Published on e-First 27 May 2023

18. INSOLVENCY LAW

SIM Kwan Kiat
LLB (Hons) (National University of Singapore),
LLM (New York University);
Advocate and Solicitor (Singapore);
Attorney and Counsellor-at-law (New York State);
Partner, Rajah & Tann Singapore LLP.

Wilson **ZHU**
LLB (Hons) (National University of Singapore);
Advocate and Solicitor (Singapore);
Partner, Rajah & Tann Singapore LLP.

Raelene **PEREIRA**
LLB (Hons) (National University of Singapore);
Advocate and Solicitor (Singapore);
Partner, Rajah & Tann Singapore LLP.

I. Introduction

18.1 2022 saw a number of decisions on novel points of law. The Singapore courts for the first time considered provisions in the Insolvency, Restructuring and Dissolution Act 2018[1] ("IRDA") on the legal standing of a director[2] to make a winding-up application and that of a shareholder[3] to oppose one. Notably, the Singapore High Court decided[4] that the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on Cross-border Insolvency[5] ("MLCBI"), as adopted by Singapore, allows recognition of foreign insolvency judgments and orders. Other interesting cases include the first time the Singapore High Court considered a "lock-up agreement" in a scheme of arrangement process.[6]

1 2020 Rev Ed.
2 *Adip Mittal v Offshore Holding Co Pte Ltd* [2022] SGHC 239.
3 *Atlas Equifin Pte Ltd v Electronic Cash and Payment Solutions (S) Pte Ltd* [2022] SGHC 258.
4 *Re Tantleff Alan* [2022] SGHC 147.
5 GA Res 52/158, adopted at the United Nations General Assembly, 52nd Session (30 January 1998).
6 *Re Brightoil Petroleum (S'pore) Pte Ltd* [2022] 5 SLR 222.

II. Winding up of companies

18.2 Apart from the creditor and the debtor, there are parties who may have an interest in or are affected by a winding-up application. These include a director and a shareholder or contributory of the company.

18.3 A Singapore incorporated company must have at least one resident director; as a general rule, the last remaining director is unable to resign from his appointment.[7] If the company is insolvent without any prospect of rehabilitation or restructuring, it makes sense for such a director to consider placing the company in liquidation. But before the IRDA came into effect, a director had no legal standing to make a winding-up application against the company. Section 124(1)(*b*) of the IRDA changed that and provides that a director can do so.

18.4 The High Court in *Adip Mittal v Offshore Holding Co Pte Ltd*[8] considered s 124(1)(*b*) of the IRDA for the first time, and helpfully set out guidelines on the operation of that provision. In that case, the applicant, who was one of two directors in a company, sought permission to commence winding-up proceedings against it. The directors had intended to commence a creditors' voluntary liquidation but were unable to obtain the requisite shareholders' resolution. The court held that a director who seeks permission under s 124(1)(*b*) of the IRDA has to satisfy two broad requirements. First, the director must show there is a *prima facie* case that the company ought to be wound up. Second, the director must satisfy the court that the winding-up application is made for a legitimate reason and not for a collateral purpose. A *prima facie* case means the claimant must adduce evidence on affidavit which, on its own and without rebuttal, would be sufficient to prove a case for winding up under s 125(1) of the IRDA.

18.5 In *Atlas Equifin Pte Ltd v Electronic Cash and Payment Solutions (S) Pte Ltd*,[9] the High Court considered whether a shareholder or contributory has the legal standing to oppose a winding-up application. The claimant in this case filed a winding-up application against the defendant on the ground of a statutory demand. A shareholder of the defendant opposed the application on the basis that the debt was disputed. The High Court noted there is no express statutory provision for a shareholder's legal standing to oppose a winding-up application, but formed the view that the relevant subsidiary legislation is not inconsistent with a shareholder having such standing. In particular, r 69 of the Insolvency, Restructuring

7 Companies Act 1967 (2020 Rev Ed) ss 145(1) and 145(5).
8 [2022] SGHC 239.
9 [2022] SGHC 258.

and Dissolution (Corporate Insolvency and Restructuring) Rules 2020 ("CIR Rules 2020") states that every shareholder is entitled to a copy of the winding-up application and its supporting affidavit. Further, nothing in the subsidiary legislation limits the right to oppose a winding-up application to the company.[10] There is also support from English case law, which holds that a shareholder or contributory has standing to oppose a winding-up application, on the condition that the company is solvent.

18.6 Nonetheless, a shareholder should seek leave to oppose a winding-up application. The High Court proceeded to set out a list of factors in deciding whether to grant leave. First, the court considers whether the shareholder holds a significant portion of the shareholdings in the company such that she has a substantial interest in opposing the application. Second, a shareholder must demonstrate the company is solvent. Third, the shareholder must act *bona fide*. Finally, the court weighs the interests of the shareholder against that of an unpaid creditor, and would generally attach little weight to the former where the creditor is unpaid and the company is unable to pay its debts.[11] In this case, as the High Court had previously granted leave for the shareholder to file her affidavit to oppose the application, the High Court, at the substantive hearing for the application, did not have to consider this list of factors in deciding whether to grant leave. On the facts, the shareholder was able to raise triable issues to dispute the debt claimed in the statutory demand, and the High Court dismissed the winding-up application.

A. Adjudication of proof of debt

18.7 In *Feima International (Hongkong) Ltd v Kyen Resources Pte Ltd*,[12] the court considered if liquidators were entitled to account for the company's counterclaims when rejecting a creditor's proof of debt.

18.8 The court clarified that if the company's counterclaim involves untangling complex and disputed facts, those disputes should be resolved in a full trial rather than in the adjudication framework provided in liquidation. While a liquidator can account for the company's counterclaims during adjudication, this can only be allowed if the factual

10 See also Form CIR-15 of the Insolvency, Restructuring and Dissolution (Corporate Insolvency and Restructuring) Rules 2020, which provides for the possibility of a shareholder or contributory expressing an intention to appear and oppose a winding-up application.

