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PLACING SANCTIONED ENTITIES INTO JUDICIAL MANAGEMENT

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The making of a judicial management order over a company subject to Singapore's asset-freezing sanctions, or overseas sanctions, poses unique challenges for Singapore-based insolvency practitioners and Singapore insolvency lawyers. Three recent English High Court judgments – *Re CargoLogicAir Ltd* [2022] EWHC 3316 (Ch), *Re Sberbank (CIB) UK Ltd* [2022] EWHC 1059 (Ch) and *Re VTB Capital plc* [2022] BCC 1049 – present potential solutions to these problems. Singapore's practitioners and courts may well find creative ways to adapt those solutions to fit Singapore's insolvency law and practice. This article considers three such solutions: *first*, the effect of pending licence applications for exemptions from sanctions on the making of judicial management orders; *second*, whether sanctioned companies in judicial management can use the Official Receiver's or Official Assignee's bank accounts in case commercial banks refuse to serve them; and *third*, the important role that judicial managers, as officers of the court, play in ensuring that sanctioned companies comply with sanctions.

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I. Introduction

1 Singapore has long enforced United Nations sanctions. It has not, at least in recent memory, imposed its own sanctions on another state. But Singapore resolved to sanction Russia four days after Russian soldiers entered Ukraine. Two types of sanctions were imposed. The first type of sanction was export controls. The second and perhaps more consequential set of sanctions were asset-freezing sanctions imposed on Russian and Russian-linked financial institutions. Similar sanctions have been imposed in the United Kingdom, United States and European Union.

2 Naturally, asset-freezing sanctions leave sanctioned entities unable to access valuable assets or bank accounts needed to fund their business operations. Without cash, sanctioned entities are often forced to enter a formal insolvency procedure. While it is possible to place sanctioned entities into liquidation, this is often undesirable. Among other reasons, judicial managers ("JMs"), like administrators in the UK, have much wider powers to trade and carry on the affairs of an insolvent business. Winding up is also perceived by market participants as a terminal procedure, meaning that liquidators are more likely to be forced to sell assets for a price far below their market value.

3 The main problem facing the JMs of sanctioned companies is that the company's assets are normally frozen in a bank which is prohibited by asset-freezing sanctions from making the assets available to the sanctioned company. That problem may disappear if the office-holders can obtain licences from the appropriate authorities enabling them to deal with the blocked account, but such licences take a long time to obtain.

4 This article examines three practical points raised by the recent English decisions on administrations of sanctioned companies set out in the abstract, and how those points might be useful to Singapore practitioners.[2] To provide the necessary context, the article sets out the problems that Singaporean and

2 See Parts IV, V and VI below.

foreign sanctions pose for insolvency practitioners,[3] and the facts of *Re CargoLogicAir Ltd*[4] ("*CargoLogicAir*"), in which *Re Sberbank (CIB) UK Ltd*[5] ("*Sberbank*") and *Re VTB Capital plc*[6] ("*VTB*") were also considered. This article will not examine the law of judicial management or sanctions in significant detail, for that is not its purpose.

II. Singapore's sanctions: the landscape

5 Singapore's asset-freezing sanctions operate, in summary, in the following way:

(a) Section 27(1) of the Monetary Authority of Singapore Act 1970[7] ("MAS Act") gives the Authority ("MAS") the power to "make recommendations" to "financial institutions", and "issue directions for the purpose of securing that effect is given to any such [...] recommendation". Section 27(4) makes it a crime to fail to comply with such a "recommendation".

(b) On 14 March 2022, the MAS issued two directions, MAS Notices SNR-N01 and SNR-N02, using its powers under s 27(1). Those directions bind "financial institutions".[8] All Singapore banks and payment services providers (among other entities) must therefore comply with SNR-N01.

(c) Who is sanctioned? Four "Designated Banks" are subject to asset-freezing sanctions by SNR-N01.[9] So are "Designated Entities", although it appears that none have yet been designated. Entities directly or indirectly owned, controlled or directed by Designated Banks and Entities are also sanctioned.

