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Case Note

CROSS-BORDER REIT "INSOLVENCIES" AND RECOGNISING FOREIGN INSOLVENCY-RELATED JUDGMENTS IN SINGAPORE

Re Tantleff, Alan [2022] SGHC 147

In the important decision of *Re Tantleff, Alan* [2022] SGHC 147 ("*Re Tantleff*"), Aedit Abdullah J declined to recognise the US restructuring of a Singapore-listed real estate investment trust ("REIT") under the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency as enacted in Singapore (the "Singapore Model Law"). No Singapore court has considered these issues before. Abdullah J commented, without deciding, that common law recognition might be possible instead. This article unpacks this comment and argues that such common law recognition is not possible. *Re Tantleff* also departs from *Re Rooftop Group International Pte Ltd* [2020] 4 SLR 680 and the UK Supreme Court's decision in *Rubin v Eurofinance SA* [2013] 1 AC 236, by ruling that the Singapore courts can recognise foreign insolvency-related judgments and possibly apply foreign insolvency law under the Singapore Model Law. Abdullah J therefore recognised orders ancillary to the Chapter 11 plans of the REIT's subsidiaries under the Singapore Model Law. This article considers if this was right, and how the law may develop in future.

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1 I would like to express my deep gratitude for the kind comments of Prof Dr Riz Mokal, barrister at South Square, Jared Kang, a Justices' Law Clerk at the Supreme Court of Singapore and Abigail Wong, Associate at Ascendant Legal LLC. All views and errors, remain mine.

I. The facts

1 Eagle Hospitality Real Estate Investment Trust ("EH-REIT") is a Singapore-listed real estate investment trust ("REIT"). It owns or controls various entities in the Eagle Hospitality group, which once held a portfolio of US properties worth over US$1bn.[2] Those properties included the *RMS Queen Mary* – which began life as one of the fastest luxury liners in the world, became a troopship for Allied soldiers during World War II, and was later moored off the Californian coast to live out her days as a hotel.[3] The group, like the *RMS Queen Mary*, has seen better times. It suffered greatly from the COVID-19 pandemic and collapsed in early 2021.[4]

2 EH-REIT wholly owns two Singapore companies, Eagle Hospitality S1 Pte Ltd ("S1") and Eagle Hospitality S2 Pte Ltd ("S2"). These special purpose vehicles ("SPVs") held other SPVs, which in turn held the REIT's properties. S1 and S2 then received and channelled income from the group's underlying properties to EH-REIT through a complex set of transactions.[5] That income was paid as dividends to EH-REIT's investors on the Singapore Exchange.

3 On 18 January 2021, S1 and S2 filed voluntary petitions under Chapter 11 of the US Bankruptcy Code[6] ("Chapter 11"). On 27 January 2021, EH-REIT itself filed for Chapter 11. The US Bankruptcy Court for the District of Delaware granted those petitions and appointed Mr Tantleff as the foreign representative of all three entities. That order gave Mr Tantleff authority to apply to foreign courts to recognise the Chapter 11 proceedings for all three entities (collectively, the "Chapter 11 Proceedings").[7]

2 Ameya Karve, "Eagle Hospitality REIT Unit Seeks Bankruptcy After Pandemic" *Bloomberg Law* (19 January 2021) <https://news.bloomberglaw.com/bankruptcy-law/eagle-hospitality-reit-unit-seeks-bankruptcy-after-pandemic-hit> (accessed 20 August 2022).

3 "The Queen Mary Long Beach" *Eagle Hospitality Trust* <https://web.archive.org/web/20210802215646/https://eagleht.com/the-queen-mary-long-beach/> (accessed 20 August 2022).

4 Dominic Lawson, "Singaporean Hotel Group Fights Chapter 11 Dismissal Motion" *Global Restructuring Review* (30 March 2021) <https://globalrestructuringreview.com/article/singaporean-hotel-group-fights-chapter-11-dismissal-motion> (accessed 25 August 2022).

5 See *In re EHT US1 Inc* 630 BR 410 at 418 (Bankr D Del, 2021) (*per* Sontchi CJ) and *Re Tantleff, Alan* [2022] SGHC 147 at [4(c)].

6 11 USC (US) (1978).

7 The procedural history of the Chapter 11 Proceedings is explained by Sontchi CJ in *In re EHT US1 Inc* 630 BR 410 (Bankr D Del, 2021).

4 In a Chapter 11 proceeding, the debtor company's negotiations with creditors may result in a plan to restructure the company. The plan may be presented to the US Bankruptcy Court, which may make an order approving and binding the parties to the plan.[8] On 20 December 2021, the US Bankruptcy Court confirmed a plan (the "Plan") in respect of EH-REIT, S1, S2 and other entities through a confirmation order[9] (the "Confirmation Order"). The Plan also bound EH-REIT's trustee, DBS Trustee Ltd ("DBS Trustee"), and required DBS Trustee to take all necessary steps to liquidate EH-REIT, S1 and S2 in Singapore.[10]

5 In Singapore, foreign insolvency proceedings and orders can be recognised and assisted, either at common law or under the UNCITRAL Model Law on Cross-Border Insolvency[11] as enacted in Singapore (the "Singapore Model Law"), to which s 252(1) of the Insolvency, Restructuring and Dissolution Act 2018[12] ("IRDA") gives force. Thus, Mr Tantleff asked the High Court: (a) to recognise him as the foreign representative of EH-REIT, S1 and S2 under Art 2(i) of the Singapore Model Law; (b) to recognise the Chapter 11 Proceedings as a foreign main proceeding; (c) to give him the power to deal with the property of all three entities in Singapore; and (d) to allow him to take steps to liquidate the three entities to implement the Plan and Confirmation Order.[13]

II. The decision

6 Aedit Abdullah J delivered a comprehensive judgment that considers three intriguing issues.

7 Abdullah J began by dismissing the application to recognise and assist EH-REIT's Chapter 11 Proceedings, and declining to recognise the Plan and Confirmation Order as it applied to EH-REIT. The Singapore Parliament, he reasoned, did not intend REITs to come within the scope of the Singapore Model Law because a REIT is not a "corporation" within the meaning of Art 2(c) of the Singapore Model Law. Abdullah J then suggested (without deciding) that EH-REIT would have to apply

8 See generally John D Ayer, Michael Bernstein & Jonathan Friedland, "The Life Cycle of a Chapter 11 Debtor Through the Debtor's Eyes, Part II" (2003) 22(8) *American Bankruptcy Institute Journal* 32.

9 *Re Tantleff, Alan* [2022] SGHC 147 at [16].

10 *Re Tantleff, Alan* [2022] SGHC 147 at [18].