11 *Atlas Equifin Pte Ltd v Electronic Cash and Payment Solutions (S) Pte Ltd* [2022] SGHC 258 at [33].

12 [2022] SGHC 304.

matrix is not complex – for example, where it is a straightforward matter of arithmetically computing the net balance of claims.

18.9 In this case, the company's counterclaim was based on dishonest assistance and knowing receipt. Such claims necessarily require a trial to determine if the standards of honest conduct are breached. As a point of principle, the High Court also clarified that while a liquidator adopts a quasi-judicial role in adjudicating claims, that does not allow the liquidator to advance, adjudicate and summarily conclude the company's own counterclaims against a creditor's proof of debt.

18.10 On one reading, it is possible that this decision might embolden creditors to raise spurious disputes to fend off the company's legitimate counterclaims. This is because creditors would be keenly aware of the twin effects of (a) the insolvent company potentially having insufficient assets to fund a trial; and (b) the estate costs rule, which holds liquidators personally liable if the company cannot satisfy adverse costs orders.

18.11 However, it is humbly submitted that the court did not prescribe that all such counterclaims had to be determined by way of a full trial. For example, the court observed that if a creditor appealed against a liquidator's reliance on a counterclaim, the court would consider, *inter alia*, whether the liquidator had made any attempt at pursuing the counterclaim through legal proceedings, and if not, whether there was a proper explanation for not doing so.[13] Another relevant factor was whether the liquidator had relied on mere, unsupported allegations for the company's counterclaims. The corollary must be that if the liquidator has good evidential grounds for the counterclaim with no good answer from the creditor, and a good reason for not litigating the counterclaim, the court can uphold the liquidator's decision within the proofing framework in liquidation. Even then, it is also possible for factual disputes to be determined with an order for limited cross-examination, rather than through the process of a full trial.

B. Advantages for funding creditors

18.12 *Song Jianbo v Sunmax Global Capital Fund 1 Pte Ltd*[14] is the first reported decision on priorities for funding creditors under s 204 of the IRDA. This new provision allows the court to make an order with respect to the distribution of assets recovered, protected or preserved in a company's liquidation, to give an advantage to a creditor who runs

13 *Feima International (Hongkong) Ltd v Kyen Resources Pte Ltd* [2022] SGHC 302 at [57].

14 [2022] SGHC 312.

certain risks in recovering, protecting or preserving those assets. Unlike its predecessor provision in s 328(10) of the Companies Act 1967,[15] the updated provision now allows the court to make prospective orders on distribution, before assets are recovered and before the creditor provides funding or an indemnity.

18.13 The High Court found assistance in Australian case law on bankruptcy, and held that the following non-exhaustive factors should be considered in deciding whether to grant a prospective order under s 204(3) of the IRDA:[16]

> (a) the complexity and necessity of the proceedings in respect of which the funding or indemnity is given;
>
> (b) the extent of the funding or indemnity to be provided, and the level of risk to be undertaken and the costs to be borne by the funding creditor;
>
> (c) the failure of other creditors to provide funding or indemnity and whether the other creditors were given the opportunity to do so;
>
> (d) the emergence of other creditors between the making of the order and the date of a distribution under the order to the funding creditor;
>
> (e) the public interest in encouraging creditors to provide funding or indemnity to enable assets to be recovered; and
>
> (f) the presence or absence of any objections from the other creditors, the liquidator, or the Official Assignee.

The High Court also held that it could award 100% of the assets recovered, protected or preserved to the funding creditor. This would depend on factors such as the risks assumed by the funding creditor, and whether any other creditors responded to the liquidators' call for assistance.

18.14 Significantly, the High Court also observed that an order to award 100% of the assets recovered would relate only to the debt owed by the company to the funding creditor, and nothing beyond that. In other words, the funding creditor should not be granted a "windfall" by recovering more than the creditor's proven debt against the company.[17]

18.15 With respect, it is not immediately apparent that the language of s 204(3) of the IRDA supports a cap on recoveries by a funding creditor. As a result of the decision, there appears to be an asymmetry between funding under s 204 of the IRDA and funding through an outright sale or assignment of the company's choses-in-action or proceeds of

15 2020 Rev Ed.
16 *Song Jianbo v Sunmax Global Capital Fund 1 Pte Ltd* [2022] SGHC 312 at [23].
17 *Song Jianbo v Sunmax Global Capital Fund 1 Pte Ltd* [2022] SGHC 312 at [46].

actions under s 144(1)(*g*) or 144(2)(*b*) of the IRDA. For the latter mode of liquidation funding, the High Court has previously accepted that it was commercially unrealistic to expect litigation funders not to seek a profit. Indeed, the High Court has also previously applied Australian and English authorities, in which litigation funders were allowed to acquire anywhere between 65% and 75% of the net proceeds recovered by liquidators (that is, without a cap on recovery).[18] Accordingly, it is conceivable that funding creditors may now find it less restrictive to provide funding by purchasing or obtaining assignments of causes of action or their proceeds, as opposed to seeking prospective orders under s 204(3) of the IRDA.

C. Voiding or deferment of dissolution

18.16 Generally, a company ceases to exist once it is dissolved. However, legislation permits deferring or voiding a dissolution in narrow circumstances. Two High Court decisions in 2022 considered the legislative framework for doing so. Each case concerned a company which developed a condominium, was later placed in voluntary liquidation and thereafter dissolved. In *Management Corporation Strata Title Plan No 4701 v MCL Land (Vantage) Pte Ltd*[19] ("*MCST Plan No 4701 v MCL Land*"), the Management Corporation Strata Title ("MCST") of the condominium made an application under s 180(7) of the IRDA to defer the dissolution on the ground that the company should remain to deal with certain outstanding matters relating to the condominium. In the other case, *Management Corporation Strata Title Plan No 4339 v Coral Edge Development Pte Ltd*[20] ("*MCST Plan No 4339 v Coral Edge*"), the MCST of the condominium tried to void the dissolution of the developer company pursuant to s 343(1) of the Companies Act (now s 208(1) of the IRDA) and argued, among other things, that it had potential claims for alleged defects to the property.

