by the insolvency law provisions affecting the substantive arbitration agreement, and would therefore be bound to find the arbitration agreement invalid if Singapore insolvency law so provides. This is because Singapore insolvency should be regarded as part of the forum mandatory rules,[7] "replete with public policy considerations"[8] whose primary intent is to protect a large class of persons – the general body of unsecured creditors. The above insolvency provisions are also not unique to Singapore, but have equivalents in the insolvency laws of many

2 See, *eg*, Michael Mustill & Stewart C Boyd, *Commercial Arbitration* (Butterworths, 2001) at p 153; Edward Bailey, Hugo Groves & Cormac Smith, *Corporate Insolvency Law and Practice* (Butterworths, 2nd Ed, 2001) at para 20.26; and Andrew R Keay, *McPherson's Law of Company Liquidation* (Sweet & Maxwell, 2009) at para 7.026.

3 Cap 20, 2009 Rev Ed.

4 *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] 3 SLR 414 at [51].

5 Though the Court of Appeal eventually decided that the subject matter of the dispute in that case was non-arbitrable on grounds of public policy.

6 See Companies Act (Cap 50, 2006 Rev Ed) s 332. See also *Velde v Prime Property Investment Pty Ltd* (2011) 86 ACSR 112 and *Prime Property Investment Pty Ltd v Van Der Velde* (2011) 87 ACSR 76 for an example of disclaimer of an arbitration agreement under the general provisions for disclaimer.

7 See also Teo Guan Siew, *Pushing the Limits of Judicial Assistance in Cross-Border Insolvencies* (2008) 20 SAcLJ 784 at 798–800, para 19 and *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2013 Reissue) at para 75.364.

8 *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] 3 SLR 414 at [30].

jurisdictions. As a comparison, tribunals in several International Chamber of Commerce ("ICC") awards have held that they are bound to take into account the insolvency law of the seat of the arbitration, once insolvency proceedings are filed in that jurisdiction.[9]

B. Impact of foreign insolvency proceedings on substantive validity of an arbitration agreement

9 How would the above answers change in the event of a *foreign* insolvency? Particularly where the foreign insolvency prescribes that the arbitration agreement is annulled upon insolvency? One notable example can be found from the Vivendi/Elektrim[10] cases arising in Europe. Elektrim was a Polish company that had entered into an investment agreement with two French companies. The agreement provided for arbitration in London. Elektrim was made bankrupt under Polish law. Polish bankruptcy law provides that an arbitration agreement is annulled upon the onset of insolvency.[11] Should the tribunal give effect to this consequence of Polish (or other) insolvency law that invalidates the arbitration agreement?

10 The English line of Elektrim decisions held that English law, and not Polish law, applied to determine validity. The English decisions turned on the interpretation of certain provisions of the European insolvency regulations.[12] Would the position be similar under common law conflict of laws rules? The question of the effect of foreign insolvency on the continued substantive validity of an arbitration seated in a common law country (say, Singapore) does not appear to have been fully worked out. This part of the article seeks to provide a working framework or some ideas as to what the position in Singapore could be.

11 First, the start point should be that foreign proceedings should not by themselves be held to invalidate a valid arbitration agreement. As discussed above, Singapore insolvency law does not automatically

9 Domitille Baizeau, "Arbitration and Insolvency: Issues of Applicable Law" in *New Developments in International Commercial Arbitration 2009* (C Müller & A Rigozzi eds) (Schulthess, 2009) at p 103, citing: *ICC Award No 8133 of 1999* in Jolivet (2006) at p 24; *ICC Award No 7205 of 1993* in *Collection of ICC Arbitral Awards 1991–1995* (J-J Arnaldez, Y Derains & D Hascher eds) (Kluwer Law International, 1997) at pp 622 and 625; and in Mantilla-Serano at p 70 (seat in Paris, insolvency proceedings filed in France).

10 *Syska (Elektrim SA) v Vivendi Universal SA* [2009] EWCA Civ 677.

11 *Syska (Elektrim SA) v Vivendi Universal SA* [2009] EWCA Civ 677 at [13]. Specifically, Art 142 of the Polish Bankruptcy and Reorganisation Law provides: "Any arbitration clause concluded by the bankrupt shall lose its legal effect as at the date the bankruptcy is declared and any pending arbitration proceedings shall be discontinued."

12 Specifically, Arts 4, 5 and 15 of Council Regulation (EU) No 1346/2000.

invalidate an arbitration agreement and the presumption is that foreign law is similar to Singapore law unless proven otherwise.[13] This is, however, only a rule of evidence, which may be rebutted on the presentation of appropriate evidence that the foreign insolvency would substantively affect the arbitration agreement.

12 Second, foreign insolvency laws have no force of law or automatic application in Singapore, a proposition that should be self-evident. Consistent with this view, it has been observed in the recent Singapore Court of Appeal decision of *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd*[14] ("*Beluga CA*") that the Singapore courts are not bound by stays of legal proceedings flowing from a foreign winding-up order, "premised on the fundamentally territorial nature of jurisdiction".[15]

13 Third, it would follow that in order for the effects of foreign insolvency law to substantively invalidate an arbitration agreement, there necessarily must be a legal basis which applies, as a matter of conflict of laws principles, the said foreign law.

14 Fourth, it should not be presumed that a tribunal would apply the same conflict of laws principles as those applicable in the Singapore court to determine whether to give effect to the foreign insolvency laws that might affect the substantive validity of the arbitration agreement. In this respect, a start point for a tribunal seated in Singapore should be Art 28 of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration[16] ("Model Law") (in the case where the International Arbitration Act[17] ("IAA") applies) and s 32 of the Arbitration Act[18] ("AA") (in the case where the AA applies).[19] The provisions essentially require the tribunal

13 *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2013 Reissue) at paras 75.296–75.298; Michael Hwang & Andrew Chan, "Proof of Foreign Law" in *Current Issues International Commercial Litigation* (Teo Keang Sood ed) (Faculty of Law, National University of Singapore, 1997) at p 131.

14 [2014] 2 SLR 815 at [90] and [98].

15 Although this statement was made in the context of procedural matters (*ie*, a stay of proceedings), it would still be correct to say that foreign laws, which do not have force of law in Singapore, must find some basis for their recognition and application in Singapore.

16 Incorporated into our domestic legislation by the First Sched to the International Arbitration Act (Cap 143A, 2002 Rev Ed).

17 Cap 143A, 2002 Rev Ed.

18 Cap 10, 2002 Rev Ed.

19 Broadly, arbitration in Singapore is "dual-track" in nature with the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") governing "international" arbitrations and the Arbitration Act (Cap 10, 2002 Rev Ed) governing domestic arbitrations. Whether an arbitration is "international" or not is by reference to s 5(2) of the IAA. Notwithstanding s 5(2) of the IAA, it is also open to parties to

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to apply to the substance of the dispute the law chosen by the parties as applicable to the substance of the dispute.[20] However, where parties have not chosen a law applicable to the dispute, the tribunal is to determine the substantive law with reference to "the conflict of laws rules which it considers applicable".[21] In such instances the tribunal has a "free hand" in deciding what conflict of laws rules apply in determining what substantive law applies.[22] However, it is the experience and understanding of the authors that in such situations, Singapore-seated tribunals would often apply Singapore conflict of laws principles.

15 The effect of Art 28 of the Model Law is that the tribunal will have to decide what law applies to the substance of the dispute. In this respect, the tribunal will invariably among other things determine what laws govern the arbitration agreement, which may not necessarily be the same governing law as the main contract within which the arbitration agreement appears.[23]

16 Fifth, a basis on which the continued validity of the arbitration agreement may be indirectly affected is where the foreign insolvency law impacts on a party's capacity to arbitrate. In this respect, it is interesting to note that the Elektrim dispute also triggered related and concurrent arbitration proceedings in Switzerland. However, in stark contrast to the English outcome (partly owing to the fact that Switzerland is not bound by similar European legislation as England), the Swiss tribunal held that Polish insolvency law was applicable to the dispute and that, as a consequence of its insolvency, Elektrim no longer had the *capacity* to be a party in the Swiss arbitration proceedings. The Swiss tribunal's decision was subsequently affirmed by the Swiss Supreme Court.[24] In Singapore, the question of capacity is traditionally determined by the law of the place of incorporation for body corporates; or in the case of natural persons, by their domicile.[25]

17 Sixth, once the tribunal determines the substantive law governing the arbitration, that substantive law should among other

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agree to be bound, or not be bound, by the provisions of the IAA (see ss 5(1) and 15(1) of the IAA).

20 International Arbitration Act (Cap 143A, 2002 Rev Ed) First Sched, Art 85; Arbitration Act (Cap 10, 2002 Rev Ed) s 32.

21 International Arbitration Act (Cap 143A, 2002 Rev Ed) First Sched, Art 28(2).

22 Robert Merkin & Johanna Hjalmarsson, *Singapore Arbitration Legislation Annotated* (informa, 2009) at p 107.

23 *Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury *et al* eds) (Sweet & Maxwell, 15th Ed, 2012) at para 16-012.

24 *Vivendi v Elektrim* (Swiss Supreme Court, Decision 4A_428/2008 dated 31 March 2009).

25 *Halsbury's Laws Singapore* vol 6(2) (LexisNexis, 2013 Reissue) at paras 75.370–75.371.

things govern the validity of the arbitration agreement.[26] In this respect, the headnote of *Global Distressed Alpha Fund I Ltd Partnership v PT Bakrie Investindo*[27] ("*Bakrie*") refers to "the long established rule that a discharge from any debt or liability under the bankruptcy law of a foreign country was effective … only if it was a discharge under the law applicable to the contract". It should follow as a general principle that if the foreign insolvency law and the law of the arbitration agreement correspond, the consequences of foreign insolvency invalidating the arbitration agreement should apply as part of the governing or proper law.[28]

18 In reaching this conclusion in *Bakrie*, Teare J held that he was bound by the decision of *Antony Gibbs & Sons v Société Industrielle et Commerciale des Métaux*[29] ("*Gibbs*") as authority that a discharge from any debt or liability under a foreign insolvency law is valid in England only if the discharge was made under the same law as the governing law of the contract. Nevertheless Teare J also saw force in the argument that the principle of modified universalism dictates that it was open for him to recognise the discharge under foreign insolvency law, but noted that it was not open to him to overrule *Gibbs*.[30] The decision in *Bakrie*, which was a first instance judgment, does not appear to have been appealed in England. The *Bakrie* saga also resulted in much litigation in Singapore.[31]

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26 Gary Born, *International Arbitration: Law and Practice* (The Netherlands: Kluwer Law International, 2012) at p 77; *Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury *et al* eds) (Sweet & Maxwell, 15th Ed, 2012) at paras 16-001 and 16-008.