11 (1997) (A/RES/52/158, adopted by the United Nations Commission on International Trade Law (30 May 1997)) (the "Singapore Model Law").

12 2020 Rev Ed.

13 See *Re Tantleff, Alan* [2022] SGHC 147 at [4]. See also [54] and [55] for a brief discussion on the reasons why Mr Tantleff sought the orders that he did.

for common law recognition. Part III explains why, while Abdullah J's decision not to recognise EH-REIT was right, common law "recognition" of a foreign trust "insolvency" is unlikely to be possible.

8 Next, Abdullah J decided that S1 and S2's Chapter 11 cases (though not EH-REIT's) should be recognised as foreign main proceedings, because their centres of main interest ("COMI") were in the US. But he also considered, and rejected, arguments that post-bankruptcy activities could affect a company's COMI on these facts.[14] While this issue is important enough for a separate thesis, space precludes discussion in this note.

9 Finally, Abdullah J considered whether the Plan and Confirmation Order, as opposed to S1 and S2's Chapter 11 Proceedings themselves, could be recognised. He ultimately granted recognition as a form of assistance under Art 21(1)(g) of the Singapore Model Law, instead of treating the Plan as part of the Chapter 11 Proceedings under Art 2(h).[15] Parts IV and V below, explain why Abdullah J's reasoning was, respectfully, incorrect. Nevertheless, the decision does raise several interesting options for insolvency practitioners in the future.

III. Recognition of foreign trust "insolvencies" at common law

10 Abdullah J's main reason for declining to recognise EH-REIT's Chapter 11 case was because the IRDA and its subsidiary legislation[16] specifically exclude various (non-REIT) corporations authorised under the Securities and Futures Act 2001[17] ("SFA"). Abdullah J ruled that, by extension, Parliament must have intended the IRDA to exclude REITS, which must also be authorised under the SFA and are subject to a bespoke statutory code.[18] If that is so, he reasoned, Parliament must have intended to exclude them from the scope of the Singapore Model Law.

11 The second reason for Abdullah J's decision was that REITs are not "corporations".[19] The Singapore Model Law (unlike the original Model Law) applies only to debtors which are "corporations".[20] This is

14 *Re Tantleff, Alan* [2022] SGHC 147 at [44]–[52].
15 *Re Tantleff, Alan* [2022] SGHC 147 at [56].
16 Such as the Insolvency, Restructuring and Dissolution (Prescribed Companies and Entities) Order 2020 (S 619/2020).
17 2020 Rev Ed.
18 *Re Tantleff, Alan* [2022] SGHC 147 at [27]–[30].
19 *Re Tantleff, Alan* [2022] SGHC 147 at [28].
20 See Singapore Model Law Art 2(c). Therefore, foreign personal bankruptcy proceedings can neither be recognised nor granted assistance under the Singapore
(cont'd on the next page)

unlike the definition of "debtor" in the UK's Cross-Border Insolvency Regulations 2006[21] ("CBIR") and under the US Bankruptcy Code; in the US, a "debtor" can be a "corporation", which can be a "business trust".[22] Indeed, in *In re EHT US1 Inc*[23] ("*EHT US1*"), Sontchi CJ found that EH-REIT was a "business trust" for the purposes of the US Bankruptcy Code.[24]

12 It is worth pausing to note that EH-REIT is not a "business trust" under Singapore law, and is not subject to the Business Trusts Act 2004.[25] It is an ordinary trust for the reasons explained below.

13 *EHT US1* was cited as an authority in *Re Tantleff*. However, Abdullah J distinguished it by pointing out that "corporation" as defined in s 4(1) of the Companies Act 1967[26] ("Singapore CA") (and transposed into the IRDA by s 2(1)) does not include a "business trust".[27]

14 This was the right decision. Abdullah J refrained from commenting further on what a "corporation" under section 4(1) of the Singapore Companies Act is, but it would seem very difficult to argue that a REIT is a "corporation" as understood in jurisdictions whose company legislation is ultimately based on English company law, (as Singapore's is):[28]

> (a) A "corporation" or "body corporate"[29] is an entity with separate legal personality and perpetual succession,[30] though not all corporations limit members' liability.[31] An entity can only be

Model Law: see *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [21].

21 SI 2006 No 1030 (UK), in which "debtor" is not expressly defined.

22 11 USC (US) (1978) §101(9)(A)(v).

23 630 BR 410 (Bankr D Del, 2021).

24 *In re EHT US1 Inc* 630 BR 410 at 423 (Bankr D Del, 2021).

25 2020 Rev Ed. EH-REIT is not on the Monetary Authority of Singapore's list of registered business trusts. However, EH-REIT's stapled sister trust, Eagle Hospitality Business Trust, is on it.

26 2020 Rev Ed.

27 *Re Tantleff, Alan* [2022] SGHC 147 at [28].

28 *Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet & Maxwell, Revised 3rd Ed, 2009) at paras 1.47–1.51.

29 "Body corporate" is how "corporation" is defined in s 4(1) of the Companies Act 1967 (2020 Rev Ed) and its predecessors, such as s 5(1) of the Companies Act 1961 (Vic).

30 *Sutton's Hospital Case* (1612) 10 Co Rep 23a at 29b *ff* (*per* Coke CJ); *Oakes v Turquand* (1867) LR 2 HL 325 at 358–360.

31 For a full history, see William Trower, Mark Phillips & Madeleine Jones, "Insolvency and Economic Disaster", presented at Law at the Cutting Edge, a Festschrift for Prof Sarah Worthington (29 July 2022).

"incorporated" by an Act of Parliament (including through the Singapore CA) or by prescription.[32]

(b) In contrast, a REIT is not a corporation, but a trust. Section 4 of the SFA defines a REIT as a "trust" which is a type of "collective investment scheme" authorised under s 286 or s 287. "Collective investment schemes" are defined, in the same section, as "arrangement[s]" having certain characteristics. A REIT is therefore simply an "arrangement" which is a trust, whose trustee takes money from investors, uses that money to buy and manage real property, and pays dividends.

(c) Nothing in the SFA makes a REIT a "corporation" by giving it legal personhood, or any other characteristic of a corporation. The SFA does provide statutory remedies in respect of REITs (such as a statutory oppression remedy), but those remedies make the REIT's *trustee* liable, not the REIT itself.[33] So the glue holding a REIT together is a trust deed, and not incorporation.

(d) One could of course argue that the definition of "corporation" in the Singapore CA only applies in the IRDA "unless the context otherwise requires".[34] Part of the relevant context to the interpretation of the Singapore Model Law is the *travaux préparatoires* and Guide to Enactment.[35] But these sources discuss neither the meaning of the word "debtor"[36] nor the word "corporation".

