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18. INSOLVENCY LAW

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I. Introduction

18.1 2024 saw a number of important court decisions on the law and practice of restructuring and insolvency. This review of selected decisions includes those on the avoidance of antecedent transactions, set-off, directors' duties, judicial management, schemes of arrangement (notably, a cross-border pre-pack scheme), and the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on Cross-Border Insolvency ("Model Law").[1]

II. Bankruptcy

18.2 In the area of bankruptcy, the High Court provided guidance as to whether to grant prospective approval for a proposed sale of property by a debtor facing pending bankruptcy proceedings as well as whether a claim against a bankrupt for breach of fiduciary duty is a provable debt in bankruptcy.

18.3 In *Re Eng Lee Ling*,[2] the High Court considered whether it has jurisdiction to grant prospective approval for a proposed sale of property by a debtor, in circumstances where a bankruptcy application has been

1 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed), Third Schedule.
2 [2024] 4 SLR 929.

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filed against the applicant, but a bankruptcy order has yet to be made. The court also provided general guidance on what it expects of the applicant when applying for prospective approval of proposed dispositions.

18.4 The applicants, Eng Lee Ling ("Mdm Eng") and Dong Yu ("Mr Dong"), were the joint owners of a property ("Property"). A bankruptcy application had been filed against Mdm Eng by Maybank Singapore Ltd ("Maybank").[3]

18.5 Mdm Eng and Mr Dong entered into an agreement with a third-party purchaser for the sale of the Property. However, before the completion of the sale, the purchaser declined to complete the sale due to concerns over whether he could obtain good title to the Property in light of Maybank's pending bankruptcy application.[4] To assuage the purchaser's concerns, Mdm Eng and Mr Dong applied to Court, seeking its consent to proceed with the proposed sale.[5]

18.6 Another creditor, DBS Bank Ltd ("DBS"), then filed further bankruptcy applications against Mdm Eng and Mr Dong.[6] DBS also opposed the applications filed by Mdm Eng and Mr Dong.

18.7 The court found that it did have the jurisdiction to grant its consent to a proposed disposition of property by a debtor prior to the making of a bankruptcy order.[7] However, the court declined to exercise its jurisdiction and dismissed the applications filed by Mdm Eng and Mr Dong.

18.8 The court's decision was influenced by two primary considerations: fairness and benefit to the general body of unsecured creditors.[8] The burden of proof lay on the applicants to demonstrate that the proposed disposition of property was likely to benefit all creditors.[9] However, the applicants failed to meet this burden, as they did not provide a comprehensive list of creditors, a valuation report, or evidence of proper marketing of the property. The court was particularly concerned with the potential preferential treatment of certain creditors over others. Mdm Eng and Mr Dong's intention to use the proceeds from the property sale to pay off Maybank in full was seen as preferential

3 *Re Eng Lee Ling* [2024] 4 SLR 929 at [4].
4 *Re Eng Lee Ling* [2024] 4 SLR 929 at [7].
5 *Re Eng Lee Ling* [2024] 4 SLR 929 at [8].
6 *Re Eng Lee Ling* [2024] 4 SLR 929 at [5]–[6].
7 *Re Eng Lee Ling* [2024] 4 SLR 929 at [13]–[18].
8 *Re Eng Lee Ling* [2024] 4 SLR 929 at [19].
9 *Re Eng Lee Ling* [2024] 4 SLR 929 at [20].

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and detrimental to the interests of other unsecured creditors, including DBS.[10]

18.9 The case provides valuable guidance for future applications seeking court approval for proposed dispositions of property by debtors in similar circumstances. Applicants must demonstrate that the proposed disposition is fair and beneficial to the general body of creditors. This includes providing detailed information on the debtor's financial situation, the valuation of the property, and evidence of attempts to sell the property at a fair market value. The court's decision underscores the importance of transparency and thorough documentation in bankruptcy proceedings.

18.10 The case of *Re Medora Xerxes Jamshid*[11] shed light on the issue of whether a claim against a bankrupt for breach of fiduciary duty is a provable debt in bankruptcy.

18.11 Tan Han Meng ("THM") was the director and owner of a number of companies, including Civil Tech Pte Ltd ("CTPL") (which was part of the Civil Tech group of companies) and Planar One & Associates Pte Ltd ("POA"), which had been placed into compulsory liquidation.[12] THM was adjudicated bankrupt and Medora Xerxes Jamshid was appointed as the private trustee in bankruptcy ("Private Trustee").[13]

18.12 POA's liquidators lodged a proof of debt in THM's bankruptcy for a sum of $6,565,803.76. This sum represented the net value of money transfers from POA to certain companies in Civil Tech group which POA's liquidators alleged that THM had procured in breach of his fiduciary duties to POA. On receipt of POA's proof of debt, the Private Trustee assessed that POA had indeed established a clear case of breach of fiduciary duty against THM. The Private Trustee thus responded to POA's liquidators communicating that he was prepared to accept POA's proof of debt in full on a provisional basis, subject to the court's directions on certain issues that were the subject of the Private Trustee's application before the High Court.[14]

10 *Re Eng Lee Ling* [2024] 4 SLR 929 at [29]–[34].
11 [2024] 5 SLR 1006.
12 *Re Medora Xerxes Jamshid* [2024] 5 SLR 1006 at [4]–[5].
13 *Re Medora Xerxes Jamshid* [2024] 5 SLR 1006 at [5].
14 *Re Medora Xerxes Jamshid* [2024] 5 SLR 1006 at [6]–[7].

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18.13 The Private Trustee primarily sought the court's determination of two questions:[15]

(a) whether POA's proof of debt against THM in respect of its claim for breach of fiduciary duty could be accepted by the Private Trustee under the proof of debt process in THM's bankruptcy ("Question 1"); and

(b) if a positive answer was given to Question 1, whether THM's liability to POA for breach of fiduciary duty accrued as of 8 August 2018 (being the date of the final improper transfer of funds from POA to the Civil Tech companies), in the sum of $6,565,803.76 as claimed by POA in its proof of debt ("Question 2").

