INSOLVENCY SET-OFF IN JUDICIAL MANAGEMENT

The Insolvency, Restructuring and Dissolution Act 2018 has extended the applicability of insolvency set-off to companies in judicial management. This presents an interesting issue as to how insolvency set-off operates when a company in judicial management transitions into winding up. This is an issue with practical consequences for insolvency practitioners and creditors alike. This article also examines the effect of judicial management on the crystallisation of floating charges, which impacts the mutuality required for insolvency set-off to operate.

KWONG Kai Sheng
LLB (Hons) (National University of Singapore); Advocate and Solicitor (Singapore); Senior Associate, WongPartnership LLP.

CHONG Yi-Hao Clayton
LLB (Singapore Management University); Advocate and Solicitor (Singapore); Partner, WongPartnership LLP.

I. Introduction

1 Insolvency set-off is a relatively new feature of the judicial management regime in Singapore. It was introduced under the Insolvency, Restructuring and Dissolution Act 2018[1] ("IRDA"), which came into force in 2020. Insolvency set-off was introduced for a fairly mundane purpose – to clarify that a creditor's proof of debt for the purposes of voting in the judicial management should take into account any mutual debts between the creditor and the company.[2] However, there are second-order effects flowing from this legislative change which have not been fully considered in case law or commentary.

2 The operation of the insolvency set-off regime could have important commercial implications for counterparties that trade with a company in judicial management and for secured lenders who have a charge over the book debts of the company. In turn, this could have third-order effects on overall effectiveness of the judicial management regime as the legal framework might influence the willingness of trade partners

1 2020 Rev Ed.
2 Insolvency Law Review Committee, *Final Report* (2013) (Chairman: Lee Eng Beng SC) ch 2, at para 27.

to continue engaging in business with a company in judicial management, and the prospects of secured lenders supporting a judicial management.

3 This article explores two interconnected issues. The first issue is whether when a company transitions from judicial management to winding up, counterparties trading with a company in judicial management can have the benefit of insolvency set-off for mutual debts incurred during the course of the judicial management.

4 The second issue is whether the judicial management regime prevents the crystallisation of a floating charge over the book debts of the company. From the perspective of the secured lender holding such a charge, crystallisation is advantageous as it breaks the mutuality required for insolvency set-off to apply. In effect, crystallisation before the date of insolvency set-off enables the secured lender to collect the full value of the book debts of the company, without any diminution of the book debts via the application of insolvency set-off against cross-debts owed by the company to the book debtors. Conversely, crystallisation is disadvantageous to the book debtors since they might be deprived of the benefit of insolvency set-off.

II. Whether insolvency set-off gets triggered a second time when a company transitions from judicial management into winding up

A. Introduction

5 Under the IRDA, insolvency set-off now applies to both companies in judicial management as well as companies in insolvent winding up. This may be contrasted with the pre-IRDA position, where insolvency set-off was applicable only to companies in insolvent winding up. In Singapore, it is not uncommon for companies to transition from judicial management into winding up, *eg*, if the judicial management fails or if the company's assets are sold and the remaining shell is wound up.[3]

6 This leads to a potential issue as to how insolvency set-off operates for a company that transitions from judicial management into winding up:

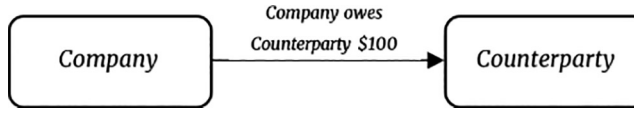
3 See Insolvency Law Review Committee, *Final Report* (2013) (Chairman: Lee Eng Beng SC) ch 6, at para 11, where it was observed that: "The judicial management regime is now commonly seen as a precursor to liquidation."

(a) does insolvency set-off apply twice, once at the commencement of judicial management and the second time at the commencement of the winding up; or

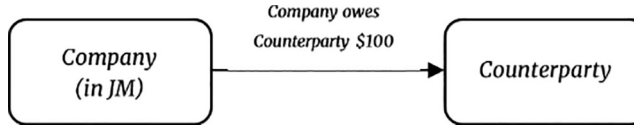
(b) does insolvency set-off only apply once, at the commencement of the earlier judicial management?

7 The answer to this issue has practical implications for counterparties that trade with a company during its judicial management, which can be illustrated with the example below:

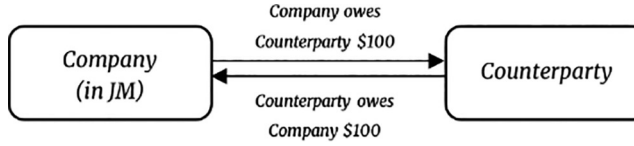
(a) The company owes a counterparty $100.



(b) The company enters into judicial management.

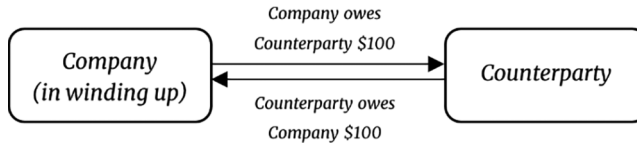


(c) The counterparty enters a new contract[4] to obtain goods or services from the company for $100.

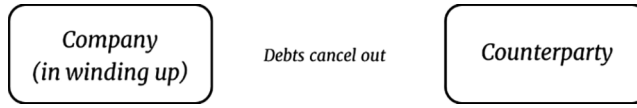


4 It should be emphasised that the example assumes that a new contract is entered into in the course of the judicial management. If the counterparty obtains goods or services from the company via a contract entered into prior to the judicial management, the debts may be subject to insolvency set-off via the application of first instance of insolvency set-off when the company entered into judicial management. See *Old Style Confections Pty Ltd v Microbyte Investments Pty Ltd* (1994) 15 ACSR 191 at 199–200, where it was held that insolvency set-off operated to set off: (a) a liquidator's claim for post-liquidation licence fees against (b) a pre-liquidation claim for damages against the company in liquidation, both claims arising under the same contract. See also *JLF Bakeries Pty Ltd v Baker's Delight Holdings Ltd* (2007) 64 ACSR 633 at [17]–[22], where it was held that insolvency set-off operated to set off: (a) the purchase price for fixtures, fittings, plants and equipment (payable pursuant to an pre-administration option exercised after the company entered into administration) against (b) other debts owing by the company in liquidation. In other words, the issue considered in this article whether insolvency set-off occurs a second time would be immaterial in the case where the goods or services acquired from the company is pursuant to a pre-judicial management contract.

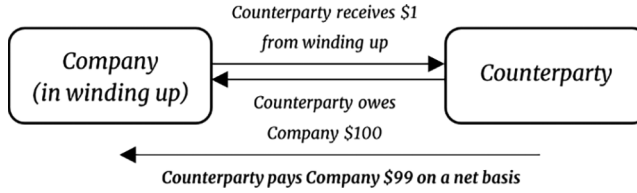
(d) The company subsequently enters into winding up.



(e) If insolvency set-off is triggered again due to the company's entry into winding up, the two debts will cancel each other out.



(f) If insolvency set-off is not triggered again, the counterparty would have to pay its $100 debt to the company in full, but would only receive a *pari passu* distribution from the company's winding up. Assuming a 1% recovery rate, the counterparty would receive only $1 but would have to pay $100 to the company. On a net basis, the counterparty would have to pay $99.



8 The illustration above shows how the application or non-application of insolvency set-off when the company transitions into winding up vastly affects the outcome for the counterparty who trades with a company during judicial management.

9 The situation can be examined from the judicial manager's perspective as well. In one outcome, the judicial manager enhances the estate by $99 and, in the other, the judicial manager not merely does not enhance the estate but effectively enables a pre-judicial management creditor to receive a full satisfaction of its debt. In the latter scenario, particularly where large sums are involved, the judicial manager could risk the ire of the other creditors of the company who may perceive that another creditor has skipped ahead of them in the queue. A judicial manager faced with the example laid out above has a tough choice to make. If the judicial manager wants to avoid the risks described, the judicial manager would have to either insist that the counterparty pays

upfront for any goods and services provided by the company, or find other trade partners without any pre-existing debts to do business with. In reality, these may not be commercially feasible options.

B. The relevant statutory provisions and concepts

10 The insolvency set-off provision is found in s 219(2) of the IRDA, which provides that:

> **Mutual credit and set-off**
>
> **219.**—(1) This section applies to —
>
> (*a*) a company in judicial management; and
>
> (*b*) an insolvent company that is being wound up.
>
> (2) Where there have been mutual credits, mutual debts or other mutual dealings between a company and any creditor, the debts and liabilities to which each party is or may become subject as a result of such mutual credits, debts or dealings must be set off against each other and only the balance is a debt provable in the judicial management or the winding up of the company, as the case may be.

11 An immediate observation is that s 219 of the IRDA does not shed much light on the identified issue as to whether insolvency set-off applies twice in the situation of a company that transitions from judicial management into winding up.

(1) Set-Off Date and Cut-Off Date

12 Here, it is appropriate to define the terminology which will be used in this article, and to elaborate on the relevant concepts.

(a) "Set-Off Date": The date on which the debts owing by the insolvent company to the counterparty, are set off against the debts owed to the insolvent company by the counterparty, *ie*, the date on which insolvency set-off is effected.

(b) "Cut-Off Date": The date after which debts incurred by the insolvent company to the counterparty, or rights acquired by the insolvent company against the counterparty, can no longer be employed in insolvency set-off, *ie*, it determines what can be employed in insolvency set-off.