(e) So, a "debtor" as defined in Art 2(c) must be a "corporation" in the traditional sense. That must exclude trusts, natural persons, or other "arrangements", and so a REIT cannot be a "debtor" under the Singapore Model Law.

15 Abdullah J then suggested – briefly, without ruling on the point – that the insolvency of EH-REIT might be granted recognition and assistance at common law upon an application by DBS Trustee, and not by Mr Tantleff as foreign representative.[37]

32 *Sutton's Hospital Case* (1612) 10 Co Rep 23a at 29b *ff*. In England, a corporation may also be created by the sovereign or by Royal Charter, but that is obviously no longer the law in Singapore.

33 See, *eg*, ss 137W(1)(*i*), 287(9B), 287(16)(*a*)(ii) and 295C(1) of the Securities and Futures Act 2001 (2020 Rev Ed).

34 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) s 2(1).

35 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) s 252(2).

36 *Re Deep Black Drilling LLP* [2020] BCC 486 at [15(i)].

37 *Re Tantleff, Alan* [2022] SGHC 147 at [87]–[90].

16 The common law recognition of foreign representatives of insolvent trusts has not yet been considered in Singapore or England. In *Rubin v Eurofinance SA*[38] ("*Rubin (HC)*"), the English High Court recognised the Chapter 11 representatives of an English trust not at common law, but under the CBIR, which enacts the UNCITRAL Model Law on Cross-Border Insolvency in the UK. But this is for now impossible in Singapore, because, as discussed, a REIT is not a corporate debtor whose insolvency can be recognised under the Singapore Model Law. That was why *Re Tantleff* did not follow *Rubin (HC)*.[39]

17 So, is common law recognition a usable alternative? As a trust, EH-REIT lacks legal personality and cannot truly be insolvent. Calling a trust "insolvent" is simply shorthand for saying that the trustee's liabilities *qua* trustee are greater than the trust assets, or that those assets cannot meet liabilities as they fall due.[40]

18 An "insolvent" trust or REIT is, however, similar to an insolvent corporation in that it is a fund to which creditors of the trust fund can look to, to satisfy their claims. A trustee conducts "trust business" in its own name, and is personally liable.[41] However, unpaid creditors can also obtain a claim (apparently proprietary)[42] against the trust fund that takes priority over the beneficiaries' rights. They do so by subrogation to the trustee's proprietary right to indemnify itself from the trust fund for payments made to creditors *qua* trustee.[43] REIT creditors, whose rights are usually unsecured rights under contracts or leases, could benefit from subrogation in this way.[44]

19 When a REIT is "insolvent", its assets are unlikely to be enough to satisfy all the claims of creditors and unitholders (*ie*, beneficiaries).

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38 [2010] 1 All ER (Comm) 81. In the UK Supreme Court, the recognition of foreign trust insolvencies was no longer an issue.

39 *Re Tantleff, Alan* [2022] SGHC 147 at [29].

40 See the very recent explanation in *Equity Trust (Jersey) Ltd v Halabi* [2022] UKPC 36 at [61]. The Trusts (Jersey) Law 1984 (Jersey) is based substantially on English trust law. See also Lynton Tucker, Nicholas Le Poidevin & James Brightwell, *Lewin on Trusts* (Sweet & Maxwell, 20th Ed, 2020) at para 27-093.

41 See, *eg*, *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd* [2013] 4 SLR 123 at [14] and *Lalwani Shalini Gobind v Lalwani Ashok Bherumal* [2017] SGHC 90 at [70].

42 *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd* [2013] 4 SLR 123 at [15].

43 See, *eg*, *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd* [2013] 4 SLR 123 at [15] and *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* (2019) 268 CLR 524 at [83]–[84], citing *Re Exhall Coal Co (Ltd)* (1866) 55 ER 970; (1866) 35 Beav 449.

44 *Re Pumfrey* (1882) 22 Ch D 255 at 259, approved in *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd* [2013] 4 SLR 123.

One view is that the assets of an insolvent trust will be treated similarly to an insolvent corporation, and that a trustee of an insolvent trust must administer it for the benefit of its creditors, not beneficiaries. The creditors, not the beneficiaries, now have the primary economic interest and so become the people to whom the trustees' equitable obligations are owed.[45] The court will use its control over the administration of trusts to direct the trustees to administer it for the creditors' benefit.[46]

20 How exactly the administration of insolvent trusts works is not entirely clear[47] (despite the momentous decision in *Equity Trust (Jersey) Ltd v Halabi*,[48] which primarily concerned questions of priority, not administration). But it is generally accepted that an insolvent trust is administered for the benefit of the trust creditors rather than the beneficiaries. An unpaid creditor's right to subrogate itself to the trustee's right of indemnity arises because "equity regards the creditor's claim as having primacy over that of the beneficiary".[49] It is only logical for equity to require trustees to put the interests of the creditors before those of the beneficiaries, in circumstances where the trust assets cannot satisfy the claims of both.

21 The proprietary nature of a trustee's right of indemnity gives rise to further questions. In the first place, it is not clear if an *unsecured trust creditor's* subrogated right of indemnity should be regarded as proprietary. An *obiter* remark in the High Court's decision in *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd* suggests that these subrogated rights are indeed proprietary.[50] However, subrogation is a remedy to reverse unjust enrichment.[51] It cannot give the subrogated party better rights than what they bargained for.[52] So, even if X's right is proprietary, subrogation will not give Y a proprietary right if the point of the subrogation is to reverse the subtraction or deprivation of a purely personal right from Y.[53] So, the claims of a REIT's non-trustee unsecured creditors should be treated in

45 Lynton Tucker, Nicholas Le Poidevin & James Brightwell, *Lewin on Trusts* (Sweet & Maxwell, 20th Ed, 2020) at para 27-098; *Re F* (32/2013, CA) (Guernsey) at [17]; *Re Z II Trusts* 2015 (2) JLR 108 at [29]–[33]; *Re Z II Trust* 2015 (2) JLR 175 at [26].

46 *Re Z II Trust* 2015 (2) JLR 175 at [26]; *Geneva Trust Co (GTC) SA v Equity Trust (Jersey) Ltd* [2020] JRC 72 at [11(i)].

47 See *Re F* (32/2013, CA) (Guernsey) at [17], in which the court held that it "nevertheless in principle has jurisdiction to bless an application of trust property that is not of benefit to creditors".

48 [2022] UKPC 36.

49 *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd* [2013] 4 SLR 123 at [15].

50 [2013] 4 SLR 123 at [15].

51 *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, affirmed in *United Overseas Bank Ltd v Bank of China* [2006] 1 SLR(R) 57 at [27].

