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17. INSOLVENCY LAW

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I. Introduction

17.1 The Singapore courts delivered a number of important decisions on insolvency law in 2019. They include the Court of Appeal's decision in *Pathfinder Strategic Credit LP v Empire Capital Resources Pte Ltd*,[1] which set out a minimal standard of disclosure by a debtor who seeks to restructure its debts by a scheme of arrangement, and the High Court's decision in *BWF v BWG*[2] on the interplay between winding up and arbitral proceedings.[3] The local jurisprudence on cross-border insolvency continues to grow, with decisions on recognition of foreign non-main proceedings.[4] and the recognition of foreign trustees in bankruptcy under common law.[5]

1 [2019] 2 SLR 77.
2 [2020] 3 SLR 894.
3 The appeal against the High Court's decision has been dismissed – see *BWG v BWF* [2020] 1 SLR 1296, and also the Court of Appeal's judgment in *AnAn Group Singapore Pte Ltd v VTB Bank* [2020] 1 SLR 1158. These two decisions will be covered in the next review.
4 *Re Rooftop Group International Pte Ltd* [2019] SGHC 280.
5 *Heince Tombak Simanjuntak v Paulus Tannos* [2019] SGHC 216.

II. Winding up of companies

A. Disputed debts

17.2 In *Seah Chee Wan v Connectus Group Pte Ltd*,[6] the High Court applied the well-established principle that where the company disputes the debt claimed by the creditor on substantial grounds, the court will restrain the winding-up application as an abuse of process for the creditor to try to enforce a disputed debt in such a way[7] and that the standard for determining the existence of a substantial dispute is "no more than that for resisting a summary judgment application, that is, the debtor-company need only raise triable issues".[8]

17.3 In this case, the applicant was himself a shareholder of the respondent company. Against a backdrop of disputes that had arisen between him and the other shareholders, the applicant served a statutory demand on the respondent company, which was unsatisfied. The applicant followed up with an application to wind up the respondent company pursuant to s 254(1)(*e*) of the Companies Act[9] which provides that the court "may order the winding up if … (e) the company is unable to pay its debts". The application was also made on the basis that it was just and equitable to wind up the company in view of the disputes between the shareholders.

17.4 While the respondent company itself was unrepresented at the hearing, one of its shareholders contested the application on the ground that the debts were disputed. Following a hearing over five days where the learned judge heard the evidence of the parties, he found that it had not been demonstrated that a substantial dispute existed in respect of the debts due and owing to the applicant.

B. Stay of enforcement

17.5 In *SCK Serijadi Sdn Bhd v Artison Interior Pte Ltd*,[10] a judgment creditor had served a pair of garnishee orders *nisi* on the garnishee. Before the show-cause hearing, however, the judgment debtor was placed under creditors' voluntary winding-up.

6 [2019] SGHC 228.
7 *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR(R) 268.
8 *Pacific Recreation Pte Ltd v SY Technology Inc* [2008] 2 SLR(R) 491.
9 Cap 50, 2006 Rev Ed.
10 [2019] 1 SLR 680.

17.6 Under s 299(2) of the Companies Act, the garnishee proceedings were stayed and could not be proceeded with except with the leave of court. Section 334(1) of the Companies Act also prevented the judgment creditor from retaining the benefit of the attachment unless the court orders otherwise.

17.7 In the circumstances, the judgment filed an application to the High Court for leave to continue with the garnishee proceedings and for an order allowing it to retain the benefit of the attachment. The High Court judge dismissed the application.[11] The judgment creditor appealed.

17.8 Before the Court of Appeal, the judgment creditor argued that the service of the garnishee order *nisi* on the garnishee rendered it a secured creditor whose rights were unaffected by the winding up of the company in liquidation, which had occurred prior to the show cause hearing.

17.9 Dismissing the appeal, the Court of Appeal followed its earlier decision in *Transbilt Engineering Pte Ltd v Finebuild Systems Pte Ltd*[12] ("*Transbilt*"), which had held that a judgment creditor who has obtained a garnishee order *nisi* is to be treated as an unsecured creditor and absent exceptional circumstances, is not entitled to proceed to have the garnishee order *nisi* made absolute after the commencement of winding-up proceedings.

17.10 The Court of Appeal nevertheless recognised that there were a number of authorities in which the courts have held that the service of a garnishee order *nisi* creates an "equitable charge" in the sense that it binds the garnishee not to pay the debt over to the judgment debtor pending the garnishee show-cause hearing. This was an argument that was not expressly considered by the court in *Transbilt*. As such, the Court of Appeal took the opportunity to trace the genesis of such an equitable charge and to explain why the service of a garnishee order *nisi* order does not render a judgment creditor a "secured creditor" for purposes of ss 299(2) and 334(1) of the Companies Act.

17.11 The Court of Appeal held that the "equitable charge" created by a garnishee order *nisi* over the garnished debt did not confer upon the judgment creditor an absolute right to have the subject property applied for its sole benefit. The "equitable charge" created by a garnishee order *nisi* only serves to prevent the judgment debtor from exercising its full and unfettered right to deal with the garnished debt in a manner that was inconsistent with the judgment creditor's rights. This is because

11 See *SCK Serijadi Sdn Bhd v Artison Interior Pte Ltd* [2018] SGHC 8.
12 [2005] 3 SLR(R) 550.

a garnishee order *nisi* created an obligation on the garnishee not to pay the garnished debt to the judgment debtor in breach of the order *nisi*.

17.12 The Court of Appeal also helpfully clarified that the "equitable charge" created by a garnishee order *nisi* was materially different from an equitable charge, which created security for the repayment of a debt. In the latter case, the creditor was given the right to resort to the charged property to satisfy the debt on the condition that it remained unpaid and this condition was necessarily fulfilled in every situation where the creditor sought to enforce its security.

17.13 By contrast, the "equitable charge" created by a garnishee order *nisi* only provides the judgment creditor with a contingent right to resort to the garnished debt, depending on whether some good cause might be shown otherwise. Whether such good cause might be shown was a future contingency which would be thwarted where the judgment debtor was placed under winding up before the show-cause hearing. As such, a judgment creditor was not in the same position as a secured creditor who had already accrued an entitlement to have the charged property of the debtor made available to satisfy the debt by virtue of the debtor's default in repayment.

C. Stay of winding-up proceedings in favour of arbitration

17.14 In *BWF v BWG*,[13] the High Court considered an application for an injunction to restrain the commencement of winding-up proceedings on the basis that the underlying disputed debt fell within the scope of an arbitration clause. The High Court had to decide what the applicable standard was for the grant of an injunction in these circumstances: would a *bona fide prima facie* dispute[14] suffice; or must the applicant show that there is a triable issue, which is the standard generally used for an injunction to restrain winding-up proceedings?[15]

17.15 The learned judge held that the existence of a *bona fide prima facie* dispute was enough for the court to grant the injunction sought. In arriving at her decision, the learned judge preferred the approach taken by the earlier High Court decision in *BDG v BDH*,[16] which, she noted, was followed by the Hong Kong Court of First Instance in *Lasmos Ltd v Southwest Pacific Bauxite (HK) Ltd*.[17]

13 See para 17.1 above.
14 As applied in *BDG v BDH* [2016] 5 SLR 977.
15 As applied in *VTB Bank v Anan Group (Singapore) Pte Ltd* [2018] SGHC 250.
16 [2016] 5 SLR 977.
17 [2018] HKCU 702.