18.14 The court split Question 1 into two issues: (a) whether a claim for breach of fiduciary duty is a provable debt in bankruptcy; and (b) if so, when a claim for breach of fiduciary duty can be resolved within the proof of debt regime.[16]

18.15 The court held that a claim for breach of fiduciary duty is a provable debt in bankruptcy. A claim for breach of fiduciary duty should be recognised as an unliquidated claim arising by reason of a breach of trust under s 87(3) of the Bankruptcy Act[17] by reading "breach of trust" in an expansionary manner.[18]

18.16 As to when a claim for breach of fiduciary duty can be resolved within the proof of debt regime, the court expressed that the complexity of the claim was an important factor, and that the principles governing applications for leave to commence an action against a bankrupt or company in insolvent liquidation – currently, under ss 327(1)(*c*) and 133(1) of the Insolvency, Restructuring and Dissolution Act 2018[19] ("IRDA") respectively – would be relevant.[20] Finally, the issue of whether a claim should be resolved through the proof of debt regime or outside of it is a matter that is, in the first instance, for the officeholder to assess and determine.[21] A natural corollary of this is that the court would generally be disinclined to interfere with the officeholder's decision-making.[22]

15 *Re Medora Xerxes Jamshid* [2024] 5 SLR 1006 at [9].
16 *Re Medora Xerxes Jamshid* [2024] 5 SLR 1006 at [11] and [30].
17 Cap 20, 2009 Rev Ed.
18 *Re Medora Xerxes Jamshid* [2024] 5 SLR 1006 at [31]–[80].
19 2020 Rev Ed.
20 *Re Medora Xerxes Jamshid* [2024] 5 SLR 1006 at [82]–[83].
21 *Re Medora Xerxes Jamshid* [2024] 5 SLR 1006 at [84].
22 *Re Medora Xerxes Jamshid* [2024] 5 SLR 1006 at [85].

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18.17 The court thus answered Question 1 in the affirmative. In principle, as a matter of the legal position, there was no objection for POA's claim against THM for breach of fiduciary duty to be accepted under the proof of debt process in THM's bankruptcy. Claims of this type are within the ambit of provable debts in bankruptcy. However, the court made no decision or direction on the specific issue of whether the Private Trustee should accept POA's proof of debt. That was a matter for the Private Trustee to decide in the first instance.[23]

18.18 With respect to Question 2, the court declined to determine the exact quantum of THM's liability to POA as sought by the Private Trustee. The quantification of THM's liability to POA was a matter to be properly determined by the Private Trustee.[24] However, the court determined two points of principle that may guide the Private Trustee in making his determination on the quantum of POA's claim against THM: (a) first, that THM's liability to POA did accrue prior to the date of the bankruptcy order;[25] and (b) second, that the Private Trustee was to use the date of the bankruptcy order – *ie*, 26 September 2019 – as the relevant date for the quantification of POA's claim against THM in adjudicating upon POA's proof of debt in THM's bankruptcy.[26]

III. Winding up

18.19 The scope of set-off in liquidation has seen considerable litigation in recent years.

18.20 The case of *Kyen Resources Pte Ltd v Feima International (Hongkong) Ltd*[27] highlighted the distinction between a set-off and a cross-claim by a company in liquidation. The Court of Appeal dismissed an appeal against the decision of the High Court to admit a proof of debt and held that, where a set-off was not available, the liquidators of the first appellant could not account for the first appellant's cross-claims ("Cross-claims") against the respondent in the proof of debt process in order to arrive at a net position on the respondent's claim. The court also dismissed the respondent's application to stay the appeal in favour of proceedings in Hong Kong, where the Cross-claims were asserted by the appellants by lodging a proof of debt in the respondent's liquidation there. In doing so, the court set out its observations on the issues of *res judicata* and election raised in the stay application.

23 *Re Medora Xerxes Jamshid* [2024] 5 SLR 1006 at [86]–[87].
24 *Re Medora Xerxes Jamshid* [2024] 5 SLR 1006 at [89]–[90].
25 *Re Medora Xerxes Jamshid* [2024] 5 SLR 1006 at [94]–[96].
26 *Re Medora Xerxes Jamshid* [2024] 5 SLR 1006 at [98]–[100].
27 [2024] 1 SLR 266.

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18.21 Kyen Resources Pte Ltd ("Kyen") and Feima International (Hongkong) Ltd ("Feima") had both entered liquidation.[28] Feima lodged a proof of debt for sums allegedly due from Kyen to Feima.[29] The liquidators of Kyen ("Kyen Liquidators") rejected Feima's proof of debt primarily on the ground that Kyen's alleged Cross-claims against Feima on the basis of certain third-party transactions exceeded the claim in Feima's proof of debt.[30] Kyen and the Kyen Liquidators were collectively referred to as the "Kyen Appellants" in the Court of Appeal's grounds of decision.[31]

18.22 Feima appealed the rejection of its proof of debt by Kyen to the Singapore High Court, which found in its favour.[32] Kyen appealed the decision. However, Feima sought a stay of the appeal as the Kyen Liquidators had lodged a proof of debt in Feima's liquidation based on the Cross-claims, which was rejected by the liquidators of Feima ("Feima Liquidators").[33] Kyen challenged the rejection in the Hong Kong court. Feima's principal argument was that as a result of Kyen placing the Cross-claims before the Hong Kong courts by lodging the proof of debt and challenging its rejection in the Hong Kong proceedings, it was inappropriate for the same issue to also be considered in the appeal.[34]

18.23 The court held that the Kyen Liquidators were not entitled to account for the Cross-claims when adjudicating Feima's proof of debt.[35] The Kyen Appellants were in substance seeking to set-off the Cross-claims against Feima's claim in order to reject Feima's proof of debt, and their argument that an "accounting" in the proof of debt process was permissible should be correctly understood in that sense.[36] However, the Kyen Liquidators were not entitled to account for the Cross-claims by way of an insolvency set-off, which was the only set-off that was raised, in the adjudication of Feima's proof of debt.[37] There was also no

28 *Kyen Resources Pte Ltd v Feima International (Hongkong) Ltd* [2024] 1 SLR 266 at [3]–[4].
29 *Kyen Resources Pte Ltd v Feima International (Hongkong) Ltd* [2024] 1 SLR 266 at [7].
30 *Kyen Resources Pte Ltd v Feima International (Hongkong) Ltd* [2024] 1 SLR 266 at [9].
31 *Kyen Resources Pte Ltd v Feima International (Hongkong) Ltd* [2024] 1 SLR 266 at [3].
32 *Kyen Resources Pte Ltd v Feima International (Hongkong) Ltd* [2024] 1 SLR 266 at [10]–[15].
33 *Kyen Resources Pte Ltd v Feima International (Hongkong) Ltd* [2024] 1 SLR 266 at [17].
34 *Kyen Resources Pte Ltd v Feima International (Hongkong) Ltd* [2024] 1 SLR 266 at [18].
35 *Kyen Resources Pte Ltd v Feima International (Hongkong) Ltd* [2024] 1 SLR 266 at [31].
36 *Kyen Resources Pte Ltd v Feima International (Hongkong) Ltd* [2024] 1 SLR 266 at [38].
37 *Kyen Resources Pte Ltd v Feima International (Hongkong) Ltd* [2024] 1 SLR 266 at [39]–[41].