27 [2011] 1 WLR 2038.

28 This position is mirrored by Art 34(2)(a)(i) of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration 1985 (GA Res 40/72, UN GOAR, 40th Sess, Supp No 17, Annex 1, UN Doc A/40/17 (1985)) ("Model Law") Article 34(2)(a)(i) provides that an award may be set aside by the court if the arbitration agreement "is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State". In other words, the default position under the Model Law is that the validity of the arbitration agreement is to be decided according to its governing law. Only where there is no indication, should the law of the seat be turned to. A similar position also applies under Art V(1)(a) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) 330 UNTS 3 (entered into force 7 June 1959) ("New York Convention"). Both Art 34(2) of the Model Law and the New York Convention have been adopted by Singapore. Accordingly, applying the above decisions in *Global Distressed Alpha Fund I Ltd Partnership v PT Bakrie Investindo* [2011] 1 WLR 2038, a Singapore court hearing the matter may only invalidate an arbitration agreement where the law of the arbitration agreement is the same as the law of the foreign insolvency proceedings.

29 (1890) 25 QBD 399.

30 *Global Distressed Alpha Fund I Ltd Partnership v PT Bakrie Investindo* [2011] 1 WLR 2038 at [25]–[26].

31 *Global Distressed Alpha Fund I Ltd Partnership v Integrated Financial Advisory Ltd* [2012] SGHC 152; *Global Distressed Alpha Fund I Ltd Partnership v PT Bakrie Investindo* [2013] 2 SLR 228; *Global Distressed Alpha Fund I Ltd Partnership v PT*

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In one of the Singapore decisions, Woo Bih Li J also saw some strength to the universality argument, and noted that the proper course was that PT Bakrie "ought to have filed an appeal in the UK proceedings".[32] Justice Woo did not have to decide the point as a matter of Singapore law, as the matter before him involved an application to set aside an order for registration in Singapore of an English judgment. The question of merits relating to universality was, on the facts of the case, essentially one to be decided as a matter of English law.

19 This leads to the seventh point – it is open to Singapore to adopt a more universalist approach such as to give effect to the foreign insolvency law at the place of incorporation. This includes giving effect to foreign law (such as Polish law) which may invalidate or discharge an arbitration agreement even where the governing law of the arbitration agreement differs from the foreign insolvency law. At this juncture it suffices to note that the exact scope of such recognition and assistance is not clearly defined in Singapore, and is discussed later in this article. Nevertheless, it should be open to the Singapore courts to assist in appropriate cases.

20 Finally, another possible basis where the arbitration agreement could be affected is that of submission to the foreign insolvency regime. This is an area which does not appear to be well developed, and the following is a discussion of one instance which may be of general interest. For instance, does the filing of a proof of debt in insolvency proceedings result in the loss of the right to arbitrate?

21 In *Tanning Research Laboratories v O'Brien*[33] ("*Tanning*"), an appeal against a rejection of a proof of debt was held to come within the terms of an arbitration agreement, and accordingly, the Australian High Court held that the appeal against the rejection would be stayed in favour of arbitration. On the facts, the liquidator's rejection of the proof was one based on principles of general law and not in reliance on grounds only available to him solely in his capacity as liquidator. Hence, the court held that the liquidator's rejection (being one made on the basis of general law) was within the scope of the particular arbitration agreement and capable of being resolved by arbitration.[34] This decision suggests that participation in a winding up by the filing of a proof of debt and a determination on such proofs *per se* does not put an end to

Bakrie Investindo [2013] 2 SLR 429; *Global Distressed Alpha Fund I Ltd Partnership v PT Bakrie Investindo* [2013] SGHC 105; *PT Bakrie Investindo v Global Distressed Alpha Fund 1 Ltd Partnership* [2013] 4 SLR 1116.

32 *Global Distressed Alpha Fund I Ltd Partnership v PT Bakrie Investindo* [2013] 2 SLR 228 at [48].

33 (1990) 91 ALR 180.

34 *Tanning Research Laboratories v O'Brien* (1990) 91 ALR 180 at 186–187.

the right to arbitrate an appeal against the rejection of a proof of debt (subject to any insolvency stay of proceedings provisions which may be applicable, some of which are discussed below). The authors suggest that this pro-arbitration approach is correct. The position would be different if the appeal concerned matters that arose only by reason of or in connection with insolvency, or those that involve rights or powers exercisable by the liquidator and not those exercisable at general law.[35]

22 A possible difficulty with adopting the approach in *Tanning* in Singapore is r 93 of the Companies (Winding Up) Rules[36] ("CWU Rules"), which provides:

> 93. If a creditor or contributory is dissatisfied with the decision of the liquidator in respect of a proof, the Court may, on the application of the creditor or contributory, reverse or vary the decision; but subject to the power of the Court to extend the time, *no application to reverse or vary the decision of the liquidator in a winding up by the Court rejecting a proof sent to him by a creditor, or person claiming to be a creditor, shall be entertained, unless notice of the application is given before the expiration of 21 days from the date of the service of the notice of rejection*. [emphasis added]

23 One view is that this rule suggests that the only appeal or remedy against the liquidator's determination is via an appeal to court under the rule. The alternative is that r 93 only deals with a default position if no application is filed in court within the stipulated time, but does not in itself preclude arbitration. However, for the following reasons, the authors are of the view that r 93 should not limit parties' recourse only to the courts, where parties have agreed to arbitrate.

24 First, in *Tanning*, a key question for the court was whether the dispute in relation to the determination by the liquidator was one "capable of settlement by arbitration". Once the dispute was one capable of being arbitrated, the fact that there was a proof of debt filed and a subsequent determination by the liquidator thereon did not preclude the dispute from being capable of being arbitrated. This would imply that the filing of a proof and a determination of the liquidator does not make a dispute under general law not arbitrable. It is suggested that a similar position should be followed in Singapore. Thus, in the case of *Larsen Oil*, the Court of Appeal observed that "in instances where the

35 For examples following the approach in *Tanning Research Laboratories v O'Brien* (1990) 91 ALR 180, see *ACD Tridon v Tridon Australia* [2002] NSWSC 896; *Tanning Research Laboratories v O'Brien* was also referred to in the decision of *ERPIMA SA v Chee Yoh Chuang* [1997] 1 SLR(R) 923.

36 Cap 50, R 1, 2006 Rev Ed. See also reg 80 of the Companies Regulations (Cap 50, Rg 1, 2006 Rev Ed) and r 198 of the Bankruptcy Rules (Cap 20, R 1, 2006 Rev Ed) for similar provisions in relation to judicial management and bankruptcy respectively.

agreement is only to resolve private *inter se* disputes between the company and another party, there will usually be no good reason not to observe the terms of the arbitration agreement".[37] This statement is significant, as it comes shortly after the court indicated that it may not be possible to contract out of the proof of debt process.[38] If the court is saying on one hand that it may not be possible to contract out of the proof of debt process and on the other hand it may be less objectionable to allow arbitration of pre-insolvency general law disputes, a balance may be struck by saying that it may be possible to arbitrate appeals from adjudications of proof of debts relating to claims and disputes under general law.

25 Second, if the arbitrability of a dispute is not precluded merely by the filing of a proof of debt and a determination by the liquidator, there should be room to say that r 93 does not put an end to the arbitration agreement such as to preclude arbitration of any appeal from the determination on the proof. Rule 93 could be read as merely providing for a default position that if no appeal is filed in court within the stipulated time, the determination of the liquidator stands. Such recourse to the court should not by itself be seen as precluding arbitration of appeals in relation to disputes under general law. Such a view is supported by s 11(2) of the IAA which provides that:

> The fact that any written law confers jurisdiction in respect of any matter on any court of law *but does not refer to the determination of that matter by arbitration* shall not, of itself, indicate that a dispute about that matter is not capable of determination by arbitration. [emphasis added]

26 If r 93 itself does not preclude arbitrating disputes arising from determination of proof of debt, and if the decision in *Tanning* is followed in Singapore to its logical conclusion that the filing of a proof of debt and a determination thereon does not preclude a pre-agreed arbitration clause from continuing to apply in relation to disputes based on general law, there should similarly be no general rule under Singapore law that the filing of a proof of debt would by itself result in the arbitration clause coming to an end.

27 The conclusion may be different in the context of foreign insolvency, where if the proper law of arbitration agreement dictates that the filing of a proof of debt would result in the arbitration agreement coming to an end.

28 As a point of interest, does filing a proof of debt in a foreign insolvency process automatically amount to submission to that foreign

37 *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] 3 SLR 414 at [51].
38 *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] 3 SLR 414 at [49].

insolvency process and all the consequences that follow (which could include making ineffective the right to arbitrate)? The decision in *Rubin v Eurofinance SA*[39] ("*Rubin*") was concerned with submission for the purposes of enforcement of transaction avoidance judgments emanating from the jurisdiction of the insolvency proceedings. In one of the conjoined appeals in *Rubin*, the court held that members of an insurance syndicate had submitted to the jurisdiction of the Australian courts by virtue of its participation in meetings of creditors *and* filing of proofs of debts in the insolvency process in Australia.[40] As a result of this submission, the court in *Rubin* held that an Australian judgment clawing back certain amounts paid to the syndicate was enforceable in England despite the syndicate refusing to accept service of the Australian originating process that sought to claw back those transactions.

29 If submission to a foreign jurisdiction leads to its claw back provisions being given effect, then there is no good reason why the right to arbitrate cannot similarly be affected where the submission is to a foreign jurisdiction whose laws invalidate the right to arbitrate. Thus submission may possibly have some bearing on the right to arbitrate.