(a) Rationale of insolvency set-off

13 Insolvency set-off is meant to ameliorate a perceived injustice, that a person should have to pay the full amount of his liability to a bankrupt, and at the same time be confined to receiving a dividend on a

cross-claim against the bankrupt.[5] It has alternatively been posited that the right of set off enhances the provision of credit and generally acts as a stimulus to trade and commerce.[6] If an enterprise wishes to raise cash, or does not wish to pay for goods or services immediately, but is otherwise reasonably sound, the possibility of a set off in its insolvency may encourage other parties to deal with it. In other words, the possibility of a set-off may be perceived as a form of security and while it is not a security in the strict sense of the word, it may give a degree of confidence to parties dealing with each other.[7] It has also been stated that the insolvency set-off provision should be given the widest possible scope.[8]

(b) Cut-Off Date

14 The relevance of the Cut-Off Date is that a debt incurred by or a right acquired by the insolvent company after the Cut-Off Date and which does not arise from an obligation incurred prior to that date will not be capable of being employed in insolvency set-off. In Singapore, the IRDA is silent on the Cut-Off Date for rights acquired by the insolvent company against the counterparty. It only defines the Cut-Off Date for debts incurred by the insolvent company. Section 219(3) of the IRDA sets out the two circumstances under which debts incurred by the insolvent company cannot be employed in insolvency set-off in judicial management and winding up.

(a) The first is where the debt is not provable in judicial management or winding up. In turn, whether a debt is provable turns on the date on which the obligation giving rise to the debt or liability arose.[9] If that obligation was incurred before the commencement of the judicial management or winding up, the debt (regardless of whether it accrues prior to or after the commencement of the insolvency process) will be provable.[10]

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5 *National Westminster Bank Ltd v Halesowen Presswork & Assemblies Ltd* [1972] AC 785 at 813. But it should also be borne in mind that the effect of a set-off is to prefer one creditor over the general body of creditors, as set off is equivalent to payment (*MS Fashions Ltd v Bank of Credit and Commerce International SA (No 2)* [1993] Ch 425 at 448, and consequently, it operates against the policy favouring equal treatment of creditors.

6 S R Derham, *Derham on the Law of Set Off* (Oxford University Press, 4th Ed, 2010) ch 6, at para 6.21.

7 S R Derham, *Derham on the Law of Set Off* (Oxford University Press, 4th Ed, 2010) ch 6, at para 6.21 citing *Studley v Boylston National Bank of Boston* (1913) 229 US 523 at 529.

8 *Gye v McIntyre* (1991) 98 ALR 393 at 399.

9 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ss 218(2)–218(3).

10 For example, if the company enters into a contract prior to winding up, a debt under that contract, *eg*, a repayment obligation or liquidated damages claim, which arises only after the company enters into winding up would still be provable in the winding

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> Here, the established Singapore position, pre- and post-IRDA, is that the "commencement of the winding up" for the purposes of proof is the date of the winding up order.[11] The "commencement of the judicial management" for the purposes of proof is likely to likewise be the date of the judicial management order, following its "plain and ordinary meaning".[12]
>
> (b) The second is where the debt arises by reason of an obligation incurred at a time when the creditor had notice that an application for a judicial management order or winding up (as the case may be) against the company was pending, or that an interim judicial manager had already been appointed. This is to address the policy concern of set-off manipulation, that creditors who owe debts to the insolvent company, upon being aware that an application to place the insolvent company into an insolvency process is pending, will buy up the company's debts from other creditors for less than the face value of the debt, and thereafter seek to set-off the full face value of the purchased debt against the debt owing by the creditor to the company, which would otherwise ordinarily have to be paid by the creditor in full.[13]

15 The Cut-Off Date for insolvency set-off in a judicial management in respect of debts incurred by the insolvent company is thus the date of the judicial management or the date on which the creditor had the requisite notice of the judicial management application or the appointment of an interim judicial manager. The Cut-Off Date for insolvency set-off in a

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up. See also *Re Nortel GmbH* [2013] 3 WLR 504, which explains the concept of when an obligation can be said to have been incurred before the Cut-Off Date and is hence provable.

11 See *Re City Securities Pte* [1995] 2 SLR(R) 746 at [7], citing the Malaysian Federal Court case of *Majlis Amanah Ra'ayat v Official Receiver, Malaysia* [1984] 1 MLJ 173, which held that the effective date for the purposes of determining the debt or liability of an insolvent company in liquidation by order of court was the date of the order for winding up, and not the date of the presentation of the winding-up petition. See also *Re Lehman Brothers Finance Asia Pte Ltd* [2013] 1 SLR 64 at [45]. See the Second Reading of the Insolvency, Restructuring and Dissolution Bill, where the Senior Minister of State for Health and Law Mr Edwin Tong Chun Fai explained that the term "commencement of the winding up" under s 218 of the Insolvency, Restructuring and Dissolution Act 2018 was intended to bear its plain and ordinary meaning (Singapore Parl Debates; Vol 94; [1 October 2018]).

12 See the Second Reading of the Insolvency, Restructuring and Dissolution Bill, where the Senior Minister of State for Health and Law Mr Edwin Tong Chun Fai explained that the term "commencement of the winding up" under s 218 of the Insolvency, Restructuring and Dissolution Act 2018 was intended to bear its plain and ordinary meaning. By extension, this would apply to the term "commencement of the judicial management" (Singapore Parl Debates; Vol 94; [1 October 2018]).

13 S R Derham, *Derham on the Law of Set Off* (Oxford University Press, 4th Ed, 2010) ch 6, at para 6.66.

pure winding up, *ie*, where the company was not in an immediately prior judicial management (which is a specific situation that is considered in the later sections of this article) in respect of debts incurred by the insolvent company is the date of the winding up order or the date on which the creditor had the requisite notice of the winding up application.

16 As for the Cut-Off Date for rights acquired by the insolvent company *cf* debts incurred by the insolvent company, while the IRDA is silent on what that date is, that date ought to be the same as the Cut-Off Date for debts incurred by the insolvent company. There is no justification for the Cut-Off Date for debts incurred by the insolvent company to be different from the Cut-Off Date for rights acquired by the insolvent company. Further, the same policy concern against set-off manipulation arguably equally applies to rights acquired by the insolvent company, which is that creditors to whom the insolvent company owes debts, upon being aware that an application to place the insolvent company into an insolvency process is pending, will, *eg*, purchase goods from the insolvent company and thereafter seek to set off their liability for the purchase price against the debt owed by the insolvent company to them.

17 In England, the relevant legislation expressly provides that the Cut-Off Date is the same regardless of whether it concerns claims incurred by the company or rights acquired by the company.[14] In Australia, Mansfield J in *Re Parker*[15] held that the Cut-Off Date should also take reference to the date for determining what claims are provable in the winding up, on the basis that the insolvency set-off provision was designed to supplement and serve the operation of the rules on the provability of debts.

(c) Set-Off Date

18 The Set-Off Date in winding up is generally the date of the winding up order. This is because the liquidation and distribution of the assets of the insolvent company are to be treated as notionally taking place simultaneously on the date of the winding up order;[16] convenience is in favour of stopping all computations at the date of the winding up, and distribution ought to be made on the debts as they stand at the date

14 See definition of "mutual dealings" in the Insolvency (England and Wales) Rules 2016 (No 1024 of 2016) r 14.25(6), which does not differentiate between debts incurred by the insolvent company and rights acquired by the insolvent company.

15 (1997) 150 ALR 92.

16 *Bloom v The Pensions Regulator* [2011] Pens LR 397 at [24]–[25] citing *Stein v Blake* [1996] 1 AC 243 at 252C. See also *Good Property Land Development Pte Ltd v Société-Générale* [1996] 1 SLR(R) 884 at [10] citing *MS Fashions Ltd v Bank of Credit and Commerce International SA (No 2)* [1993] 33 All ER 769 at 775–776.

of the winding up for when the estate is insolvent, this rule distributes the assets in the fairest way.[17] In turn, insolvency set-off is essentially an aspect of the rules which determine how much each creditor ought to receive in the distribution, *ie*, the rules regulating the proof of debts,[18] for only the balance after set-off is provable in the insolvency. The right of insolvency set-off would be meaningless if the set-off was only applied after the date of the winding up order (after the notional distribution had already taken place).

19 In Singapore, though the IRDA is silent on the Set-Off Date in winding up is, the Court of Appeal in *Good Property Land Development Pte Ltd v Société-Générale*[19] has held that the Set-Off Date in winding up is the date of the presentation of the winding up petition, instead of the date of the winding up order. The Court of Appeal reached this conclusion on the basis of s 255 of the then Companies Act[20] ("CA") which provided that in any case other than voluntary winding up, the winding up shall be deemed to have commenced at the time of the presentation of the winding up petition.

20 As for the Set-Off Date in judicial management, as far as the authors are aware, there has been no reported Singapore case in which this issue has been considered.[21]

21 In England, the relevant legislation expressly provides that the Set-Off Date for administration (on which Singapore's judicial management regime is based[22]) is the date on which the administrator gives notice of his intention to declare a distribution.[23] This was because

17 *In re Dynamics Corporation of America* [1976] 1 WLR 757 at 761–765.

18 *Mersey Steel and Iron Co Ltd v Naylor, Benzon, & Co* (1884) 9 App Cas 434 at 437–438; *Re Northside Properties Pty Ltd and the Companies Act* [1971] 2 NSWLR 320, 323; *Re Bank of Credit and Commerce International SA (No 8)* [1996] Ch 245 at 256; *Re One Tel Ltd* (2002) 43 ACSR 305 at [25]–[26]. In *Re One Tel Ltd* (2002) 43 ACSR 305 at [25]–[26], it was stated that the bankruptcy rules as to "debts provable" must be regarded as those that play a part in ascertaining that quantum and measuring creditors' respective entitlements so as to determine the proportions in which available assets are to be distributed, which would include rules relating to set off.

19 [1996] 1 SLR(R) 884 at [14].

20 Cap 50, 1994 Rev Ed.

21 In *PT Bank Negara Indonesia (Persero) TBK, Singapore Branch v Farooq Ahmad Mann* [2023] SGHC 249, the issue of insolvency set-off in judicial management was briefly discussed but was resolved on the basis that insolvency set-off did not apply to interim judicial management (see [43]–[45]).

22 *An Guang Shipping Pte Ltd v Ocean Tankers (Pte) Ltd* [2023] 1 SLR 656 at [49].