3 See Part II below.
4 [2022] EWHC 3316 (Ch). See Part III below.
5 [2022] EWHC 1059 (Ch).
6 [2022] BCC 1049.
7 2020 Rev Ed.
8 As defined in para 2.1 of SNR-N01 and SNR-N02.
9 Namely, VTB Bank PJSC, The Corporation Bank for Development and Foreign Economic Affairs "Vnesheconombank", Promsvyazbank PJSC, and Bank Rossiya.

(d) What do the asset-freezing sanctions do? Paragraph 3.1 of SNR-N01 prohibits financial institutions from "directly or indirectly" transacting, assisting or transferring assets to Designated Banks and Designated Entities. Paragraph 3.2 requires financial institutions to immediately freeze their funds.

6 There are two main avenues by which otherwise frozen funds can be made available to Designated Banks and Designated Entities:

(a) Paragraphs 3(a) and 3(b) of SNR-N02 create certain general carve-outs from the sanctions regime, such as payments for wages, CPF contributions, lawyers and auditors.

(b) Paragraph 8(b) of SNR-N01 provides that the asset-freezing sanctions in SNR-N01 do not apply to transactions in relation to which the MAS, upon application by a financial institution (note – not the sanctioned entity) grants an exemption under s 178 of the MAS Act.[10]

7 What is Singapore's sanctions regime likely to mean in practice for directors, Singapore insolvency practitioners and their legal advisers?

(a) A Designated Bank's business, and the business of its direct or indirect subsidiaries incorporated or based in Singapore, will be crippled. Banks and payment service providers in Singapore are likely to refuse to give these entities access to the funds held in their accounts, and are likely to refuse to allow them to use payment infrastructure. In practice, financial institutions may be unwilling to serve even non-sanctioned entities they suspect of having links to Designated Banks and Designated Entities.

10 These exemptions, while made by regulation, do not need to be published in the Gazette (s 178(4) of the Monetary Authority of Singapore Act 1970 (2020 Rev Ed)) so it is very difficult to know how many sanctions-related exemptions have been granted to date.

(b) Entities affected by Singapore's sanctions are very likely, therefore, to become cash-flow insolvent because they cannot meet their debts as they fall due.

(c) To carry on ordinary trading (with the aim of achieving the statutory purposes in s 89 of the Insolvency, Restructuring and Dissolution Act 2018[11] ("IRDA") and maximise realisations), the JMs or interim JMs of a sanctioned entity may well have to ask the entity's bank to apply to the MAS for an exemption under s 178 of the MAS Act, as SNR-N02 contemplates (as the sanctions regime does not let the JMs make the application themselves).

(d) The exemptions application process is likely to be slow and difficult.

8 Singapore's sanctions affect a far narrower range of entities than US, UK and EU sanctions (though this may change in the future). But it is not just Singapore's sanctions that JMs and interim JMs must worry about: US, UK and EU sanctions may affect Singapore-incorporated companies or the Singapore-based or incorporated beneficial owners, subsidiaries or related entities of sanctioned companies. Most international banking groups will refuse to do business with entities subject to such sanctions. Either way, a licence from either the MAS or the relevant foreign authority will be needed to achieve the purpose of a Singapore JM over entities affected by foreign sanctions. That licence may be costly and difficult to obtain.

9 The English courts have now considered the interaction of the UK and US sanctions regimes with the administration regime in Schedule B1 of the UK's Insolvency Act 1986[12] ("IA 1986"). Judicial management was modelled on administration (although the two are obviously not identical). The English cases were most recently considered in *CargoLogicAir*, and they may be a useful starting point for Singapore practitioners and the Singapore courts in a suitable case.