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precedent or policy that supported the position that liquidators had a general entitlement to account for the company's cross-claims against its creditor. To account for the company's cross-claims in the proof of debt process, the liquidator must establish a permissible set-off.[38]

18.24 The court held that if the claim and the cross-claim were not disputed and a set-off was available, it was then a matter of simple arithmetic in setting-off the cross-claim against the claim to arrive at a net position on the claim. Where the cross-claim was substantially disputed and factually complex, it might be inappropriate for the liquidator to summarily deal with it in the adjudication process. In such circumstances, the liquidator ought to seek directions from the court on the manner or mode by which the cross-claim should be resolved.[39]

18.25 In view of the court's conclusion that the Kyen Liquidators were not entitled to exercise a set-off on the basis of the Cross-claims, it was not necessary to decide whether the doctrines of *res judicata* and election prevented the Cross-claims from being pursued in Singapore. Nevertheless, the court observed that the doctrines of *res judicata* and election were not engaged as the Cross-claims were properly asserted before the Singapore and Hong Kong courts for different purposes and the proceedings were distinct in nature.[40] In Kyen's liquidation, the Cross-claims were asserted by the Kyen Liquidators as a set-off in the adjudication of Feima's proof of debt. As regards Feima's liquidation, the Cross-claims were asserted by Kyen as Feima's creditor in the proof of debt process in Hong Kong.

18.26 The transnational nature of this dispute brought an added dimension to the analysis. The Kyen Liquidators' decision to set off the Cross-claims was a matter of Singapore's law and public policy. Therefore, any decision of the Hong Kong courts on the merits of the Cross-claims could not bind the court in these proceedings.[41]

18.27 In *Park Hotel CQ Pte Ltd v Law Ching Hung* and *Park Hotel Management Pte Ltd v Law Ching Hung*,[42] the High Court decided that only counterclaims amounting to a permissible set-off can be brought by

38 *Kyen Resources Pte Ltd v Feima International (Hongkong) Ltd* [2024] 1 SLR 266 at [42].
39 *Kyen Resources Pte Ltd v Feima International (Hongkong) Ltd* [2024] 1 SLR 266 at [53].
40 *Kyen Resources Pte Ltd v Feima International (Hongkong) Ltd* [2024] 1 SLR 266 at [63].
41 *Kyen Resources Pte Ltd v Feima International (Hongkong) Ltd* [2024] 1 SLR 266 at [64].
42 [2024] 5 SLR 138.

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a defendant to proceedings against a company in insolvent liquidation, without obtaining leave of court under s 133(1) of the IRDA (which stays actions against such a company without the court's leave). The High Court also held that statutory insolvency set-off was the only permissible set-off against a company in insolvent liquidation; equitable set-off and legal set-off had no room to operate. This answers a question that was left open by the Court of Appeal in *Kyen Resources Pte Ltd v Feima International (Hong Kong) Ltd*.[43]

18.28 In this case, liquidators brought claims against the company's director for breaches of fiduciary duties and breaches of trust. The director sought to amend his defence to add counterclaims for payments of sums owing. The director argued that leave of Court was not needed to assert any counterclaim, and that there was no further requirement that the counterclaim must constitute a set-off.

18.29 The High Court disagreed with the director. The High Court explained that the starting point was the default rule of *pari passu* distribution in insolvent liquidation. The question was whether anything providing for another form of distribution was a legitimate exception to that rule. The High Court then reasoned that true exceptions to the *pari passu* principle were almost exclusively prescribed by statute – specifically, preferential payments under s 172 of the IRDA, and insolvency set-off under s 219(2) of the IRDA.[44] Allowing other forms of set-off, such as legal or equitable set off, would undermine the policy of *pari passu* distribution.

18.30 The High Court noted that the IRDA expressly contemplated the possibility that not all claims against an insolvent company were provable in the company's liquidation. For instance, a creditor's claims for unliquidated damages are not provable.[45] If so, that creditor should not be allowed to improve his position and obtain satisfaction of his non-provable claims by asserting an equitable or legal set-off, just because the insolvent company brought an action against him. The High Court also observed that the spectre of visiting unfairness on a creditor from his inability to rely on such set-off was more apparent than real. This was because the vast majority of claims that could amount to equitable set-off would already be subject to the mandatory operation of insolvency set-off.

43 [2024] 1 SLR 266.

44 The High Court referred to "s 218(2) of the IRDA" at [22] of its judgment. But this is likely an error, as insolvency set-off is contained in s 219(2) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed).

45 See s 218(3) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed).

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18.31 In *DGJ v Ocean Tankers (Pte) Ltd*,[46] a debtor of a company procured the assignment of claims by a related party to itself in the advent of the company's compulsory liquidation, in order to improve its position with an insolvency set-off.

18.32 The main question before the Court of Appeal was whether the assignments should be rendered void, unenforceable and/or ineffective against the insolvent company, on the grounds of public policy. It was undisputed that the assignments were made to allow the debtor to assert insolvency set-off against the company's claims against it.

18.33 The Court of Appeal held that the assignments were ineffective, and that there was no room for insolvency set-off to operate in these circumstances. The Court of Appeal first observed that any assignment is potentially liable to be struck down if it contravenes public policy. Where a liquidation forms the backdrop to a dispute, the courts will typically have regard to the public policy of the insolvency regime, even when dealing with questions which may be primarily concerned with matters of private law such as assignments of contractual or tortious rights.

18.34 The Court of Appeal reiterated that the policy of *pari passu* distribution is fundamental to the process of liquidation, and that the proof of debt process was the exclusive procedure for a creditor to recover his debt against a company in liquidation. The insolvency set-off mechanism was an exception to the *pari passu* rule, as it allowed set-off of the company's claims against the creditor's claims. The Court of Appeal explained that this is a concession to the notion that where parties have been dealing with one another in reliance on their ability to secure payment by withholding what is due to them, it would be unjust, on the advent of liquidation, to deprive the solvent party of his security by compelling him to pay what he owes in full and be left to prove for his own claim. However, insolvency set-off is not meant to encourage parties to engage in the trafficking of debts to avail themselves of the exception and thereby rank in priority to other unsecured creditors.

18.35 The Court of Appeal therefore found that the attempted set-off was void for public policy reasons. In doing so, the Court of Appeal reinforced a line of decisions stating that private arrangements that contravene or otherwise undermine the rule of *pari passu* distribution in liquidation will not be given effect.

46 [2024] 2 SLR 790.