18.17 Sections 180(7) and 208(1) of the IRDA apply in different contexts. After the affairs of the company have been fully wound up in a voluntary liquidation, a final meeting is held and the liquidator lodges a return with the Registrar of Companies and the Official Receiver. The company is dissolved three months later.[21] Section 180(7) allows a court to defer such dissolution. On other hand, s 208(1) of the IRDA applies generally to all types of liquidation. It allows the court to void a dissolution provided

18 See, *eg*, *Re Solvadis Commodities Chemicals GmbH v Affert Resources Pte Ltd* [2018] 5 SLR 1337 at [29].
19 [2022] SGHC 308.
20 [2022] SGHC 250.
21 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) s 180(6).

the application is made within two years. The two provisions, however, share common features. First, if not the liquidator, the applicant must be a person "who appears to the Court to be interested"; and second, the applicant must demonstrate that the court should exercise its discretion to defer or void the dissolution.

18.18 In the absence of prior binding authority, the court in *MCST Plan No 4701 v MCL Land* took the opportunity to set out the applicable principles for an application under s 180(7). First, the applicant must be one who has a legitimate interest in the deferment of the dissolution, not merely one with an interest in making the application or may be affected by its outcome. On the facts, the court held that the applicant, which was the MCST of the condominium, had the requisite legitimate interest in deferring the dissolution. The outstanding matters to be resolved included defects to the common area for the developer company to rectify.

18.19 Second, as part of the court's exercise of discretion, the court considers if there is a proper purpose in the deferment of the dissolution. A clear example of a proper purpose would be the existence of pending proceedings against the company which are arguable. In the present case, the parties were able to agree on the terms of the deferment of the dissolution and sought to enter a consent order, which the court approved.

18.20 On the other hand, in *MCST Plan No 4339 v Coral Edge*, the application to void the dissolution of the developer company failed. For an application under s 343(1) of the Companies Act, an applicant must show it has an interest of a proprietary or pecuniary nature (which is not shadowy) in resuscitating the company. It was arguable that the MCST had such interest, but the court was of the view it need not decide this issue as it would not have exercised its discretion to void the dissolution in any event. Among other reasons, the order sought would be futile as the liquidator of the company had already distributed its assets to the shareholders in accordance with the liquidation process and there was no suggestion that the liquidator failed to comply with his duties. Further, there was no basis to unwind such distributions.

III. Avoidance of antecedent transactions

18.21 The decision of the High Court in *Rothstar Group Ltd v Chee Yoh Chuang*[22] – that the mortgage to secure a debt owed by a third party constituted a transaction at an undervalue – was essentially upheld on

22 [2021] SGHC 176. See (2021) 22 SAL Ann Rev 508 at 535, para 18.100.

appeal. The Court of Appeal in *Rothstar Group Ltd v Leow Quek Shiong*[23] took the opportunity to consider a vexed issue – can the grant of security by a debtor to secure its own existing indebtedness be regarded as a transaction at an undervalue? There appear to be conflicting decisions under English law. *Re MC Bacon*[24] held it could not, whereas *Hill v Spread Trustee Co Ltd*[25] suggests it could. The Singapore High Court in *Encus International Pte Ltd v Tenacious Investments Pte Ltd*[26] left the issue open.

18.22 The Court of Appeal preferred the reasoning in *Re MC Bacon*. The grant of security for a debtor's own existing debt does not, by itself, deplete or diminish the debtor's assets. The grant of security ascribes the security to the repayment of the secured debt, but the debtor retains the ability to redeem the security by repaying the debt. Before the creation of such security, the debtor's asset could be the subject of enforcement by creditors by, for instance, seizure and sale. After the creation of security, the asset could still be subject to enforcement by, for instance, appointing receivers. The debtor's position, including its balance sheet, does not change when it creates a security for its own existing indebtedness.

18.23 The position is different if the debtor grants a security for the indebtedness of a *third party*. In this case, the insolvent grantors created the mortgage to secure a debt owed by a company called Agritrade International (Pte) Ltd. The mortgage can be set aside as a transaction at an undervalue. The Court of Appeal emphasised that, in comparing the value provided by the grantor and the value it received, the focus is on the value which accrues to the grantor. Further, such value must be quantifiable in money or money's worth. On the evidence, Rothstar Group Ltd, the mortgagee, was unable to establish the value of any benefit which accrued to the debtors in return for granting the mortgage. The Court of Appeal did not decide that benefits to a third party will never be taken into account in assessing the value received by the grantor of the security. This may be relevant in assessing the benefit to companies which are part of a group. What is clear is that such benefits must accrue to the grantor, and must be properly particularised and substantiated.

18.24 The High Court had rejected the alternative ground of challenge based on a voluntary conveyance to defraud creditors.[27] The Court of Appeal agreed with that decision. The mortgage was not granted for no or nominal consideration. As such, it must be shown that the debtors

23 [2022] 2 SLR 158.
24 [1990] BCLC 324.
25 [2007] 1 WLR 2404.
26 [2016] 2 SLR 1178.
27 Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed) s 73B(1). See now s 438 of the IRDA.

acted with actual intent to defraud their creditors, and that the transferee (mortgagee) had notice of such fraudulent intention. These were not established on the evidence.

IV. Judicial management

A. Appointment of interim judicial managers

18.25 In *Re Hodlnaut Pte Ltd*,[28] the High Court considered an application by Hodlnaut Pte Ltd ("Hodlnaut") for the appointment of interim judicial managers pending the determination of the company's application for a judicial management order. There were competing nominations for interim judicial managers from Hodlnaut and a contingent creditor, Samtrade Custodian Limited (Under Judicial Management) ("Samtrade"). The High Court invited the other creditors present at the initial hearing to put forward other nominations and eventually decided that an interim judicial management order should be made, and that two insolvency practitioners from Ernst & Young, who were nominated by another creditor, be appointed as interim judicial managers.

18.26 In deciding the application, the High Court considered two issues: first, whether an interim judicial management order should be made; and secondly, who should be appointed by the court as interim judicial managers.