11 Act 40 of 2018.
12 c 45.

III. *Re CargoLogicAir Ltd*: the facts

10 There were three issues of potential interest to Singapore practitioners that were raised in *CargoLogicAir*:

(a) First, when should a judicial management order take effect? At the time of the hearing, or at some later time when the necessary licences to achieve the statutory purposes have been obtained?[13]

(b) Second, what can be done to make sure that the company has access to banking facilities even if commercial banks refuse to serve it, after obtaining the necessary licences (or while waiting for them)?[14]

(c) Third, what role do JMs and administrators play in a sanctioned company? Does the fact that the company is sanctioned make a judicial management or administration order easier to obtain?[15]

11 A brief summary of the facts is as follows:

(a) CargoLogicAir Ltd ("the Company") is registered in the UK. The Company was, until it stopped trading, the UK's only "maindeck" freighter airline. After the Russian invasion, the Company and its parent became subject to the full force of UK asset-freezing sanctions.

(b) The imposition of those sanctions meant that the Company had to cease trading.[16] It applied for and was granted a "Basic Needs Licence" by OFSI (the UK Treasury's sanctions enforcement arm), allowing it to make payments of salary arrears and some other basic payments. But its bankers, Citibank, nevertheless decided to close the Company's only current account within a matter of months, notwithstanding the grant of the Basic Needs Licence.[17]

13 See Part IV below.
14 See Part V below.
15 See Part VI below.
16 *Re CargoLogicAir Ltd* [2022] EWHC 3316 (Ch) at [10].
17 *Re CargoLogicAir Ltd* [2022] EWHC 3316 (Ch) at [5].

(c) Because the Company faced the imminent threat of being unable to access its funds, it would imminently become unable to pay its debts as they fell due. It was therefore cash-flow insolvent.[18]

(d) Michael Green J granted the Company's application. He found that the administration was likely to achieve the purpose at para 3(b) of Schedule B1 of IA 1986. An administration was likely to achieve a better result for creditors than a winding up: among other reasons, because the administrators were more likely to be able to sell the Company's aircraft (and its business, together with its valuable air operations licences) at advantageous prices.[19]

IV. Effect of pending licence applications on the judicial management order

12 Obtaining the necessary licences to deal with a sanctioned company's assets may take a significant amount of time, and the company may have to enter judicial management before those licences are granted. This poses practical and legal problems for the court, as well as for those seeking a judicial management order.

13 The court can only make a judicial management order if it considers that the making of an order "would be likely to achieve one or more of the purposes of judicial management mentioned in section 89(1)".[20] The three purposes are the survival of the company or a whole or part of its undertaking, the approval of a scheme of arrangement, or a more advantageous realisation of the company's assets than on a winding up.[21] If the company cannot access its funds, it is likely to find it difficult to demonstrate to the court on affidavit that these purposes can "likely" be achieved. It follows that if the court makes an order at a time

18 *Re CargoLogicAir Ltd* [2022] EWHC 3316 (Ch) at [6].
19 *Re CargoLogicAir Ltd* [2022] EWHC 3316 (Ch) at [21]–[29].
20 Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) s 91(2).
21 Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) ss 89(1)(*a*)–89(1)(*c*).

when licences that allow the company to access its funds have not yet been granted, the statutory requirement in s 91(2) may not have been met.

14 A similar issue has arisen in England, where an administration order can likewise only be made if the court is satisfied that there is a real prospect the order will serve its purpose. Different English judges have addressed this problem in different ways. In *VTB*, the applicants were the directors of VTB Capital, a sanctioned Russian bank. VTB Capital had assets of US$340 billion but was unable to use these assets, which were in a frozen HSBC account, to meet its expenses. OFSI granted a licence to VTB Capital, but HSBC refused to bank it unless it was granted an OFAC licence from the US authorities. At the time of the administration application, no such licence had been granted and it was uncertain how long OFAC would take to process VTB's application. Fancourt J refused to make an administration order, because that would be pointless if the licence was not granted. However, the statutory conditions for the making of an order had otherwise been met. The court approved a draft order in principle, but would seal the order upon a further hearing at which evidence that both licences were granted would be presented.[22]

15 A different approach was taken in *Sberbank*. Here the directors of Sberbank applied for a special administration order before OFSI had granted Sberbank a licence to use the funds in its bank account.[23] At the time of the administration, negotiations with OFSI had taken place. Michael Green J acknowledged that the company's business could not be wound down without the appropriate licence. But he made and sealed the administration order after satisfying himself that the administrators would not do anything requiring a licence without first obtaining that licence.[24]

22 *Re VTB Capital plc* [2022] BCC 1049 at [25].