17.16 The learned judge also took guidance from the two decisions of the Court of Appeal which emphasised the primacy of party autonomy. In *Tjong Very Sumito v Antig Investments Pte Ltd*,[18] the Court of Appeal held that the need to respect party autonomy has been accepted as the cornerstone underlying judicial non-intervention in arbitration. In similar vein, the Court of Appeal in *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd*[19] held that, in the context of exclusive jurisdiction clauses, the principle of party autonomy warranted that a court should disregard the merits of the parties' cases when considering whether there was a strong cause to refuse a stay. In doing so, the Court of Appeal in *Vinmar* departed from previous authorities laid down by the court.

17.17 The learned judge considered that the existence of an arbitration clause displaced the principle that a bankruptcy court should be able to have recourse to the summary judgment standard in order to protect the interest of a meritorious debtor. Where parties have agreed to an arbitration clause, it would be a misuse of judicial facilities for a creditor to proceed with winding-up proceedings knowing that the debt which is its premise is the subject of a dispute which was earlier agreed to be arbitrated, unless there is good reason to allow him to renege upon his contractual bargain. To hold otherwise would encourage parties to bypass the arbitration agreement as a standard tactic by presenting a winding-up application, thereby pressuring the alleged debtor with the draconian threat of liquidation.

17.18 The learned judge noted that in *VTB Bank v Anan Group (Singapore) Pte Ltd*,[20] the High Court considered that *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd*[21] ("*Metalform*"), which was binding on the High Court, had held that where there was a cross-claim that was to be referred to arbitration, the applicable standard for an injunction restraining the winding-up proceedings was the triable issues standard. The learned judge (correctly in the view of the authors) reasoned that in the Court of Appeal in *Metalform* did not have to decide on the significance of the arbitration clause because the parties did not argue on the significance of the cross-claim's submission to arbitration with regard to the applicable standard for granting injunctions to restrain the commencement of winding-up proceedings. As such, *Metalform* did not bind the High Court on the question before the court in *BWF*.

18 [2009] 4 SLR(R) 732.
19 [2018] 2 SLR 1271.
20 [2018] SGHC 250.
21 [2007] 2 SLR(R) 268.

17.19 Accordingly, the learned judge concluded that the relevant standard was that of a *bona fide prima facie* dispute and that the court. when faced with an application for an injunction against the commencement of winding-up proceedings, need not be concerned with the merits of the parties' arguments. Only where an applicant for a stay is guilty of an abuse of process would the court decline to grant a stay. One example would be where the applicant had made a clear and unequivocal admission as to both the liability and quantum of a claim but seeks a stay for no reason other than its alleged inability to pay. The learned judge noted that the threshold for abusive conduct is very high and would only occur in exceptional situations. On the facts, the learned judge found that there was a *bona fide prima facie* disputed debt and granted the injunction.

D. Stay of winding-up proceedings

17.20 *Industrial Floor & Systems Pte Ltd v Civil Tech Pte Ltd*[22] involved an unusual application by a company to adjourn the winding-up application pending the hearing of its application to stay the winding-up proceedings.

17.21 The stay application was premised upon the court not proceeding with the application pending the resolution, whether by agreement or adjudication, of a claim against its main contractor for a sum that it alleged would be enough to repay all its debts. In making the application, the company did not dispute that it was in dire financial straits and was facing multiple claims and five other winding-up applications.

17.22 The learned judge was unpersuaded that this was a sufficient reason to adjourn the winding-up application. Any delay in the winding up of the company would permit it to continue incurring debts in the course of its business when it was already clearly insolvent. Notably, the company had not made any proposals for payment of its debts to its creditors which were found to be acceptable, nor had the company offered to provide any security to its creditors.

17.23 The learned judge was also not prepared to adjourn the winding-up application on an indefinite basis. Yet, this was exactly what the company was asking the court to do given that the initial adjournment would not be the last. Further, the learned judge entertained doubts as to the correctness of the position taken by the company in relation to its entitlement to bring a claim against its main contractor via adjudication.

22 [2019] SGHC 50.

17.24 Further, the company also urged the court to give the company a chance to fend off the winding-up application given its established track record as a contractor in Singapore and that this was a public policy consideration that the court should take into account. The learned judge disagreed. He held that it would not be in the public interest for the court to permit a heavily insolvent company to continue business operations and keep its debtors waiting indefinitely without any prospect of recovery. After all, the company conceded that it had considered but had dismissed applying for judicial management as a possibility. Accordingly, the learned judge proceeded with the application and made an order winding up the company.

E. Setting aside a winding up

17.25 The High Court in *Standard Chartered Bank (Singapore) Ltd v Construction Professional Resources Pte Ltd*[23] *had to address the question whether it has the power to set aside a winding-up order against the defendant.*

17.26 The plaintiff had obtained an order of court to wind up the defendant on account of unpaid debts, and liquidators were appointed. The defendant, however, managed to pay the plaintiff's debts later and applied for the winding-up order to be permanently stayed, relying on the High Court decision in *Interocean Holdings Group (BVI) Ltd v Zi-Techasia (Singapore) Pte Ltd*.[24]

17.27 In the present case, the court noted that while there might be no express legislative power for the court to set aside the order, other legal issues could surface if the court was unwilling to set aside the order. For instance, if the company had been legally wound up and the board of directors regained its powers due to a stay of the order, it was unclear what future creditors would be able to do if the company faced problems in paying its debts. These creditors would not be able to wind up the company as it had already been wound-up, and they might not be entitled to rescind the stay order.

17.28 The court held that there was no express power granted in the relevant legislation, and that it would have to find its source of power elsewhere. The court then suggested that the source might be its inherent powers under O 92 r 4 of the Rules of Court.[25] The court's inherent powers may be invoked in areas where no statutory provision applies and

23 [2019] 5 SLR 709.
24 [2014] 2 SLR 485.
25 Cap 322, R 5, 2014 Rev Ed.

there are gaps in the law. The court then noted that while its inherent power should not be the source of unrestrained judicial power, it can be used in instances where it can express justice and ensure that no one is prejudiced in any way.

17.29 The court directed that an application for the winding-up order to be set aside should be made by either the creditor or the liquidator under a fresh originating summons, as the current winding-up proceeding was spent and the defendant had no *locus standi* to apply. The application was thus adjourned, to be heard with any application for the winding-up order to be set aside. Such an application was subsequently made, and the court set aside the winding-up order.