18.27 With respect to the criteria and rationale for the making of an order for interim judicial management, the High Court held that:[29]

> [T]here must be a *prima facie* case for the making of a full judicial management order, though not all criteria for the grant of a full order need be met; and usually there must be some danger to the assets of the company. Some sort of urgency or exigency must be shown.

In this regard, Hodlnaut relied on the development of a plan for recovery for its business. However, the High Court held that this by itself was not enough. It had to be shown that the recovery plan would be endangered if interim judicial managers were not brought in.

18.28 In the end, what mattered to the High Court was that, based on the evidence, the assets were probably in some jeopardy and that the directors and management of Hodlnaut would not be able to function

28 [2022] SGHC 209.

29 *Re Hodlnaut Pte Ltd* [2022] SGHC 209 at [5]. See *Re KS Energy* [2020] 5 SLR 1435 at [14] and [15].

without being liable for insolvent trading at this time. The High Court thus determined that the grant of an interim judicial management order would help to preserve the assets of Hodlnaut until the hearing of the application for the judicial management order proper.[30]

18.29 With respect to the persons to be appointed as interim judicial managers, issue was taken with Hodlnaut's nominee as well as the nominees proposed by Samtrade. The High Court acknowledged that there was "something to be said for the proposition that significant weight should be given to the choice made by the largest creditor or group of creditors".[31] However, "in the context of preserving and safeguarding assets where a large number of unsecured creditors are involved, it was best … to have an appointment that would avoid as best as possible any concerns about independence"[32] though this does not mean that "any nominee by an applicant company or by a contingent or contested creditor will be rejected out of hand. It will be a fact-sensitive exercise, with the court having to consider different factors from case to case".[33]

B. The judicial management expenses principle and leave under section 133(1) of the Insolvency, Restructuring and Dissolution Act

18.30 In the course of the judicial management and subsequent liquidation of Ocean Tankers (Pte) Ltd ("OTPL"), the Court of Appeal considered and recognised the judicial management expenses principle[34] ("the Principle") and considered whether leave of court is required under s 133(1) of the IRDA in respect of an appeal against determinations made by the court in an application for directions.[35]

18.31 In May 2020, OTPL applied for and obtained an order for the appointment of interim judicial managers. At the time, OTPL was the charterer of over 100 vessels belonging to 40 associated companies ("the XH Companies"). From 20 May 2020 to 3 June 2020, notices of termination were issued by the XH Companies in respect of bareboat charters for several vessels and the termination notices were accepted by the interim judicial managers of OTPL.

30 *Re Hodlnaut Pte Ltd* [2022] SGHC 209 at [7].
31 *Re Hodlnaut Pte Ltd* [2022] SGHC 209 at [11].
32 *Re Hodlnaut Pte Ltd* [2022] SGHC 209 at [12].
33 *Re Hodlnaut Pte Ltd* [2022] SGHC 209 at [13].
34 *An Guang Shipping Pte Ltd (under judicial management) v Ocean Tankers (Pte) Ltd* [2022] SGCA 69.
35 *An Guang Shipping Pte Ltd (judicial managers appointed) v Ocean Tankers (Pte) Ltd* [2022] 1 SLR 1232.

18.32 On 7 August 2020, OTPL was placed under judicial management. From 31 August 2020 to 3 September 2020, the OTPL judicial managers sent notices to the relevant XH Companies electing not to adopt the bareboat charters in respect of various vessels. In response, the XH Companies sought to retract the termination notices and issued notices to the OTPL judicial managers affirming the bareboat charters. The OTPL judicial managers subsequently applied for leave to disclaim and terminate various bareboat charters as unprofitable contracts.

18.33 Concurrently with parties' discussions regarding the redelivery of the vessels, from 12 May 2020 to 8 September 2020, the OTPL judicial managers marketed some of the XH Companies' vessels for hire. Some of these marketed vessels were successfully deployed on sub-charters.

18.34 The XH Companies were eventually also placed in judicial management in November 2020. Disputes arose between the judicial managers of OTPL and the judicial managers of the XH Companies. The main dispute was whether the XH Companies' claims against OTPL under the bareboat charters fell within the scope of the Principle so as to enjoy priority in OTPL's judicial management. The OTPL judicial managers were prepared to admit the charterhire claims as ordinary unsecured debts of OTPL but not as priority expenses.

18.35 To resolve matters, the OTPL judicial managers filed an application seeking directions from the court on how the XH Companies' claims arising out of OTPL's bareboat charters of 76 vessels owned by the XH Companies were to be treated. OTPL was placed in liquidation before the application for directions was heard and determined, and the liquidators of OTPL (who were the former judicial managers) obtained orders allowing them to continue with the pending application as well as any appeals that might arise from the application.

18.36 The application for directions was heard and determined by the High Court on 20 September 2021. The High Court held in *Re Ocean Tankers (Pte) Ltd*[36] that, while priority could be accorded to a small part of the XH Companies' claims under the Principle, the balance would have to be regarded as ordinary unsecured debt as the OTPL judicial managers had not retained the vessels for the benefit of OTPL's estate.

36 [2022] SGHC 55.

C. Leave under section 133(1) of the Insolvency, Restructuring and Dissolution Act

18.37 The XH Companies filed a notice of appeal against the decision of the High Court in respect of the period before the OTPL judicial managers had issued notices to the XH Companies electing not to adopt the bareboat charters in respect of most of the vessels in issue.

18.38 OTPL applied to strike out the notice of appeal on the basis that the XH Companies failed to seek leave of court under s 133(1) of the IRDA, which provides that when a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding may be proceeded with or commenced against the company except (a) by the leave of the court; and (b) in accordance with such terms as the court may impose.

18.39 The XH Companies argued that there was no need for them to seek leave of court as they had taken a purely defensive step[37] against the adverse ruling that OTPL had secured in the application for directions. In the alternative, the XH Companies argued that the proceedings commenced by the application for directions and the consequent appeal did not fall within s 133(1) of the IRDA.