23 Insolvency (England and Wales) Rules 2016 rr 14.24(1) and 14.24(2). Note that though the Set-Off Date (the date on which the account of what is due from each party to the other in respect of the mutual dealings is to be taken and the sums

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when the concept of a mandatory and self-executing administration set-off rule was first raised in the consultation regarding the Enterprise Act 2002, there were concerns that if the set-off applied on the date of the administration, it would freeze positions under *eg*, running accounts or hedging agreements, and could have hindered the administrator from continuing to trade, which would have undermined the rescue culture underpinning administration (where the administrator may wish to encourage counterparties to continue to deal with it to rescue the company as a going concern).[24] Thus, it was agreed that the administration set-off rules was only necessary once the administrator had concluded that a rescue was not possible and that the administration should instead be used to make distributions to creditors, *ie*, a liquidating administration.[25]

22 Given that judicial management is a corporate rescue mechanism designed to allow viable companies in difficulties a reasonable chance to be resuscitated and for insolvent companies to be liquidated in a more orderly fashion[26] *cf* winding up, where the core of the liquidator's duties is the duty to get in, realise, and distribute the company's insufficient assets in settlement of its liabilities *pari passu*,[27] and that judicial managers do not generally make distributions,[28] the rationale in winding up for the Set-Off Date being the same as the winding up order (liquidation and distribution notionally taking place simultaneously), is not easily transposable to judicial management.

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due from one party are to be set off against the sums due from the other) is the date of the notice of distribution, the Cut-Off Date, which is the date after which claims incurred or acquired by the solvent counterparty, or incurred by the insolvent company, can no longer be included in the account for set off purposes, is backdated to the date of the administration order (Insolvency (England and Wales) Rules 2016 r 14.24(6)). Thus, there is a gap between the Set-Off Date and the Cut-Off Date.

24 *Lightman & Moss on The Law of Administrators and Receivers of Companies* (Sir Gavin Lightman *et al* gen eds) (Sweet & Maxwell, 6th Ed, 2017) ch 22, at para 22-079 discussing r 14.24(1) of the Insolvency (England and Wales) Rules 2016.

25 *Lightman & Moss on The Law of Administrators and Receivers of Companies* (Sir Gavin Lightman *et al* gen eds) (Sweet & Maxwell, 6th Ed, 2017) ch 22, at para 22-079 discussing r 14.24(1) of the Insolvency (England and Wales) Rules 2016.

26 TC Choong, *Judicial Management in Singapore* (Butterworths, 1990) at p 12.

27 *Petroships Investment Pte Ltd v Wealthplus Pte Ltd* [2018] 3 SLR 687 at [148]. See also s 147(*a*) of the Insolvency, Restructuring and Dissolution Act 2018. See also *Joo Yee Construction Pte Ltd v Diethelm Industries Pte Ltd* [1990] 1 SLR(R) 171 at [18]. See also *Feima International (Hongkong) Ltd v Kyen Resources Pte Ltd* [2022] SGHC 304 at [48].

28 Though judicial managers have been granted permission by the court to make distributions before. See, *eg*, *Singapore High Court Approves of General Distributions by Judicial Managers* (Rajah & Tann Asia, 2020 March) <https://eoasis.rajahtann.com/eoasis/lu/pdf/2020-03-SG_High_Court_Approves.pdf> (accessed 19 September 2023).

23 Nonetheless, the authors tentatively suggest that the Set-Off Date in judicial management ought to be the date of the judicial management order, for there is no justification for having the Set-Off Date be a different date from the Cut-Off Date in judicial management (which is generally the date of the judicial management order, as explained at para 14 above) in the absence of any indication to the contrary.

24 At first blush, it may be questioned why the authors are drawing a distinction between the Set-Off Date and the Cut-Off Date when they should generally be the same date, *ie*, the date on which the insolvency set-off is effected (the Set-Off Date) ought to be the same date on which what can be employed in insolvency set-off is crystallised (the Cut-Off Date). Nonetheless, it is worth drawing a distinction between the two because they may not always coincide:

(a) In Singapore, in the context of a winding up, *Good Property Land Development Pte Ltd v Société-Générale*[29] establishes that the Set-Off Date is the date of presentation of the winding up petition. In contrast, the Cut-Off Date is generally the date of the winding up order (see para 14 above). Thus, in Singapore, the Cut-Off Date is effectively pushed forward to the Set-Off Date.[30]

(b) In England, in the context of an administration, the Set-Off Date is the date of notice of the administrator's intention to make a distribution, while the Cut-Off Date is the date the company entered into administration.[31]

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29 [1996] 1 SLR(R) 884 at [14]. There have been doubts expressed against the decision in *Good Property Land Development Pte Ltd v Société-Générale* on this point – see *Lehman Brothers Finance Asia Pte Ltd* [2013] 1 SLR 64 at [41] citing Lee Eng Beng, *Trust Funds, Ascertainability of Beneficial Interest and Insolvency Set-Off* (1996) SAcLJ 489 at 494.

30 There have been doubts expressed against the decision in *Good Property Land Development Pte Ltd v Société-Générale* on this point – see *Lehman Brothers Finance Asia Pte Ltd* [2013] 1 SLR 64 at [41] citing Lee Eng Beng, *Trust Funds, Ascertainability of Beneficial Interest and Insolvency Set-Off* (1996) SAcLJ 489 at 494.

31 Note that though the Set-Off Date (the date on which the account of what is due from each party to the other in respect of the mutual dealings is to be taken and the sums due from one party are to be set off against the sums due from the other) is the date of the notice of distribution, the Cut-Off date, which is the date after which claims incurred or acquired by the solvent counterparty, or incurred by the insolvent company, can no longer be included in the account for set off purposes, is backdated to the date of the administration order (see Insolvency (England and Wales) Rules 2016 rr 14.24(2) and 14.24(6)). Thus, there is a gap between the Set-Off date and the Cut-Off Date. Note also that there have been calls to shift the Cut-Off Date to be in line with the Set-Off Date (see the concerns raised in the Financial Law Markets Committee paper titled *Legal Assessment of Rule 2.85 of the Insolvency Rules 1986 and its Interplay with Other Insolvency Provisions in Respect of Post-administration*

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25 Turning back to the identified issue of whether insolvency set-off applies twice in the situation of a company that transitions from judicial management to winding up, the answer primarily turns on whether in such a situation, there are two different sets of Cut-Off Dates (one relating to judicial management and one relating to winding up), or only one common set of Cut-Off Dates. If there is only one common set of Cut-Off Dates, there will be no change in the outcome even if insolvency set-off is applied twice. Thus, the legal analysis as to whether there are two sets of Cut-Off Dates or just one common set of Cut-Off Dates affects whether the judicial manager (and by extension the company's estate) actually receives cash for what was sold.

(2) The position in England and Australia

26 The position in both England and Australia illustrates the point:

(a) The position in England is that insolvency set-off is available in both administration and in winding up. However, in the situation of a company that transitions from administration into winding up, and when it comes to determine the Cut-Off Date for insolvency set-off in the winding up, that Cut-Off Date remains the date of the administration order. This is because the definition of "mutual dealings", which defines what can be employed in insolvency set-off in winding up, excludes debts arising out of an obligation incurred during an administration that immediately preceded the winding up.[32] Thus, where the company transitions from administration to winding up, there is only one common Cut-Off Date, which is the date of the administration order. Applying the English position to the hypothetical set out at para 7 above:

(i) The $100 that the counterparty incurred to the company while the company was in administration would not be capable of being employed in insolvency set-off in administration even if the administrator subsequently gave notice of his intention to make a distribution (thus triggering insolvency set-off). This is because the Cut-Off Date for set-off in administration is the date of the administration order.

Liabilities Owed to Counterparties (1 November 2007), accessible at <https://fmlc.org/publications/paper-legal-assessment-of-rule-2-85-of-the-insolvency-rules-1986-and-its-interplay-with-other-insolvency-provisions-in-respect-of-post-administration-liabilities-owed-to-counterparties/> (accessed 19 September 2023).

32 Insolvency (England and Wales) Rules 2016 r 14.25(6).

(ii) Even after the company transitions from administration (where insolvency set-off was triggered once) to winding up, thus triggering insolvency set-off in winding up, the $100 that the counterparty incurred to the company while the company was in administration would not be capable of being employed in insolvency set-off in winding up. This is because the Cut-Off Date for set-off in winding up, for a situation where the winding up was immediately preceded by an administration, is likewise the date of the administration order.

That there were two Set-Off Dates does not make a difference to the analysis because there is only one common Cut-Off Date.

(b) The position in Australia reaches the same result as in England. Mansfield J in *Re Parker*[33] *held that the determination of set-off entitlements, ie*, the Cut-Off Date, should also take reference to the date for determining what claims are provable in the winding up,[34] to the effect that where a winding up follows immediately after an administration, the Cut-Off Date is the day on which the administration began. This is because in Australia, the relevant legislation provides that in every winding up, all debts payable by, and all claims against, the company (present or future, certain or contingent, ascertained or sounding only in damages), being debts or claims the circumstances giving rise to which occurred before the relevant date, are admissible to proof against the company.[35] In turn, "relevant date" is defined to mean the day on which the winding up is taken to have begun.[36] The winding up is taken to have begun on the day the administration began, if, immediately before the order was made, the company was under administration.[37]

Therefore, there is only one Cut-Off Date, which is the day the administration began. Applying the Australian position to the hypothetical set out at para 7 above, though insolvency set-off does not apply in administration in Australia, the $100 that the counterparty incurred to the company while the company was in administration would not be capable of being employed in insolvency set-off in winding up.

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33 (1997) 150 ALR 92.

34 *Re Parker* (1997) 150 ALR 92 at 105–106; see also *JLF Bakeries Pty Ltd v Baker's Delight Holdings Ltd* (2007) 64 ACSR 633 at [17].