17.30 This decision highlights a lacuna in the insolvency legislation currently in force. The gap has been addressed by way of s 186 of the Insolvency, Restructuring and Dissolution Act,[26] which expressly states that the court has the power to, *inter alia*, make an order terminating a winding up. In making such an order, the court may give directions for the resumption of management and control of the company by the officers of the company, including directions for the convening of a general meeting of members of the company to elect directors to take office upon the termination of the winding up.

F. Winding up for collateral purpose

17.31 In *China Zhejiang Construction Group (HK) Ltd v Zhejiang Construction Investment (S) Pte Ltd*,[27] the High Court dealt with an application by China Zhejiang Construction Group (HK) Ltd ("Zhejiang HK") to wind up Zhejiang Construction Investment (S) Pte Ltd ("the Company") on the ground that the latter was unable to pay its debts. While the Company did not oppose the winding up, a non-party, Chiu Teng Construction ("the Non-Party") applied for the winding-up application be dismissed on the basis that it was brought for a collateral purpose.

17.32 The Non-Party and the Company had entered into a joint venture agreement to work on a construction project. The Non-Party claimed that the Company mismanaged the project and that it had consequentially suffered losses. In November 2018, the Non-Party served a letter of demand on the Company, but the claim was denied by the Company. The Non-Party and the Company were in the midst of negotiations for the

26 No 40 of 2018.
27 [2019] SGHC 195.

payment claims when the Non-Party was alerted about the winding-up application by Zhejiang HK.

17.33 The Non-Party alleged that the winding-up application was for a collateral purpose, as Zhejiang HK and the Company shared the same directors up till April 2019 and had the same controlling shareholder, Zhejiang Construction Investment Group Co Ltd ("Zhejiang China"). One of the loans extended by Zhejiang HK to the Company was used to repay the Company's other debts. The Non-Party also alleged that (a) such related party transactions were not properly reflected in the Company's financial statements; (b) the Company's records were suspicious; and (c) that it was doubtful if liabilities owed by the Company were genuine.

17.34 The court held that it has an inherent jurisdiction to prevent an abuse of process when hearing a winding-up application, and retains the residual discretion to consider all relevant factors, including utility, propriety and the effect of a winding-up order, as well as the overall fairness and justice of the case.

17.35 The court, however, held that the evidence did not suggest any abuse of process, and that the Non-Party's case was merely based on suspicion and speculation. The court added that if Zhejiang HK's intention of winding up the Company was to enable the latter to avoid paying its creditors, then a winding-up order was all the more appropriate; the Company should be wound up without delay and the alleged suspicious transactions be examined by the liquidator to determine if there are grounds for any clawback. The Non-Party would then be able to provide evidence of any wrongdoing against the Company or its directors and assist the liquidator in deciding if any further action was necessary.

17.36 This decision is correct on the facts. A creditor pursuing its claim against the debtor may view a winding-up application filed by the debtor's related company as an attempt to stymie the claim. But if the winding-up application is properly made and based on an undisputed debt, it is difficult to argue that it must have been made for a collateral motive. It is then up to the liquidator to review the debtor's affairs to see if there is any ground to challenge any antecedent transactions.

III. Judicial management

17.37 The appointment of judicial managers lasts for a period of 180 days and can be extended by order of court. In *Re CNA Group Ltd*,[28]

28 [2019] SGHC 78.

a mainboard-listed company had been in judicial management since September 2015. Between September 2015 and March 2019, the High Court granted six extensions of the judicial management period to allow the judicial managers to achieve the purposes of their appointment.

17.38 By March 2019, it appeared that the only purpose remaining was for the judicial managers to monetise the company's listing status by securing an investment. In this regard, the High Court noted that the judicial managers had courted at least six potential investors, but each of the courtships had failed. The High Court observed that judicial managers were obliged under s 227Q(1) of the Companies Act to apply for a discharge, if it appeared that the remaining purpose was incapable of being achieved. As the judicial managers were only able to state that they were following up on two potential investors as at March 2019, the High Court held that this was at best an expression of hope, and an insufficient basis to justify a further extension of the judicial management orders.

IV. Schemes of arrangement

17.39 In *Pathfinder Strategic Credit LP v Empire Capital Resources Pte Ltd*,[29] the Court of Appeal gave important guidance on the extent of disclosures that should be made at the time a company applies for leave to convene a creditors' meeting to consider a scheme under s 210(1) of the Companies Act.

17.40 The applicant is an investment holding company and a member of the Indonesia-based Berau group of companies. Various entities within the Berau group had previously commenced restructuring proceedings in Singapore, which had since been dismissed or withdrawn. The present application was the first to be filed by the applicant, who was a guarantor of two sets of notes issued by related companies. The proposal was broadly for noteholders to forgive the debts of companies related to the applicant, in exchange for new notes which would be redeemed with proceeds from group operations.

17.41 The Court of Appeal affirmed that at the leave stage, disclosure on an applicant's financial affairs must be to an extent reasonably necessary for the court to be satisfied that the fair conduct of a meeting was possible. Reasonableness was contextual, and the court would consider factors like the size and resources of the company, the size of debts to be restructured, the urgency of the application and reasons for the company's inability to provide more disclosure.

29 See para 17.1 above.

17.42 In this case, the Court of Appeal was troubled by the complete lack of updated financial information on ten related companies whose debts were sought to be compromised. In particular, the financial statements of the applicant and the note issuers were not available. Audited accounts for other related companies were either almost four years old, or so sparse as to not be meaningful. Further, the applicant had not responded adequately to allegations that at least US$150m had been wrongfully diverted from accounts that were intended as securities for the notes. Accordingly, the court held that it would be futile to grant leave to convene the scheme meeting.

17.43 The court went on to observe, in *dicta*, that it had jurisdiction to grant leave under s 210(1) to convene a scheme meeting for a proposal to release third parties from their liabilities. The test was whether there was a sufficient nexus between the release of such liabilities, and the relationship between the creditor and the company proposing the scheme. On the facts, there was a sufficient connection as the applicant was a guarantor of the notes, and releasing the issuers was necessary to give effect to a proposed scheme. This suggests that the court had accepted, as a matter of principle, that a guarantor could make a proposal to release claims as against a principal obligor, and that the court's jurisdiction was not limited to applications made by the principal obligor itself to present a scheme.

17.44 The court also considered, in *dicta*, whether the two sets of noteholders should be classed separately for the purposes of voting. The court observed that although the two sets of noteholders would receive different estimated rates of recovery, they could still sensibly consult together on their common interest as there would only be a 3% difference between their estimated recoveries in the proposed scheme.

17.45 Finally, the court declined to find that the Berau group was abusing the scheme regime to prevent or delay enforcement. Although this was the Berau group's fourth set of restructuring proceedings in Singapore, the court accepted that there were genuine changes in the restructuring plans put forth. Likewise, creditors' positions and the composition of creditors had changed over time.

V. Bankruptcy

A. Annulment of bankruptcy orders

17.46 In *Standard Chartered Bank, Singapore Branch v Chua Seng Kiat*,[30] the High Court gave guidance on whether a bankruptcy order could be annulled, where there were still disputed debts which had yet to be admitted or proved against the estate.