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IV. Directors' duties

18.36 The case of *Foo Kian Beng v OP3 International Pte Ltd*[47] deals with the evolving nature of the fiduciary responsibilities that directors owe to their companies, particularly when a company approaches or enters insolvency.

18.37 Foo Kian Beng ("Mr Foo"), the sole director and shareholder of OP3 International Pte Ltd ("OP3"), was found to have breached his fiduciary duties by authorising the payment of a dividend and the repayment of a loan to himself during a period when OP3 was in financial distress. The High Court determined that OP3 was in a financially parlous state at the time Mr Foo authorised the payments, thus obligating him to consider the creditors' interests as part of his fiduciary duty to act in the best interests of the company. Mr Foo appealed against the High Court's findings.[48] The Court of Appeal upheld the High Court's decision.

18.38 Central to the appeal was the question of when the interests of creditors should acquire discrete significance and even pre-eminence, as part of the director's fiduciary duty to always act in the best interests of the company. The Court of Appeal referred to the director's obligation to consider creditors' interests as the "Creditor Duty".[49] This duty is a fiduciary responsibility that directors owe to the company, rather than directly to the creditors. Consequently, creditors cannot sue directors for breaches of this duty.[50]

18.39 It is not the case that the interests of creditors only become relevant when the Creditor Duty is engaged or that those interests are otherwise immaterial. The predicate duty is a duty to act in the best interests of the company, and this enjoins directors to have regard to the interests of different stakeholders, including creditors, at all times. It is simply that when the company is financially healthy, directors would be justified in treating the interests of shareholders as a proxy for the interests of the company and in according commensurately less or even no discrete weight to the interests of creditors.[51]

18.40 In an action for breach of the Creditor Duty, the relevant question is whether the director exercised his discretion in good faith in what he considered (and not what the court considers) to be in the best interests

47 [2024] 1 SLR 361.
48 *Foo Kian Beng v OP3 International Pte Ltd* [2024] 1 SLR 361 at [3].
49 *Foo Kian Beng v OP3 International Pte Ltd* [2024] 1 SLR 361 at [4].
50 *Foo Kian Beng v OP3 International Pte Ltd* [2024] 1 SLR 361 at [60].
51 *Foo Kian Beng v OP3 International Pte Ltd* [2024] 1 SLR 361 at [70].

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of the company, as understood with reference to the financial state of the company prevailing at the material time.[52] That said, while an action for breach of the Creditor Duty focuses on the subjective intentions of a director, compliance with the Creditor Duty does not immunise a director from breaches of other directors' duties which may be engaged on the same set of facts.[53]

18.41 The underlying rationale for the Creditor Duty is the need to constrain directors from externalising the risks of continued trading of financially distressed companies onto creditors.[54] Having regard to this underlying rationale, the Court of Appeal endorsed the following analysis of the scope and content of the Creditor Duty:

> (a) First, the court should objectively ascertain the financial state of the company that was prevailing at the time the transaction sought to be impugned was entered into or that was likely to arise as a result of the company entering into the said transaction.[55] In this regard, the court should objectively determine which of three financial stages the company was in at the time the transaction was entered into or that was likely to arise as a result of the company entering into the said transaction (namely, the company is solvent, the company is imminently likely to be unable to discharge its debts or where corporate insolvency proceedings are inevitable).[56]
>
> (b) Having ascertained the financial state of the company at the material time, the court should then examine the subjective intentions of the director and determine whether he acted in what he considered to be the best interests of the company with specific reference to the three financial states a company may be found to have been in at the time a disputed transaction was entered into.[57]
>
> (c) Should the court find that a director had acted in breach of the Creditor Duty, it should lastly consider whether it is appropriate to relieve him of liability under s 391 of the Companies Act 1967.[58] The court retains the discretion to so relieve a director on the cumulative account of him having acted

52 *Foo Kian Beng v OP3 International Pte Ltd* [2024] 1 SLR 361 at [74].
53 *Foo Kian Beng v OP3 International Pte Ltd* [2024] 1 SLR 361 at [77].
54 *Foo Kian Beng v OP3 International Pte Ltd* [2024] 1 SLR 361 at [72] and [89].
55 *Foo Kian Beng v OP3 International Pte Ltd* [2024] 1 SLR 361 at [103].
56 *Foo Kian Beng v OP3 International Pte Ltd* [2024] 1 SLR 361 at [105].
57 *Foo Kian Beng v OP3 International Pte Ltd* [2024] 1 SLR 361 at [106].
58 2020 Rev Ed.

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honestly and reasonably, and in so far as it is fair for the court to excuse him for his default.[59]

V. Avoidance of transactions

18.42 There were two notable decisions on undervalue transactions. These decisions dealt with how to value an asset when undertaking the value comparison exercise, and the court's discretion to make no orders, even if a transaction is found to be at an undervalue.

18.43 In *SW Trustees Pte Ltd v Teodros Ashenafi Tesemma*,[60] the High Court held that when assessing whether an asset was sold at an undervalue under s 224 of the IRDA,[61] it is the asset's value to a hypothetical market participant, and not its value to a specifically identified buyer, that is relevant.

18.44 In that case, the Claimant company sold shares in its subsidiary to the Defendant for approximately US$10.8m. The Defendant was that subsidiary's only other shareholder. No valuation was conducted at the time, and the Defendant asserted that it had its own commercial reasons for agreeing to pay US$10.8m. After the Claimant went into insolvent liquidation, its Liquidator alleged that the sale was an undervalue transaction, on the basis that the asset was worth more than its contract price.

18.45 The High Court had to decide between two competing bases of valuation:

(a) Equitable Value: the Liquidator argued that the asset's value should be derived based on its "*Equitable Value*". This is the price that is fair between two specific, identified parties, bearing in mind the respective advantages or disadvantages that each will gain from the transaction.

(b) Market Value: the Defendant argued that the asset's "*Market Value*" was the correct approach. This is the price for which the asset should be transacted at between a hypothetical willing buyer and a willing seller in an arm's length transaction, after proper marketing and where parties had each acted knowledgeably, prudently and without compulsion.

59 *Foo Kian Beng v OP3 International Pte Ltd* [2024] 1 SLR 361 at [107].
60 [2025] 3 SLR 1027.
61 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed).

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18.46 The High Court agreed with the Defendant and held that the Market Value approach was the correct one. In particular, s 224 of the IRDA required a comparison between the value of the asset, against what the Claimant received. The Defendant's subjective perception of the value of the asset was irrelevant in this analysis.