35 Corporations Act 2001 (Act 50 of 2001) (Cth) s 553.

36 Corporations Act 2001 (Act 50 of 2001) (Cth) s 9.

37 Corporations Act 2001 (Act 50 of 2001) (Cth) ss 513A–513B.

C. Whether there are two Set-Off Dates when a company transitions from judicial management to winding up

27 While s 219(2) of the IRDA is silent on whether insolvency set-off applies twice, the authors' view is that on a plain reading of s 219(2) of the IRDA (which is reproduced at para 10 above), insolvency set-off applies twice in the context of a company in judicial management which later transitions into an insolvent winding up, *ie*, there are two Set-Off Dates. This is due to the use of the phrase "as the case may be" in s 219(2) of the IRDA, which lends itself to the interpretation it is meant to tailor the relevant portion of the provision to whether the situation involves a judicial management or winding up. Under this interpretation, the winding up and judicial management regimes are distinct and separate regimes, and that no relevance ought to be accorded to the fact that the company was in judicial management prior to it being placed into winding up.

28 Therefore, the position is that:

(a) When the company is in judicial management, insolvency set-off applies such that only the balance is a debt provable in the judicial management.

(b) When the company transitions from judicial management to insolvent winding up, insolvency set-off applies again such that only the balance is a debt provable, but this time round in the winding up instead of in the judicial management.

D. Whether there are two sets of Cut-Off Dates when a company transitions from judicial management to winding up

29 As discussed at paras 24–25 above, having two Set-Off Dates will generally not make a substantive difference if there is only one common set of Cut-Off Dates that are before or on the first Set-Off Date.

30 We now come to the nub of the issue, which is the difficulty in identifying whether in the situation of a company that transitions from judicial management to winding up, there are a common set of Cut-Off Dates (like the position in England) or whether there are two different sets of Cut-Off Dates (one for judicial management and one for winding up). The Cut-Off Dates, at least for debts incurred by the company, are derived from ss 219(3)(*a*) and 219(3)(b) of the IRDA (see para 14 above).

31 Section 219(3)(*b*) of the IRDA provides that there is to be excluded from any set-off under s 219(2) of the IRDA any debt or liability of the company which "arises by reason of an obligation incurred at a

time when the creditor had notice that an interim judicial manager had been appointed under s 94(3) of the IRDA, or that the application for a judicial management order or the application for winding up (*as the case may be*) relating to the company was pending." [emphasis added]. The use of the term "as the case may be" is more ambiguous than in s 219(2) of the IRDA as it is liable to multiple interpretations.

(a) As discussed previously, one interpretation is that the term "as the case may be" is meant to tailor the relevant portion of the provision to whether the situation involves a judicial management or winding up. The judicial management and winding up regimes are separate regimes. When it comes to set-off in judicial management, the Cut-Off Date is the time when the creditor had notice that an interim judicial manager had been appointed or that a judicial management application was pending and when it comes to set-off in winding up, the Cut-Off Date is the time when the creditor had notice that the application for winding up was pending.

(b) The other interpretation is that the term "as the case may be" is not meant to make such a delineation, but is merely temporal. When it comes to set-off in winding up, the Cut-Off Date is when the creditor had notice that an interim judicial manager had been appointed (if any), that there was a judicial management application (if any) pending, or that there was a winding up application pending (whichever was first). If there was no prior judicial management, then the proviso on notice of the appointment of an interim judicial manager or notice of a judicial management application would be inapplicable. Likewise, when it comes to set-off in judicial management, the Cut-Off Date is when the creditor has notice of any of the events listed in s 219(3)(*b*) of the IRDA. Under this interpretation, there is a common set of Cut-Off Dates across both the judicial management and winding up.

32 Section 219(3)(*a*) of the IRDA provides that there is to be excluded from any set-off under s 219(2) of the IRDA any debt or liability of the company which "is not a debt provable in judicial management or winding up". Curiously, the term "as the case may be", which is used in both ss 219(2) and 219(3)(*b*) of the IRDA has been omitted. There are two possible interpretations:

(a) One interpretation is that the omission of the term "as the case may be" was intentional, to the effect that:

(i) In respect of insolvency set-off in winding up, the debt or liability, before it can be employed in such set-off, has to be provable in *both* judicial management

(if any) and in winding up. In other words, if the debt or liability is not provable in a prior judicial management (if there was one) it cannot be employed in a subsequent set-off in winding up.

(ii) In respect of insolvency set-off in judicial management, the debt or liability, before it can be employed in such set-off, has to likewise be provable in *both* judicial management and in winding up. Given that a winding up will generally always be subsequent to, and not precede, a judicial management, such that whatever is provable in judicial management will likewise be provable in the subsequent winding up, the requirement for the debt to be provable in winding up before it can be employed in judicial management set-off is effectively otiose. The only criteria is whether the debt or liability is provable in the judicial management.

(b) The other interpretation is that the omission of the term "as the case may be" was accidental, and this term ought to be read into s 219(3)(*a*) of the IRDA. There are two further sub-interpretations stemming from the insertion of "as the case may be":

(i) The first sub-interpretation is that the term "as the case may be" is meant to tailor the relevant portion of the provision to whether the situation involves a judicial management or winding up. The judicial management and winding up regimes are separate regimes, and no relevance ought to be accorded to the fact that the company was in judicial management prior to it being placed in winding up:

(A) Set-off in judicial management does not apply to any debt or liability of the company which is not a debt provable in the judicial management.

(B) Set-off in winding up does not apply to any debt or liability of the company which is not a debt provable in the winding up.

(ii) The second sub-interpretation is that the term "as the case may be" is not meant to tailor the relevant portion of the provision to whether the situation involves judicial management or winding up, but is instead meant to connote temporality, *ie*, whichever comes first.

(A) Set-off in judicial management does not apply to any debt or liability of the company which is not a debt provable in judicial management or winding up. Given that a winding up will generally always be subsequent to, and not precede, a judicial management, such that whatever is provable in judicial management will likewise be provable in the subsequent winding up, the requirement for the debt to be provable in winding up before it can be employed in judicial management set-off is effectively otiose. The only criteria is whether the debt or liability is provable in the judicial management.

(B) Set-off in winding up does not apply to any debt or liability of the company which is not a debt provable in judicial management or winding up. In other words, the debt has to be provable in *both* the judicial management and winding up before it can be employed in set-off in winding up. If the company was in judicial management prior to it being placed into winding up, the operative criteria is whether the debt is provable in that prior judicial management. By the same token, if the company was not in judicial management prior to it being placed into winding up, the reference to provability in judicial management would not apply (as it would not exist) and the operative criteria is whether the debt is provable in the winding up. In other words, the term "as the case may be" is meant to refer to the earlier of the two insolvency processes (if there were in fact two insolvency processes).

33 It will be apparent that the interpretations at paras 31(a) and 31(b)(ii) are essentially the same in that they require the debt or liability to be provable in the prior judicial management before it can be employed in insolvency set-off in winding up. In contrast, the interpretation at para 31(b)(i) merely requires the debt or liability to be provable in the winding up before it can be employed in insolvency set-off in winding up.

34 There is an additional layer of analysis in that the test for whether a debt or liability is provable in judicial management or winding up is

ambiguous. Again, this is due to the usage of the term "as the case may be" in the definition of provability in s 218 of the IRDA, which provides that:

> **Description of debts provable in judicial management or winding up**
>
> **218.**— …
>
> (2) Subject to this section and section 203, the following are provable where a company is in judicial management or an insolvent company is being wound up:
>
> (a) any debt or liability to which the company —
>
> (i) is subject at the commencement of the judicial management or winding up, as the case may be; or
>
> (ii) may become subject after the commencement of the judicial management or winding up (as the case may be) by reason of any obligation incurred before the commencement of the judicial management or winding up, as the case may be. …

35 Again, there are two ways to interpret the term "as the case may be" which is used in s 218(2) of the IRDA:

(a) Under the first interpretation, the term "as the case may be" is meant to tailor the relevant portion of the provision to whether the situation involves a judicial management or winding up. The judicial management and winding up regimes are separate regimes, and no relevance ought to be accorded to the fact that the company was in judicial management prior to it being placed into winding up. Therefore:

(i) When the company is in judicial management, a debt or liability will be provable in the judicial management if the obligation giving rise to the debt or liability was incurred before the commencement of the judicial management.

(ii) When the company is in winding up, a debt or liability will be provable in the winding up if the obligation giving rise to the debt or liability was incurred before the commencement of the winding up.

(b) Under the second interpretation, the term "as the case may be" is not meant to tailor the relevant portion of the provision to whether the situation involves a judicial management or winding up, but is instead meant to connote temporality, *ie*, whichever comes first:

(i) Where a company is in judicial management, a debt or liability will be provable in the judicial

management if the obligation giving rise to the debt or liability was incurred before the commencement of the judicial management or the commencement of the winding up. Given that a winding up will always be subsequent to, rather than precede, a judicial management such that an obligation incurred before the commencement of the judicial management is likewise incurred before the commencement of the winding up, the requirement for the obligation to be incurred before the commencement of the winding up is otiose. The only criteria is whether the obligation was incurred before the commencement of the judicial management.

(ii) Where a company is in winding up, a debt or liability will be provable in the winding up if the obligation giving rise to the debt or liability was incurred before the commencement of the judicial management or the commencement of the winding up. If the company was in judicial management prior to it being placed into winding up, the operative criteria is whether the obligation giving rise to the debt was incurred before the commencement of the judicial management. By the same token, if the company was not in judicial management prior to it being placed into winding up, the reference to the commencement of the judicial management would not apply (as it would not exist) and the operative criteria is whether the obligation was incurred before the commencement of the winding up. In other words, the term "as the case may be" is meant to refer to the earlier of the two insolvency processes (if there were in fact two insolvency processes).

36 Here, it is apposite to touch on s 217 of the IRDA, which is an interpretational or definitional section that imposes several "relation-back" rules. In a case where a company in judicial management is wound up via a court order, the time of the "commencement of the winding up" refers back to the time of the commencement of the judicial management. In essence, the commencement date of the winding up is "related back" all the way to the commencement date of the initial judicial management.

37 If this definition was applicable to interpret s 218(2) of the IRDA, there would be no distinction between the two interpretations set out at para 34 above.