17.47 In this case, the bankrupt had settled all his debts during his bankruptcy, save for two disputed claims, which he offered to secure by a solicitors' undertaking. The bankrupt successfully annulled his bankruptcy under s 123(1)(*b*) of the Bankruptcy Act,[31] on the basis that the debts and expenses of the bankruptcy had either been paid or secured to the satisfaction of the court.

17.48 Practically, this meant that the bankrupt had paid selected creditors within his bankruptcy, while the creditor of the disputed debts was left to pursue his claims through a civil writ action instead of through adjudication by the bankrupt's private trustee. The creditor argued that allowing the then-bankrupt to pick and choose who he paid was effectively a circumvention of *pari passu* principles.

17.49 The High Court affirmed the annulment and held that there was no requirement in s 123(1)(*b*) of the Bankruptcy Act for disputed debts to first be proven in bankruptcy when security was offered for the debts. The High Court also observed that *pari passu* principles were not offended, as the intervening creditor was now akin to a secured creditor for his claims. Any prejudice from having to pursue a civil writ action was minimal.

17.50 The authors agree that in this case, the intervening creditor would have suffered no material prejudice from the annulment. In a normal case, creditors will determine their disputed debts through litigation. The quicker mode of proving and adjudicating debts is merely an incident of bankruptcy, and the court should not withhold an annulment simply because the private trustees have not adjudicated a disputed debt for which security is offered. In this case, the intervening creditor would have comfort in starting litigation, as he would be secured for his entire liquidated claim.

17.51 However, the authors envisage that issues could arise if the disputed claim was not for a liquidated sum. For example, s 87 of the

30 [2019] SGHC 240.
31 Cap 20, 2009 Rev Ed.

Bankruptcy Act provides that creditors may prove for unliquidated claims (including, *inter alia*, those arising from contracts, breaches of trust, tort, bailments or obligations to make restitution). The nature of such claims is that the full extent of loss has yet to be ascertained, or can only be determined after taking into account future events. If a bankruptcy is annulled after the bankrupt provides security for a disputed but unliquidated claim, it is possible that the creditor's claims may later exceed any security provided. If the debtor is unable to provide further security, the effect is that some creditors would have been paid in full prior to the annulment of a bankruptcy, while the creditor whose claim is disputed would be out of pocket for the unsecured portion of his claims. Accordingly, it is submitted that the court may also have regard in a future case to the nature of the disputed debt, the adequacy of the security offered and the bankrupt's means to satisfy any claims beyond the security.

B. Setting aside statutory demands

17.52 In *Yashwant Bajaj v Toru Ueda*,[32] parties settled a long-running dispute by appointing an independent accountant to calculate a settlement sum using an agreed formula. The independent accountant's terms of reference also provided that the computed sum was to be a final and binding determination. Disagreements later arose on the data that the accountant could rely on. As these disagreements were not resolved, the accountant computed a sum but qualified that it was subject to adjustments, if the disagreements were resolved.

17.53 The issue was whether a bankruptcy statutory demand founded on the independent accountant's computation could be set aside, on the basis that the underlying debt in the settlement agreement had not accrued yet.

17.54 The Court of Appeal held that a qualified computation lacked certainty and was not a final determination under the accountant's terms of reference. As this meant that no debt was due under the settlement agreement, the Court of Appeal set aside the statutory demand pursuant to rr 98(2)(*b*) and 98(2)(*e*) of the Bankruptcy Rules.[33]

17.55 This case illustrates that the terms of reference for an expert valuation, and the expert's approach towards gaps in information, would be key in deciding whether a valuation is valid and binding. In

32 [2020] 1 SLR 36.
33 Cap 20, R 1, 2006 Rev Ed.

the subsequent case of *Viking Engineering Pte Ltd v Feen, Bjornar*,[34] an expert valuer was likewise faced with gaps in information due to a party's refusal to co-operate. The valuer's terms of reference granted him various discretionary powers where such gaps existed. The valuer in this case computed a sum, and listed assumptions he had to make as a result of gaps in information. The High Court found that the valuation was not qualified, and that it was valid and binding.

17.56 In *Lalwani Ashok Bherumal v Lalwani Shalini Gobind*,[35] the High Court heard an appeal against the setting aside of a statutory demand on the ground that the sums in the demand were inaccurate. The High Court was clear in their position that "the overall effect of non-compliance with r 98(2)(*d*) of the Bankruptcy Rules is not … that a statutory demand would automatically be set aside".[36]

17.57 The appellants were beneficiaries of their late father's estate. The respondent was the executor and trustee of the estate. The defendants previously commenced and succeeded in a suit against the plaintiff for the recovery of sums he misappropriated from the estate, and for accounts to be taken. The appellants issued a statutory demand for the judgment sum against the respondent, which he set aside on the basis that, *inter alia*, the sums were inaccurate, and there were issues with whether the sums were due to the appellants as beneficiaries, or to the estate.

17.58 On the facts, the court correctly held that the statutory demand should not be set aside on a technicality of an inaccurate sum where there was no substantial injustice to the debtor.[37]

17.59 The High Court agreed with the appellants that r 278 of the Bankruptcy Rules gives the court discretion to deal with alleged irregularities and ordered the respondent to pay the correct sum within a further 21 days, failing which a bankruptcy application could be filed.

17.60 As an overlay, the High Court also correctly decided that the respondent should not be allowed to rely on the technical ground that the judgment sum was due to the estate and not to the beneficiaries. As the executor of the estate, the respondent was duty-bound under court order to pay the misappropriated money to the estate, and thereafter

34 [2020] SGHC 78.
35 [2019] 4 SLR 1304.
36 *Lalwani Ashok Bherumal v Lalwani Shalini Gobind* [2019] 4 SLR 1304 at [22].
37 Relying on *Wheeler, Mark v Standard Chartered Bank (Singapore) Ltd* [2018] SGHC 205; *Re Rasmachayana Sulistyo* [2005] 1 SLR(R) 483; and *iTronic Holdings Pte Ltd v Tan Swee Leon* [2018] 4 SLR 359.

duty-bound as a fiduciary to distribute that money to the beneficiaries in accordance with the directions of the will.

17.61 Another attempt to set aside a statutory demand arose in *Asia Silks Stores v Lata Ashok Khemlani*,[38] the High Court heard an appeal against an order setting aside a statutory demand. The plaintiff sold textiles to the defendant, the sole proprietor of a firm trading under the name DJ Hira Enterprises ("DJ Hira").

17.62 The defendant initially ignored the statutory demand because she allegedly obtained legal advice that she could do so if she did not owe the money. This subsequently formed her basis for setting aside the statutory demand in that the debt was disputed on substantial grounds. The defendant's counsel subsequently argued, *inter alia*, that the defendant's marriage had broken down and her husband had accrued the trading debt without her knowledge. Further, the defendant removed her husband's authority to operate the cheques account upon discovery of the foregoing. Her counsel admitted that the defendant ought to have closed the account or removed herself from the business after she was no longer involved.