18.47 The High Court also explained that the purpose of avoidance transactions was to protect creditors against a diminution of assets available to them, by a transaction which conferred an unfair or improper advantage on the other party. The undervalue transaction provisions would be engaged if the asset could have fetched a significantly higher price when offered to the world at large. That goes to the market value of the asset. If the Claimant could not have fetched a higher price if it tried to sell the asset on the open market, then setting the transaction aside would not make the Claimant's creditors better off.

18.48 Finally, adopting the Equitable Value approach would mean that the value of the consideration provided by an insolvent company may fluctuate, depending on the identity of the counterparty. This would give rise to uncertainty on whether a transaction may be set aside in the future and would also lead to unfair outcomes – *eg*, if similar assets are sold to different parties, yet only one of the transactions is deemed at an undervalue.

18.49 On the facts, the High Court accepted the Defendant's valuation expert's evidence, which valued the asset significantly lower than its contract price of US$10.8m. Accordingly, the Claimant would not have been better off, if it had tried to sell the asset on the open market.

18.50 In *Affert Resources Pte Ltd v Industries Chimiques du Senegal*,[62] the High Court had to decide whether the Claimant's waiver of claims against a related company was a transaction at an undervalue under s 98 of the Bankruptcy Act,[63] read with s 329(1) of the Companies Act.[64]

18.51 The commercial context was that the Claimant and its related company were struggling financially. A third-party investor purchased a stake in the related company and injected funds into the group, on the basis that the Claimant would waive its claims against the related company. The acquisition also required the related company to make

62 [2024] SGHC 57.

63 Cap 20, 2009 Rev Ed.

64 2006 Rev Ed. These provisions were subsequently consolidated and extended to cover corporate insolvency, under s 224 of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed).

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various payments to other group entities. After the Claimant commenced insolvent liquidation, its Liquidator asserted that the waiver was an undervalue transaction.

18.52 The High Court found that the waiver was a transaction at an undervalue. In doing so, the High Court accepted that the Claimant received practical benefit from the waiver. This was in the form of the investor injecting funds into the Claimant's broader corporate group of companies. The Claimant had significant business dealings with its group entities, and such infusion of funds would have allowed those dealings to continue. Such benefits accruing to the Claimant could, in principle, be valued. However, no expert evidence was led on what that value was. Accordingly, the High Court was unable to assign a value to the benefits received by the Claimant. The High Court was therefore unable to say that the value that the Claimant received was likely less or more than the value of the claims it had waived.

18.53 Despite finding that the transaction was at an undervalue, the High Court declined to make any orders to vary the transaction. The High Court observed that s 98 of the Bankruptcy Act only allowed the court to "make such order as it thinks fit for restoring the position to what it would have been if that individual had not entered into that transaction". The court therefore could only restore the position to the *status quo ante*, without going further to reconstruct the position to what would have been. To do the latter would be to speculate what the insolvent company would have done.

18.54 In this case, the court could not reconstruct the position to what it would have been if the Claimant had, in addition to not granting the waiver, also actively pursued its claims against the related party. The High Court considered that setting aside the waiver did not mean that the Claimant would have pursued the claims or would have been successful at doing so. The High Court observed that prior to liquidation, there was no evidence that the Claimant had intended to or took steps to recover its debts. There were also indications that the Claimant did not do so, as it was concerned of counterclaims. Setting aside the orders would therefore not be restorative.

18.55 Notably, the High Court also opined that it could consider fairness to parties when deciding whether to make orders following a finding of an undervalue transaction. In this case, the High Court accepted that it would be unfair to the investor if the waiver was set aside, as the investor had already injected funds into the Claimant's group on the basis that the relevant outstandings were settled. Setting aside the waiver would have effectively rewritten parties' bargain and placed the Claimant's creditors

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in a better position than they would have been if the Claimant had not granted the waiver.

VI. Judicial management

18.56 In a judicial management application, there may be disagreement between the applicant company and its creditors on who to appoint as the judicial manager. This was the case in *Re Logistics Construction Pte Ltd,*[65] where the Singapore High Court considered whether the choice of a majority of creditors who voiced their position at the application should prevail over the company's nominee.

18.57 Section 91(3)(*a*) of the IRDA states that an applicant for judicial management must nominate a qualified person to be the judicial manager. However, the court is not bound by the applicant's nomination and, pursuant to s 91(3)(*c*), "may reject the nomination of the applicant and appoint another person in place of the applicant's nominee" (s 91(3)(*c*)). In particular, where the nomination is made by the applicant company, s 91(3)(*d*) states that a majority of the creditors "in number and value" may be heard in opposition to the nomination and, if the court is satisfied as to the number and value of the creditors' claims and as to the grounds of opposition, the court may invite the creditors to nominate another person in place of the applicant's nominee and, if the court sees fit, adopt their nomination.

18.58 The court is at liberty to decide whether to accept the nomination of a majority of creditors in number and value but is not obliged to do so. The issue is whether such majority should be determined based on the creditors who appeared at, or expresses a position at the application, or based on the entire body of creditors. The court held it should be the latter.

18.59 The opposing creditor raised a number of arguments against such an interpretation of s 91(3)(*d*), including its impracticality. There may be a large number of creditors, many of whom may not be interested, or cannot afford to be involved, in the restructuring or winding-up of the company. It would therefore skew matters in favour of the company's nomination if the determination of a majority is made with reference to the body of creditors that includes these potentially disinterested creditors.

65 [2024] SGHC 58.

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18.60 In the court's view, such difficulty may well have been "by design" and what Parliament intended. The legislative history behind s 91(3)(*d*) of the IRDA suggests that it should be difficult for creditors to be heard in opposition to an applicant's nomination of a judicial manager. Unlike other provisions in the IRDA which refer to majority thresholds of creditors "present and voting" (*eg*, ss 94(11)(*e*) and 98(2)(*a*)), there is no similar qualifying language in s 91(3)(*d*). The court remarked that Parliament could have introduced such language if it had intended that the threshold should be based on creditors participating in the application.

VII. Scheme of arrangement

18.61 A debtor which intends to propose a scheme of arrangement may apply for moratorium protection under s 64(1) of the IRDA. If the debtor is part of an enterprise group, it may be necessary to protect other members of the group from legal or enforcement action during the scheme process, which is the key objective of s 65 of the IRDA, allowing the court to grant moratorium protection to the debtor's related companies which are "necessary and integral" to the proposed scheme.