30 What if there was only a filing of a proof of debt in *Rubin*? Would that suffice as submission to the foreign insolvency? Decisions subsequent to *Rubin* have raised questions as to whether the act of filing a proof of debt alone is sufficient to amount to a submission to the foreign insolvency, and the prevailing view appears to be that the mere filing of a proof of debt would not suffice to amount to submission for all purposes.[41] In the recent Singapore High Court decision of *Manharlal Trikamdas Mody v Sumikin Bussan International (HK) Ltd*,[42] George Wei JC considered the question of whether the Singapore courts would have jurisdiction to make an order against a foreign party on the basis that the foreign party had lodged a proof of debt in Singapore insolvency proceedings, thereby submitting to the jurisdiction of the Singapore courts. The Honourable Judicial Commissioner expressed the view that the submission of a proof of debt does constitute a sufficient basis to allow a supervising court to make orders against that foreign creditor, which the authors suggest, on a proper reading of the decision, should relate to those in the administration of insolvency.[43]

39 [2013] 1 AC 236.

40 *Rubin v Eurofinance SA* [2013] 1 AC 236 at [158].

41 *Ackers v Saad Investments Co Ltd; Re Saad Investments Co Ltd* [2013] FCA 738; *Isis Investments Ltd v Oscatello Investments Ltd* [2013] EWHC 75 (Ch). See also Adrian Briggs, "*Rubin* and New Cap: Foreign Judgments and Insolvency" (Jones Day Professorship of Commercial Law Lecture, 2013).

42 [2014] SGHC 123.

43 *Manharlal Trikamdas Mody v Sumikin Bussan International (HK) Ltd* [2014] SGHC 123 at [120] and [122]–[123].

31 For the above reasons, it is the authors' view that:

(a) a mere filing of a proof of debt should not necessarily result in the right to arbitrate being extinguished; and

(b) there should be no general principle that a mere filing of a proof of debt should by itself automatically amount to submission to the foreign insolvency and its full consequences (including possibly its consequences on the substantive right to arbitrate). However, the filing of a proof of debt may result in the relevant court having jurisdiction to make orders in relation to the administration of the insolvency.

III. The impact of foreign insolvency on the right of representation of parties to an arbitration agreement

32 Another question which may arise is who has the right of representation to appear on behalf of a party to an arbitration which has since entered insolvency proceedings?

A. Impact of a Singapore insolvency on a Singapore-seated arbitration

33 A common feature amongst the various forms of insolvency proceedings in Singapore is that rights in relation to property and certain other functions (such as management of the company) may vest in an independent third party. For example, in a compulsory winding up, the liquidators will take into custody and control all property and things in action to which the company is entitled.[44] The liquidators also assume wide-ranging powers to act on behalf of the company.[45] Similar provisions exist in relation to the judicial management of companies and bankruptcy of individuals.[46]

34 No similar provisions exist in the context of schemes of arrangement. This may be because the scheme of arrangement procedure is intended to resemble a debtor-in-possession regime where the company's management remains in charge of the company.[47]

35 Thus, insolvency proceedings in Singapore (with the possible exception of schemes of arrangement) generally result in property and authority to act on the debtor's behalf vesting in an independent third

44 Companies Act (Cap 50, 2006 Rev Ed) s 269.
45 Companies Act (Cap 50, 2006 Rev Ed) s 272.
46 For judicial management, see s 227G of the Companies Act (Cap 50, 2006 Rev Ed). For bankruptcy, see s 76(1) of the Bankruptcy Act (Cap 20, 2009 Rev Ed).
47 *Report of the Insolvency Law Review Committee* (2013) at p 107.

party. As these provisions have the force of law in Singapore, the appointment of the relevant insolvency appointee should normally be recognised in the case of a Singapore-seated international arbitration.

B. Impact of foreign insolvency proceedings on a Singapore-seated arbitration

36 Would the above position change in the event of a foreign insolvency?

37 First, the issue of who has authority to act on behalf of the insolvent company or individual is normally determined according to the "personal" law of the party concerned.[48] For companies, it follows that a liquidator appointed under the law of the company's place of incorporation will be recognised as having authority to wind up the company, and to represent it in legal proceedings brought either against or on behalf of the company, provided that such representative authority is conferred upon him by the law governing his appointment.[49] This proposition has recently been endorsed by the Singapore Court of Appeal in *Beluga CA* where Sundaresh Menon CJ clearly stated:[50]

> The law of the place of incorporation of a company governs an agent's authority to act on behalf of the company, and if a liquidator is properly appointed under that law, his authority and title to act on behalf of a company should be recognised.

38 Second, whilst this proposition is uncontroversial, complications arise in respect of companies which are subject to insolvency proceedings in jurisdictions other than those where the company was incorporated. In *Rubin*,[51] Lord Collins noted that the common law has not yet adopted the "modern approach"[52] of recognising the centre of main interest as the "jurisdiction of international competence".[53] Fletcher suggests that in such cases, the insolvency appointee's capacity to act on the company's behalf may be

48 *Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury *et al* eds) (Sweet & Maxwell, 15th Ed, 2012) at paras 30-100–30-106, r 64; see also *Re China Underwriters Life and General Insurance Co Ltd* [1988] 1 SLR(R) 40.

49 Ian Fletcher, *The Law of Insolvency* (Sweet & Maxwell, 4th Ed, 2009) at paras 30-054–30-057.

50 *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd* [2014] 2 SLR 815 at [86].

51 *Rubin v Eurofinance SA* [2013] 1 AC 236.

52 In contrast with the European approach under Council Regulation (EC) No 1346/2000 and that under the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency 1997 (GA Res 52/158, Annex) (adopted May 1997) ("CBI Model Law").

53 *Rubin v Eurofinance SA* [2013] 1 AC 236 at [13].

deemed to be restricted to matters within the jurisdiction of the foreign court.[54] This issue is particularly relevant to "offshore" companies, which may be registered in certain tax havens but in reality have the bulk of their interests, assets and business activities in another jurisdiction. One such example is the Bermudan Supreme Court decision of *In the Matter of the Liquidation of Founding Partners Global Fund Ltd and In the Matter of a Letter of Request to the Grand Court of Cayman dated 16 June 2009*[55] ("*Founding Partners*"). That decision essentially involved conflicting claims between the liquidators of a Cayman incorporated fund and a receiver in the US (where the bulk of the main interests of the fund were actually located) over certain assets located in Bermuda. It fell to the Bermudan Supreme Court to decide who was primarily entitled to take control over the assets in Bermuda. Whilst Kawaley J found compelling the arguments that the US was the true centre of main interest of the company and therefore the US receiver should be entitled, Kawaley J found that he "must reject counsel's siren call to indulge in what would amount to almost an orgy of ground-breaking judicial activism".[56] Hence, the common law rule that an insolvency appointee's authority is essentially determined by the law of the place of incorporation appears to hold fast.[57]

39 It should be added that the mere fact that a liquidator has been appointed by the Singapore court does not in itself mean that the foreign liquidator ceases to have any standing for all purposes. The office of the foreign liquidator is not *per se* terminated by the appointment of the local liquidator. Hence, a foreign liquidator would have standing to seek an order from the Singapore court in respect of remission of assets of the Singapore branch of the foreign company (in which the foreign liquidator is liquidator) notwithstanding that a local liquidator has also been appointed.[58]

40 In regard to the bankruptcy of natural persons, s 43 of the Evidence Act[59] provides, among other things, that a judgement or order of a competent court in the exercise of its bankruptcy jurisdiction is conclusive proof of the legal character of the person upon which the

54 Ian Fletcher, *The Law of Insolvency* (Sweet & Maxwell, 4th Ed, 2009) at para 30-057.
55 [2011] SC (Bda) 19 Com.
56 *In the Matter of the Liquidation of Founding Partners Global Fund Ltd and In the Matter of a Letter of Request to the Grand Court of Cayman dated 16 June 2009* [2011] SC (Bda) 19 Com at [44].
57 Arguments in favour of modernising the law in Singapore have been made before. See Wee Meng Seng, "Lessons for the Development of Singapore's International Insolvency Law" (2011) 23 SAcLJ 932.
58 See *Tohru Motobayashi v Official Receiver* [2000] 3 SLR(R) 435 at [30].
59 Cap 97, 1997 Rev Ed.

judgment or order is made.[60] This suggests that a judgment or order from a foreign court appointing a trustee in bankruptcy should be recognised as conclusive proof of the trustee's character in Singapore. The position with respect to the recognition between Malaysia and Singapore is separate, as Malaysia and Singapore have mutual recognition provisions.[61]

C. Impact of Singapore insolvency proceedings on a foreign-seated arbitration

41 Conversely, will the authority of an insolvency practitioner appointed in Singapore insolvency proceedings be recognised in a foreign-seated arbitration? The answer to this question depends on two intertwining issues: (a) does the Singapore insolvency proceedings purport to give the insolvency appointee extraterritorial reach, and (b) whether the foreign jurisdiction will recognise and give effect to the Singapore-based insolvency appointee.

42 On the first issue, Singapore's insolvency laws do in some respects purport to give its liquidators, judicial managers and official assignees extraterritorial reach.

43 In bankruptcy proceedings, "property" of the bankrupt vests in the Official Assignee upon the making of a bankruptcy order.[62] The definition of "property" under s 2(1) of the Bankruptcy Act includes "things in action" and "every description of property". The phrase "things in action" is a wide one that generally encompasses all causes of action,[63] and the "property" that would vest in the Official Assignee should include the right to arbitrate.[64] The definition of "property" in s 2(1) of the Bankruptcy Act further extends to property "wherever situate", which would in principle mean that the right to arbitrate overseas or outside Singapore would also vest in the Official Assignee.[65]

60 It is unclear whether "bankruptcy" under s 43 of the Evidence Act (Cap 97, 1997 Rev Ed) includes corporate insolvencies.

61 See ss 151 and 152 of the Bankruptcy Act (Cap 20, 2009 Rev Ed) and the Reciprocal Recognition of Official Assignees Notification (Cap 20, N 1, 2002 Rev Ed).

62 Bankruptcy Act (Cap 20, 2009 Rev Ed) s 76(1)(*a*)(i).

63 Certain causes of action are personal to the bankrupt and do not vest in the Official Assignee, one example being those where "the damages are to be estimated by immediate reference to pain felt by the bankrupt in respect of his body, mind, or character, and without immediate reference to his rights of property": *Standard Chartered v Loh Chong Yong Thomas* [2010] 2 SLR 569 at [13]–[14], citing *Heath v Tang* [1993] 1 WLR 1421 at 1423.