52 *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 at 235–237.

53 See, *eg*, *Paul v Speirway Ltd* [1976] Ch 220.

the same way as the claims of a company's unsecured creditors. Both are funds whose assets are insufficient to satisfy the claims made against the assets. The creditors of those funds must share *pari passu* in whatever assets are left.

22 In any event, the Privy Council's very recent decision in *Equity Trust (Jersey) Ltd v Halabi* has now held (by a majority) that successive trustees must share *pari passu* in an insolvent trust's assets. They must do so even though each of them has equitable *proprietary* rights to the trust assets, and even though equitable interests arising first in time normally have priority over later interests.[54] This part of the majority's decision is contentious and a full treatment of that decision is beyond the scope of this article. Nevertheless, it seems very possible that the Singapore courts would be persuaded to accept this conclusion in a future trust or REIT insolvency. It would follow that trust or REIT creditors who are subrogated to these trustees' rights of indemnity must also share *pari passu*, even if their subrogated rights are proprietary.

23 If the analysis above is right, the Singapore courts should exercise their supervisory jurisdiction over the administration of trusts to direct the trustees to administer them in the interests of the general body of unsecured creditors, rather than the beneficiaries. Those interests will normally be served by steps which increase the assets available for distribution and minimise wastage of those assets on expenses of the trust "insolvency".

24 The next question is whether, and how, the supervisory jurisdiction can be used to recognise and assist foreign *trust* insolvencies at common law. Can the courts assist by deploying their inherent jurisdiction to supervise administration of insolvent trusts and REITs for the benefit of their unsecured creditors, and ensure an orderly *pari passu* distribution? How should private international law principles apply to this inherent jurisdiction?

25 Common law recognition of *corporate* insolvencies is based on "modified universalism". This is the principle that one court should take the lead in collecting and distributing an insolvent corporation's assets. Other courts will recognise and assist, so far as consistent with local public policy, to prevent a value-destructive race to the courthouse by creditors hoping to grab the estate's worldwide assets.[55] There is a well-established

54 *Equity Trust (Jersey) Ltd v Halabi* [2022] UKPC 36 at [251]–[278].
55 *Re Opti-Medix Ltd* [2016] 4 SLR 312 at [17]; *Allenger, Shiona v Pelletier, Olga* [2022] 3 SLR 353 at [89].

jurisdiction to apply this principle to assist foreign insolvencies.[56] And this idea is not limited to corporations. The court will, for instance, grant anti-suit injunctions to stop enforcement against the overseas assets of the estate of a deceased person who died domiciled in Singapore, to enable her assets to be distributed in Singapore.[57]

26 An insolvent trust, like an insolvent corporation, is essentially a fund whose creditors would benefit from a centralised process of distribution that maximises the value of the fund, and from court orders preventing a disorderly "grab race", so to speak. Therefore, a principle akin to modified universalism should, arguably, be amongst the principles that guide the court's exercise of its inherent jurisdiction to supervise the trust. The Singapore courts might be able, for instance, to assist a foreign REIT insolvency at common law by an order permitting the REIT trustee to take evidence from Singapore-based third parties.[58] The proper way to obtain such an order is likely to be an application under O 32 r 2 of the Rules of Court 2021.[59]

27 However, this is where the court's power to assist foreign trust insolvencies at common law ends. It is unlikely that the court's inherent jurisdiction allows it to non-consensually alter the rights of beneficiaries (*ie*, unitholders in a REIT) or trust creditors by recognising a foreign plan or order that substantively alters those rights.

28 The court's common law power to assist foreign corporate insolvencies at common law is procedural and does not allow the court to alter substantive rights by way of assistance, for instance by recognising foreign judgments[60] or transferring title to land.[61] Similarly, the inherent jurisdiction to supervise trust administration by approving distributions

56 Traceable to *Re African Farms Ltd* [1906] TS 373 and *Re Lee Wah Bank* [1958] 2 MC 81 (decided in 1926). See also, more recently, *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd* [2014] 2 SLR 815 at [75] and [99] and *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] AC 1675 at [13].

57 *Carron Iron Co v McLaren* (1855) 5 HL Cas 416 at 439–440; *Weinstock v Sarnat* [2005] NSWSC 744 at [25]–[27]; *VKC v VJZ* [2021] 2 SLR 753 at [24] *ff* (although here the injunction was granted on the ground of vexation and oppression).

58 By analogy with *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] AC 1675.

59 On this, see Lynton Tucker, Nicholas Le Poidevin & James Brightwell, *Lewin on Trusts* (Sweet & Maxwell, 20th Ed, 2020) at para 27-098 and *Lady Moon SPV SrL v Petricca & Co Capital Ltd* [2019] EWHC 439 (Ch) ("*Lady Moon*") at [101]. *Lady Moon* concerned Pt 64 of the English Civil Procedure Rules 1998 (SI 1998 No 3132), the spiritual successor to O 80 of the old Rules of Court (2006 Rev Ed) (UK). Abdullah J emphasised the breadth of O 32 of the new Rules of Court 2021 (which retains the wording of O 80 of the old Rules of Court (2006 Rev Ed) (UK)) in *Re Croesus Retail Asset Management Pte Ltd* [2017] 5 SLR 811 at [11] and [13].

60 *Rubin v Eurofinance SA* [2010] 1 All ER (Comm) 81.

61 *Kireeva v Bedzhamov* [2022] EWCA Civ 35; [2022] 2 All ER (Comm) 212 at [100] *ff*.

of trust assets, for instance through "*Benjamin* orders", gives the court no power to destroy or vary beneficiaries' interests in the trust property.[62] Neither will orders to distribute trust assets *pari passu* among beneficiaries extinguish the beneficiaries' subsisting equitable interests.[63] By extension, even if the equitable obligations owed by trustees of an insolvent trust somehow "shift" to creditors, the court cannot use its inherent jurisdiction to recognise a foreign plan that alters those creditors' rights.

29 So, EH-REIT's trustee, and future REIT trustees, will likely face significant hurdles in recognising foreign REIT restructurings. This is not desirable. A great many REITs that invest primarily in foreign property are listed in Singapore, and EH-REIT is neither the first nor will it be the last of these REITs to find itself in financial trouble. Parliament should seriously consider enacting legislation which allows recognition of foreign REIT insolvencies, as the US Bankruptcy Code does, since REITs behave much more like corporations than traditional trusts.