38 However, the entirety of s 217 of the IRDA is limited to ss 224–229 of the IRDA, which are the provisions of the IRDA that are

concerned with the avoidance of prior transactions such as transactions at an undervalue and unfair preferences. The effect of the "relation back" rule to ss 224–229 is to ensure that any voidable transactions that were caught in the clawback periods prior to the company's entry into judicial management would still be caught within the same clawback periods when the company enters winding up. The impetus for this "relation-back" rule was related to the issue raised in *Neo Corp Pte Ltd v Neocorp Innovations Pte Ltd*,[38] where the Court of Appeal held that the right to set aside transactions under the avoidance provisions was personal to the judicial manager. While s 217(1)(*b*) does not directly allow the liquidator to continue with the claim of the judicial manager, it nevertheless preserves the liquidator's ability to pursue a fresh avoidance action without prejudice to the avoidance lookback period, given that the commencement of winding up is backdated to the commencement of the judicial management.[39]

39 Parliament did not intend for the "relation back" rules under s 217 of the IRDA to apply outside the context of the avoidance provisions in ss 224–229 of the IRDA. In the Second Reading of the Insolvency, Restructuring Dissolution Bill, the Senior Minister of State for Health and Law, Mr Edwin Tong Chun Fai, explained that the term "commencement of the winding up" under s 218 of the IRDA was intended to bear its plain and ordinary meaning:[40]

> Mr de Souza also referred to clause 218(2)(*a*)(i) and (ii), where the phrase 'commencement of the judicial management or winding up' is used. A similar phrase 'commencement of the winding up' is also used at clause 218(1)(*a*)(i) and (ii). And the meaning of those phrases must be ascertained in the context of the provision itself. In other words, the phrase used in this clause is not defined in Part 9 and considering the context of this clause in the manner described above, the plain and ordinary meaning of these words would apply.

40 Thus, the "commencement of the judicial management" refers to the date of the judicial management order, and the "commencement of the winding up" refers to the date of the winding up order.

41 Drawing the different strands together, here is where we are in the situation of a company that, before being placed into winding up, was in judicial management:

> (a) If the meaning of the term "as the case may be" in ss 218(2) and 219(3) of the IRDA is that it is simply meant to

38 [2006] 2 SLR(R) 717.

39 Harold Foo & Beverly Wee, *Annotated Guide to the Singapore Insolvency Legislation: Corporate Insolvency* (Academy Publishing, 2023) ch 11, at para 11.012(b).

40 Singapore Parl Debates; Vol 94; [1 October 2018].

tailor the relevant portion of the provision to whether the situation involves a judicial management or winding up ("First Interpretation"), the following conclusions follow:

(i) Set-off in judicial management does not apply to any debt or liability which is not provable in the judicial management. Set-off in winding up does not apply to any debt or liability which is not provable in winding up (see para 31(b)(i) above).

(ii) A debt or liability is provable in the judicial management if the obligation giving rise to it was incurred before the judicial management order. A debt or liability is provable in the winding up if the obligation giving rise to it was incurred before the winding up order (see para 34(a) above).

(iii) Set-off in judicial management does not apply to any debt or liability which arises by reason of an obligation incurred at a time when the creditor had notice that an interim judicial manager had been appointed, or that the judicial management application was pending. Set-off in winding up does not apply to any debt or liability which arises by reason of an obligation incurred at a time when the creditor had notice that a winding up application was pending (see para 30(a) above).

(iv) *There are thus two different sets of Cut-Off Dates*. For set-off in judicial management, the Cut-Off Dates are the date of the judicial management order and/or the date on which the creditor had the requisite notice. For set-off in the subsequent winding up, the Cut-Off Dates are the date of the winding up order and/or the time at which the creditor had the requisite notice.

(b) In contrast, if the term "as the case may be" in ss 218(2) and 219(3) of the IRDA is not meant to tailor the relevant portion of the provision to whether the situation involves judicial management or winding up, but is instead meant to connote temporality, *ie*, whichever comes first ("Second Interpretation"), the following conclusions follow:

(i) Set-off in judicial management does not apply to any debt or liability which is not provable in the judicial management. Set-off in winding up does not apply to any debt or liability which is not provable in judicial management, if there was a prior judicial management (see paras 31(a) and 31(b)(ii) above).

(ii) A debt or liability is provable in the judicial management if the obligation giving rise to it was incurred before the judicial management order (see para 34(b) above).

(iii) Set-off in judicial management does not apply to any debt or liability which arises by reason of an obligation incurred at a time when the creditor had notice that an interim judicial manager had been appointed, or that the judicial management application was pending, or that a winding up application was pending. Set-off in winding up does not apply to any debt or liability which arises by reason of an obligation incurred at a time when the creditor had notice of the aforementioned events (see para 30(b) above).

(iv) *There is thus only one set of common Cut-Off Dates*. For set-off in judicial management, the Cut-Off Dates are the date of the judicial management order and/or the time at which the creditor had notice that an interim judicial manager had been appointed, or that the judicial management application was pending, or that a winding up application was pending. For set-off in the subsequent winding up, the Cut-Off Dates are likewise the date of the judicial management order and the time at which the creditor had notice of the above-mentioned events.

42 The Explanatory Statement to the IRDA does not provide much elucidation on whether the First Interpretation or Second Interpretation is to be preferred.[41] It simply states that "Clause 218 [s 218 of the IRDA] sets out the debts that are provable in judicial management or winding up" and "Clause 219 [s 219 of the IRDA] provides that where there have been mutual dealings between a company and any creditor, the mutual

41 The authors note that in *Re Ocean Tankers (Pte) Ltd* [2023] SGHC 330, the High Court considered at [111]–[127] whether mutuality was tested at the commencement of the winding up or at the date of the application for judicial management in the context of a company which had transitioned from judicial management (under the Companies Act) into winding up (under the Insolvency, Restructuring and Dissolution Act 2018 ("IRDA")). The High Court found that mutuality was to be tested at the commencement of the winding up, as insolvency set off did not apply to a company that was placed into judicial management under the predecessor provisions of the Companies Act. Thus, the timing at which mutuality is to be tested for a company which transitions from judicial management under the IRDA to winding up under the IRDA remains an open one.

debts and liabilities are to be set off, and only the balance is a debt provable in the judicial management or the insolvent winding up of the company".

43 The Parliamentary debates are also generally silent on the purpose behind ss 218 and 219 of the IRDA, perhaps due to their established lineage. However, in the Insolvency Law Review Committee's *Final Report*, the extension of insolvency set-off to judicial management was recommended for the purposes of determining the creditors' right to vote[42] (presumably in the context of voting on the judicial manager's statement of proposals). There was no specific discussion on whether it should affect a counterparty's rights *vis-à-vis* new debts incurred with the company.

44 The authors' view is that the First Interpretation ought to be preferred over the Second Interpretation for two reasons.

45 First, the First Interpretation, which allows debts incurred by, and rights acquired by the company during judicial management to be employed in insolvency set-off in the subsequent winding up, better promotes the legislative objectives of the judicial management regime. As mentioned at para 21 above, judicial management at its heart is a corporate rescue mechanism designed to allow viable companies in difficulties a reasonable chance to be resuscitated and for insolvent companies to be liquidated in a more orderly fashion,[43] with the judicial manager statutorily required to achieve a more advantageous realisation of the assets than in a winding up, the survival of the company as a going concern, or the promotion of a compromise or arrangement between the company and its creditors.[44]

46 Thus, in the context of corporate rescue mechanisms such as judicial management and schemes of arrangement, it has been held that the *pari passu* principle does not apply,[45] with the rationale being that these rescue mechanisms need the flexibility to be able to discriminate amongst creditors, to be effective.[46]

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42 Insolvency Law Review Committee, *Final Report* (2013) (Chairman: Lee Eng Beng SC) ch 2, at para 27.

43 TC Choong, *Judicial Management in Singapore* (Butterworths, 1990) at p 12.

44 Singapore Parl Debates; Vol 48; [5 May 1986].

45 *Hitachi Plant Engineering & Construction Co Ltd v Eltraco International Pte Ltd* [2003] 4 SLR(R) 384 at [80]–[81]; *Re Wan Soon Construction Pte Ltd* [2005] 3 SLR(R) 375 at [25].

46 *Hitachi Plant Engineering & Construction Co Ltd v Eltraco International Pte Ltd* [2003] 4 SLR(R) 384 at [80]–[81].

47 The First Interpretation arguably promotes the purposes of the judicial management regime. It encourages the company's trading partners to extend credit to it, which facilitates the company's continued trading and operation, as access to credit is the lifeline for a business. Persons may be more prepared to extend credit to a company in judicial management if these debts could be set off via insolvency set-off in the event that the company's judicial management failed and the company transitioned into winding up. Otherwise, these persons would have to pay what they owe to the company in full yet only receive a dividend on their claim against the company, which is precisely the injustice that the insolvency set-off regime seeks to remedy.

48 While these debts would presumably constitute expenses of the judicial management to be paid out in priority to the company's other unsecured creditors,[47] that may be of cold comfort if the company does not have sufficient assets to pay its priority expenses in full.[48] It is crucial that the judicial management regime gives the company the best possible shot at survival. Allowing these debts to be capable of being set off in the company's subsequent winding up would provide the creditor with additional comfort and give it the confidence to continue doing business with the company on credit terms.

49 In so far as the First Interpretation may be said to contravene the *pari passu* principle in that it also allows debts incurred by the creditor to the company while the company is in judicial management to be subject to set off in the company's winding up (as set out in the hypothetical at the start of this Part), and thus results in the creditor "upgrading" his priority and the other unsecured creditors "losing value", there are two potential counter-arguments.

50 The *pari passu* principle has attenuated relevance in the context of judicial management. In *Re Wan Soon Construction Pte Ltd*,[49] the High Court doubted whether the principle ought to apply in the context of judicial management,[50] citing the Singapore Court of Appeal decision of

47 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ss 104(3) and 114.