64 See *Bessie Elkinson, Plaintiff v Vincent Kelly and James J Doyle, Official Assignee in Bankruptcy, Defendants* [1946] IR 248 at 261–263.

65 See *Singh v Official Receiver* [1997] BPIR 530; Ian Fletcher, *Insolvency in Private International Law* (Oxford University Press, 2nd Ed, 2005) at pp 72–73;

(*cont'd on the next page*)

The Singapore Bankruptcy Act therefore purports to confer upon the Singapore Official Assignee the ability to enforce a right to arbitrate outside Singapore. Whether or not the Official Assignee wishes to and can in fact do so depends on the facts of the case, and consideration in this respect should be given to s 148A of the Bankruptcy Act.[66]

44 Similarly, for judicial management, s 227B(11) of the Companies Act[67] essentially provides that for the purposes of judicial management, references to "property" in relation to a company includes "money, goods, things in action and every description of property whether real or personal, and whether in Singapore or elsewhere".[68] In the context of judicial management, the property remains with the company[69] (and, unlike in a bankruptcy, does not vest in the judicial manager). The judicial manager would among other things have the powers to manage the affairs, business and property of the company.[70] This in principle should confer the right on the judicial manager to manage the company's right to arbitrate, which given the words "or elsewhere", should extend to arbitration held overseas.

45 There is no general definition of "property" in the context of company liquidation under the Companies Act. Section 269 of the Companies Act simply provides that the liquidator is tasked with taking into his custody or control all the property of the company, without expressly defining "property" to include property located overseas. Vinodh Coomaraswamy JC (as he then was) in the Singapore High

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K Anandarajah, N Parwani, A Chan & H Subramaniam, *Law and Practice of Bankruptcy in Singapore and Malaysia* (Singapore: Butterworths, 1999) at p 238.

66 Section 148A of the Bankruptcy Act (Cap 20, 2009 Rev Ed) provides:

> (1) This section shall apply where a bankrupt had become party to a contract containing an arbitration agreement before the commencement of his bankruptcy.
>
> (2) If the Official Assignee adopts the contract, the arbitration agreement shall be enforceable by or against the Official Assignee in relation to matters arising from or connected with the contract.
>
> (3) If the Official Assignee does not adopt the contract and a matter to which the arbitration agreement applies requires to be determined in connection with or for the purposes of the bankruptcy proceedings –
>
> (*a*) the Official Assignee; or
>
> (*b*) any other party to the agreement,
>
> may apply to the court which may, if it thinks fit in all the circumstances of the case, order that the matter be referred to arbitration in accordance with the arbitration agreement.
>
> (4) In this section, 'court' means the court which has jurisdiction in the bankruptcy proceedings.

67 Cap 50, 2006 Rev Ed.

68 Companies Act (Cap 50, 2006 Rev Ed) s 227B(11).

69 *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd* [2014] 2 SLR 815 at [87].

70 For example, s 227B(2) of the Companies Act (Cap 50, 2006 Rev Ed).

Court decision of *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd*[71] ("*Beluga HC*") observed that:

> [L]iquidators' statutory duties and powers under the [Companies] Act are not subject to any express or implied statutory territorial limits. There is therefore no statutory basis for holding that these duties and powers stop at Singapore's shores.

46 Though the subsequent appeal against this decision was allowed by the Court of Appeal,[72] this observation was not overruled and it is suggested that the statement by Vinodh JC remains valid. The Singapore liquidator should have the right to manage the company's right to arbitrate, which should in principle then extend to arbitration held overseas.

47 Second, notwithstanding the purported extraterritorial reach of Singapore insolvency laws as enumerated above, the efficacy of these laws depends upon the Singapore insolvency appointee establishing authority under the local law of the seat of the arbitration.[73] This is where the second issue arises, of whether the foreign jurisdiction will recognise and give effect to the Singapore-based insolvency appointee. As Fletcher has noted, the foreign courts' "rules of recognition are ultimately decisive".[74] As the question of recognition abroad involves questions of foreign law, this article cannot meaningfully address this second issue due to the significant variations in private international law rules of foreign jurisdictions. However, three examples where Singapore insolvency proceedings have been recognised abroad will be discussed briefly below.

IV. Common law recognition and assistance in Singapore of foreign insolvency proceedings

48 Although foreign insolvencies at the place of domicile of individuals or the place of incorporation of a foreign company may be readily recognised in Singapore, recognition would mean little without

71 [2013] 2 SLR 1035 at [66]. See also Ian Fletcher, *The Law of Insolvency* (Sweet & Maxwell, 4th Ed, 2009) at para 30-042, where the learned author said:

> As a matter of law, an English winding-up order is not regarded as being limited in its effect to the company's English assets and affairs … Correspondingly, the effects of the order are considered to extend to the company's foreign assets unless the order of the court [appointing the liquidator] itself introduces some restrictive limitations upon the liquidator's powers in relation to assets located overseas.

72 *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd* [2014] 2 SLR 815.

73 Ian Fletcher, *The Law of Insolvency* (Sweet & Maxwell, 4th Ed, 2009) at para 29-028.

74 Ian Fletcher, *The Law of Insolvency* (Sweet & Maxwell, 4th Ed, 2009) at para 30-039; *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd* [2013] 2 SLR 1035 at [67].

the assistance of the Singapore courts. For example, in *Re China Underwriters Life and General Insurance Co Ltd*[75] ("*China Underwriters*"), the court was prepared to recognise the authority of a Hong Kong liquidator, but held that in the absence of local insolvency proceedings, it was not able to assist the Hong Kong liquidator by compelling the examination of connected individuals in Singapore.

49 In the context of arbitration, as mentioned previously, one of the main forms of assistance a Singapore court may render to foreign insolvency proceedings would be to stay or restrain arbitration proceedings taking place in Singapore. This is important as foreign stay provisions do not automatically have effect in Singapore. The Singapore Court of Appeal in *Beluga CA* expressly noted that: "Singapore courts are clearly not bound by any stay of legal proceedings that flows from a foreign winding-up order in the absence of local winding-up proceedings."[76]

50 As a matter of statutory law, the ability of a Singapore court to assist is limited. In the context of insolvencies of individuals, s 152 of the Bankruptcy Act provides for the reciprocal recognition of Official Assignees between Singapore and Malaysia. Section 151 further provides for the Singapore courts to act in aid and be auxiliary to the courts in Malaysia. This provision is limited in its application as it only recognises and assists in Singapore the Official Assignee appointed in Malaysia, and not the insolvency regimes of other nations. Section 151 of the Bankruptcy Act permits the Minister for Law to designate countries for which the Singapore High Court may be able to grant orders in assistance of bankruptcies in those countries. However, no other country has yet been designated under that section.

51 In the context of corporate insolvencies, there is no statutory provision of general application which enables assistance of foreign insolvencies. Section 377(2)(*b*) of the Companies Act provides that "[i]f a foreign company goes into liquidation or is dissolved in its place of incorporation or origin … the liquidator shall, until a liquidator for Singapore is duly appointed by the Court, have the powers and functions of a liquidator for Singapore". This provision does not, however, carry with it recognition or the ability to assist in Singapore foreign stay provisions.

75 [1988] 1 SLR(R) 40, affirmed in *Official Receiver of Hong Kong v Kao Wei Tseng* [1990] 1 SLR(R) 315. See further Chan Sek Keong CJ, "Cross-border Insolvency Issues Affecting Singapore" (2011) 23 SAcLJ 413 at 425, para 24.

76 *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd* [2014] 2 SLR 815 at [98].

52 One may then have to look to the common law to find an avenue for assistance. One of the earliest[77] decisions recognising the ability to assist foreign insolvencies is the decision of *Re African Farms, Ltd*[78] ("*African Farms*"). In that case, the Transvaal court extended the "recognition which our courts, in common with those of most civilized countries, accord to a foreign trustee in bankruptcy"[79] to a voluntary liquidation in England. The court went further and noted that "recognition … carries with it the active assistance of the court".[80] Closer to home, in *Wan Weng v Too Boon Chiar*,[81] the Federated Malay States court sitting in Selangor recognised a bankruptcy order from Singapore and assisted the Singapore bankruptcy by granting a temporary stay of proceedings so as to enable the Singapore Official Assignee to be joined into the action in Selangor.

53 More recently, the common law principle of recognition and assistance of foreign insolvencies has been reinvigorated by the UK Privy Council decision of *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc*[82] ("*Cambridge Gas*"). In this regard, Lord Hoffman said:[83]

> At common law, their Lordships think 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. *But the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency. The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum.* [emphasis added]

54 Although *Cambridge Gas* has been described as "wrongly decided" (on a different point) by the subsequent decision of *Rubin*,[84] the general proposition that the courts have the common law power to recognise and render assistance to foreign proceedings probably remains valid.[85] In the recent decision of *Beluga CA*, the Singapore Court of

77 For an even earlier case, see *Solomons v Ross* (1764) 1 H Bl 131n; 126 ER 79.
78 *Re African Farms, Ltd* [1906] TS 373 (Transvaal SC).
79 *Re African Farms, Ltd* [1906] TS 373 at 378.
80 *Re African Farms, Ltd* [1906] TS 373 at 377.
81 [1916] 1 FMSLR 279.
82 *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508; see also *Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852.
83 *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508 at [22].
84 *Rubin v Eurofinance SA* [2013] 1 AC 236 at [132].
85 See, *eg*, *In the matter of Saad Investments Co Ltd* [2013] SC (Bda) 28 Com at [29]–[32].

Appeal confirmed that the Singapore courts retain discretion to assist foreign insolvencies at common law. The court in *Beluga CA* noted that foreign stay provisions do not automatically apply in Singapore, but that it nonetheless "remains open to the courts to assist the foreign liquidation proceedings by exercising their inherent discretion to stay proceedings".[86]

A. Scope of recognition and assistance at common law

55 What then is the scope of recognition and assistance at common law? The precise limits of common law recognition and assistance have not been worked out in Singapore. The authorities suggest that they could fall into one of several usual categories:[87]

> The common law assistance cases have been concerned with such matters as the vesting of English assets in a foreign office-holder, or the staying of local proceedings, or orders for examination in support of the foreign proceedings, or orders for the remittal of assets to a foreign liquidation, and have involved cases in which the foreign court was a court of competent jurisdiction in the sense that the bankrupt was domiciled in the foreign country or, if a company, was incorporated there.