18.62 In *Re Picotin Pte Ltd,*[66] the applicant for moratorium protection under s 64(1) of the IRDA was a holding company with operating subsidiaries. These subsidiaries owed rent to their landlords. The applicant concurrently sought protection for its subsidiaries under s 65 of the IRDA. The Singapore High Court decision in *Re Picotin* gave useful guidance on s 65 of the IRDA in at least two aspects. First, the court observed that s 65, on its face, suggests the court can make a s 65 order only after it has made an order under s 64(1). The court considered that "it would be sufficient that the s 65(1) application be preceded by the making of that under s 64(1) in a single hearing", and that there is "nothing in the language of the statute that would require the passing of any minimum period between applications." This approach is correct and practical. It makes sense for the grounds for the s 64 application to include the reasons for the s 65 application, so that the court can assess the matter holistically in deciding the nature and scope of any moratorium protection for the group restructuring.

18.63 Second, the court considered the meaning of "necessary and integral" in s 65 of the IRDA. In the court's view, what is necessary and integral must be measured against the restructuring objectives of the

66 [2024] SGHC 156.

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proposed scheme. Consistent with the approach in *Re IM Skaugen*,[67] an applicant is not required at this stage to provide a high level of detail for the proposed scheme and the role of the subsidiaries. Notably, the court did not consider it was necessary to show that the proposed restructuring plan involving the subsidiaries was the only possible or plausible plan. In addition, the court would generally not displace the applicant's business judgment on the formulation of the plan so long as it was made in good faith. Here, the applicant's proposed plan entailed, among other things, a deed poll structure and potential funding for the subsidiaries, and the continued use of the subsidiaries' premises for the restructured business. There was also evidence of support for the plan. The court was satisfied that the applicant had met the requirements for s 65 protection for its subsidiaries.

18.64 In addressing the request by the subsidiaries' landlords for a carve-out from the s 65 protection, the court applied the principles in *Re Atlantic Computer Systems plc*.[68] Whilst mindful of the landlord's proprietary interests, the court weighs factors including the history of the matter, financial position, the length of time, the objectives of the restructuring, and the probabilities of the various outcomes, as well as the conduct of the parties. In this case, the factors weighed against a carve-out for the landlords. The landlords would be paid rent moving forward while the subsidiaries remain on the premises. Further, as a condition to protect the interests of the landlords, their rights of re-entry may be exercised in relation to each property if rent is unpaid for more than one month going forward.

A. Pre-pack scheme

18.65 *Re No Va Land Investment Group Corp*[69] marks the first occasion the Singapore International Commercial Court ("SICC") considered and approved a cross-border pre-pack scheme of arrangement under s 71 of the IRDA.

18.66 The applicant, incorporated in Vietnam, proposed a pre-pack scheme for its noteholders. In deciding that the applicant had the standing to make the application, the SICC considered that the applicant was a "company liable to be wound up" due to its "substantial connection"[70] with Singapore as, *inter alia*, its bonds were listed in

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67 [2019] 3 SLR 979.
68 [1992] Ch 505.
69 [2024] 6 SLR 76.
70 Sections 63(3) and 246(1)(*d*) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed).

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Singapore, the bond instrument contained a Singapore-seated arbitration clause, and the scheme proposed voluntary submission to the SICC's jurisdiction. It was also clear that the SICC had the jurisdiction to hear the application as it was "international and commercial in nature".[71] The Vietnam-incorporated applicant had a substantial connection with Singapore, and its debt obligations were governed by New York law.

18.67 On the facts, the applicant complied with the approval requirements under s 71 of the IRDA. There was proper disclosure of information to the bondholders; the bondholders were properly classified; and there was practically unanimous support from the bondholders for the scheme.

18.68 Finally, the SICC made some observations to guide future cases. The court remarked that the applicant in this case had fully complied with its duties of disclosure, and had provided clear, comprehensive and useful information to creditors to allow them to consider the scheme. However, the court expressed some concern about the vast amount of work and related costs associated with pre-filing disclosure and solicitation of acceptances. More data and more written materials did not necessarily mean better disclosure. In fact, what the interested stakeholders really deserved was a clear and concise description of the proposed restructuring, potential risks and rewards, alternatives to the proposal, along with accessible, clearly formatted supporting financial data and an index to other related materials to allow for deeper diligence if thought necessary.

VIII. Cross-border insolvency

18.69 The start of the year saw the important decision from the SICC in *Re PT Garuda Indonesia (Persero) Tbk*.[72] In its first decision on the Model Law, the SICC expounded and gave useful guidance on a number of key principles.

18.70 Garuda, the national carrier of Indonesia, had undergone a suspension of payment or *Penundaan Kewajiban Pembayaran Utang* ("PKPU") proceeding in Indonesia to restructure its debts. After the Indonesian court approved the restructuring plan, Garuda applied to the SICC for, *inter alia*, recognition of the PKPU proceeding as a foreign main proceeding and for recognition and enforcement of the restructuring plan.

71 Section 18D(2)(*c*) of the Supreme Court of Judicature Act 1969 (2020 Rev Ed).
72 [2024] 3 SLR 254.

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18.71 Certain creditors of Garuda opposed the recognition application on the ground that recognition of the PKPU proceeding and the restructuring plan were premature and would be contrary to the public policy of Singapore.

18.72 The opposing creditors argued that recognition of the PKPU proceeding would be premature because they had appealed against the homologation of the restructuring plan approved pursuant to the PKPU proceeding. In the SICC's view, this argument has no merit. Art 17 of the Model Law does not require a foreign proceeding or any appeal to be concluded before recognition may be granted. If the foreign proceeding is terminated or reversed on appeal after a recognition application has been granted, it is open to a party to seek a termination of the recognition (Art 17(4) of the Model Law).

18.73 With regard to public policy (see Art 6 of Model Law), the SICC considered whether the removal of the word "manifestly" from the Model Law as adopted by Singapore meant a lower threshold for the test of what may be regarded as contrary to public policy. The SICC decided that the term "manifestly" is not intended to affect the standard of public policy as contemplated and applied in Art 6 of the Model Law. Its inclusion is to make explicit that a high threshold has to be met before recognition is refused on the ground of public policy.[73]

18.74 The creditors' argument on public policy was that creditors were not treated fairly and equitably under the PKPU proceeding. Specifically, the creditors claimed they were not properly classified for purposes of voting on the restructuring plan, there was inadequate disclosure of information (including information relating to third party releases under the restructuring plan granted to Garuda France, which was not a party to the PKPU proceeding) and there were private discussions between Garuda with some but not all its creditors.

18.75 The SICC decided that the opposing creditors failed to demonstrate that Garuda acted contrary to Indonesian law on the conduct of the PKPU proceeding. Further, the SICC rejected the objecting creditors' arguments which were effectively criticisms of the Indonesian insolvency regime by comparing it with the Singapore insolvency regime. According to the SICC, such arguments would be contrary to the spirit of modified universalism as envisaged by the Model Law.