23 For present purposes, the difference between the UK's special administration regime (for investment banks) and the administration regime in Schedule B1 of the Insolvency Act 1986 (c 45) is unimportant.

24 *Re Sberbank (CIB) UK Ltd* [2022] EWHC 1059 (Ch) at [31].

16 The inconsistency between these approaches was resolved in *CargoLogicAir*. Counsel for the applicant director submitted, in their skeleton arguments, that the *VTB* approach should only be adopted in cases where there were "multiple material uncertainties" as to whether a licence would be granted. In other cases, the court should make an order which was immediately effective even where licence applications were pending. If unexpected issues arose, the administrators could apply for directions.[25]

17 Michael Green J accepted these submissions. He ruled that the order should take effect immediately. OFSI was very likely to grant the licence to the administrators, unlike in *VTB* where there was no indication how long the OFAC licence application would take or how likely OFAC was to grant a licence. The order was sealed immediately:[26]

> 32. There is one further matter to deal with, an apparent divergence on the authorities that Mr Al-Attar took me to as to the timing of sealing of the order that I am going to make. In Sberbank, I directed that the order should be sealed immediately on the basis that OFSI was very likely to grant the licence to the administrators. In another Russian bank case, *Re VTB Capital plc* [2022] EWHC 1106 (Ch), Fancourt J directed that administrators would, in principle, be appointed but the order was effectively suspended whilst steps were taken to obtain a necessary licence from the US office equivalent of OFSI, which is the US Office of Foreign Assets Control, and the order was, as I said, not sealed until those licences had been obtained. In this case, only a licence from OFSI will be required and the administrators already have in place the Basic Needs Licence. There is also a further difference, as Mr Al-Attar pointed out to me, that the bank account in question in the *VTB Capital* case was a correspondent bank account allied to a US dollar account in the United States and that is a significant difference between that case and this.
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> 33. In my view, it is important that the administrators take immediate control of the Company. I will follow the route that I took in *Sberbank* and direct that the order be sealed immediately…

25 As Michael Green J pointed out in *Re Sberbank (CIB) UK Ltd* [2022] EWHC 1059 (Ch) at [30]–[31].

26 *Re CargoLogicAir Ltd* [2022] EWHC 3316 (Ch) at [32]–[33].

18 JMs (like administrators) only obtain control over the company's affairs, business and property from the date that the order takes effect. The court can change this by specifying a different date.[27] So, there seems to be no reason in principle why the Singapore courts should not look favourably upon Michael Green J's practical and sensible approach in *CargoLogicAir*. Based on the English cases, counsel for the applicants for a JM order might ask the court to take the following approach in a situation where the company needs to enter JM before relevant licences are granted:

(a) First, save in cases where the prospective or interim JMs have next to no clarity on when the required licence applications will be processed, it is unnecessary to make prospective or interim JMs wait for an indefinite amount of time before their appointments are confirmed. That would simply increase the costs of the judicial management, to the detriment of creditors.

(b) Second, as long as the purpose of the judicial management can likely be fulfilled once the relevant licences are granted, the appointment of JMs should be made effective immediately.

(c) Third, the order should take effect immediately even if the relevant licence applications are pending, as long as the JMs confirm that they will take scrupulous care not to breach the relevant sanctions. JMs are officers of the court and the court is entitled to rely on this assurance.

(d) Finally, if, contrary to expectations, the licence is not granted, the JMs can always apply to the court for directions under s 99(5) of the IRDA. If necessary, the judicial management order can expressly direct the JMs to apply to the court for directions in such a situation.