56 Similarly, in *Beluga CA* it was noted that common law assistance can come in several forms:[88]

> Assistance might, for example, take the form of a stay of a claim if Singapore is not the *forum conveniens*; or staying an execution or attachment; or exercising a discretion against granting a garnishee order absolute; or refusing leave to serve process out of the jurisdiction; or winding up the company in Singapore.

57 Guidance may also be found in *Cambridge Gas*. As noted in the passage cited above,[89] Lord Hoffman was of the view that, at common law, it is doubtful that assistance could take the form of applying provisions of the foreign insolvency law which form no part of the domestic system. However, the domestic court should be able to provide assistance "by doing whatever it could have done in the case of a domestic insolvency".[90]

86 *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd* [2014] 2 SLR 815 at [98].

87 *Rubin v Eurofinance SA* [2013] 1 AC 236 at [31].

88 *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd* [2014] 2 SLR 815 at [99].

89 *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508 at [22].

90 *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508 at [22].

58 With these broad propositions in mind, how then may the Singapore court assist foreign insolvencies and thereby impact on arbitration? Whilst the precise scope may not have been defined, here are some possible thoughts on assistance.

59 First, as stated above, where the Singapore courts are prepared to grant recognition, such recognition should not simply be a bare acknowledgment[91] of the foreign insolvency but also carry with it the assistance of the Singapore courts.[92]

60 Second, what is the source of the Singapore court's ability to assist? This question is important, as it may demarcate the extent of the Singapore court's ability to assist. As mentioned previously, the statutory basis for assistance in Singapore is limited. In *China Underwriters*, Chan Sek Keong JC (as he then was) held that the courts had no inherent jurisdiction to exercise powers pursuant to statutory provisions where they were otherwise not applicable.[93] This suggests that the extent of judicial assistance permissible is constrained where there is a lack of local insolvency proceedings and consequent invocation of local insolvency provisions. However, whilst recounting this particular decision extrajudicially, Chan Sek Keong CJ (as he then was) noted that his decision was "was simply based on a construction of the provisions of the Companies Act".[94] This suggests that the availability of the power to assist at common law was not fully explored. In the subsequent decision of the Court of Appeal in *Official Receiver of Hong Kong v Kao Wei Tseng*,[95] and the court also proceeded on the basis that the statutory provisions under the Companies Act did not give the court the ability to assist.

61 However, three more recent Singapore cases suggest that the Singapore courts should have the power to assist at common law. In *In the Matter of China Sun Bio-Chem Technology Group Co Ltd*[96] ("*China Sun*"), the Singapore court granted a declaration that provisional liquidators of a company incorporated in the Cayman Islands were authorised and empowered to recover and take possession of the company's movable and immovable assets, and the submissions filed in

91 *Re Impex Worldwide Ltd* [2004] BPIR 564 at [106].

92 *Re African Farms, Ltd* [1906] TS 373 at 377.

93 *Re China Underwriters Life and General Insurance Co Ltd* [1988] 1 SLR(R) 40 at [38].

94 Chan Sek Keong CJ, "Cross-border Insolvency Issues Affecting Singapore" (2011) 23 SAcLJ 413 at 425, para 24.

95 [1990] 1 SLR(R) 315 at [17]–[22].

96 Unreported, Originating Summons No 762 of 2010. See *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd* [2014] 2 SLR 815 at [88] and Rodney Keong & Melvin See, "Foreign Liquidators of Unregistered Foreign Companies" <http://www.rodyk.com/page/Resources/article/329> (accessed 2 May 2014).

China Sun indicate that the decision of *Cambridge Gas* was used to persuade the court to reach its decision. In that case, the court also made consequent orders confirming the ability of the provisional liquidators to issue instructions and requests, and this may have facilitated the co-operation of the former bankers and accountants of the company in the provision of information.[97]

62 In *Re Aero Inventory (UK) Ltd*[98] ("*Re Aero*"), the Singapore courts ordered that the administrators of an English company would have the same power over the company's property and assets in Singapore as they had under English law pursuant to an administration order made by the English High Court. Again, the submissions filed in *Re Aero* indicate that the *African Farms* and *Cambridge Gas* line of cases were the central authorities cited to the Singapore court in favour of the orders eventually granted by the court. In *Re Aero*,[99] the court also made consequential orders for judicial management such as moratoriums against actions and proceedings, against enforcement of security and against appointment of a receiver.

63 Although there were no written grounds issued in relation to either of these decisions, these decisions do indicate (given in particular, the central reliance on *Cambridge Gas*) that the ability to assist at common law has found acceptance in Singapore.

64 In *Beluga CA*,[100] the Court of Appeal, in addressing the question of what effect "recognition of the foreign [insolvency] proceedings or the initiation of such proceedings would have", confined its observations to whether a stay of execution arising under a foreign winding-up order would extend to assets in Singapore. The court held that while foreign stays or moratoriums do not generally have effect in Singapore,[101] it was nevertheless open to the Singapore courts to exercise their "inherent discretion to stay proceedings" as a means to assist foreign liquidation.[102]

65 On a narrow view, the Court of Appeal's decision in *Beluga CA* could (if one were to look at the examples given for assistance of foreign insolvencies) be read as being limited to the courts' jurisdiction to

97 Order of Court dated 5 August 2010.

98 Originating Summons No 127 of 2011) (unreported), cited in *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd* [2014] 2 SLR 815 at [88]; the lead author of this article was counsel for the applicant in the matter.

99 Order of Court dated 11 April 2011.

100 *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd* [2014] 2 SLR 815 at [89].

101 *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd* [2014] 2 SLR 815 at [90] and [98].

102 *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd* [2014] 2 SLR 815 at [98].

regulate its own proceedings. That this is within the inherent jurisdiction of the courts to do so is well supported.[103] However, it is suggested that the decision in *Beluga CA* does not preclude the power to assist being broader, as the Court of Appeal was careful to confine the above comments to the situation of stays of proceedings or execution in aid of foreign insolvency. The decisions in *China Sun* (where the court confirmed the ability of the foreign provisional liquidators to give instructions) and in *Re Aero* (where the court granted orders, *inter alia*, that there can be no enforcement of security, unless with the court's or the administrators' permission) clearly show that the court's ability to assist is wider than merely being able to regulate the court's own proceedings.

66 Instead, the power to assist at common law may be derived from the long line of cases beginning with *African Farms* as discussed previously. Hence, by an "accretion of judicial decisions",[104] the power to assist foreign insolvencies has become exercisable by the courts at common law.[105] In general, it is suggested that such assistance should enable the court to assist by exercising inherent discretion to regulate its own proceedings and to give effect (subject to possible limitations further discussed below) to certain aspects of the foreign insolvency proceedings. The latter would help explain why the Singapore court in *China Sun* was able to declare that the foreign provisional liquidator could give instructions in Singapore and why the Singapore court in *Re Aero* was able to grant moratoriums against enforcement of security similar to that applicable in England.

67 While the exact scope and basis of assistance remains to be worked out in Singapore, it may well be that the parameters of common law assistance may go beyond just the inherent jurisdiction of the court, and be delineated "by both the general law (including the Court's inherent powers) and the statutory insolvency regime which would apply in a local primary or ancillary liquidation".[106]

103 See, *eg*, *Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852 and *Re Impex Services World Wide* [2004] BPIR 564.

104 To borrow the phraseology of Scott VC in *Re Bank of Credit and Commerce International SA (No 10)* [1997] 1 Ch 213 at 247C.

105 *Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852; *Re Impex Services World Wide* [2004] BPIR 564; *In the matter of Saad Investments Co Ltd* [2013] SC (Bda) 28 Com.

106 The latter was stated to be the preferred jurisdictional basis by Justice Kawaley in *In the matter of Saad Investments Co Ltd* [2013] SC (Bda) 28 Com at [8].

68 Third, as indicated by Lord Hoffman in *Cambridge Gas*, a Singapore court ought to be able to do "whatever it could have done in the case of a domestic insolvency".[107] In this regard, it should not matter that the domestic insolvency proceedings themselves may not strictly speaking be applicable to the foreign entity. For instance, in *African Farms*, the Transvaal court was able to recognise and assist the foreign liquidator even though the company itself could not have been wound up under Transvaal law.[108] In *Re Aero*, the Singapore High Court recognised an English administration order[109] even though a Singapore court would strictly speaking not have been able to make an administration order (or even a judicial management order) against the foreign company itself. Nevertheless the Singapore High Court ordered granted assistance by ordering that the administrators of the English company would have the same powers in relation to the company's assets in Singapore as he would have had under English law. Hence, it is suggested that the Singapore courts should as a rule be prepared to grant similar remedies in aid of foreign insolvencies as those available in local proceedings.

69 Fourth, any assistance should not, however, be contrary to the mandatory laws of the place of the assisting court. The extent to which local insolvency provisions can be relied upon in aid of the foreign insolvency should not be used beyond the original statutory purpose of the provisions invoked and should not conflict with local public policy interests.[110] In *Re Bank of Credit and Commerce International SA (No 10)*[111] ("*BCCI*"), the English court held that the remittance of assets in England to Luxembourg in aid of Luxembourg insolvency proceedings was subject to the mandatory set-off[112] provisions that applied as a matter of English law.[113] Accordingly, only the net amounts (*ie*, after mandatory set-off in accordance with English law) owing by debtors could be collected in England and remitted to Luxembourg. The position was different under Luxembourg law as the entire debt would have to be paid without set-off and the debtor would be left with a cross-claim as an unsecured creditor. In Singapore, *Re Aero* is also demonstrative of this principle. Although the court order that the English administrators would have the same powers as under English law, this was qualified by providing that they shall not cause or suffer

107 *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508 at [22].

108 *Re African Farms, Ltd* [1906] TS 373; see also *In the matter of Saad Investments Co Ltd* [2013] SC (Bda) 28 Com at [70].

109 Which bears similarity to the judicial management regime in Singapore.

110 *In the matter of Saad Investments Co Ltd* [2013] SC (Bda) 28 Com at [68].