IV. Recognition of foreign judgments and enforcement of foreign law under Article 21(1)(g) of the Singapore Model Law

30 In *Re Tantleff*, counsel for the trustee argued that the Plan and Confirmation Order were part and parcel of the Chapter 11 Proceedings and so fell within the definition of "foreign proceeding" in Art 2(h) of the Singapore Model Law. A foreign proceeding must involve court control and supervision over the debtor's property.[64] But, as Abdullah J recognised, the US Bankruptcy Court does retain a limited degree of control over the debtor after the Confirmation Order.[65] For this reason, Abdullah J expressed the view that the Plan and Confirmation Order were part of the "foreign proceedings" recognisable under Art 2(h).[66]

31 But that conclusion was *obiter*. Abdullah J instead recognised the Chapter 11 Plan and Confirmation Order under Art 21(1)(g),[67] holding that this Article allows foreign insolvency-related judgments to be recognised and enforced.[68] He reached this conclusion because

62 *Ernest Ferdinand Perez De La Sala v Compañía De Navegación Palomar* [2020] 1 SLR 950 at [52]–[55], citing *Re MF Global UK Ltd* [2013] 1 WLR 3874 at [26].
63 *Fordyce v Ryan* [2017] 2 Qd R 240 at [50]–[54].
64 *Re Tantleff, Alan* [2022] SGHC 147 at [59], citing *United Securities Sdn Bhd v United Overseas Bank Ltd* [2021] 2 SLR 950 at [53].
65 *Re Tantleff, Alan* [2022] SGHC 147 at [63], citing *Re Oversight and Control Commission of Avanzit SA* 385 BR 525 (Bankr SDNY, 2008).
66 *Re Tantleff, Alan* [2022] SGHC 147 at [65].
67 *Re Tantleff, Alan* [2022] SGHC 147 at [66].
68 *Re Tantleff, Alan* [2022] SGHC 147 at [77]–[78].

Parliament has omitted a crucial phrase from the Singapore Model Law. Articles 21(1) and 21(1)(*g*) of the Singapore Model Law read:

> 1. Upon recognition of a foreign proceeding … where necessary to protect the property of the debtor or the interests of the creditors, the Court may … grant any appropriate relief, including —
>
> …
>
> (*g*) granting any additional relief that may be available to a Singapore insolvency officeholder, including any relief provided under section 96(4) of this Act.

32 Article 21(1)(g) of the First Schedule to the CBIR (the "UK Model Law") more closely replicates UNCITRAL's original drafting. It reads:

> (g) granting any additional relief that may be available to a British insolvency officeholder *under the law of Great Britain*, including any relief provided under paragraph 43 of Schedule B1 to the Insolvency Act 1986.
>
> [emphasis added in italics]

33 Section 1521(a) of Chapter 15 of the US Bankruptcy Code, like the Singapore Model Law, lacks the words "under the law of [this state]".

34 The words "under the law of Singapore", present in the Companies (Amendment) Bill 2017, were omitted when that Bill was enacted to bring the Singapore Model Law into force. As the Ministry of Law explained in its response ("the MinLaw Response"), that omission was intentional, and was intended to "align the wording with the US provision in Chapter 15".[69] *Re Tantleff* also observed that the US Bankruptcy Court frequently enforces foreign insolvency judgments under §1521(a).[70] It followed, said Abdullah J, that the Singapore courts could enforce foreign judgments and orders using this provision, as well as apply foreign insolvency law.[71]

35 This is the most significant part of *Re Tantleff*. As Abdullah J acknowledged,[72] his reading of Art 21(1)(g) of the Singapore Model Law in *Re Tantleff* departs from his comments in *Re Rooftop Group*

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69 *Re Tantleff, Alan* [2022] SGHC 147 at [77], citing the Ministry of Law in: *Ministry's Response to Feedback from Public Consultation on the Draft Companies (Amendment) Bill 2017 to Strengthen Singapore as an International Centre for Debt Restructuring* (Ministry of Law, 27 February 2017) <https://www.mlaw.gov.sg/files/Annex_A-Goverment_Response_to_Public%20Consult_Feedback_for_Companies_Act_Amendments.pdf/> (accessed 20 August 2022).

70 See *Re Tantleff, Alan* [2022] SGHC 147 at [71]–[74] and the cases cited therein. See also *In re Rede Energia SA* 515 BR 69 at 89 (Bankr SDNY, 2014) and *In re Cell C Proprietary Ltd* 571 BR 542 at 551 (Bankr SDNY, 2017).

71 *Re Tantleff, Alan* [2022] SGHC 147 at [69] and [77]–[78].

72 *Re Tantleff, Alan* [2022] SGHC 147 at [69].

International Pte Ltd[73] ("*Rooftop*"). In *Rooftop* he had approved, *obiter*,[74] the reasoning in *Re Pan Ocean Co Ltd*[75] ("*Pan Ocean*"), where Morgan J refused to restrain the termination of contractual rights subject to a so-called "*ipso facto*" clause[76] which was otherwise enforceable under English law. He rejected the argument that the English courts had the power to do so by applying Korean law, under which this would have been possible.[77] In reaching this conclusion, Morgan J applied the UK Supreme Court's decision in *Rubin v Eurofinance SA*[78] ("*Rubin (SC)*"). In *Rubin (SC)*, their Lordships had rejected the argument that Art 21(1) could be used to enforce foreign insolvency-related judgments as a form of relief, commenting that Art 21 was procedural and contained nothing which altered the common law rules on recognition and enforcement of judgments, even on a purposive interpretation of the UK Model Law.[79]

36 In my view, Abdullah J was right to rule that the Singapore Model Law allows the Singapore courts to apply foreign law. However, it is respectfully argued that it was wrong to rule that the Singapore Model Law allows foreign judgments to be enforced.

37 It is true that the words "under the law of Singapore" were deleted to "align the wording with the US provision in Chapter 15 of the US Bankruptcy Code".[80] The MinLaw Response fell within the range of extraneous material that was admissible to determine the purpose of Art 21(1)(g) of the Singapore Model Law.[81] As is well known, one of the purposes of the Singapore Model Law as a whole is to further the goal of modified universalism to advance Singapore's ambition to become an international hub for debt restructuring. The alignment of Art 21(1)(g) with the US position must have been done in aid of this broader aim.