27 Insolvency Restructuring and Dissolution (Corporate Insolvency and Restructuring) Rules 2020 (S 603/2020) r 30.

V. Access to banking arrangements

19 JMs and administrators need the company to have access to a bank account and payment facilities in order to perform their statutory functions. But commercial banks may refuse to serve the company or the JMs even with exemptions from the MAS, OFAC, OFSI or other relevant authorities. Following *CargoLogicAir*,[28] it has become the practice for prospective administrators to seek permission from the UK's Insolvency Service to use the Insolvency Services Account for ordinary banking activities as a "back up" in case commercial banks refuse the administrators' custom. The Ministry of Law, Singapore JMs and legal practitioners, and ultimately the court, might consider allowing JMs to use the Companies Liquidation Account and Bankruptcy Estates Account as a "back up" account.

A. The position in England and Wales

20 The Insolvency Service is an executive agency in the UK which oversees a range of government functions relating to insolvency administration and policy, including the running of Official Receiver's offices throughout the country. Its (rough) equivalent in Singapore would be the Official Receiver's and Official Assignee's offices. The Insolvency Services Account is maintained with the Bank of England on behalf of the Insolvency Service.

21 Liquidators are required to pay any money received by them in the course of carrying out their functions into the Insolvency Services Account.[29] Trustees in bankruptcy must follow similar rules.[30] Administrators, on the other hand, are not required to use the Insolvency Services Account and are not required to apply for permission to open a local bank account to carry on the business of the company. But nothing in the Insolvency Rules 1994 *prevents* administrators from using the

28 See *Re Sberbank CIB (UK) Ltd* [2022] EWHC 1059 (Ch) at [34], *Re VTB Capital plc* [2022] BCC 1049 at [8] and *Re CargoLogicAir Ltd* [2022] EWHC 3316 (Ch) at [31].

29 Insolvency Regulations 1994 (SI 1994 No 2507) r 5 (UK).

30 Insolvency Regulations 1994 (SI 1994 No 2507) rr 20–22 (UK).

Insolvency Services Account, or prevents the Insolvency Service from giving others permission to use it.

22 That was exactly what the Insolvency Service did in *Sberbank*, *VTB* and *CargoLogicAir*. The court was then asked to declare, for the avoidance of doubt, that the administrators would have permission to use the account. The proposed administrators in each case worked with the Insolvency Service to develop an order in the following form. An order along these lines was presented to the court in draft, and ultimately made, in each of the three cases (including *CargoLogicAir*):

> During the period in which the administration order is in force, the Joint Administrators shall be permitted to make use of the Insolvency Services account ('ISA') for the purposes of operational banking, including utilising basic banking functions such as receiving payments in and making payments from the ISA.

23 A second paragraph of the order made provision for the administrators to pay the fees associated with the use of the account. That paragraph is less relevant to Singaporean practitioners, and is not reproduced here.

24 It is clear that the English courts considered that they had the power to make this order, which was in fact made in all three cases. In *VTB*, counsel for the applicant directors[31] made the following submission in their skeleton arguments:

> What is contemplated is that the IS permit the ISA to be used in the administration of the Company (which is a decision for the IS). The above orders do not therefore contemplate the Court extending a statute beyond its defined scope (which the Court cannot do); *rather, they record the terms on which the IS is content to make the ISA available to the Proposed Administrators, as administrators*. In this respect, the ancillary orders are unusual, but they are desired by the IS for its benefit, and the Applicants and the Proposed Administrators see no detriment from their perspective. [emphasis added]

31 Daniel Bayfield KC and Adam Al-Attar, both of South Square.

25 Fancourt J made an order along the lines of that set out in para 22 above. It follows that the applicants' submissions, as set out above, were accepted.

26 In *CargoLogicAir*, Michael Green J expressed approval for the practice of administrators using the Insolvency Services Account:[32]

> 31. I refer to the ancillary order that is sought in relation to the Insolvency Services Account. The form of wording that has been put into the draft order, Mr Al-Attar explained to me, was wording that has been approved by the Insolvency Service itself. It seems to me to be the most sensible thing to do and will still be under the control of the Insolvency Service, as I understand it, but it is a necessary option for the administrators should they have difficulty in securing a commercial bank account.