111 [1997] 1 Ch 213.

112 Insolvency Rules 1986 (UK) r 4.90.

113 *Re Bank of Credit and Commerce International SA (No 10)* [1997] 1 Ch 213 at 248–249.

anything to be done that would be a breach of any applicable local insolvency law.[114] Another instance where local insolvency provisions trump foreign insolvencies is where there is a branch of a foreign company that is registered in Singapore. In such a case, Singapore law dictates that certain debts, including "all debts and liabilities" of the foreign company that are incurred in Singapore, shall first be paid out of assets realised in Singapore and only the balance would be paid to the foreign liquidator.[115]

70 Fifth, it follows that assistance of foreign insolvencies should not prejudice the legitimate rights of local creditors. This principle was recognised in *African Farms*, where the Transvaal court held that the court ought to recognise the foreign insolvency "subject only to such conditions as the Court may impose for the protection of local creditors".[116] This qualification has also been recognised in subsequent cases.[117] In any consideration of protection to be accorded, it is suggested that the Singapore court may consider what the equivalent position would be in the case of a local insolvency. In Singapore, one example of such protective mechanisms can be found in s 334(1) of the Companies Act. Section 334(1) provides that a creditor shall not be entitled to retain the benefit of the execution or attachment against a company unless such execution was completed before the commencement of winding up. In essence, the purpose of s 334 is to prevent a "disorganised or unfair rush by creditors to put assets of the company beyond the liquidator's control and thus alienate them from a fair distribution to all creditors".[118] This protection is further enhanced by s 334(1)(*a*), which provides that if the creditor had notice of a meeting where voluntary winding up was to be proposed, the execution sought must have been completed before the time of the notice instead of the commencement of winding up.

114 *Re Aero Inventory (UK) Ltd* (Originating Summons No 127 of 2011) (unreported).

115 Companies Act (Cap 50, 2006 Rev Ed) ss 377(3)(*c*), 377(7) and 328. See also *Tohru Motobayashi v Official Receiver* [2000] 3 SLR(R) 435; *RBG Resources plc v Credit Lyonnais* [2006] 1 SLR(R) 240; and *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd* [2014] 2 SLR 815 at [36]–[54], which make it clear that s 377(3)(*c*) does not apply to *unregistered* foreign companies that do not have a place of business nor commenced carrying on business in Singapore, but would apply to an unregistered foreign company if that company was liable to register under s 368 because it intended to establish a place of business or commence carrying on business in Singapore.

116 *Re African Farms, Ltd* [1906] TS 373 at 377.

117 *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508 at [21]; *Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852 at [40].

118 *Transbilt Engineering Pte Ltd v Finebuild Systems Pte Ltd* [2005] 3 SLR(R) 550 at [2].

71 Sixth, while international comity normally militates in favour of assistance to foreign insolvencies, one constraint on assistance of foreign insolvencies may be where the foreign insolvencies are in jurisdictions with corrupt legal systems. It has been suggested that foreign proceedings originating from such jurisdictions may be set aside on grounds that they are unjust or oppressive.[119] The approach that may be taken in such cases is one used in *AK Investment CJSC v Kyrgyz Mobil Tel Ltd*[120] where it was held that cogent evidence would be required to prove that a foreign court system is corrupt or otherwise lacking in independence. Evidence of corruption, while admissible, had to go beyond generalised anecdotal material. This approach is consistent with that taken in Singapore[121] and should act as a safeguard against the assistance of tainted foreign proceedings, whilst operating at a threshold high enough to respect notions of international comity.

72 With these principles in mind, how may assistance of a foreign insolvency possibly impact on arbitration in Singapore? As mentioned previously, one crucial aspect would be the stay or restraint of arbitration proceedings. As noted in *Beluga CA*, foreign stay provisions arising from foreign insolvencies do not automatically apply in Singapore. However, the Singapore courts may assist foreign insolvencies to the extent permissible under local law, including domestic stay provisions. These stay provisions are applicable to:

(a) bankruptcies of individuals;[122]

(b) creditors' voluntary winding up;[123]

(c) compulsory winding up;[124]

119 Adrian Briggs, "*Rubin* and New Cap: Foreign Judgments and Insolvency" (Jones Day Professorship of Commercial Law Lecture, 2013).

120 *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 WLR 1804 at [101], cited in Adrian Briggs, "*Rubin* and New Cap: Foreign Judgments and Insolvency" (Jones Day Professorship of Commercial Law Lecture, 2013).

121 See the Singapore Court of Appeal decision of *Hong Pian Tee v Les Placements Germain Gauthier Inc* [2002] 1 SLR(R) 515 at [30]–[33].

122 Bankruptcy Act (Cap 20, 2009 Rev Ed) ss 76(1)(*c*), 45 and 56F.

123 Companies Act (Cap 50, 2006 Rev Ed) s 299(2). This provision prevents any "action or proceeding" from being "proceeded with or commenced" against the company, except by leave of the court and subject to such terms as the court imposes.

124 Companies Act (Cap 50, 2006 Rev Ed) s 262(3). This is supplemented by s 258, which provides for the possibility of a stay or restraint of any "action or proceedings" during the period after the winding-up application and before the winding-up order is made.

(d) schemes of arrangement;[125] and

(e) judicial management.[126]

73 The word "proceedings" as used in some of these provisions has been held to include "arbitration" proceedings.[127] In the case of a winding up in Singapore, s 258 of the Companies Act[128] provides that the company or any creditor or contributory may, prior to a winding-up order being made, apply to the Singapore courts to stay or restrain proceedings against the company against whom the liquidation order is sought. If the scope of assistance as noted by Lord Hoffman includes "doing whatever it could have done in the case of a domestic insolvency",[129] the existence of provisions in the case of a domestic (*ie*, Singapore) insolvency that enables an application to be made to the Singapore courts for an order to restrain "arbitration" proceedings, may be a basis for a Singapore court in appropriate cases to assist foreign insolvency by restraining arbitration taking place in Singapore.

74 A provision that may stand in the way of a Singapore court granting such an order for assistance is Art 5 of the Model Law, which provides that, "[i]n matters governed by this Law, no court shall intervene except where so provided in this Law". However, the authors are of the view that this provision does not prevent the Singapore courts from granting an order restraining arbitration proceedings in Singapore. The restriction against intervention by the court is only on those matters "governed by" the Model Law, and the Model Law does *not* govern the consequences of insolvency proceedings. Consistent with this

125 Companies Act (Cap 50, 2006 Rev Ed) s 210(10). However, the stay does not occur automatically. Instead, the company, member or creditor of the company needs to *apply* to restrain further proceedings in any action or proceeding against the company.

126 Companies Act (Cap 50, 2006 Rev Ed) s 227C(*c*). During the period after the making of the application of the judicial management order and before the judicial management order is actually made, "no other proceedings … or other legal process shall be commenced or continued … except with leave of the Court and subject to such terms as the Court may impose".

127 It has been held by the Court of Appeal in *Electro Magnetic (S) Ltd v Development Bank of Singapore Ltd* [1994] 1 SLR(R) 574 at [18], in the context of judicial management, that the word "proceedings" in ss 227C and 227D of the Companies Act (Cap 50, 1990 Rev Ed) includes arbitration proceedings; Similarly, it has been held in *The Engedi* [2010] 3 SLR 409 at [36] that "proceedings" for the purposes of s 299 of the Companies Act (Cap 50, 2006 Rev Ed) includes arbitration. *The Engedi* was reversed by an unreported decision in the Court of Appeal, however, the finding that the word "proceedings" includes arbitration should remain valid. See also *Bristol Airport plc v Powdrill* [1990] Ch 744 at 765G.

128 See also ss 210(10) and 258 read with s 310 of the Companies Act (Cap 50, 2006 Rev Ed) and s 74 of the Bankruptcy Act (Cap 20, 2009 Rev Ed) for similar provisions in the context of different insolvency proceedings.

129 *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508 at [22].

view, as suggested above, in the case of a domestic insolvency, the stay and restraint provisions under insolvency legislation are capable of applying to arbitration. It remains to be seen whether a Singapore court will be prepared in appropriate cases to assist foreign insolvency by restraining arbitration in Singapore. In any event, s 6 of the IAA and Art 8(1) of the Model Law both provide an exception to the stay of court proceedings in favour of arbitration where the "arbitration agreement is null and void, inoperative or incapable of being performed". It is suggested that the consequences of insolvency proceedings, including insolvency stay and restraint provisions, may result in an arbitration being "incapable of being performed" at the very least.[130]

75 Another possible manner in which a Singapore court could assist a foreign insolvency would be making orders of examination of certain persons within the jurisdiction. In the case of a winding up in Singapore, a Singapore court may order an examination of or the provision of information by certain persons connected with the company.[131] Given that in rendering assistance, the Singapore courts may do "whatever it could have done in the case of a domestic insolvency",[132] it follows that the Singapore courts may be able to assist foreign insolvency by making orders to procure information, which in appropriate cases may be used for arbitration. In *Re Impex Services World Wide*[133] ("*Re Impex*"), a Manx court made an order for examination and production of documents in aid of the provisional liquidation in England. In that case, the English liquidator made the application under the Manx statutory equivalent to the English provision. The Manx court held although the statutory jurisdiction was not available (because Impex was not a "company" within the meaning of the Manx Companies Act),[134] it had power at common law to make an order for examination in the same terms as the statutory power.[135] This decision therefore marks a progressive development of the common law. In contrast, as discussed above, in *China Underwriters*, the Singapore court held that it did not have the power to assist a foreign liquidator as the local provisions to compel information only applied to Singapore companies. However, as discussed above, there is now a more established basis for saying that there could be assistance at common law, which may go beyond the inherent jurisdiction of the court. It may therefore be open for a foreign insolvency practitioner to seek to

130 *Attorney General of Canada v Reliance Insurance Co* (2007) 87 OR (3d) 42.

131 Under Singapore law, see, for example, ss 285 and 286 of the Companies Act (Cap 50, 2006 Rev Ed).

132 *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508 at [22].

133 [2004] BPIR 564.

134 *Re Impex Services World Wide* [2004] BPIR 564 at [42].

135 *Re Impex Services World Wide* [2004] BPIR 564 at [106].

persuade a Singapore court to make an order for the examination of connected persons, so as to procure information for use in arbitration.