18.40 The Court of Appeal delivered its decision dismissing the striking-out application in *An Guang Shipping Pte Ltd (judicial managers appointed) v Ocean Tankers (Pte) Ltd*.[38] The Court of Appeal held that the application for directions could not be considered a proceeding against OTPL within the meaning of s 133(1) of the IRDA. Whether leave was required under s 133(1) of the IRDA was to be judged by reference to the nature of the original application. It is the original application that will determine whether or not a proceeding in court is one that can be classified as "against the company".

18.41 The Court of Appeal held that the only issue between OTPL and the XH Companies in the application for directions was regarding the priority of charterhire debts owed to the XH Companies. The application for directions did not seek a ruling on the liability of OTPL to pay the XH Companies the charterhire debts but directions as to whether these should be paid before or with the unsecured debts. This was "a question of law which the liquidators of OTPL required to have determined in order for them to properly carry out their duties in the liquidation of

37 See *Hyflux Ltd v SM Investments Pte Ltd* [2020] 4 SLR 1265.
38 [2022] 1 SLR 1232.

OTPL".[39] The mere fact that the XH Companies contested the position that the liquidators of OTPL were asking the court to adopt could not turn the application for directions into a proceeding against OTPL.[40]

18.42 With respect to the XH Companies' argument that they had taken a purely defensive step against an adverse ruling, the Court of Appeal expressed the view that it is difficult at a general level to describe an appeal as "a defensive step".[41] The purpose of an appeal is for the appellant to challenge a court ruling in favour of the respondent which the appellant does not agree with and replace that ruling with one in favour of the appellant. Described that way, an appeal seems to be offensive rather than defensive. However, it was not necessary for the Court of Appeal to come to a conclusion on this point.

D. Judicial management expenses principle

18.43 The XH Companies' appeal against the decision of the High Court in *Re Ocean Tankers (Pte) Ltd*[42] was heard and dismissed by the Court of Appeal in *An Guang Shipping Pte Ltd (under judicial management) v Ocean Tankers (Pte) Ltd*.[43]

18.44 The Court of Appeal held that expenses incurred by a company's judicial managers in relation to the retention and continued use of property under pre-judicial management contracts would fall within the ambit of the Principle, so as to be accorded priority over the company's other unsecured debts, if this was for the benefit of the estate. Whether the property was retained and used for the benefit of the estate would depend on the purpose of the judicial managers in retaining possession of such property, which was to be assessed objectively based on their conduct. Determining whether the Principle applied in a given case was necessarily a highly fact-sensitive inquiry, the answer to which would turn on the precise facts and all the circumstances of each case.

18.45 The Court of Appeal expressed tentative views on the question of whether and how the position of interim judicial managers should differ from that of judicial managers with regard to the application of the Principle. The Principle applied to both interim judicial managers

39 *An Guang Shipping Pte Ltd (judicial managers appointed) v Ocean Tankers (Pte) Ltd* [2022] 1 SLR 1232 at [19].
40 *An Guang Shipping Pte Ltd (judicial managers appointed) v Ocean Tankers (Pte) Ltd* [2022] 1 SLR 1232 at [19].
41 *An Guang Shipping Pte Ltd (judicial managers appointed) v Ocean Tankers (Pte) Ltd* [2022] 1 SLR 1232 at [20].
42 See para 18.36 above.
43 [2022] SGCA 69.

and judicial managers, and the central question in both contexts was whether the property was retained for the benefit of the estate. However, in ascertaining whether an interim judicial manager had in fact retained property for the benefit of the estate in a given case, the purpose, powers and position of interim judicial managers ought to be borne in mind.[44]

18.46 Turning to the main issue in dispute in the appeal, the Court of Appeal held that the High Court judge did not err in inferring from the material before him that the OTPL judicial managers generally did not retain the vessels (including those marketed for hire) for the benefit of OTPL's estate.

18.47 With respect to the vessels which the OTPL judicial managers deployed on sub-charters, the Court of Appeal held that the High Court judge did not err in holding that the Principle would not apply to periods of inactivity before and between redeployments of the vessels on sub-charters. The Court of Appeal noted that the judge's finding on this point appeared to have flowed from the premise that the OTPL judicial managers did not choose to retain the relevant vessels generally for a purpose regarded as being beneficial to OTPL's estate.[45]

18.48 In the view of the Court of Appeal, the High Court judge also did not err in requiring the XH Companies to prove that their ancillary claims for repair costs were linked to the period that these vessels were retained by the OTPL judicial managers for the benefit of OTPL's estate. In this regard, the Court of Appeal held that the "relative approach", which required a link to be established between ancillary costs claimed and the use of the property in the period of use, should be preferred to the "accruals approach", under which any liability which accrued while the property in question was being beneficially retained would attract the Principle.[46]

E. Directors' residual powers

18.49 In *Hin Leong Trading (Pte) Ltd v Rajah & Tann Singapore LLP*,[47] the directors of two companies instructed Rajah & Tann Singapore LLP ("R&T") to file applications on behalf of each company to be put under

44 *An Guang Shipping Pte Ltd (under judicial management) v Ocean Tankers (Pte) Ltd* [2022] SGCA 69 at [57].

45 *An Guang Shipping Pte Ltd (under judicial management) v Ocean Tankers (Pte) Ltd* [2022] SGCA 69 at [111].

46 *An Guang Shipping Pte Ltd (under judicial management) v Ocean Tankers (Pte) Ltd* [2022] SGHC 69 at [119].

47 [2022] 2 SLR 253.

judicial management and for interim judicial managers to be appointed. After interim judicial managers were appointed by the court, the interim judicial managers retained the legal services of R&T. The directors of the companies objected and caused an action to be commenced in the name of each company to injunct R&T from acting for the interim judicial managers, who were subsequently appointed as the judicial managers and then the liquidators of the companies, and the companies. R&T filed applications for the injunction applications to be struck out on the basis that the directors did not have the requisite authority to cause the companies to commence the actions as they had been divested of their managerial powers as directors of the companies upon the appointment of the interim judicial managers. The High Court allowed the striking-out applications[48] and the directors caused the companies to file appeals against the decision of the High Court.