B. Singapore

27 A similar, though not identical, set of statutory provisions governs the Companies Liquidation Account and Bankruptcy Estates Account operated by the Official Receiver and Official Assignee, respectively:

(a) The Official Assignee is required to keep a Bankruptcy Estates Account with "such bank as the Official Assignee thinks fit". Money received by the Official Assignee pursuant to the relevant statutory provisions is to be paid into these bank accounts.[33] So the Official Assignee has a discretion over who to pay out of these accounts, and in what amount.[34]

(b) The Official Receiver maintains a Companies Liquidation Account. Liquidators are required to pay money received by them into the Companies Liquidation Account.[35] However, and as in England, JMs are not required to pay money received by them to the Official

32 *Re CargoLogicAir Ltd* [2022] EWHC 3316 (Ch) at [31].
33 Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) s 28(1).
34 Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) s 28(2).
35 Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) s 146; Insolvency, Restructuring and Dissolution (Court-Ordered Winding Up) Regulations 2020 (S 607/2020) r 33(1).

> Receiver, nor are they required to use the Companies Liquidation Account or Bankruptcy Estates Account.

28 Nothing in these statutory provisions *prohibits* the Official Receiver (or the Official Assignee) from allowing JMs from using the Companies Liquidation Account or Bankruptcy Estates Account. On the face of it, nothing stops the Official Receiver or the Official Assignee from giving the JMs of sanctioned companies permission to use the Companies Liquidation Account with the Ministry of Law's permission. These JMs might also be given permission to use the Bankruptcy Estates Account or Debt Repayment Schemes Account, if the Ministry of Law considers this to be a more workable arrangement.

VI. Role of judicial managers of sanctioned companies

29 Sanctioned companies are often sanctioned because the companies or their stakeholders supported or carried on the company's business in support of an objectionable purpose, such as the invasion of Ukraine. Once an insolvency practitioner takes control of a sanctioned company, things are different. The JM, or liquidator, takes control and the directors lose it. Unlike (some) directors, JMs are professionals who can (ordinarily) be trusted to ensure that the companies administered by them comply scrupulously with sanctions. The appointment of JMs helps uphold Singapore's sanctions regime, is in line with public policy, and is a *positive* reason to make an order.

30 It is suggested that the Singapore courts should endorse this principle, a similar formulation of which the English courts first endorsed in *Sberbank*. As Michael Green J explained, it is far more likely that independent insolvency practitioners (who face the danger of having their licence revoked) will respect the sanctions regime than directors. *Sberbank* at [29] states:

> 29. The final matter to consider is the court's discretion. It seems to me that given the situation that the company is in, it is preferable to put it into the responsible hands of experienced independent special administrators who will take control of the company's assets in an orderly way and ensure that sanctions

> are not broken and that all proper cooperation and coordination with the government and OFSI takes place.

31 Michael Green J made very similar comments in *CargoLogicAir*:[36]

> 30. Mr Al-Attar also addressed me shortly on the exercise of discretion. He kindly referred to something that I said in *Re Sberbank CIB (UK) Ltd* [2022] EWHC 1059 (Ch) that there is a positive reason for putting companies such as these into administration, namely that independent, experienced insolvency practitioners will take control of the Company and ensure an orderly winddown of the business while respecting the sanctions and not making any distribution to the Company's shareholders directly or otherwise. I have no doubt that that applies in this case and that I should exercise my discretion in favour of putting the Company into administration and appointing the proposed administrators.

32 There is no reason why the Singapore courts should not take the same approach. The vast majority of reputable insolvency practitioners do. Independent and experienced insolvency practitioners are far more likely to respect Singaporean or foreign sanctions than the directors of a sanctioned company. That is a *positive* reason why control of the company should be handed over to them, and a positive reason in favour of the court making any order it can to assist the JMs (or liquidators) of a sanctioned company in carrying out their functions.

36 *Re CargoLogicAir Ltd* [2022] EWHC 3316 (Ch) at [30].