76 In short, there is growing assurance that there exists in Singapore the ability to assist foreign insolvency. If so, two possible manners in which the Singapore courts may assist could be a restraint of arbitration proceedings, or an order for compelling examination of certain persons within the jurisdiction.

B. Recognition of Singapore insolvencies in foreign jurisdictions

77 As previously mentioned, certain insolvency proceedings in Singapore may have extraterritorial effect. A Singapore insolvency practitioner may also apply to a foreign court for the recognition and assistance of the Singapore insolvency proceedings. In this regard, the question of whether Singapore insolvencies will be recognised and assisted by foreign jurisdictions is matter of foreign law. It is beyond the scope of this article to examine foreign recognition rules. It would, however, be appropriate to highlight a few notable examples of Singapore insolvency proceedings being recognised in other jurisdictions.

78 First, in 2009, Armada (Singapore) Pte Ltd ("Armada") entered into a scheme of arrangement under s 210 of the Companies Act. It also filed a Chapter 15 petition for recognition of the Singapore scheme of arrangement proceedings in the US, and the US Bankruptcy Court for the Southern District of New York issued an order recognising the Singapore scheme of arrangement and granted provisional relief to Armada.[136] Chapter 15 of the US Bankruptcy Code enacts the Model Law on Cross-Border Insolvency promulgated by UNCITRAL in 1997 ("CBI Model Law").[137]

79 Second, pursuant to the provisions of the Cross-Border Insolvency Regulations 2006 (the UK regulations enacting the CBI Model Law), the judicial managers appointed over Armada were also granted recognition in England by way of a Recognition Order dated 30 July 2009.

136 See *Armada (Singapore) Pte Ltd v North China Shipping Co Ltd* (09 Civ 5069 (WHP) United States District Court for the Southern District of New York). See also Ben James, "Shipping Co Armada Files Ch 15 Petition in NY" *Law360* <http://www.law360.com/articles/82156/shipping-co-armada-files-ch-15-petition-in-ny> (accessed 28 March 2014).

137 US Courts website <http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter15.aspx> (accessed 2 May 2014).

80 Third, in *Re Contel Corp Ltd*,[138] the Bermudan court recognised in Bermuda a Singapore-approved scheme of arrangement sanctioned by Justice Quentin Loh on 1 February 2011 based on the *Cambridge Gas* common law principles.

81 A number of major commercial jurisdictions, such as the US, Japan, the UK, Australia and Canada, have adopted the CBI Model Law, which permits an application to their courts for specified forms of recognition and assistance including a stay of proceedings.[139] Singapore has not yet chosen to enact the CBI Model Law.[140] However, most of the major commercial jurisdictions that have enacted the CBI Model Law have not imposed a requirement of reciprocity on the part of the Singapore courts before permitting recognition and assistance of Singapore insolvencies.[141] Accordingly, at least for the purposes of recognition and assistance of Singapore insolvency procedures in these jurisdictions, Singapore may be able to rely on the provisions of the CBI Model Law.

V. Insolvency proceedings in Singapore in respect of a foreign entity

82 It is also open for parties to commence insolvency proceedings in Singapore in respect of a foreign entity. When a foreign entity undergoes insolvency proceedings in its place of incorporation or domicile, subsequent insolvency proceedings taken in Singapore are in a sense parallel or ancillary to those proceedings. The immediate impact of having insolvency proceedings or procedures in Singapore is that the domestic provisions would automatically apply.

83 For bankruptcy, *any* creditor or debtor is permitted to make a bankruptcy application against an individual,[142] provided that the Singapore courts have jurisdiction[143] over the debtor sought to be made

138 *Re Contel Corp Ltd* [2011] SC (Bda) 14 Com.

139 See, *eg*, Arts 20 and 21 of the CBI Model Law.

140 However, the Insolvency Law Review Committee has recommended in its 2013 Final Report that the CBI Model Law be adopted for corporate insolvencies (subject to certain modifications). See *Report of the Insolvency Law Review Committee* (2013) at pp 234–239. The Singapore Ministry of Law has broadly agreed with this recommendation. See Ministry of Law website, "Summary of Feedback on the ILRC Report and MinLaw's Response" (6 May 2014) at p 36 <http://www.mlaw.gov.sg/news/public-consultations/response-to-feedback-from-public-consultation-on-ILRC-report.html> (accessed 10 May 2014).

141 *Report of the Insolvency Law Review Committee* (2013) at p 237.

142 Bankruptcy Act (Cap 20, 2009 Rev Ed) s 57(1).

143 Section 60 of the Bankruptcy Act (Cap 20, 2009 Rev Ed) provides that no bankruptcy application shall be made against a debtor unless he is domiciled in Singapore; has property in Singapore; or has, at any time within the period of one

(*cont'd on the next page*)

bankrupt. Therefore foreign creditors may make a bankruptcy application against a debtor in Singapore. The normal requirements for bankruptcy would apply, however, including that the debtor must be domiciled in Singapore; have property in Singapore; or have, at any time within the period of one year immediately preceding the date of the making of the application been ordinarily resident or have had a place of residence in Singapore; or carried on business in Singapore.[144]

84 For the winding up of corporate bodies, s 351 of the Companies Act allows the Singapore courts to wind up "unregistered companies". An "unregistered company" is defined under s 350(1) to include a "foreign company", which is in turn defined in s 4(1) of the Companies Act to mean a company, corporation, society, association or other body incorporated outside Singapore; or an unincorporated society, association or other body which does not have its head office or principal place of business in Singapore. The courts in Singapore have shown that they are willing to wind up a foreign company under s 351 if:

> (a) the foreign company has assets in Singapore or there is otherwise a sufficient connection or nexus between the foreign company and Singapore. In this respect, the existence of assets in Singapore is not an absolute prerequisite, although it may be helpful in making out the case for the Singapore courts to exercise their jurisdiction;[145]
>
> (b) there is a reasonable possibility that benefit would accrue to the company's creditors from the winding up;[146] and
>
> (c) one or more persons interested in the distribution of benefits are persons over whom the court can exercise jurisdiction.[147]

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year immediately preceding the date of the making of the application, been ordinarily resident or has had a place of residence in Singapore; or carried on business in Singapore.

144 Bankruptcy Act (Cap 20, 2009 Rev Ed) s 60.

145 See *Tong Aik (Far East) Ltd v Eastern Minerals & Trading* (1959) Ltd [1965] 2 MLJ 149; *Re Griffin Securities Corp* [1999] 1 SLR(R) 219; *Re Projector SA* [2009] 2 SLR(R) 151; *Re Real Estate Development Co* [1991] BCLC 210; and *Re Compania Merabello San Nicholas SA* [1973] Ch 75.

146 This criterion was applied in Singapore in the case of *Re Griffin Securities Corp* [1999] 1 SLR(R) 219, in which the court wound up a company incorporated in the Philippines. In this case, the Singapore solicitors acting for the company had accepted service of the originating process, which subjected the company to the jurisdiction of the Singapore courts. Also, the company had the major part of its assets and extensive business operations in Singapore. After considering that the company was unable to pay its debts, and that it was just and equitable to wind up the company, the court granted the order to wind up the foreign company in Singapore.

147 *Re Real Estate Development Co* [1991] BCLC 210.

85 If a foreign company is wound up in Singapore, the consequences normally applicable to winding up, such as a stay of actions and proceedings and the examination of certain persons connected with the company, would apply.[148]

86 Besides the winding up of foreign companies, s 210(11) of the Companies Act also provides that the schemes of arrangement regime applies to "any corporation or society liable to be wound up under the Companies Act". As discussed above, foreign companies are liable to be wound up under the Companies Act and it follows that schemes of arrangement are also applicable to such foreign companies. In a similar vein, it is also necessary that there should be sufficient connection between the foreign company and Singapore in order for schemes of arrangement under s 210 to apply to foreign companies. One example that highlights the limits of applying schemes of arrangement to foreign companies with few connections to Singapore can be seen in the decision of *Re TPC Korea Co Ltd*.[149] In that decision, a company incorporated in the Republic of Korea applied for rehabilitation in Korea under proceedings similar to Chapter 11 of the US Bankruptcy Code. It applied for a Singapore court order to convene a meeting of its creditors in Singapore for the purpose of considering the Korean rehabilitation plan pursuant to the scheme of arrangement provisions under Singapore law. In this case, the company had no presence or assets in Singapore save for its interest in five vessels that plied the ports of Singapore. It seemed the company sought a moratorium under s 210(10) of the Companies Act which would prevent its creditors from proceeding against those vessels. The court held that it was inappropriate to conflate the Korean process with a Singapore scheme in relation to a Korean corporation, emphasising that the company had no assets or operations in Singapore besides those vessels that plied Singapore's ports. Thus, the court held that it was unable to offer assistance to the Korean rehabilitation proceedings.

87 It is, however, not open to persons to apply for judicial management proceedings in respect of an unregistered foreign company in Singapore. Section 227A of the Companies Act applies only to a "company" which is defined under s 4(1) of the Companies Act to mean "a company incorporated pursuant to this Act or pursuant to any corresponding previous written law".[150] Hence, the judicial management regime does not apply to unregistered foreign companies. It has been

148 This is because s 351(1) of the Companies Act (Cap 50, 2006 Rev Ed) makes applicable (with necessary modifications) to the winding up of foreign companies, the provisions of the Pt X of the Companies Act. Part X of the Companies Act includes, *inter alia*, s 262(3) (which provides for stay of proceedings) and s 285 (which enables the court to make orders for examination).

149 *Re TPC Korea Co Ltd* [2010] 2 SLR 617.

150 *Report of the Insolvency Law Review Committee* (2013) at p 228.

noted, however, by the Insolvency Law Review Committee that there is "in principle, no justification for such differentiated treatment", and hence the Committee has recommended that the judicial management regime be extended to include foreign companies.[151]

88 As previously discussed, a common consequence that follows the commencement of insolvency proceedings in Singapore is a stay or moratorium of proceedings.[152] In addition, a common feature in many of Singapore's insolvency regimes (with the possible exception of schemes of arrangement) is that rights in relation to property and certain other functions (such as management of the company) typically vest in a third party. For example, in bankruptcy, the property of the bankrupt automatically vests in the Official Assignee on the making of the bankruptcy order.[153] In a compulsory winding up, the liquidator may apply to the court to direct that the company's property vest in the liquidator.[154] The directors of the company become *functus officio*, and the assets of the company become impressed with a statutory trust that is administered by the liquidator for the benefit of the company's creditors.[155] It follows that the commencement of parallel insolvency proceedings in Singapore would result in these consequences affecting arbitration proceedings which are to be seated in Singapore.