18.50 The Court of Appeal dismissed the appeals. In arriving at its decision, the Court of Appeal considered whether directors have the legal standing to authorise the injunction applications in the companies' names, the legal effect of an order placing a company under interim judicial management, and whether directors retain thereafter a common law power to commence such action.

18.51 Having regard to the terms of the interim judicial management orders made in this case, the Court of Appeal held that the interim judicial managers:[49]

> … possessed the power, exclusively, to bring or defend any action or other legal proceedings in the name and on behalf of the [companies]. … This position remained after the [companies] were placed under judicial management as the judicial management orders were worded almost identically to the [interim judicial management orders].

18.52 Upon a court order placing a company under judicial management or in liquidation, with insolvency representatives being appointed concomitantly over the company:[50]

> … the company's directors retain residual powers in the limited situation where the company seeks to appeal against or challenge the very order appointing the judicial managers or liquidators, and must therefore act through its directors. This residual power is of narrow scope and is to be invoked only in very specific situations.

48 See *Ocean Tankers (Pte) Ltd v Rajah & Tann Singapore LLP* [2021] SGHC 47.
49 *Hin Leong Trading (Pte) Ltd v Rajah & Tann Singapore LLP* [2022] 2 SLR 253 at [24].
50 *Hin Leong Trading (Pte) Ltd v Rajah & Tann Singapore LLP* [2022] 2 SLR 253 at [62].

Given that the injunction applications did not challenge the juridical basis of the powers of the interim judicial managers, judicial managers and liquidators, the Court of Appeal held that the present case did not come within the strictures of the aforesaid exception.

F. Grounds for winding up

18.53 The issue at the heart of *Grimmett, Andrew v HTL International Holdings Pte Ltd*[51] was whether HTL International Holdings Pte Ltd ("HTLI") should be wound up on the application of its judicial managers in order to prevent its shareholder from unwinding the sale of assets of HTLI, namely, shares in its subsidiaries, to an investor. The High Court dismissed the winding-up application after concluding that the grounds for winding up were not made out. However, to protect the restructuring efforts, the High Court extended the judicial management order to allow the judicial managers to consider what alternative course, if any, might be available.

18.54 The judicial managers of HTLI applied to wind up HTLI on the ground that it was just and equitable to do so under s 125(1)(*i*) of the IRDA as there was a loss of substratum and/or that it is in the public interest to do so. Further, and/or in the alternative, the judicial managers submitted that HTLI had suspended its business for a whole year, and it should be wound up under s 125(1)(*c*) of the IRDA.

18.55 HTLI's shareholder and its parent company (together "the Shareholders") opposed the winding-up application on the grounds that the judicial managers had completed the objectives of the judicial management and that HTLI was a solvent company that should be returned to the Shareholders.

18.56 The judicial managers and HTLI's main unsecured creditor, who supported the winding-up application, alleged that the Shareholders were attempting to unravel the work that had been done in the judicial management. The judicial managers had sold HTLI's shares in its subsidiaries to one Golden Hill Capital Pte Ltd ("Golden Hill"). However, the Shareholders objected to the sale of the shares and preferred another offer instead, and had unsuccessfully sought to stop the sale in previous applications to the courts.[52]

51 [2022] 5 SLR 991.

52 See *Re HTL International Holdings Pte Ltd* [2021] 5 SLR 586, which was affirmed on appeal in *Yihua Lifestyle Technology Co, Ltd v HTL International Holdings Pte Ltd* [2021] 2 SLR 1141.

18.57 The High Court first considered whether a judicial manager has standing to petition to wind up a company on just and equitable grounds under s 125(1)(*i*) of the IRDA. The judge held that a judicial manager has such standing, noting that there is nothing inherent in the language of s 124(1)(*h*) of the IRDA which limits the grounds for winding up which may be relied upon by the judicial manager other than the one ground in s 125(1)(*b*) of the IRDA, where default is made by the company in lodging a statutory report or holding the statutory meeting, which is excluded by virtue of s 124(2)(*c*) of the IRDA.[53]

18.58 The High Court then considered whether the court may order a company to be wound up on the ground that it would be in the public interest to do so. After considering the positions in England and Australia, the judge held that "[t]he existence of s 125(1)(*n*) of the IRDA alongside s 125(1)(*g*) supports the proposition that for matters relating to the public interest, only the Minister may petition on such grounds".[54]

18.59 Moving on to the issue of whether the just and equitable ground was made out on the basis of loss of substratum, the High Court stated that "[t]he jurisdiction of the court to order winding up on that ground should be triggered only where it involves some breakdown in the relationship between the shareholders of the company, or some other basis going to the continued existence of the company".[55] The High Court held that "[i]t could not be sensibly extended to the present situation, which involved the interest of an investor or corporate rescuer".[56] The risk of the Shareholders trying to unwind the share sale to Golden Hill was a separate matter which could be more appropriately addressed by other means. This background should not be conflated with the company law rationale in winding up a company. Hence, this ground of winding up was not made out.

18.60 The next issue that the High Court considered was whether the ground of suspension of business under s 125(1)(*c*) of the IRDA was made out. It was not disputed that HTLI no longer carried on any investment holding activities and remained an empty shell with only cash assets. However, the judge noted that:[57]

> … the commercial plans for HTLI had been submitted to the High Court in a sealed affidavit where the Shareholders expressed their intention to carry on business in HTLI in some form and [were] opposed to the winding up of the

53 *Grimmett, Andrew v HTL International Holdings Pte Ltd* [2022] 5 SLR 991 at [38].
54 *Grimmett, Andrew v HTL International Holdings Pte Ltd* [2022] 5 SLR 991 at [53].
55 *Grimmett, Andrew v HTL International Holdings Pte Ltd* [2022] 5 SLR 991 at [56].
56 *Grimmett, Andrew v HTL International Holdings Pte Ltd* [2022] 5 SLR 991 at [56].
57 *Grimmett, Andrew v HTL International Holdings Pte Ltd* [2022] 5 SLR 991 at [83].