48 For more detail on this point, see the concerns raised in the Financial Law Markets Committee paper titled *Legal Assessment of Rule 2.85 of the Insolvency Rules 1986 and its Interplay with Other Insolvency Provisions in Respect of Post-administration Liabilities Owed to Counterparties* (1 November 2007) at paras 4.1–4.8, accessible at <https://fmlc.org/publications/paper-legal-assessment-of-rule-2-85-of-the-insolvency-rules-1986-and-its-interplay-with-other-insolvency-provisions-in-respect-of-post-administration-liabilities-owed-to-counterparties/> (accessed 19 September 2023).

49 [2005] 3 SLR(R) 375.

50 *Re Wan Soon Construction Pte Ltd* [2005] 3 SLR(R) 375 at [24]–[25].

Hitachi Plant Engineering & Construction Co Ltd v Eltraco International Pte Ltd.[51] The Court of Appeal held there that:[52]

> … one has to remember that a scheme of arrangement is a corporate rescue mechanism. As with other corporate rescue mechanisms, such as judicial management, it seeks to rehabilitate the company and achieve a better realisation of assets than possible on liquidation: see, generally, Walter Woon, Company Law (2nd Ed, 1997) at p 627 and Chapter 17. Such a rescue mechanism may need, in order to be effective, to discriminate amongst creditors for example by repaying bigger creditors proportionately less than small creditors are repaid. Dictating that the assets should be distributed in a *pari passu* manner would not only decrease the flexibility now available to planners of schemes but it may also put a dampener on what the scheme of arrangement could achieve and sound the death knell of the company prematurely.

51 Further, any contravention of the *pari passu* principle only takes place when the company transitions from judicial management into winding up. If the company's judicial management is a successful one, the creditor will have to pay the company in full, as insolvency set-off in winding up would not apply. Adopting the Second Interpretation, as opposed to the First Interpretation, may in fact lead to a self-fulfilling prophecy of the *pari passu* principle being contravened, by making it more difficult for a judicial management to succeed, thus leading to the company being placed into winding up.

52 Second, the First Interpretation is more consistent with the structure of the relevant provisions. There is a presumption that where an identical expression is used in a statute, and especially when it is used in the same sub-clause of a section in a statute, it should presumptively have the same meaning.[53] There is little ambiguity that the term "as the case may be", in the context of s 219(2) of the IRDA, leads to the conclusion that it is meant to tailor the relevant portion of the provision to whether the situation involves a judicial management or winding up (see para 26 above). The same interpretation ought to apply to the term "as the case may be" in ss 218(2) and 219(3) of the IRDA.

E. Opinion

53 As discussed above, the First Interpretation should be preferred. Singapore has attempted to improve its judicial management regime in recent years to boost its attractiveness and to encourage trading, through

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51 [2003] 4 SLR(R) 384.

52 *Hitachi Plant Engineering & Construction Co Ltd v Eltraco International Pte Ltd* [2003] 4 SLR(R) 384 at [81].

53 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [58(c)(i)].

the enactment of, amongst others, the *ipso facto* and super-priority rescue financing provisions. Having two different sets of Cut-Off Dates, which allows debts incurred by the company during its judicial management to be the subject of set off should it transition into winding up encourages and serves this rehabilitative purpose.

54 Nonetheless, it would be fair to question whether there is room for abuse by creditors. Take, *eg*, a trading counterparty which has a claim against the company, with the company thereafter placed into judicial management. That counterparty knows that it will stand to only receive a dividend on his claim. During the judicial management, the counterparty thus enters into various transactions with the company, *eg*, contracting with the company to purchase its goods and/or property, which result in the company having claims against it, for the dominant purpose of asserting set off should the company transition into winding up. This does a disservice to the judicial management regime as the creditor not only fails to extend further credit to the company, but depletes the company's assets to the detriment of the company's other creditors without any reciprocal benefit to the company.

55 A potential legislative solution could be to insert a provision in the IRDA that if such transactions are entered into during the judicial management by the trade counterparty with the dominant motive of getting priority over their fellow creditors, then insolvency set-off would be inapplicable, using a similar "desire to prefer" type of test found in the unfair preference context. However, it is acknowledged that it may be difficult to implement such a solution in practice and the prospect of litigation may well deter an honest counterparty from trading with the company.

56 In the meantime, judicial managers should be alive to this issue. As a practical matter, a judicial manager should consider collecting on all outstanding debts owing to the company arising out of obligations incurred during the company's judicial management, prior to placing the company into winding up.

III. Crystallisation of floating charges and insolvency set-off

A. The crystallisation of a floating charge destroys mutuality for the purposes of insolvency set-off

57 Preliminarily, we set the context for the second issue by unpacking the interplay between the crystallisation of floating charges and its effect on insolvency set-off. The crystallisation of a floating charge destroys mutuality for the purposes of insolvency set-off. This is advantageous for

a secured lender who holds a charge over book debts of the company because it enables the secured lender to collect the full value of the book debts of the company, without any diminution of the book debts via the application of insolvency set-off against cross-debts owed by the company to the book debtors.

58 The interplay between crystallisation and insolvency set-off came to the fore in *BP Singapore Pte Ltd v Jurong Aromatics Corp Pte Ltd*[54] ("*BP v JAC*").

59 The relevant facts of *BP v JAC* were as follows:

(a) Jurong Aromatics Corporation Pte Ltd ("JAC") was incorporated for the purposes of developing and operating an aromatics plant. JAC obtained loans from a syndicate of lenders ("Senior Lenders") and in return, granted in favour of the Senior Lenders, amongst others, a floating charge over all of its undertakings and all its present and future assets.[55]

(b) JAC traded with BP Singapore Pte Ltd ("BP") and Glencore. Under these various trading arrangements, there were substantial sums owing by JAC to Glencore and BP[56] ("JAC Indebtedness"). During this time, a set-off agreement between JAC and Glencore Singapore Pte Ltd ("Glencore") resulted in a net debt payable by Glencore to JAC[57] ("Glencore Set-Off Agreement Debt").

(c) JAC later ran into financial difficulties and the Senior Lenders appointed receivers and managers over JAC's assets. During the receivership, the receivers entered into various arrangements with Glencore and BP, resulting in BP and Glencore each owing two sets of debts to JAC, known as the "Tolling Fee Debt"[58] and the "Final Payment Amount".[59]

(d) After the plant was sold, Glencore with BP's support applied for JAC to be wound up. Both Glencore and BP then

54 [2020] 1 SLR 627.

55 *Jurong Aromatics Corporation Pte Ltd v BP Singapore Pte Ltd* [2018] SGHC 215 at [6].

56 *Jurong Aromatics Corporation Pte Ltd v BP Singapore Pte Ltd* [2018] SGHC 215 at [5] and [14].

57 *Jurong Aromatics Corporation Pte Ltd v BP Singapore Pte Ltd* [2018] SGHC 215 at [7] and [13].

58 *Jurong Aromatics Corporation Pte Ltd v BP Singapore Pte Ltd* [2018] SGHC 215 at [9] and [12(a)]

59 *Jurong Aromatics Corporation Pte Ltd v BP Singapore Pte Ltd* [2018] SGHC 215 at [10] and [12(b)].

attempted to set off the amounts which they owed JAC (*ie*, the Glencore Set-Off Agreement Debt, the Tolling Fee Debt, and the Final Payment Amount) against the sums which JAC owed them (*ie*, the JAC Indebtedness).

(e) The receivers sought declarations that BP and Glencore were not entitled to the set offs.

60 The Court of Appeal affirmed the lower court's decision and held that insolvency set-off could not apply due to the lack of mutuality. As soon as the Tolling Fee Debt and the Final Payment Amount arose, they became subject to the floating charge in favour of the Senior Lenders, which had crystallised upon the appointment of receivers. In other words, it was the Senior Lenders, not JAC, who were entitled to be paid on those debts by BP and Glencore.[60]

61 Further, while the Glencore Set-Off Agreement Debt accrued before receivership, it became subject to the crystallised floating charge upon the appointment of receivers, such that it was similarly the Senior Lenders, and not JAC, who were entitled to be paid on that debt by Glencore. The Senior Lenders neither ceded control over the receivables from BP and Glencore nor released their security so as to permit any estoppel, waiver or de-crystallisation to arise.[61]

62 This was a problem for BP and Glencore because insolvency set-off can only operate in respect of claims which are mutual. To satisfy the mutuality requirement, there must be identity between the holder of the beneficial interest in the claim and the person against whom the cross-claim is asserted.[62] In other words, the debts must be due between the same parties, in the same right.[63]

63 The crystallisation of a floating charge destroys mutuality. A floating charge becomes a fixed charge upon crystallisation.[64] Prior to crystallisation, a floating charge does not fix on specific assets, and the assets subject to a floating charge remain free to be dealt with and may be

60 *Jurong Aromatics Corporation Pte Ltd v BP Singapore Pte Ltd* [2018] SGHC 215 at [35].

61 *Jurong Aromatics Corporation Pte Ltd v BP Singapore Pte Ltd* [2018] SGHC 215 at [35]; *BP Singapore Pte Ltd v Jurong Aromatics Corp Pte Ltd* [2020] 1 SLR 627 at [22]–[47].

62 *Jurong Aromatics Corporation Pte Ltd v BP Singapore Pte Ltd* [2018] SGHC 215 at [124].

63 *Jurong Aromatics Corporation Pte Ltd v BP Singapore Pte Ltd* [2018] SGHC 215 at [124].