VI. Subject matter arbitrability

89 Another issue that faces the tribunal is whether the claim or dispute facing the tribunal is amenable to arbitration. This question is important for two reasons. First, the arbitrability of the given issue is an important factor in determining whether a stay of judicial proceedings should be granted in favour of arbitration.[156] For instance, if an application is made under s 6(2) of the IAA to stay Singapore court proceedings in favour of arbitration, the court may consider the subject matter of the dispute and its arbitrability in deciding whether or not to

151 *Report of the Insolvency Law Review Committee* (2013) at p 229. The Singapore Ministry of Law has broadly agreed with the recommendation that the judicial management regime be extended to foreign companies. See Ministry of Law website, "Summary of Feedback on the ILRC Report and MinLaw's Response" (6 May 2014) at p 36 <http://www.mlaw.gov.sg/news/public-consultations/response-to-feedback-from-public-consultation-on-ILRC-report.html> (accessed 10 May 2014).

152 As previously mentioned, "proceedings" includes arbitration proceedings.

153 Section 76(1)(*a*)(i) of the Bankruptcy Act (Cap 20, 2009 Rev Ed), which has been held not have extraterritorial effect outside of Singapore. See *Manharlal Trikamdas Mody v Sumikin Bussan International (HK) Ltd* [2014] SGHC 123 at [109].

154 Companies Act (Cap 50, 2006 Rev Ed) s 269.

155 *Chi Man Kwong Peter v Lee Kum Seng Ronald* [1983–1984] SLR(R) 700 at [18].

156 *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] 3 SLR 414 at [23]–[26].

stay the proceedings.[157] Second, an arbitral award made in respect of an issue that is non-arbitrable may not be enforceable. In Singapore, s 11 of the IAA provides that "[a]ny dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by *arbitration unless it is contrary to public policy to do so*" [emphasis added].[158] Furthermore, s 31(4) of the IAA provides that enforcement may be refused if "the subject-matter of the difference between the parties to the award is not capable of settlement by arbitration under the law of Singapore".[159] Hence, where a tribunal purports to issue an award on a claim that is non-arbitrable under the laws of Singapore, enforcement of the award may be refused in Singapore.

90 What then are the Singapore principles that determine subject matter arbitrability in Singapore? The leading Singapore case on this issue is the Court of Appeal's decision in *Larsen Oil*. In that case the liquidators of the respondent sought to set aside several payments which were made to the appellant pursuant to a management agreement on the basis that they were unfair preferences or transactions at an undervalue.[160] The appellant argued for a stay of judicial proceedings in favour of arbitration pursuant to the management agreement. The Court of Appeal, among other things, examined the question of whether certain insolvency-related claims came within the scope of the arbitration agreement, and if so, whether such claims were even capable of being arbitrated. It is the second question that is of relevance in our present discussion.[161]

91 In deciding whether certain issues were arbitrable, the court considered the legislative history and intent behind the AA and IAA for "some clues as to how the drafters of the statutes viewed the concept of arbitrability". It examined a report by the Review of Arbitration Act Committee that was issued in 2000, and established that:[162]

> It can be seen from the Report that the drafters of the AA and IAA regarded the question of arbitrability as being subject to public interest considerations. More importantly, they recognised that insolvency/bankruptcy law is *an area replete with public policy*

157 *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] 3 SLR 414 at [23]–[26].

158 International Arbitration Act (Cap 143A, 2002 Rev Ed) s 11(1).

159 International Arbitration Act (Cap 143A, 2002 Rev Ed) s 31(4); this reflects Art 36(1)(b)(i) of the Model Law and Art V2(a) of the New York Convention.

160 Sections 98 and 99 of the Bankruptcy Act (Cap 20, 2009 Rev Ed), read with s 329(1) of the Companies Act (Cap 50, 2006 Rev Ed).

161 The court in *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] 3 SLR 414 at [21] held that as a matter of construction, arbitration clauses would not usually be construed as including claims that would arise only by reason of or following insolvency.

162 *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] 3 SLR 414 at [30].

> *considerations that were too important to be settled by parties privately through the arbitral mechanism*. [emphasis added]

92 The key distinction then was whether a given claim or dispute stemmed from the company's pre-insolvency rights and obligations, as opposed to those that arose only upon the onset of insolvency due to the operation of the insolvency regime.[163] In this regard, disputes arising strictly from the operation of the statutory insolvency provisions (such as preference or avoidance claims) will *per se* be non-arbitrable even if the parties expressly included them within the scope of the arbitration agreement.[164] It followed that claims to set aside transactions on the basis that they were unfair preferences or transactions at an undervalue are non-arbitrable.

93 Hence, it is clear that *Larsen Oil* stands for the proposition that avoidance claims, which sit firmly within the heart of the insolvency regime, are non-arbitrable. However, what if the nature or the origin of the claim is less clear cut? The respondents in *Larsen Oil* also brought a claim under s 73B of the Conveyancing and Law of Property Act[165] ("CLPA") on the ground that the imputed transactions were made with the intent to defraud it as a creditor of its subsidiaries. In this regard, the Court of Appeal was of the view that a claim under that section "is one that may straddle both a company's pre-insolvency state of affairs, as well as its descent into the insolvency regime".[166] For instance, a debtor may dissipate its assets to put them out of reach of its creditors without any real consequence on its solvency. In another scenario, the transaction may have been made in spite of the debtor's insolvency, or been the *cause* of his insolvency. In this manner, such a claim strongly resembles an unfair preference or transaction at an undervalue claim, and therefore should be non-arbitrable.[167]

94 In a cross-border context, how should a court in Singapore or a tribunal sitting in Singapore treat claims or disputes arising by reason or following foreign insolvency? This is not a question that appears to have been worked out. The following are the views of the authors in two instances.

95 First, if a claim arises by reason of a foreign insolvency, it should not automatically follow that it would not be capable of arbitration. It is suggested that reference should be made to the content of the foreign

163 *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] 3 SLR 414 at [45]. There are parallels in this reasoning with that in *Tanning Research Laboratories v O'Brien* (1990) 91 ALR 180.

164 *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] 3 SLR 414 at [46].

165 Cap 61, 1994 Rev Ed.

166 *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] 3 SLR 414 at [55].

167 *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] 3 SLR 414 at [56].

insolvency laws in determining whether the dispute is one capable of settlement by arbitration. If the foreign insolvency laws allow or permit the claim or dispute arising by reason of insolvency to be arbitrated, Singapore law should not prevent the claim from being arbitrated. Furthermore, while it is a ground for refusing enforcement of an arbitral award that the dispute is not capable of arbitration under Singapore law,[168] it is suggested that the Singapore court nevertheless retains the discretion to enforce the arbitration award.[169] Given Singapore's pro-arbitration stance and ability to recognise and assist foreign insolvencies, the Singapore courts should not be too quick to refuse enforcement where foreign insolvency laws dictate that the underlying dispute is arbitrable.

96 Second, as discussed above, it is possible that the proper law of a contract or agreement may carry with it the application of foreign insolvency laws.[170] In this respect, it may be possible for the chosen law to include and make applicable insolvency related principles applicable even though the chosen law of the contract is not the law governing the insolvency of a relevant party. Thus, in one of the appeals in *Perpetual Trustee Co Ltd v BNY Corporate Trustee Services Ltd*,[171] none of the parties to an agreement were English companies, but the choice of English law was held to carry with it the potential application of the anti-deprivation rule under English law[172] which may have impacted the validity of certain provisions of the agreement. There is no good reason why if principles of foreign insolvency law are imported only by reason of a contractual choice of law that it should not be arbitrable.

VII. Conclusion

97 In this era of increased financial volatility, insolvencies can often have far-reaching effects that flow outside the borders of a given jurisdiction. It is submitted that the confluence of insolvency law, conflict of laws and arbitration law is becoming increasingly relevant, and hence this article has sought to bring together these disparate areas of law into what is hopefully a fruitful and beneficial discussion. This article has, however, barely scratched the surface of the wide-ranging

168 International Arbitration Act (Cap 143A, 2002 Rev Ed) s 31(4); Arts 34 and 35 of Model Law; Art V of the New York Convention.

169 This arises by reason of the use of the word "may" in the above provisions. See also *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd* [2006] 3 SLR(R) 174 at [57].

170 See the discussion at paras 9–31 above.

171 *Perpetual Trustee Co Ltd v BNY Corporate Trustee Services Ltd* [2009] EWCA Civ 1160 at [112].

172 Very broadly, the anti-deprivation rule provides that the parties to a contract are not permitted to contract out of and thereby "direct a fraud upon the bankrupt laws". See *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2012] 1 AC 383; [2012] 1 All ER 505 at [2], *per* Lord Collins.

and complex interaction between these areas. Space constraints prevent a fuller discussion of other issues which may arise, including issues arising at the enforcement stage under the New York Convention[173] or the impact of insolvency transaction avoidance by a foreign insolvency proceeding[174] upon Singapore arbitrations.

98 Nonetheless, from the above survey, it is suggested that there are at least four means by which cross-border insolvency proceedings may have effect upon arbitrations. First is through the operation of the proper law of the contract coupled with the normal conflict of law rules. Second, insolvencies in one jurisdiction may have reach beyond their borders in certain instances by statutory recognition and assistance under statutory provisions. Third, and more pertinently in the case of Singapore, is by recognition and assistance via the common law. Fourth, parties to an arbitration may yet also be affected by the commencement of parallel insolvency proceedings at the jurisdiction of the seat of the arbitration.

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173 See the useful discussion in Nicholas Poon, "Choice of Law for Enforcement of Arbitral Awards" (2012) 24 SAcLJ 113, although not necessarily in the context of cross-border insolvencies.

174 See the useful discussion in Ho Look Chan, "Conflict of Laws in Insolvency Transaction Avoidance" (2008) 20 SAcLJ 343, although not necessarily in the context of its impact on arbitration.