17.63 Despite the defendant's husband acknowledging the debt and the fact that he accrued the debt without his wife's knowledge, the High Court found sufficient evidence to show the plaintiff was doing business with DJ Hira, and that DJ Hira was liable for the debt. Accordingly, the appeal was allowed, and the defendant was given 21 days to comply with the statutory demand.

C. Service of statutory demand

17.64 In *Marina Bay Sands Pte Ltd v Osuki Yohei*,[39] the learned assistant registrar was faced with a bankruptcy application where a statutory demand sent to the defendant was returned unclaimed with the remark "[n]o such name/company".[40] The assistant registrar set aside the bankruptcy application on the basis that "a statutory demand cannot be validly served when it is returned unclaimed".[41] Thus, the presumption that the defendant was unable to pay his debt was not triggered and s 61(1)(*c*) of the Bankruptcy Act was deemed to be unsatisfied.

38 [2019] SGHC 112.
39 [2019] SGHCR 7.
40 *Marina Bay Sands Pte Ltd v Osuki Yohei* [2019] SGHCR 7 at [4].
41 *Marina Bay Sands Pte Ltd v Osuki Yohei* [2019] SGHCR 7 at [33].

17.65 The plaintiff had previously obtained a judgment in default of appearance against the defendant. Pursuant to the judgment, the plaintiff issued a statutory demand and argued that, under a credit agreement between the parties, merely "sending" the demand constituted valid service. The plaintiff relied on two High Court decisions to make his point, namely, *Re Rasmachayana Sulistyo*[42] ("*Rasmachayana*") and *Oversea-Chinese Banking Corp Ltd v Measurex Corp Bhd*[43] ("*Measurex*"). The assistant registrar considered whether, as a general principle, there was valid service of a statutory demand if it was returned unclaimed.

17.66 The assistant registrar distinguished *Rasmachayana* on the basis that (a) the crux of the matter was whether parties could contractually agree on alternative modalities of service and not whether there was service at all; (b) there was no complaint that the debtors there did not have *de facto* notice of the statutory demand; and most importantly, (c) the debtors were represented by counsel. Hence, it must have been that the debtors must have at some point been aware of the bankruptcy proceedings against them.[44]

17.67 In the assistant registrar's view, the decision in *Measurex* could also be distinguished. The defendant in *Measurex* executed two deeds of guarantee that provided that service of process in any legal action or proceeding was deemed to be good service if served on its subsidiary. Even though judgment in default of appearance was entered, the defendant came to know of the writ and the default judgment later. The matter concerned a writ action and not a bankruptcy application, hence a different set of rules and procedures applied. The defendant had recourse against its subsidiary for failing to forward the writ.[45] Having distinguished the two earlier High Court decisions, the assistant registrar opined that previous case law was silent on the matter.

17.68 The assistant registrar found it "linguistically and conceptually difficult to conclude that there can be deemed service of a statutory demand that is returned unclaimed".[46] It is contradictory to say that there is deemed service when, as a matter of fact, there was none. Conceptually, deemed service covers situations where the court does not know whether there has been actual service but is prepared to accept that there is valid service notwithstanding. An unclaimed statutory demand, however, does not fall within this ambit.

42 [2005] 1 SLR(R) 483.
43 [2002] 2 SLR(R) 684.
44 *Marina Bay Sands Pte Ltd v Osuki Yohei* [2019] SGHCR 7 at [17].
45 *Marina Bay Sands Pte Ltd v Osuki Yohei* [2019] SGHCR 7 at [19].
46 *Marina Bay Sands Pte Ltd v Osuki Yohei* [2019] SGHCR 7 at [23].

17.69 Further, the assistant registrar was of the view that it cannot be allowed that a legal conclusion is fundamentally at odds with factual reality. As stated in *Rasmachayana*,[47] "the essence of service requirements under the [Bankruptcy Rules] is to ensure that the statutory demand, bankruptcy petition and other relevant processes are brought to the personal attention of the debtor".[48] It cannot be said that there is deemed service if the debtor had no notice of it.

17.70 The assistant registrar concluded that a statutory demand cannot be validly served when it is returned unclaimed. He clarified that this position did not impose on creditors a requirement to verify whether there had been actual service. For example, the assistant registrar observed that it is open for parties to agree to a mode of service that does not allow the creditor to know whether service has been successful.

D. Voluntary arrangement

17.71 In *Aathar Ah Kong Andrew v CIMB Securities (Singapore) Pte Ltd*,[49] the Court of Appeal dealt with an appeal against the revocation of a previously approved voluntary arrangement. The Court of Appeal dismissed the plaintiff's appeal on the basis that, *inter alia*, the High Court was correct in revoking the prior approval for the plaintiff's voluntary arrangement because it was fraught with material irregularities, in particular, in the manner in which the creditors' claims were adjudicated by the plaintiff's nominee and the results of the adjudication.

17.72 This appeal concerned the plaintiff's second attempt at obtaining approval for a voluntary arrangement. Approval for the plaintiff's first voluntary arrangement was revoked by the dissenting creditors due to the plaintiff's lack of candid disclosure in his statement of affairs. In his second attempt, similar issues on the lack of transparency and veracity of the information on the plaintiff's assets and debts were raised. The High Court had revoked the second voluntary arrangement, noting a number of material irregularities. One was the manner in which the nominee treated certain litigation claims. The nominee initially took the position that he had doubts about the claims. He agreed to mark the claims as "objected to", in which case the votes of such claims should have been counted, subject to the vote being deemed invalid if the objection was maintained. However, the nominee later departed from this approach and ascribed no value to such claims. If such claims had been taken into account, the voluntary arrangement would have failed.

47 *Re Rasmachayana Sulistyo* [2005] 1 SLR(R) 483 at [21].
48 *Marina Bay Sands Pte Ltd v Osuki Yohei* [2019] SGHCR 7 at [27].
49 [2019] 2 SLR 164.

17.73 The High Court had also not been satisfied with the plaintiff's explanation on why a group of creditors, who had previously waived their claims, were participating and voting to approve the arrangement. Moreover, r 68(2)(*b*) of the Bankruptcy Rules requiring the debtor to state the proposed source of his funding was not satisfied.[50]

17.74 On what constitutes material irregularity, the Court of Appeal held that as a starting point, "material irregularity can occur at several stages in a proposed voluntary arrangement"[51] and that courts should "look at the whole process". Importantly, an irregularity is material "if, objectively assessed, the procedure had been carried out correctly (or certain facts truthfully told), it would likely have made a material difference in the way the creditors would have considered and assessed the terms of the proposed voluntary arrangement".[52] This applies equally to those present at the creditors' meeting and proxies in the context of omissions.

17.75 Additionally, material irregularity in the context of voting may also arise "even if the numbers in respect of the irregularity do not at first blush appear capable of changing the outcome of the creditors' meeting".[53] In such instances, the nature of the irregularity and the circumstances of the meeting ought to be considered.