64 *BP Singapore Pte Ltd v Jurong Aromatics Corp Pte Ltd* [2020] 1 SLR 627 at [23] citing *Dredsner Bank AG v Ho Mun-Tuke Don* [1992] 3 SLR(R) 307 at [60].

disposed of by the chargor, without more.[65] However, on crystallisation, the assets are appropriated to, and become subject to the equitable interest of the chargee.[66] Though beneficial ownership may remain with the chargor, the fact that the property is appropriated to the charge means that the property must be available for the satisfaction of the chargee's security, and with that encumbrance or appropriation, mutuality is destroyed.[67]

64 There was thus no mutuality between the Glencore Set-Off Agreement Debt, the Tolling Fee Debt and the Final Payment Amount on the one hand (as they were payable by Glencore or BP to the Senior Lenders) and the JAC Indebtedness on the other hand (as it was payable by JAC to Glencore and BP) and insolvency set-off could not apply. This result was upheld by the Court of Appeal in *BP v JAC*.[68]

65 The main takeaway from *BP v JAC* is that by the Set-Off Date, *ie*, the date for assessing rights of insolvency set-off, mutuality had been broken. The Senior Lenders thus were able to receive full repayment on the Glencore Set-Off Agreement Debt, Tolling Fee Debt and the Final Payment Amount without those debts being set off against the JAC Indebtedness.

66 The situation in *BP v JAC* can be contrasted with a scenario where crystallisation only takes place *after* the Set-Off Date. In *Re Parker*,[69] insolvency set-off was permitted because the crystallisation of the floating charge only took place after the Set-Off Date. Mutuality of debts still subsisted at the Set-Off Date. The facts of *Re Parker* were as follows:

> (a) The creditors of a company under administration (the "Company") resolved that it be wound up. The Company had a holding company ("Holco") and it was alleged that there were cross-debts between them.
>
> (b) Holco had granted a floating charge over all of its assets to a secured creditor, including the debts owing by the Company

65 *Jurong Aromatics Corporation Pte Ltd v BP Singapore Pte Ltd* [2018] SGHC 215 at [56].

66 *Jurong Aromatics Corporation Pte Ltd v BP Singapore Pte Ltd* [2018] SGHC 215 at [59].

67 *Jurong Aromatics Corporation Pte Ltd v BP Singapore Pte Ltd* [2018] SGHC 215 at [137] citing S R Derham, *Derham on the Law of Set-Off* (Oxford University Press, 4th Ed, 2010) ch 11, at para 11.46); and *BP Singapore Pte Ltd v Jurong Aromatics Corp Pte Ltd* [2020] 1 SLR 627 at [17].

68 *BP Singapore Pte Ltd v Jurong Aromatics Corp Pte Ltd* [2020] 1 SLR 627 at [32], [42] and [45].

69 (1997) 80 FCR 1.

to Holco. Due to the charge, nothing would be available for Holco's unsecured creditors, including the Company.

(c) The floating charge crystallised after the commencement of the Company's administration and before the resolution for its winding up. The court was asked to determine whether, in those circumstances, there could be a set off in the Company's liquidation. One of the issues was the Set-Off Date.

(i) If the Set-Off Date was the Company's winding up, there would be no mutuality as Holco's floating charge had crystallised by then. Holco's debt to the Company would have been payable by Holco to the Company while the Company's debt to Holco would have been payable by the Company to the secured creditor.

(ii) If the Set-Off Date was the Company's administration, there would be mutuality as Holco's floating charge had not crystallised by then.

(d) The court found that the Set-Off Date was the Company's administration, and hence the secured creditor took subject to insolvency set-off.

67 Hence, what *BP v JAC* and *Re Parker* illustrate is that the timing at which crystallisation takes place is critical. Mutuality is only broken if the crystallisation occurs before the Set-Off Date. When a company transitions from judicial management to winding up, there is a real possibility that a second Set-Off Date occurs when the company enters into winding up.[70] A secured lender with a floating charge over book debts would be eager to ensure that it can crystallise its charge before the second Set-Off Date, raising the question whether crystallisation can in fact take place during the judicial management. We explore this issue in the next two sections.

B. The various ways in which a floating charge can crystallise

68 There are broadly three groups of events by which a floating charge can crystallise:[71]

(a) Events denoting the cessation of trading by the company as a going concern.

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70 This is also the authors' preferred interpretation, *ie*, the First Interpretation.

71 Roy Goode & Louise Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security* (Sweet & Maxwell, 6th Ed, 2017) ch 4, at para 4-32. See also *Malayan Banking Berhad v Bakri Navigation Company Ltd* [2020] SGCA 41 at [73]–[75].

(b) Intervention by the charge holder to enforce his security which deprives the company of *de jure* control of the charged assets and thus terminates its authority to deal with them free from the security interest.

(c) Other acts or events contractually specified in the debenture as causing the charge to crystallise.

69 On the first group, a floating charge crystallises on the occurrence of an event which is incompatible with the continuance of trading by the company as a going concern, such as the liquidation of the company and the *de facto* cessation of trading by the company.[72] This is said to occur as a matter of law,[73] because it is inherent in a floating charge that the debtor company retains the ability to function as a going concern. Once it ceases trading or is disabled from continuing to trade as a going concern, the rationale for the freedom given to the company by the floating charge to dispose of its assets in the ordinary course of business disappears.[74]

70 On the second group, to be effective in crystallising a floating charge, the charge holder's act of intervention must satisfy a threefold test. First, it must be done with the intention of converting the charge into a fixed charge. Second, it must be authorised by the express or implied terms of the debenture. Third, it must divest the company of *de jure* control of the assets.[75] The appointment of receivers is sufficient to crystallise a floating charge as it is in law an assertion of control over the charged assets by the chargee.[76]

71 For the third group, since the acts or events which terminate the company's authority from the charge holder to manage its assets are a matter of contract between them, it is open to the charge holder to specify any method of crystallisation he chooses, with two distinct types of provision being used: (a) crystallisation by notice; and (b) automatic crystallisation on the occurrence of a designated event.[77]

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72 Roy Goode & Louise Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security* (Sweet & Maxwell, 6th Ed, 2017) ch 4, at paras 4-33–4-39.

73 Roy Goode & Louise Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security* (Sweet & Maxwell, 6th Ed, 2017) ch 4, at para 4-33, citing *Re Brightlife Ltd* [1987] Ch 200 at 212.

74 Roy Goode & Louise Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security* (Sweet & Maxwell, 6th Ed, 2017) ch 4, at para 4-36.

75 Roy Goode & Louise Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security* (Sweet & Maxwell, 6th Ed, 2017) ch 4, at paras 4-40–4-50.

76 *BP Singapore Pte Ltd v Jurong Aromatics Corp Pte Ltd* [2020] 1 SLR 627 at [28].

77 Roy Goode & Louise Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security* (Sweet & Maxwell, 6th Ed, 2017) ch 4, at paras 4-51–4-53.

C. Whether judicial management can prevent a floating charge from crystallising or re-float a crystallised floating charge

72 The key consideration from a chargee's perspective is whether judicial management prevents the crystallisation of a floating charge.

73 Under the judicial management regime, the first two groups of crystallisation events (cessation of trading and enforcement by the charge holder) are likely to be inapplicable.

74 In relation to the first group (cessation of trading), the making of a judicial management order, whether on application of the company, its directors, or a creditor, does not mean that the company ceases to trade as a going concern. To the contrary, one of the statutory objectives of judicial management is the survival of the company, or the whole or part of its undertaking, as a going concern[78] and to that end, the judicial manager is expressly empowered to carry on the business of the company.[79] Thus, the making of a judicial management order does not result in crystallisation of a floating charge under the first group of crystallisation events.[80]

75 In relation to the second group (enforcement by the charge holder), this is also largely inapplicable due to the moratorium on enforcement. When a judicial management application is made, an automatic moratorium comes into play.[81] If the judicial management order is granted, the moratorium continues for the duration of the judicial management.[82] The moratorium prohibits any enforcement of security unless the consent of the judicial manager or permission of court is obtained.[83] Further, no receiver or manager can be appointed over any property or undertaking of the company while the company is in judicial management.[84] This means that crystallisation via the intervention and enforcement by the charge holder would be largely inapplicable in a judicial management.

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78 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) s 89(1).

79 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) s 99 read with First Schedule.

80 By analogy to the position in administration; see Roy Goode & Louise Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security* (Sweet & Maxwell, 6th Ed, 2017) ch 4, at para 4-37.

81 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) s 95(1)(*b*), though this appears to only apply when the company is the applicant for the judicial management order.

82 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) s 96(4).

83 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) s 96(4).

84 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) s 96(4)(*b*).

76 That leaves the third group of crystallising events, which are contractually specified crystallisation events, primarily crystallisation by notice and automatic crystallisation clauses. For crystallisation by notice, the charge holder is given the right to make the floating charge specific by notice, either at will or after the occurrence of a specified event.[85] As for automatic crystallisation clauses, no action on the part of the charge holder is needed to crystallise the charge; crystallisation occurs automatically on the occurrence of a specified event.[86] From the weight of the authorities, such automatic crystallisation clauses are considered capable of converting a floating charge into a fixed charge.[87]

77 The question is whether crystallisation by notice or automatic crystallisation is prevented by the statutory regime when a company is under judicial management.

78 First, the moratorium that comes into play when a company is in judicial management prevents any step from being "taken to enforce any security over any property of the company".[88] While the appointment of a receiver would clearly be a step taken to enforce the security, it is unclear if the mere crystallisation of a floating charge without more would constitute such a step.

79 The scope of the prohibition against enforcement of security was briefly considered in *The Ocean Winner*[89] ("*Ocean Winner*"). *Ocean Winner* concerned the scheme moratorium under s 211B of the Companies Act (now s 64 of the IRDA), which is *in pari materia* with the judicial management moratorium provisions. There, the primary issue was whether the scheme moratorium prevented the filing of the admiralty *in rem* writs against vessels demised chartered by the moratorium company. This was an important issue in the context of the case, as the filing of the admiralty writs was necessary for the claimant to obtain a statutory lien over the vessels which conferred a security interest to the claimant under maritime law.[90]

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85 Roy Goode & Louise Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security* (Sweet & Maxwell, 6th Ed, 2017) ch 4, at para 4-52.

86 Roy Goode & Louise Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security* (Sweet & Maxwell, 6th Ed, 2017) ch 4, at para 4-53.