> company[, and that] this alone would suffice to dispose of this ground. Further, the inactivity of HTLI [could] also be explained on the basis that it was placed in judicial management for the past few years …

Hence, the High Court held that this ground of winding up was also not made out, and dismissed the winding-up application.

18.61 However, the High Court was:[58]

> … satisfied that the restructuring efforts should be given some protection from the possible actions of the Shareholders in unwinding what has been wrought by the judicial managers. Not giving such protection would put the credibility of the judicial management regime at risk and undermine the confidence of investors involved in corporate rescues.

In the circumstances, the High Court extended the judicial management order for six months to allow the judicial managers the time to consider the appropriate application (if any) to protect the corporate rescue efforts.

V. Schemes of arrangement

18.62 The High Court considered lock-up agreements in a scheme of arrangement for the first time in *Re Brightoil Petroleum (S'pore) Pte Ltd*[59] ("*Re Brightoil*"). In essence, a lock-up agreement is entered into in advance of a scheme meeting under which one or more creditors, usually in return for certain payments (sometimes referred to as a "consent fee"), agree to support the scheme. The issue was whether, for the purpose of voting on a proposed scheme, creditors who had entered into a lock-up agreement should be placed in the same class as those who had not.

18.63 The court surveyed the case law, particularly from England and Hong Kong, and concluded that the use of lock-up agreements, by itself, will not fracture a class of creditors for voting in a proposed scheme. The court then set out certain principles in deciding whether a lock-up agreement would cause creditors who entered into it to be classed separately, not only for purposes of voting on a scheme but also for a notional tabulation of votes for a pre-pack scheme under s 71 of the IRDA.

18.64 First, it is important to ask whether:[60]

> … the benefit conferred under the lock-up agreement is so sizeable that it would have a significant influence on the decision of a reasonable creditor when

58 *Grimmett, Andrew v HTL International Holdings Pte Ltd* [2022] 5 SLR 991 at [35].
59 [2022] 5 SLR 222.
60 *Re Brightoil Petroleum (S'pore) Pte Ltd* [2022] 5 SLR 222 at [46(a)].

> voting for the proposed scheme. In assessing whether there was a significant influence, one would look at the relative size of the consent fee (or benefit) when compared to the forecasted returns to creditors under the implemented scheme and the estimated recovery in liquidation (or another appropriate comparator).

In *Re Brightoil*, the court decided that a consent fee of 1% of a scheme creditor's admitted debt was not so significant as compared with the potential recovery of 12% under the proposed scheme and of 0.2% in liquidation.

18.65 Secondly, "the lock-up agreement must have been made available to all scheme creditors within the relevant class such that they were all given the equal right to enter into the agreement, and the agreements made with each creditor must be on substantially the same terms".[61] It is up to each creditor to decide whether to exercise that right to enter into the lock-up agreement; that is beyond a scheme company's control.

18.66 Thirdly, the use of the lock-up agreement must be done *bona fide* (for example, there should be no misleading of creditors).[62] The court will not sanction a scheme if the company and/or its majority creditors are not acting *bona fide*. This applies to both a conventional and a pre-pack scheme.

18.67 Still on the issue of classification of creditors, a debtor company may have a large number of creditors with relatively small claims and would consider how to minimise the cost and time in dealing with them. This was what confronted the debtor in *Re Zipmex Co Ltd*.[63] Ahead of a proposed pre-packaged scheme under s 71 of the IRDA, the debtors applied to court for approval of the creation of a separate class of creditors which comprised a large number of customers with claims equal to or less than US$5,000. The debtors referred to such a class as an "administrative convenience" class and relied on US precedents based on § 1122(b) of the US Bankruptcy Code.[64] Although there is no equivalent statutory provision in Singapore law, the debtors urged the Singapore High Court to exercise its inherent power to approve the creation of such a class so as to alleviate the burden on the debtors in otherwise having to deal with a large number of creditors with small claims.

18.68 The court refused to grant the application. Nothing in legislation empowers the court to create an administrative convenience class, or allows or contemplates a "pre-application blessing or approval" under

61 *Re Brightoil Petroleum (S'pore) Pte Ltd* [2022] 5 SLR 222 at [46(b)].
62 *Re Brightoil Petroleum (S'pore) Pte Ltd* [2022] 5 SLR 222 at [46(c)].
63 [2022] SGHC 306.
64 11 USC (US).

s 71 of the IRDA. The court emphasised it was not rejecting outright the notion of an administrative convenience class. The proper course is for the debtors to proceed with the process under s 71. When the debtors eventually seek approval of the pre-packaged scheme under s 71, the court will then consider whether all the relevant requirements have been met, including the classification of creditors to determine if the notional voting outcomes would have satisfied the voting thresholds.[65]

VI. Bankruptcy

A. Leave to continue proceedings against a bankrupt

18.69 In *Wang Aifeng v Sunmax Global Capital Fund 1 Pte Ltd*,[66] the court provided guidance on how it would exercise its discretion to grant leave for legal proceedings to proceed against a bankrupt under s 327(1)(*c*) of the IRDA.

18.70 The court observed that the broad policy purpose behind staying proceedings in bankruptcy (and likewise in corporate insolvency) is to "prevent a scramble of creditors going after the bankrupt and potentially violating the *pari passu* principle of distribution".[67] With this in mind, the court held that the following non-exhaustive list of factors would be relevant in considering how its discretion should be exercised:

(a) **the timing of the application for permission**.[68]

> The stage to which proceedings have progressed, as well as any delay in bringing the application for permission and whether pre-trial procedures are likely to be required or beneficial, would be relevant … [T]he closer to the date of bankruptcy the application is made, the more likely it is for a court to infer that the application was made to snatch at the bankrupt's assets.