17.76 In the present case, the Court of Appeal held that the nominee's conduct amounted to a clear example of material irregularity. The nominee flipflopped on an agreed upon course of action pursuant to the minutes taken at the creditors' meeting, objecting to the litigation claims knowing full well that if he had rejected them instead that he would have to provide written reasons. The nominee provided the court with statements found to be internally inconsistent and difficult to reconcile. Had certain votes been admitted instead of objected to, there would have been insufficient votes for the second voluntary arrangement. The Court of Appeal dismissed the appeal.

50 *Aathar Ah Kong Andrew v CIMB Securities (Singapore) Pte Ltd* [2019] 2 SLR 164 at [37].

51 *Aathar Ah Kong Andrew v CIMB Securities (Singapore) Pte Ltd* [2019] 2 SLR 164 at [40], citing *Andrew Fender v The Commissioners of Inland Revenue* [2003] EWHC 3543 (Ch) at [11].

52 *Aathar Ah Kong Andrew v CIMB Securities (Singapore) Pte Ltd* [2019] 2 SLR 164 at [41].

53 *Aathar Ah Kong Andrew v CIMB Securities (Singapore) Pte Ltd* [2019] 2 SLR 164 at [71].

17.77 Importantly, the Court of Appeal emphasised that a nominee in a voluntary arrangement is not unlike a scheme manager,[54] and owes certain duties. The nominee is not simply a rubber stamp of the debtor. He must be independent. Further, he should satisfy his doubts on the feasibility and propriety of the debtor's proposal to ensure candour and full disclosure by the debtor. The Court of Appeal provided useful and welcome guidance on the duties of a nominee in a voluntary arrangement. In so doing, the court correctly drew an analogy with the duties of a scheme manager. Whilst both a scheme manager and a nominee are engaged by the debtor, it cannot be gainsaid that both perform critical functions in the debt restructuring process, which should be conducted with the requisite transparency and integrity.

E. Interim orders

17.78 Debtors who intend to propose a voluntary arrangement can seek temporary relief from a bankruptcy order being made, by applying for an interim order under s 45(1) of the Bankruptcy Act. This involves a balancing exercise between upholding creditors' rights to enforce their claims and giving the debtor an opportunity to avert bankruptcy with an acceptable repayment proposal.

17.79 In *Re Andrla, Dominic*,[55] the High Court reaffirmed that an applicant must show that his proposal to creditors is "serious and viable", before an interim order would be granted. In dismissing the applicant's appeal for an interim order, the High Court noted that applications for interim orders should not become a means of postponing the making of bankruptcy orders. The High Court observed that the applicant gave no information on how he would procure a debtor company to repay a loan owed to him to fund his proposal. Although the applicant was managing director of that debtor, the applicant could not give meaningful details on how the debtor would be able to pay the entire loan within the period proposed.

F. Extent of equitable lien arising from an uncompleted property purchase

17.80 The case of *DBS Bank Ltd v Davis, Colin Niel*[56] highlights the differences in outcome between pursuing personal and equitable claims against a defendant who has been made bankrupt.

54 See *Royal Bank of Scotland v TT International Ltd* [2012] 2 SLR 213.
55 [2019] SGHC 77.
56 [2020] 3 SLR 1090.

17.81 In that case, prospective buyers paid a deposit and exercised an option to purchase a property. The purchase was not completed, as creditors filed a bankruptcy application against the seller. The buyers obtained default judgment for a refund of their deposit, damages for breach of the option to purchase, and costs. Subsequently, the mortgagee bank exercised its power of sale and sold the property. The seller was then declared bankrupt.

17.82 At issue was whether the surplus proceeds should be paid to the buyers to satisfy their judgment debt in priority, or whether the buyers' judgment was a mere unsecured claim in the seller's bankrupt estate. In this regard, the buyers had also claimed for a further sum of $95,000, representing the increase in value of the property had the sale been completed.

17.83 The buyers asserted that they were entitled to an equitable lien over the surplus proceeds pursuant to s 74(1) of the Land Titles Act,[57] which states that the surplus proceeds received by a mortgagee who has exercised its power of sale are held on trust and "paid to the person who appears from the land register to be entitled to the mortgaged property". The buyers' position was that they were entitled to the mortgaged property, as they had an agreement to buy the property, and had lodged the necessary caveats.

17.84 The High Court disagreed, pointing out that the buyers had elected to obtain judgment for, *inter alia*, damages for breach of the option. While the buyers were entitled to an equitable lien for the refund of their deposit, the equitable lien did not extend to damages, or to the increase in price of the property.

17.85 The High Court distinguished the earlier case of *Chip Thye Enterprises Pte Ltd v Development Bank of Singapore*[58] ("*Chip Thye*") by noting that the prospective buyers in that case discontinued their suit against the seller and did not obtain final judgment, after the seller failed to complete the sale. This meant that the buyers in *Chip Thye* did not rescind the sale and purchase agreement. The buyers in *Chip Thye* were therefore owners in equity and entitled to gains in the price of the property.

17.86 With respect, it is difficult to read *Chip Thye* as being a case where the buyers did not rescind the sale and purchase agreement. In both *Chip Thye* and the present case, the buyers commenced action for damages. It

57 Cap 157, 2004 Rev Ed.
58 [1994] 2 SLR(R) 68.

follows that in both cases, the buyers' position must have been that the sale and purchase agreement had been terminated by repudiation.

17.87 It is submitted that the same outcome would be arrived at in the present case on the basis that specific performance was no longer available to the buyers, once their cause of action had combined into an *in personam* judgment for damages. If so, the buyers were no longer owners in equity and would not be entitled to the increase in price of the property, had the purchase been completed.

VI. Cross border insolvency

A. Recognition of foreign main proceedings

17.88 In *Re Zetta Jet Pte Ltd*[59] ("*Re Zetta Jet (No 2)*"), the High Court was faced with a renewed application by a Singapore-incorporated company and its bankruptcy trustee in the US for full recognition of US Chapter 7 bankruptcy proceedings.

17.89 Prior to that application, the High Court had granted limited recognition of the US Chapter 7 bankruptcy proceedings under the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on Cross-Border Insolvency[60] in *Re Zetta Jet Pte Ltd*[61] *("Re Zetta Jet (No 1)*"). Pursuant to s 354B of the Companies Act, the UNCITRAL Model Law on Cross-Border Insolvency was enacted under the Tenth Schedule of the Companies Act ("the Singapore Model Law"). The US Chapter 7 proceedings had been continued in breach of an injunction that the High Court had previously granted in proceedings involving the applicants and an intervener. In the circumstances, the High Court reasoned that it would be against the public policy of Singapore of upholding the administration of justice to grant full recognition to the US bankruptcy trustee whose appointment stemmed from a breach of an express order of the Singapore court. As such, the High Court granted only limited recognition for the US bankruptcy trustee to apply for the setting aside of the prior injunction.