73 In so holding, the SICC disagreed with the views in *Re Zetta Jet Pte Ltd* [2018] 4 SLR 801 at [23] that the Singapore Parliament intended a lower threshold by removing "manifestly" in Art 6 of the Model Law adopted by Singapore.

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18.76 The SICC went on to provide examples where a challenge to recognition may succeed on public policy grounds:

(a) where recognition is sought in respect of a foreign proceeding commenced in breach of a moratorium over legal proceedings (*eg*, *In re Gold and Honey, Ltd*);[74]

(b) where the relief sought under the Model Law is prohibited in the forum state or where compliance with orders for such reliefs would open individuals to criminal prosecution (*eg*, *In re Toft*);[75]

(c) where the foreign representatives acted in bad faith or failed to make full and frank disclosure of material facts to the receiving court (*eg*, *In re Creative Finance Ltd*);[76]

(d) where recognition is sought of a foreign proceeding commenced in breach of the recognising court's order granted in a prior proceeding (*Re Zetta Jet Pte Ltd*);[77] or

(e) where there is a failure to accord due process to the creditors and other relevant stakeholders in the foreign insolvency process.

18.77 The application in *PT Garuda* extended to the recognition of its restructuring plan approved by the Indonesian court. In this regard, the SICC was of the view that the basis for doing so should be the *chapeau* of Art 21(1) (*ie*, under the limb of "any appropriate relief"), instead of Art 21(1)(*g*).

18.78 In granting relief, the SICC decided that the recognition and enforcement of the PKPU proceeding and the restructuring plan would be without prejudice to ongoing litigation or arbitration proceedings between the opposing creditors and Garuda France and any other subsidiaries of Garuda (which were not parties to the PKPU proceeding) within the jurisdiction of Singapore or where Singapore is the seat of the arbitration, as the case may be.

18.79 In *Re Fullerton Capital Ltd*,[78] the liquidators of a company ("FCL") incorporated in the British Virgin Islands ("BVI") applied to the Singapore High Court for, *inter alia*, recognition of the liquidation in the BVI as a foreign main proceeding, for the liquidators to be appointed

74 410 BR 357 (2009).
75 453 BR 186 (Bankr SDNY, 2011).
76 2016 BL 8825 (Bankr SDNY Jan 13, 2016).
77 [2018] 4 SLR 801 at [25].
78 [2024] SGHC 155.

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as foreign representatives, and for examination and disclosure orders against certain parties.

18.80 Before FCL was placed under insolvent liquidation in the BVI, Discovery Key Investments Limited ("DKI"), which was FCL's sole creditor, had commenced legal proceedings against, *inter alia*, the parties against whom examination and disclosure orders were sought in the liquidators' recognition application.

18.81 On whether the liquidation of FCL in the BVI was a foreign main proceeding, the Singapore High Court assessed a number of factors in determining FCL's centre of main interests ("COMI"). The location and control of FCL outside the BVI was not determinative. On the facts, there was insufficient evidence to tip the scale in favour of any particular jurisdiction. In the court's view, the presumption of the BVI (FCL's place of incorporation) as the COMI was not displaced.

18.82 It was clear that the court had the power to make the disclosure and examination orders under Art 21(1)(*d*) and Art 21(1)(*g*) of the Model Law, read with s 244 of the IRDA. The court stated that the BVI liquidators had to satisfy two different elements in their application for such orders: the Content Element[79] and the Reasonable Basis Element.[80]

18.83 The Content Element is the requirement that the documents or information sought must concern the debtor's property, affairs, rights, obligations or liabilities. The Reasonable Basis Element is the existence of some reasonable basis for the liquidators' belief that the party concerned can assist in obtaining relevant information or documents, and that the information or documents are reasonably (and not absolutely) required.

18.84 If the liquidators can satisfy the Content Element and the Reasonable Basis Element, the court would exercise its discretion to decide whether to make the order. In exercising its discretion, the court must consider all relevant circumstances and ensure that the interests of the affected party are adequately protected, which includes not making an order that is wholly unreasonable, unnecessary or oppressive to it. A balance must be struck between the relief sought and the interests of the affected party. The court described this as the Discretion Element.

18.85 The court decided that the BVI liquidators had satisfied the Content Element and the Reasonable Element. The opposing parties argued that the examination and disclosure orders would be

79 *See Re Fullerton Capital Ltd* [2024] SGHC 155 at [87(a)].
80 *See Re Fullerton Capital Ltd* [2024] SGHC 155 at [87(b)].

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oppressive because information and documents they disclose may be used in DKI's legal proceedings against them. The court decided that this concern was adequately addressed by the BVI liquidators' undertaking that they would not disclose to DKI documents and information directly relevant to DKI's legal proceedings against the opposing parties, which the liquidators obtained from them pursuant to the Disclosure and Examination Order, except for documents and information already obtained in such legal proceedings and subject to the liquidators having liberty to apply to the court to do so. The court granted the examination and disclosure orders sought by the BVI liquidators.

18.86 The appeal against the High Court's decision was dismissed. There are at least two aspects of the Court of Appeal's judgment[81] which should be highlighted – first, on the rebuttable presumption that a debtor's COMI is the location of its registered address, and second, consideration of the acts of a foreign representative in the COMI analysis.

18.87 First, on the question of burden of proof in the COMI analysis, it was necessary to distinguish between (a) the question of whether a foreign proceeding was taking place at the debtor's COMI; and (b) the question of where the debtor's COMI was. The foreign representative seeking recognition bears the burden to prove whether a foreign proceeding was taking place at the debtor's COMI. For the second question, since the debtor's COMI is presumed to be at its registered office unless there was "proof to the contrary" (Art 16(3)), the burden of establishing "proof to the contrary" rested on the party who claims that the debtor's COMI was at a place other than the registered office. It was thus insufficient for such party to merely downplay or disprove the connection between the debtor and its registered office. It has to put forward a positive case, how and why another jurisdiction had a stronger connection with the debtor. The standard of proof was a balance of probabilities. On the facts, the appellant failed to discharge the burden of rebutting the presumption of the debtor's COMI being the location of its registered office.

18.88 Second, the Court of Appeal clarified that there was no absolute bar against taking the actions of a foreign representative into account in the COMI analysis. If the relevant date for assessing COMI was the date of the recognition application, all factors had to come into play.

81 *Re Fullerton Capital Ltd* [2025] 1 SLR 432 at [3].

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18.89 The decisions relating to the Sapura group – *Re Sapura Fabrication Sdn Bhd*[82] and *Re Sapura 1200 Ltd*[83] – are noteworthy for a number of reasons. The Sapura restructuring provided the occasion for the Singapore courts to consider the intersection between insolvency and arbitration. In addition, for the first time, the Singapore and Malaysian courts invoked a court-to-court protocol to facilitate communications and coordination on cross-border issues.