38 However, as Abdullah J recognised, the US Bankruptcy Court can assist the foreign court both by recognising foreign judgments as

73 [2020] 4 SLR 680 at [27].
74 *Re Rooftop Group International Pte Ltd* [2020] 4 SLR 680 at [28].
75 [2014] Bus LR 1041.
76 That is, a clause providing one party with a right to terminate upon the insolvency of its counterparty.
77 *Re Pan Ocean Co Ltd* [2014] Bus LR 1041 at [108].
78 [2013] 1 AC 236.
79 *Rubin v Eurofinance SA* [2013] 1 AC 236 at [142]–[143]; see also *Re OJSC International Bank of Azerbaijan* [2019] 2 All ER 713.
80 *Ministry's Response to Feedback from Public Consultation on the Draft Companies (Amendment) Bill 2017 to Strengthen Singapore as an International Centre for Debt Restructuring* (Ministry of Law, 27 February 2017) <https://www.mlaw.gov.sg/files/Annex_A-Goverment_Response_to_Public%20Consult_Feedback_for_Companies_Act_Amendments.pdf/> (accessed 20 August 2022).
81 On which, see *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [47]–[53].

well as applying foreign insolvency law, as appropriate.[82] The aim of the Singapore Model Law could have been served by engrafting either, or both, of these powers into Singapore's law. Unfortunately, the MinLaw Response is too general to show what exact outcome was intended, and does not explain how and if the Ministry of Law or Parliament sought to balance the aims of the Singapore Model Law with other policy goals.

39 Therefore, we must look to the broader context in which Art 21(1)(g) of the Singapore Model Law was enacted.[83] The context is the Singapore courts' existing powers to apply foreign law and recognise foreign judgments. These powers are very different.

40 Unfortunately, Abdullah J did not comment much on the application of foreign insolvency law in either Singapore or the US. The leading US decision is *In re Condor Insurance Ltd*[84] ("*Condor*"). In *Condor*, the US court recognised the winding up of a Nevis-incorporated insurance company in Nevis, and applied Nevis law's fraudulent transfer provisions in US proceedings as a form of "appropriate relief" under §1521 of the US Bankruptcy Code.

41 Did Parliament intend Singapore's courts to be able to act in a similar way? Singapore's courts already apply foreign law with great frequency. They do so, for instance, when deciding disputes about contracts governed by foreign laws, or when deciding claims against directors for breach of duty to companies incorporated abroad.[85] Singapore's courts are perfectly capable of applying foreign insolvency laws in the same way that the US Bankruptcy Court can, and have added procedural tools to do so. The bench of the Singapore International Commercial Court ("SICC") has the required expertise, as well as the power, to order foreign law issues to be decided on the basis of submissions.[86] In a particularly difficult case, the General Division of the High Court[87] or the SICC[88] can order the parties to refer a question of foreign law to a foreign court. A similar procedure has in fact been used to refer questions of law to the English High Court in the past.[89]

82 *Re Tantleff, Alan* [2022] SGHC 147 at [69] and [77]–[78].
83 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [42].
84 601 F 3d 319 (5th Cir, 2010).
85 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [59].
86 Singapore International Commercial Court Rules 2021 (S 924/2021) O 16 r 8.
87 Rules of Court 2021 (S 914/2021) O 29.
88 Singapore International Commercial Court Rules 2021 (S 924/2021) O 15.
89 *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR* [2009] 1 All ER (Comm) 780.

42 The context against which Parliament enacted Art 21(1)(g), which is described above, suggests that Parliament may well have intended Singapore's courts to be able to assist foreign insolvencies by applying foreign law – just as the US Bankruptcy Court does. Nothing in this backdrop appears to suggest otherwise.

43 It seems much less likely that Parliament intended to change Singapore's rules on foreign judgments without expressly saying so. While Parliament was undoubtedly aware of the decisions in *Rubin (HC)* and *Rubin (SC)* when enacting the Singapore Model Law, the statutory context still suggests that Parliament had no clear intention to reverse the long-standing common law rules on recognition and enforcement of judgments. The principal Acts by which Parliament has altered the rules for recognition and enforcement of foreign judgments in Singapore are the Reciprocal Enforcement of Commonwealth Judgments Act 1921,[90] Reciprocal Enforcement of Foreign Judgments Act 1959[91] and the Choice of Court Agreements Act 2016.[92] The last Act (but not the first two) specifically excludes insolvency matters from its scope.[93]

44 Therefore, where Parliament intends to use instruments of this kind to change Singapore's rules on recognition of foreign judgments, it has expressly said so in the statute's text. The text of these statutes sets out very clear conditions under which foreign judgments can be recognised and enforced. These statutes do not allow judgments to be enforced simply when it is desirable to do so to aid a foreign court, and do not suggest that Parliament has ever intended to give the courts such a power. The courts risk "cutting across" or undermining the statutory scheme created by all of the above Acts if they were to create an entirely new basis for the recognition and enforcement of foreign judgments without Parliament's express approval.[94]

45 A further point is that the rules regulating the status of foreign judgments in Singapore, or any nation, are quasi-public law rules involving weighty political choices on when to recognise and aid foreign exercises of sovereign power.[95] The common law rules governing this field were developed by the courts. The Court of Appeal has rightly said

90 2020 Rev Ed.
91 2020 Rev Ed.
92 2020 Rev Ed.
93 Choice of Court Agreements Act 2016 (2020 Rev Ed) s 9(2)(*d*).
94 *X v Bedfordshire County Council* [1995] 2 AC 633 at 749–750.
95 See Adrian Briggs, *The Conflict of Laws* (Oxford University Press, 4th Ed, 2019) at p 127 and Andrew Dickinson, "Keeping Up Appearances: The Development of Adjudicatory Jurisdiction in the English Courts" (2015) 86 *British Yearbook of International Law* 6 at 7.

that it can and must re-examine unsatisfactory and outdated common law rules.[96] But the nature of the rule matters. The rules on judgments are so long-standing and the policy issues involved so consequential that it is more appropriate to let Parliament change them expressly.[97] This is especially true in a field where Parliament has legislated extensively.

46 Therefore, the courts should approach the rules on foreign judgments (and applying foreign law) with caution, and avoid modifying them absent *clear* indications from Parliament. It is Parliament which should choose to change the rules on foreign judgments, and Parliament must choose clearly before the courts can act.

V. The future

47 Nevertheless, the ability to enforce foreign insolvency-related judgments and apply foreign insolvency law in Singapore may well be desirable as a matter of legal policy. As Abdullah J rightly noted,[98] the UNCITRAL drafted the Model Law on Recognition and Enforcement of Insolvency-Related Judgments[99] ("MREIJ") partly to reverse *Rubin (SC)*, as well as a similar decision of the Supreme Court of Korea.[100] The UK's Insolvency Service has also launched a consultation on implementing Art X of the MREIJ, which would give the UK courts a discretion to enforce insolvency-related judgments.[101]

48 If *Re Tantleff* is followed, the Singapore courts would retain the discretion to decide whether or not to enforce foreign insolvency judgments under Art 21(1)(g) of the Singapore Model Law.[102] This Part sets out some thoughts on how the courts and practitioners might develop the law after *Re Tantleff*. As Abdullah J observed, the outer limits

96 *Lee Chez Kee v Public Prosecutor* [2008] 3 SLR(R) 447 [122]–[124].