87 Roy Goode & Louise Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security* (Sweet & Maxwell, 6th Ed, 2017) ch 4, at para 4-55 citing *Re Brightlife Ltd* [1987] Ch 200; *Re Manurewa Transport Ltd* [1971] NZLR 909; *Deputy Commissioner of Taxation v Horsburgh* [1984] NZLR 513; and *DFC Financial Services Ltd v Coffey* [1991] 2 NZLR 513.

88 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) s 96(4)(*e*).

89 [2021] 4 SLR 526.

90 *The Ocean Winner* [2021] 4 SLR 526 at [34].

80 *Ocean Winner* mainly concerned other limbs of the moratorium relating to the prohibition against the commencement of proceedings and the execution, distress or other legal process. However, for completeness, the court briefly addressed whether the filing of the writs constituted an enforcement of security prohibited by the moratorium. The court held the mere filing of the admiralty writs creates the security interest in the form of statutory liens over the vessels, but that it was not considered a step taken to enforce that security.[91]

81 It perhaps could be argued that the crystallisation of a floating charge is not a step taken to enforce the security as it merely converts the nature of the security interest from one form to another. However, the analogy with *Ocean Winner* is a tenuous one. Without the filing of the writs in *Ocean Winner*, the security interest over the vessels would not even exist.[92] There would be no security to speak of unless the writs were allowed to be filed.[93] But where the crystallisation of a floating charge is concerned, the security interest already exists and what crystallisation aims to achieve is to put an end to the authority conferred on the debtor company to manage the assets comprising the security.[94] This makes it likely to be construed as a step taken to enforce security that is caught by the moratorium. Further, allowing a charge holder to terminate the company's authority to deal with the charged assets would seem to run counter to the purpose of the moratorium, which is to provide breathing space for the company and to enhance the prospects of restructuring.[95]

82 The crystallisation of a floating charge may also be fundamentally inconsistent with the judicial manager's statutory powers to deal with floating charge property. Under s 100(1) of the IRDA, the judicial manager is empowered to dispose or otherwise deal with any property that is subject to a floating charge. Section 100(3) of the IRDA makes it clear that one assesses whether the charge is a floating or fixed charge at the time that it was created. Hence, a floating charge holder cannot escape from the consequences of the provision by simply saying that the charge has crystallised into a fixed charge. It appears that these statutory provisions render any purported or attempted crystallisation of a floating charge ineffective, as the judicial manager is expressly conferred statutory powers to continue exercising authority to deal with the floating charge assets.

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91 *The Ocean Winner* [2021] 4 SLR 526 at [95].
92 *The Ocean Winner* [2021] 4 SLR 526 at [95].
93 *The Ocean Winner* [2021] 4 SLR 526 at [77].
94 Roy Goode & Louise Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security* (Sweet & Maxwell, 6th Ed, 2017) ch 4, at para 4-31.
95 *The Ocean Winner* [2021] 4 SLR 526 at [45]–[49]; *Re IM Skaugen SE* [2019] 3 SLR 979 at [41]–[42].

83 A further roadblock to crystallisation is the restriction on the operation of *ipso facto* clauses[96] pursuant to s 440 of the IRDA. While a company is undergoing judicial management, s 440 of the IRDA prevents the exercise of certain contractual rights that are conditioned solely on the company's insolvency or entry into judicial management or scheme proceedings. The *ipso facto* restrictions apply to generally all agreements of the company,[97] including a "security agreement". The term "security agreement" is not defined in the IRDA, but would likely capture a floating charge on a plain interpretation of the term.

84 Among other things, s 440 of the IRDA prohibits and renders ineffective the termination or modification of any right or obligation under any agreement with the company.[98] Since the crystallisation of a floating charge to a fixed charge terminates the company's authority to deal with the charged assets, it is likely to be caught by the *ipso facto* restrictions under s 440 of the IRDA. Furthermore, it is not easy to work around the *ipso facto* regime through clever drafting. Section 440(3) of the IRDA provides that "[a]ny provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to this section is of no force or effect", thereby nullifying attempts to "contract out" of the *ipso facto* regime. Where proxies for a company's insolvency are used, such as the suspension or threat of suspension of payment of the company's indebtedness, negotiations with creditors with a view to restructuring its indebtedness, or the occurrence of cross-defaults under banking facilities, these proxies may be construed as in substance contrary to s 440 of the IRDA and thereby rendered ineffective by s 440(3) of the IRDA.[99]

85 Tying together the threads of the discussion above, we can see that a floating charge holder may not be able to crystallise its floating charge into a fixed charge while a company is in judicial management due to the moratorium, the judicial manager's statutory powers to deal with floating charge assets, and the *ipso facto* restrictions. This is potentially disadvantageous to the floating charge holder, since book debts of the

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96 *Ipso facto* is a Latin phrase meaning "by the fact itself". *Ipso facto* clauses are clauses that allow one party to terminate the contract or exercise certain rights if specified events occur, usually if the counterparty becomes insolvent or enters insolvency proceedings.

97 Certain classes of agreements are excluded from the scope of s 440 of the Insolvency, Restructuring and Dissolution Act 2018, but these are not material for the purposes of the present discussion. See ss 440(5) and 440(5)(*a*) of the Insolvency, Restructuring and Dissolution Act 2018 read with Insolvency, Restructuring and Dissolution (Prescribed Contracts under Section 440) Regulations 2020.

98 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) s 440(1)(*b*).

99 Chong Yi-Hao Clayton, "Section 440 of the Insolvency, Restructuring and Dissolution Act 2018: Restrictions on *Ipso Facto* Clauses" [2019] SAL Prac 27 at para 18.

company under the floating charge may be subject to insolvency set-off if the company enters winding up.

86 One could argue that the entire issue above can be obviated by treating the floating charge as crystallising simultaneously on the date the judicial management is discharged and the company is placed into winding up. On the date of the discharge of judicial management, all the features of the judicial management regime discussed above would cease to apply. However, the problem is that the crystallisation of the floating charge at that point may still be too late for the secured lender. This is because based on existing authority, the Set-Off Date (and accordingly the effective Cut-Off Date) for a company in winding up is not the date which the court makes the order to wind up the company, rather it is "related back" to the date that the application for winding up is made.[100] Hence, the mutuality requirement will be tested on that date, at which point the floating charge still would not have crystallised.

87 Nonetheless, it is unclear whether *Good Property Land Development Pte Ltd v Société-Générale* will be followed by subsequent courts in the light of the following developments:

(a) The reasoning in *Good Property Land Development Pte Ltd v Société-Générale* was premised on the then s 255(2) of the CA (which "related back" the commencement of winding up to the time of the application for winding up) being applicable to determine the Set-Off Date. However, in the Second Reading of the Insolvency, Restructuring Dissolution Bill, the Senior Minister of State for Health and Law, Mr Edwin Tong Chun Fai, explained in the context of s 126 IRDA (which is *in pari materia* to s 255 of the CA) that it would not apply to the provability provisions under s 218 of the IRDA.[101] By extension, the relation back rule under s 126 of the IRDA might now be inapplicable to the set-off provision under s 219 of the IRDA.

(b) The decision in *Good Property Land Development Pte Ltd v Société-Générale* on this point, which leads to a divergence in the Cut-Off Date and the Set-Off Date (with the latter being earlier than the former) has been questioned on at least one occasion.[102]

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100 *Good Property Land Development Pte Ltd v Société-Générale* [1996] 1 SLR(R) 884 at [14].

101 Singapore Parl Debates; Vol 94; [1 October 2018]. Nonetheless, see Kiu Yan Yu, "Certain Drafting Mysteries Concerning the New Insolvency, Restructuring and Dissolution Act (2020) 2 SJLS 581 at 582–586 for the consequential problems arising from this interpretation.

102 See *Re Lehman Brothers Finance Asia Pte Ltd* [2013] 1 SLR 64 at [40]–[45].

(c) If s 126 of the IRDA cannot be relied on, it could provide an avenue for the courts to find that the Set-Off Date for a company in winding up is the date of the winding up order, which would bring the Set-Off Date in line with the Cut-Off Date as well as obviate the above-identified issue.

D. Opinion

88 The issue described above may not be comforting to a secured lender, but in the authors' view, it does not mean that Parliament should amend the legislation to address the issue. It should be recalled that the judicial management regime already provides a reasonable degree of protection to secured lenders. In particular, s 91(6) of the IRDA provides that the court must dismiss an application for a judicial management order if the holder of a floating charge over substantially the whole of the company's property opposes the judicial management order and intends to appoint a receiver and manager, and if the court is satisfied that the prejudice that would be caused to that floating charge holder (if the order is made) is disproportionately greater than the prejudice that would be caused to unsecured creditors of the company (if the application is dismissed).

89 If the authors' analysis is correct that a floating charge does not crystallise during judicial management and the book debts caught by the floating charge can have the benefit of insolvency set-off, it should provide a greater degree of assurance to counterparties trading with a company in judicial management, since they have the quasi-security of set-off to protect their downside if the judicial management fails. This may better serve the rehabilitative purposes of the judicial management regime by encouraging counterparties to continue trading with the company and preserving the value of the business as a going concern.

IV. Conclusion

90 In September 2022, the Second Minister for Law Mr Edwin Tong SC announced that Singapore will be undertaking "a root-and-branch study" of the judicial management regime to strengthen it as a corporate rescue tool.[103] It is timely to consider refinements to the regime to give clarity on the issues raised above. Although a topic as esoteric

103 "Opening Remarks by Second Minister for Law Edwin Tong SC, at SICC INSOL seminar" *Ministry of Law* (22 September 2022) <https://www.mlaw.gov.sg/news/speeches/opening-remarks-by-second-minister-for-law-edwin-tong-at-sicc-insol-seminar/> (accessed 19 September 2023).

as insolvency set-off might be seen as a secondary concern, set-off is an important quasi-security device that counterparties look to when hedging their commercial risk. Insolvency set-off is functionally akin to the super-priority rescue financing regime as it facilitates counterparties extending trade credit to the company to facilitate the survival of the company. It is a crucial aspect of the judicial management regime and should be more closely looked into.