18.90 Companies in the Sapura group, both incorporated in Malaysia, commenced a scheme of arrangement process in Malaysia. As part of the scheme process, the Malaysian High Court granted restraining orders which prevented all proceedings against the Sapura companies and their assets. The Sapura companies then applied to the Singapore High Court to seek recognition of the Malaysian proceeding, including the restraining orders, as a foreign main proceeding under Art 20(6) of the Model Law. Upon such recognition, an automatic moratorium arises under Art 20(1) of the Model Law.

18.91 A non-party referred to as "GAS" due to a sealing order and which had commenced arbitration proceedings against the Sapura companies, sought a carve-out from the moratorium to allow its arbitration to proceed.[84] The Singapore High Court granted the recognition application and had to decide whether to allow the carve-out.

18.92 In this regard, the High Court examined the following factors:[85]

(a) the timing of the application for the carve-out;

(b) the nature of the claim in the arbitration;

(c) the existing remedies;

(d) the merits of the claim in the arbitration;

(e) the existence of prejudice to the creditors or to the orderly administration of the insolvency proceeding to be recognised; and

(f) other miscellaneous factors such as the potential of an avalanche of litigation being unleashed by the grant of permission, the proportionality of the cost of the proceeding to the debtor's resources, and the views of the majority creditors.

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82 [2024] SGHC 241.

83 [2025] 3 SLR 398.

84 [2024] SGHC 241 at [3].

85 For brevity, the "*Wang Aifeng* factors" – see *Wang Aifeng v Sunmax Global Capital Fund 1 Pte Ltd* [2023] 3 SLR 1604.

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18.93 The High Court decided to grant the carve-out sought by GAS. Among other reasons, the High Court was of the view that the dispute between GAS and the Sapura companies was complex and should be resolved through arbitration instead of the proof of debt regime in the scheme of arrangement process. There was no evidence to show that GAS's claim was unmeritorious. There was also nothing which indicates any undue prejudice to the Sapura companies' other creditors if the arbitration proceeds. There was no evidence of a risk of a flood of similar proceedings that may undermine the effectiveness of the moratorium.

18.94 To mitigate against any potential prejudice to other creditors who are subject to the moratorium, the High Court imposed a condition[86] to the carve-out that there should be no enforcement of the arbitration award anywhere, whether of the claims in the arbitration or of costs, without the permission of the court. This condition allows the court the opportunity to consider and weigh the overall impact that any enforcement of an award may have at the appropriate juncture.

18.95 Apart from its exercise of discretion to grant the carve-out, the High Court observed that it would have done the same because of the court's mandatory obligation to enforce the arbitration agreements. This was premised on the Court of Appeal's decision in *AnAn Group (Singapore) Pte Ltd v VTB Bank* ("*AnAn*").[87]

18.96 Sapura appealed against the grant of the carve-out and the Singapore Court of Appeal dismissed the appeal – see *Sapura Fabrication Sdn Bhd v GAS.*[88] Whilst it concluded that the carve-out for GAS should be granted, the Court of Appeal said that the High Court's view on the Singapore court's mandatory obligation to grant a carve-out to enforce the arbitration agreement ought not to be followed. According to the Court of Appeal, *AnAn* did not stand for the proposition that the policy of enforcing arbitration agreements should trump the insolvency regime under all circumstances. In cases like *AnAn*, the issue was whether to stay or dismiss a winding-up application if the dispute giving rise to the application may be subject to an arbitration agreement. In such cases, the policy concerns of the insolvency regime were not strictly engaged because the company was not yet determined to be a debtor at the time that the winding-up application based on the disputed debt was brought. In comparison, the policy concerns of the insolvency regime were

86 See Art 20(6) of the Model Law adopted by Singapore in the Third Schedule of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed).
87 [2020] 1 SLR 1158.
88 [2025] 1 SLR 492.

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strictly engaged in the present case where the Sapura companies were in the course of trying to restructure their debts in a scheme of arrangement.

18.97 Moreover, the concern of a creditor trying to use a winding up application to bypass an arbitration agreement was not present when a creditor (such as GAS) was trying to assert its right to arbitrate by seeking a carve-out from the moratorium. Ultimately, allowing a creditor to arbitrate a prior private *inter se* dispute against the insolvent company did not necessarily undermine the underlying policy aims of the insolvency regime.

18.98 The Court of Appeal held that it was correct to refer to the *Wang Aifeng* factors[89] in exercising discretion to decide whether to allow the carve-out and saw no reason to disturb the High Court's decision in that respect.[90]

18.99 In the related decision of *Re Sapura 1200 Ltd*,[91] the court granted the recognition application and the interim order sought by the applicant under the Model Law. Further, the court referred to the Protocol on Court-to-Court Communication and Cooperation between Malaysia and Singapore in Cross-Border Corporate Insolvency Matters (23 July 2021) ("Protocol"), as well as the draft Judicial Insolvency Network guidelines on the Management of Applications for the Arrest of Vessels where the Vessel Owner or Bareboat Charterer is the Subject of Cross-Border Insolvency Proceedings (2025) ("Draft JIN Admiralty Guidelines").

18.100 The Protocol facilitates communications between the Singapore and Malaysia Courts with a view to enhancing coordination and the efficiency in the administration of, *inter alia*, cross-border insolvency cases commenced in both jurisdictions.

18.101 Although in draft form, the Draft JIN Admiralty Guidelines are intended to enhance the coordination and cooperation of the courts in managing applications for the arrest of vessels, where an entity concerned is undergoing cross-border insolvency or restructuring proceedings. Measures under such Guidelines are aimed at ensuring that the impact of arrest on restructuring proceedings and *vice versa*, are properly considered. Among others, these measures include having the applicant for recognition inform the court in the arresting jurisdiction of vessels

89 *Cf* n 86.
90 See *Sapura Fabrication Sdn Bhd v GAS* [2025] 1 SLR 492 at [6].
91 [2025] 3 SLR 398.

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that may be subject to arrest, the existence of orders affecting the situation, and the advertisement of any orders and decisions made.

18.102 The court in *Re Sapura 1200 Ltd* noted that court-to-court communications were held between the Singapore and the Malaysian Courts to apprise the Malaysian Court of the steps taken in Singapore, and the application of the Draft JIN Admiralty Guidelines. Such communication enabled the efficient management of potential further applications by other entities of the Sapura Group for recognition of the Malaysian proceeding in Singapore to restrain the arrest of any vessel owned or bareboat chartered by the Sapura Group.

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