17.90 Before the applicant filed the application in *Zetta Jet (No 2)*, the injunction in question had been discharged by consent of the parties to that application. Against that background, the applicants sought full

59 [2019] 4 SLR 1343.
60 30 May 1997.
61 [2018] 4 SLR 801.

recognition of the US Chapter 7 bankruptcy proceedings and the US bankruptcy trustee pursuant to Art 15 of the Singapore Model Law.

17.91 Article 17 of the Singapore Model Law mandates that the Singapore court must recognise a foreign proceeding if the conditions under Art 17(1) of the Singapore Model Law are met. This is subject to the Singapore Court's overriding discretion to refuse recognition if such recognition would be "contrary" to the public policy of Singapore.

17.92 It was not seriously disputed that the US bankruptcy proceedings under Chapter 7 amounted to a "foreign proceeding" within the meaning of Art 2(*h*) of the Singapore Model Law. The key issue in the application concerned the location of the Singapore company's centre of main interest ("COMI"). If the Singapore company had its COMI in the US, the US bankruptcy proceedings would be recognised as a foreign main proceeding. Conversely, if the Singapore company had its COMI elsewhere, the US bankruptcy proceedings would be recognised as a foreign non-main proceeding. An issue was also raised as to whether there was any public policy in Singapore that would militate against recognising the US bankruptcy proceedings.

17.93 On the key issue, a dispute arose as to when the COMI is to be determined ("the relevant date"). The learned judge held that the relevant date was the date of the recognition application in Singapore, following the position in the US.[62]

17.94 By contrast, the European and English courts take the relevant date as the application date of the foreign insolvency proceeding.[63] The Australian courts take the relevant date as the date of the hearing of the recognition application but regard may be had to historical facts which led to the position at the time.[64]

17.95 The learned judge concluded that the US position was to be preferred as it provides greater certainty and better accords with commercial realities and the language of the provisions of the Model Law for three reasons.

62 *In re Betcorp Ltd* 400 BR 266 (Bankr D Nev, 2009); *In re Ran* 607 F 3d 1017 (5th Cir, 2010).

63 *In the Matter of Videology Ltd v In the matter of the Cross-Border Insolvency Regulations 2006* [2018] EWHC 2186 (Ch); *In re Stanford International Bank Ltd* [2010] 3 WLR 941.

64 *Moore v Australian Equity Investors* [2012] FCA 1002; *Legend International Holdings Inc v Legend International Holdings Inc* [2016] VSC 308; *Wood v Astra Resources Ltd* [2016] FCA 1192.

17.96 First, while the definitions in Art 2 of the Singapore Model Law do not specify the relevant date, the definitions of "foreign main proceedings" and "foreign non-main proceedings" refer to proceedings that are "taking place". This indicates that what matters is the situation at the time of the application for recognition.

17.97 Second, postponing the relevant date until the application of recognition is made accepts that in contemporary practice various entirely legitimate measures may be taken to shift a debtor's COMI to another jurisdiction that will offer the best prospects for achieving an effective restructuring solution. This recognises debtors' autonomy and gives effect to any preference exercised by applicants, subject to any public policy concerns.

17.98 Third, in preferring the US position to the Australian one, the learned judge considered that there was nothing in the Singapore Model Law that distinguishes the date of the application from the date of the hearing as the relevant date. The Australian position, which allows the court to consider historical facts, suffered from uncertainty.

17.99 On the facts, the learned judge was satisfied that the Singapore company's COMI was in the US. Even though COMI was not defined in the Singapore Model Law, Art 8 of the Singapore Model Law requires regard to be paid to its international origins and the promotion of uniformity in the Model Law's application. Thus, while the court should take guidance from the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, consistency and comity allowed the court to also consider other UNCITRAL guides.

17.100 In deciding that the Singapore company's COMI was in the US, the learned judge again examined the approaches taken by the European, English, Australia and US courts on this issue. Following the English, European and Australian position, the learned judge considered that the Singapore court would, in determining the debtor company's COMI, first presume that the place of the debtor company's registered office is its COMI in accordance with Art 16(3) of the Singapore Model Law. This presumption would be displaced if it is shown that the place of the company's administration and other factors point the COMI away from the place of registration to some other location.

17.101 The COMI factors should be those that are objectively ascertainable by third parties generally, with a focus on creditors and potential creditors. The factors should be those with an element of settled or intended permanence that a creditor would consider in his deliberations as to whether to afford credit to the applicant company.

These factors would then feed into the court's analysis as to where the centre of gravity of the objectively ascertainable facts lies.

17.102 In undertaking such an analysis, the court need not maintain strictly the difference between entities within a group and it is possible for the analysis to be made of the activities of an entire group of companies rather than of the specific debtor company in question. Where there are disputed facts, the court will have to make the best conclusions it can in the circumstances. Where the scale does not clearly tip either way, the location of the registered office will be taken to be the COMI by default.

17.103 On the facts, the learned judge assessed the various factors raised by the parties in the following categories: (a) the location from which control and direction were administered; (b) the location of clients; (c) the location of creditors; (d) the location of employees; (e) the location of operations; (f) dealings with third parties; and (g) the governing law.

17.104 On an overall assessment of the factors, the learned judge considered that the following factors displaced the presumption that Singapore as the place of the debtor company's registered office was its COMI: (a) central management and direction of the Singapore company were conducted from the US at all relevant times; (b) corporate representations indicated that it operated from the US; and (c) a substantial portion of its creditors were in the US. The fact that the company's administration and operations were carried out at least to some extent in Singapore was outweighed by the above factors. Of these factors, the learned judge considered that the primary decision-makers being in the US was the most important.

17.105 As regards the public policy question, the learned judge held that no reason remained to deny recognition following the consensual discharge of the prior High Court injunction order. In *Zetta Jet (No 1)*,[65] the court had denied recognition as the US bankruptcy trustee had flouted an express court order, which undermined the administration of justice in Singapore. While the applicants continue to remain potentially liable for contempt of court for their earlier breach of the injunction, the learned judge considered that it did not follow that such failure to comply remains a ground for refusing recognition whether under the Singapore Model Law or the common law now that the injunction has been discharged. The learned judge did not accept the applicants' argument that there was a countervailing public policy consideration of ensuring that the general interests of creditors are protected that overrode the

65 See para 17.89 above.

public policy that the administration of justice in Singapore should not be undermined.

B. Recognition of foreign non-main proceedings

17.106 *Re Rooftop Group International Pte Ltd*[66] involved an application to the High Court for recognition of the foreign representative appointed under US Chapter 11 proceedings and assistance under the Singapore Model Law. There was no contest as regards the recognition *per se* of the Chapter 11 proceedings as the foreign non-main proceeding. Instead, the parties disputed whether the US Chapter 11 proceedings ought to be recognised as the foreign main proceeding. Parties also disagreed on the scope of the assistance to be afforded and the recognition of the second applicant as the first applicant company's foreign representative.