97 As Lord Neuberger explained in *R (Prudential plc) v Special Commissioner of Income Tax* [2013] 2 AC 185 at [49]–[52].

98 *Re Tantleff, Alan* [2022] SGHC 147 at [76].

99 (2018) (A/RES/73/200, adopted by the United Nations Commission on International Trade Law (2 July 2018)).

100 United Nations Commission on International Trade Law, *UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment* (United Nations Publications, 2019) at p 11, fn 1.

101 "Closed Consultation: Implementation of Two UNCITRAL Model Laws on Insolvency Consultation" *The Insolvency Service* (7 July 2022) <https://www.gov.uk/government/consultations/implementation-of-two-uncitral-model-laws-on-insolvency/implementation-of-two-uncitral-model-laws-on-insolvency-consultation#:~:text=Article%20X%20states%20that%20the,related%20judgments%20through%20the%20MLCBI> (accessed 20 August 2022).

102 *Re Tantleff, Alan* [2022] SGHC 147 at [69].

of recognition under Art 21(1)(g), at least as it operates in Singapore, will have to be worked out in subsequent cases.[103]

49 Singapore's courts might consider the following factors relevant to the exercise of the discretion to recognise a foreign judgment under Art 21(1)(g), some of which are discussed in *Re Tantleff*:

(a) The court should ensure that the foreign proceedings leading up to the order observed the fundamental rules of natural justice.[104] The rules of natural justice are those that have long been a requirement for the enforcement of foreign judgments at common law.[105]

(b) The foreign judgment must be sufficiently connected to restructuring and insolvency proceedings.[106]

(c) Judgments obtained by fraud should be unenforceable.[107]

(d) The Singapore courts can refuse to recognise a judgment where the foreign court took jurisdiction on a basis not recognised by its own law, or on a basis under which the Singapore courts could have exercised jurisdiction, or by "generally accepted international rules of jurisdiction".[108] The Singapore courts could, potentially, deny recognition because the foreign court lacked jurisdiction in the eyes of the common law, which has traditionally had a more restrictive set of international bases of jurisdiction.[109]

(e) The interests of creditors, shareholders and the debtor must be "adequately protected".[110] This requirement is present in Art 22 of the CBIR and the Singapore Model Law, is present in

103 *Re Tantleff, Alan* [2022] SGHC 147 at [81]; see also *Re Rams Challenge Shipping Pte Ltd* [2022] SGHC 220 at [10].

104 *Re Tantleff, Alan* [2022] SGHC 147 at [73] and [81], citing *Re CGG SA* 579 BR 716 (Bankr SDNY, 2017).

105 See *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [28]–[31] and *Re Rams Challenge Shipping Pte Ltd* [2022] SGHC 220 at [10].

106 *Re Rams Challenge Shipping Pte Ltd* [2022] SGHC 220 at [10].

107 As they are at common law: *Heince Tombak Simanjuntak v Paulus Tannos* [2020] 4 SLR 816 at [41]–[42] and under Art 14(b) of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments.

108 *In re Metcalfe & Mansfield* 421 BR 685 at 699–700 (Bankr SDNY, 2010); Art 14(g) of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments.

109 See Adrian Briggs, *Civil Jurisdiction and Judgments* (Informa Law, 7th Ed, 2021) at p 766.

110 *Re Tantleff, Alan* [2022] SGHC 147 at [81]. Adequate protection of creditors or shareholders is also an express requirement under §1522(a) of the US Bankruptcy Code 11 USC (US) (1978).

§1522(a) of the US Bankruptcy Code, and "requires a balance to be struck between the relief to be granted and the interests of persons affected".[111]

(f) The general principles of comity are relevant in recognising and enforcing a foreign judgment, so the Singapore courts should not re-try the case. Comity is less of a concern when recognising orders from "sister common law jurisdictions with procedures akin to [Singapore's]".[112]

(g) The US Bankruptcy Court has held that Art 22 requires the proceeds of the foreign estate to be distributed substantially in accordance with US bankruptcy law.[113] The English High Court has also made similar remarks,[114] and the speeches of Lords Scott, Neuberger and Phillips in *Re HIH Casualty & General Insurance Ltd*[115] seem to support this approach. If these decisions are followed, the Singapore courts would not enforce foreign orders resulting in a distribution varying radically from Singapore's statutory *pari passu* scheme. However, this would be an indefensible and parochial outcome.

(h) It is worth clarifying that, either way, the Singapore courts should still recognise foreign schemes and restructuring plans that depart from the *pari passu* distribution that IRDA mandates in a liquidation.[116]

50 A Singapore court may also be asked to recognise and enforce foreign restructuring plans that compromise debts governed by Singapore law or a law other than that of the insolvency process. The rule in *Gibbs v Société des Métaux*[117] ("*Gibbs*") prohibits this in, among others, English,[118] Scottish[119] and Hong Kong[120] law. The Singapore courts have, in *Re Pacific Andes Resources Development Ltd* ("*Pacific Andes*"), heavily criticised

111 *Re Tantleff, Alan* [2022] SGHC 147 at [81].
112 *In re Metcalfe & Mansfield* 421 BR 685 at 698–699 (Bankr SDNY, 2010).
113 *In re PT Bakrie Telecom Tbk* 682 BR 859 at 876 (Bankr SDNY, 2021); *In re Atlas Shipping AS* 404 BR 726 at 740 (Bankr SDNY, 2014); *In re Metcalfe & Mansfield* 421 BR 685 at 697 (Bankr SDNY, 2010).
114 *Re Swissair* [2009] BPIR 1505 at [14].
115 [2008] 1 WLR 852.
116 *Re BCCI (No 3)* [1993] BCLC 1490 at 1510.
117 *Gibbs v Société des Métaux* (1890) 25 QBD 399.
118 *Re OJSC International Bank of Azerbaijan* [2019] 2 All ER 713 at [89]–[92], which affirmed *Gibbs v Société des Métaux* (1890) 25 QBD 399.
119 *Chang v Cosco Shipping (Qidong) Offshore Ltd* [2022] BCC 176 at [62]–[64].
120 See, *eg*, *Re China Oil Gangran Energy Group Holdings Ltd* [2021] 3 HKLRD 69 at [23].

Gibbs in *obiter dicta*.[121] This decision is often misunderstood as having completely disapplied or rejected *Gibbs* in Singapore.

51 In fact, all *Pacific Andes* actually decided, strictly speaking, was that *Gibbs* does not stop a Singapore court from sanctioning a Singapore scheme of arrangement which compromises a debt governed by foreign law.[122] This has long been possible.[123] Common law courts have frequently sanctioned schemes of debts governed by foreign law.[124] Where that law is New York law, the scheme can later be recognised in the US under Chapter 15 of the US Bankruptcy Code.[125] The Singapore court might refuse to sanction a scheme which will be ineffective in the jurisdiction of the law governing the debt, but that goes to discretion, not jurisdiction.[126] Such schemes can still be sanctioned if there is a good reason to do so.[127]

52 What *Gibbs* does prevent is the *recognition and enforcement* in Singapore of foreign orders compromising a debt governed by a different law.[128] *Pacific Andes* did not decide this point, strictly speaking. Of course, one must recognise that Kannan Ramesh J criticised the *Gibbs* rule in fairly trenchant terms, and a future Singapore court might well follow his *obiter dicta*.[129]

53 Even if the Singapore courts choose not to use Art 21(1)(g) to circumvent the *Gibbs* rule, there are two qualifications to *Gibbs* that will, in practice, allow many foreign orders altering rights governed by a different law to be recognised:

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121 [2018] 5 SLR 125 at [46]–[52].

122 *Re Pacific Andes Resources Development Ltd* [2018] 5 SLR 125 at [50] and [52].

123 *New Zealand Loan and Mercantile Agency Co v Morrison* [1898] AC 349 at 357–358 (English scheme compromising Victorian-law debt was effective to compromise the debt in the UK, though not in Australia).

124 See, *eg*, *Re Magyar Telecom BV* [2013] EWHC 3800 (Ch) at [19]; *Re China Lumena New Materials Corp* [2020] HKCFI 338 at [10]–[13] (PRC law debt); and *Re Freeman Fintech Corp Ltd* (4 February 2021, Grand Court) (Cayman Islands) at [29]–[32] (Macau law debt).

125 See, *eg*, *Re Magyar Telecom BV* [2013] EWHC 3800 (Ch) and *Re Petra Diamonds US$ Treasury* [2021] 1 WLUK 64 at [26].

126 *Re Van Gansewinkel Groep BV* [2015] Bus LR 1046 at [71].

127 *Re Lehman Brothers International (Europe)* [2018] EWHC 1980 (Ch) at [188]. For examples, see *Re Van Gansewinkel Groep BV* [2015] Bus LR 1046 at [71]; *Re China Lumena New Materials Corp* [2020] HKCFI 338 at [13]; and *Re Freeman Fintech Corp Ltd* (4 February 2021, Grand Court) (Cayman Islands) at [29].

128 See, *eg*, *Re OJSC International Bank of Azerbaijan* [2019] 2 All ER 713 and *Chang v Cosco Shipping (Qidong) Offshore Ltd* [2022] BCC 176.

129 *Re Pacific Andes Resources Development Ltd* [2018] 5 SLR 125 at [47]–[48].

(a) A creditor who has submitted to the proceeding resulting in the order, for instance by appearing and making submissions, cannot rely on *Gibbs*.[130]

(b) *Gibbs* does not seem to apply to foreign judgments invalidating a debt as a transaction at an undervalue, preference or related party transaction, *etc*: see *Erste Group Bank AG v JSC VMZ Red October*.[131] The reasoning of the English Court of Appeal was, briefly, that *Gibbs* only protects creditors against their debts being discharged under a law they did not choose. It does not protect them if they should not have been entitled to those debts in the first place. So, a Singapore court should enforce, for instance, a foreign judgment setting aside a Singapore-law guarantee granted as an unfair preference.

54 Finally, *Re Tantleff* suggests that Art 21(1)(g) can be used to recognise and enforce foreign schemes and restructuring plans in Singapore.[132] This will no doubt be useful for practitioners. Recognition of these plans under Art 21(1)(g) could also become a valuable tool in ensuring that foreign restructurings of Singapore-law governed debt have worldwide effect.

55 In Judge Martin Glenn's very recent decision in *In re Modern Land (China) Co Ltd*[133] ("*Modern Land*"), a Cayman Islands ("Cayman") scheme was used to compromise New York law-governed debt. The US Bankruptcy Court decided that comity required Chapter 15 recognition of the Cayman scheme to operate as a substantive discharge of the debt under New York law, and not just as a procedural stay of actions on the debt in the US.[134]

56 If, contrary to what has been argued, the Singapore courts accept that Parliament intended Singapore's Article 21(1)(g) to incorporate the "US model" of recognition of foreign insolvency-related orders into Singapore law, the Singapore courts might well follow the *Modern Land* decision. If they do so, Singapore orders recognising restructuring plans which compromise Singapore-law debt are likely to be viewed overseas as a substantive discharge of the debt.

130 See, *eg*, *Re OJSC International Bank of Azerbaijan* [2019] 2 All ER 713 at [51].

131 [2015] 1 CLC 706 at [76] and [145].

132 *Re Tantleff, Alan* [2022] SGHC 147 at [72], following the numerous cases in which English schemes have been recognised under Chapter 15 of the US Bankruptcy Code 11 USC (US) (1978).

133 Case No 22-10707 (MG) (Bankr SDNY, 2022).

134 *In re Modern Land (China) Co Ltd* Case No 22-10707 (MG) at 8–9 (Bankr SDNY, 2022).

57 What does this mean in practice? Say an English scheme discharges a Singapore-law guarantee granted by a Cayman company. The scheme is recognised in Singapore under Art 21(1)(g). A dissenting creditor might sue the Cayman company on the guarantee in Cayman. If *Modern Land* is applied in Singapore, the company could put in expert evidence (in Cayman) that recognition under Art 21(1)(g) of the Singapore Model Law substantively discharges the loan under its rightful governing law, in compliance with *Gibbs*. That could stop the dissenting creditor's Cayman action in its tracks.

58 Finally, Abdullah J also briefly remarked in *Re Tantleff* that Art 21(1)(g) allows the application of foreign insolvency law in Singapore.[135] In future, practitioners might be able to rely on this part of *Re Tantleff* to commence so-called "synthetic proceedings" in Singapore, for instance, by seeking orders that the Singapore court apply foreign transaction avoidance laws with no local equivalent. The Singapore courts are well equipped to apply foreign law, for the reasons explained at para 41 above.

VI. Conclusion

59 *Re Tantleff* has opened an exciting new chapter in the development of Singapore's cross-border insolvency law, despite reservations about some aspects of the decision. It certainly raises many questions which the Court of Appeal may wish to consider. And it creates opportunities for creative counsel and insolvency practitioners to push the boundaries of the possible in cross-border restructuring and asset-recovery cases with a Singapore connection.

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135 *Re Tantleff, Alan* [2022] SGHC 147 at [69].