17.107 The learned judge held that the debtor company's COMI was in Singapore by virtue of the presumption in favour of the place of incorporation. As such, the US Chapter 11 proceedings were recognised as a foreign non-main proceeding under Art 17 of the Singapore Model Law.

17.108 In arriving at his decision, the learned judge applied the principles laid down in *Zetta Jet (No 2)*.[67] In his analysis, the learned judge considered that (a) the fact that the primary decision maker for the debtor company was a US citizen; (b) the debtor company's sales were primarily concentrated in the US; and (c) its main assets (its IP rights) were substantially registered in the US were insufficient to displace the presumption that the debtor company's COMI was in its place of incorporation (Singapore). The learned judge considered that these factors were not of a nature that would weigh heavily in a creditor's mind; a different conclusion might have been reached had there been stronger evidence of corporate decision and management being centred in the US. In the circumstances, the US Chapter 11 proceedings were recognised as a foreign non-main proceeding with the scope of assistance governed by Art 21 of the Singapore Model Law.

17.109 As regards the assistance to be afforded to the US Chapter 11 proceedings, the learned judge noted that where foreign non-main proceedings are involved, stays and other orders are granted at the discretion of the court. The learned judge, however, emphasised that, in exercising its discretion, the general inclination would be to grant such orders to assist the foreign representative in the performance of her

66 See para 17.1 above.
67 See para 17.88 above.

functions to the same degree and extent as would be granted to a local insolvency representative. That inclination would be displaced where factors point to the need to address any overriding interests within the jurisdiction, such as possible societal concerns or employee rights, for instance. This would serve the objectives of modified universalism as endorsed in *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd*.[68] The learned judge went on to add that assistance of a particular form may not be granted if in the same circumstances it may be denied or is not available to a local representative.

17.110 On the facts, the learned judge granted a moratorium on the commencement of proceedings against the applicant company, subject to various qualifications which are addressed below. The learned judge also ordered that no resolution may be made for the winding up of the debtor company and that no execution, distress or other legal process may be commenced, continued or levied against the property of the debtor company.

17.111 The learned judge refused to extend the stay to cover proceedings that had been commenced to enforce the non-party's rights under a charge over the shares in the applicant company. The learned judge was not satisfied that the Singapore court ought to intervene to prevent any change in the control of the applicant company. The point of assistance under the Singapore Model Law is to ensure the orderly and equitable distribution of assets and to facilitate the process of restructuring whenever possible. It is not intended to preserve a party's position within the applicant company in the case of a dispute between its shareholders or to prevent a different view being taken subsequently in the foreign proceedings about the direction of the restructuring efforts or whether restructuring efforts should even be maintained.

17.112 The fact that the parties had subjected the debts in respect of which the share charge over the debtor company's shares was given to dispute resolution, with a determination having been made, would be a factor pointing against any stay or moratorium by the court, especially where no assets or property of the applicant company that would otherwise be available to the general pool of creditors was at stake.

17.113 As regards the argument that the US Chapter 11 proceedings would be effectively negated as a result of the enforcement of the share charge, the learned judge accepted that it was possible that the resultant change in ownership could displace the foreign representative, but he did

68 [2014] 2 SLR 815.

not understand the Singapore Model Law to require that a recognising court preserve and protect the foreign proceedings.

17.114 The applicants also sought, in the alternative, recognition under the common law as another basis to stay the proceedings commenced to enforce the share charge. The learned judge rejected the submission holding that the court would be slow to allow common law recognition to be invoked. Recognition of most, if not all, foreign corporate insolvency proceedings should be made under the Singapore Model Law. The common law should only be invoked in situations where recognition is not catered for by the Singapore Model Law, for example, in foreign personal bankruptcy proceedings.

17.115 Turning to the recognition of the foreign representative, it was argued that the court had discretion to designate another person to administer the property of the applicant company, taking into account the interests of the creditors as mandated by Arts 21(1) and 22(1) of the Singapore Model Law. In support of its submission, the non-party referred to various factors that militate against him being recognised as the foreign representative.

17.116 The learned judge disagreed that it was open to a Singapore court to appoint a different person as a foreign representative of the applicant company. In his analysis, Art 2(i) of the Singapore Model Law defines a "foreign representative" as meaning:

> … a person or body … authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's property or affairs or to act as a representative of the foreign proceeding.

As such, the learned judge reasoned that the appointment of a particular person as a foreign representative is a matter that falls to be determined by the foreign proceeding itself.

17.117 The learned judge also noted that Art 21(1)(*e*) of the Singapore Model Law states that following recognition of a foreign proceeding, the court may "at the request of the foreign representative" grant any appropriate relief including entrusting the administration or realisation of all or part of the debtor company's property in Singapore to the foreign representative or another person designated by the court.

17.118 In his judgment, nothing in Art 21(1)(*e*) of the Singapore Model Law suggests that the court may, of its own accord, decide to appoint a different person as the foreign representative of the foreign proceedings. Given the limitations of the Singapore Model Law, the learned judge concluded that the second applicant will continue to act as the foreign

representative recognised by the US Chapter 11 proceedings, even though the learned judge considered the foreign representative ill-suited to protect the interest of the debtor company's creditors.

C. Common law recognition for foreign trustees in bankruptcy

17.119 *Heince Tombak Simanjuntak v Paulus Tannos*[69] is the latest in a line of decisions in which the High Court granted recognition and assistance to foreign insolvency professionals under the common law.[70]

17.120 In this case, the respondents argued that the Singapore court should not recognise or assist the Indonesian receivers and administrators of their estates. According to the respondents, their bankruptcy orders under the Penundaan Kewajiban Pembarayan Utaang ("PKPU") regime were not final and conclusive, as there was a pending appeal to the Supreme Court of Indonesia. Further, the respondents argued that there was a breach of natural justice from lack of notice of the Indonesian proceedings, and that the bankruptcy orders were obtained in Indonesia by fraud.

17.121 The Singapore High Court proceeded on the basis that the principles for recognising foreign insolvency orders and for enforcing foreign judgments were doctrinally similar. The High Court would recognise a foreign bankruptcy order if (a) the foreign order was made by a court of competent jurisdiction; (b) the foreign court had jurisdiction on the basis of domicile; residence or by submission; (c) the foreign order was final and conclusive; and (d) no defences to recognition applied.

17.122 On the facts, the respondents were unable to satisfy the Singapore High Court that appeals were pending before the Indonesian court. There was also no breach of natural justice, as the PKPU proceedings were advertised in accordance with the Indonesian court's directions. Further, there was evidence that the respondents participated in the PKPU proceedings. As for fraud, these related to certain representations allegedly made by the Indonesian court on the availability of an appeal. The Singapore court noted that such matters were well within the remit of the Indonesian court.

69 See para 17.1 above.

70 *Re Opti-medix Latd* [2016] 4 SLR 312; *Re Taisoo Suk* [2016] 5 SLR 787; *Re Gulf Pacific Shipping Ltd* [2016] SGHC 287.