(b) **the nature of the claim**.[69]

> The claim must be of a type which should proceed by action rather than through the proofing procedure in bankruptcy …. The court will consider the degree of complexity of the legal and factual issues involved, and whether it may be preferable for those issues to be resolved at a hearing rather than by way of a proof of debt …. Leave is also more appropriately granted where the proceedings involve other

65 See *Re DSG Asia Holdings Pte Ltd* [2022] 3 SLR 1250.
66 [2022] SGHC 271.
67 *Wang Aifeng v Sunmax Global Capital Fund 1 Pte Ltd* [2022] SGHC 271 at [11].
68 *Wang Aifeng v Sunmax Global Capital Fund 1 Pte Ltd* [2022] SGHC 271 at [33].
69 *Wang Aifeng v Sunmax Global Capital Fund 1 Pte Ltd* [2022] SGHC 271 at [35].

> parties, the proper conduct of which [may require] the bankrupt to become a party …

(c) **the existing remedies**. If the nature of the claim is such that it can be dealt with adequately within the bankruptcy regime, then it would not serve any good purpose to grant permission to continue or commence proceedings by other means.[70]

(d) **the merits of the claim**. "If the proposed action is doomed to fail from the start, then it would not serve any good purpose to grant permission to commence what would likely be an exercise in futility."[71]

(e) **the existence of prejudice to creditors or to the orderly administration of the bankruptcy**. The court will consider whether the applicant was seeking to gain some advantage or steal a march over the other creditors, in contravention of the *pari passu* regime. In this connection, whether the trustee in bankruptcy opposes the grant of leave will be a relevant consideration.

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

B. Effect of bankruptcy on execution proceedings

18.71 The High Court's decision in *Abuthahir s/o Abdul Gafoor v Bangkok Bank Public Co Ltd*[72] concerned a bankrupt's share of the surplus proceeds from a mortgagee's sale of a property of which the bankrupt was a joint owner. The dispute was over who had a prior right to the bankrupt's share of the surplus proceeds. The contest was between the bankrupt's estate and a judgment creditor, Bangkok Bank Public Co Ltd, who had registered an order of court attaching the bankrupt's interest in the property ("the Attachment Order") with the Singapore Land Authority and issued a writ of seizure and sale before the making of the bankruptcy order. The sale of the property was completed after the making of the bankruptcy order.

18.72 The High Court found that the judgment creditor was entitled to the surplus proceeds in priority to the bankrupt's estate. In coming to its decision, the High Court considered the applicability of ss 367,

70 *Wang Aifeng v Sunmax Global Capital Fund 1 Pte Ltd* [2022] SGHC 271 at [37].
71 *Wang Aifeng v Sunmax Global Capital Fund 1 Pte Ltd* [2022] SGHC 271 at [39].
72 [2022] SGHC 274.

368(3) and 368(4) of the IRDA. If s 367 applied to this case, the judgment creditor would be entitled to the surplus proceeds. However, if s 368(4) applied, the bankrupt's estate would be entitled to the surplus proceeds.

18.73 The High Court held that, pursuant to s 367(2)(*c*) of the IRDA, the judgment creditor completed its execution against the bankrupt's interest in the property when the Attachment Order was registered with the Singapore Land Authority.

18.74 With respect to s 368(4) of the IRDA, the High Court held that for the section to apply:[73]

> (a) a writ of seizure and sale must have been filed;
>
> (b) the seized property must have been sold pursuant to the writ of seizure and sale;
>
> (c) the Sheriff must have received the proceeds of the sale; and
>
> (d) the Sheriff must have been notified of the bankruptcy application, and the bankruptcy order must have been made, within the 14-day period.

18.75 The High Court noted that:[74]

> … any case that falls within s 368(4) of the IRDA would also fall within s 367(1). …
>
> The only way to reconcile s 367(1) and s 368(4) of the IRDA is to restrict s 367(1) to cases which do not fall within s 368(4). However, there appears to be no apparent reason justifying such a distinction and s 367(1) and s 368(4) should perhaps be reviewed.

18.76 That said, it was unnecessary for the High Court to resolve the inconsistency between ss 367(1) and 368(4) of the IRDA in the present case. The High Court agreed with the judgment creditor that, on the facts, the present case did not fall within s 368(4) of the IRDA. The property was sold by the mortgagee, and not by the Sheriff under the writ of seizure and sale. There was therefore no "moneys coming to the Sheriff's hands under the writ of seizure and sale" for the purpose of s 368(3) of the IRDA. Thus, the commencement of the 14-day period was not triggered and neither the notification of the bankruptcy application to the Sheriff nor the making of the bankruptcy order could be said to have been made within the time mentioned in s 368(3) of the IRDA.

73 *Abuthahir s/o Abdul Gafoor v Bangkok Bank Public Co Ltd* [2022] SGHC 274 at [36].
74 *Abuthahir s/o Abdul Gafoor v Bangkok Bank Public Co Ltd* [2022] SGHC 274 at [37]–[38].

C. Variation of a bankrupt's contributions

18.77 In *Haotanto Anna Vanessa v Fang Ching Wen Ted*,[75] the High Court considered, amongst other issues, the question of the appropriate standard of review of a private trustee's determination of the monthly contribution and target contribution.

18.78 On 6 April 2021, the petitioning creditor, Haotanto Anna Vanessa, filed a bankruptcy application against Fang Ching Wen Ted ("the Bankrupt"). A bankruptcy order was made on 15 April 2021 and the Official Assignee ("OA") was appointed as the trustee of the Bankrupt's estate. The OA determined the Bankrupt's monthly contribution and target contribution to be $2,620 and $136,240 respectively.[76]

18.79 The petitioning creditor applied for the appointment of a private trustee to administer the Bankrupt's estate. The private trustee was appointed on the basis that he would be in a better position to administer the Bankrupt's estate, given that the Bankrupt had assets overseas. The private trustee revised the applicant's monthly contribution and target contribution to $10,620 and $552,240 respectively.

18.80 The Bankrupt subsequently applied to vary the monthly contribution and target contribution set by the private trustee pursuant to s 340 of the IRDA. The High Court held that there was no reason to disturb the private trustee's determination of the Bankrupt's monthly contribution and target contribution, and dismissed the application.

18.81 The High Court held that the standard of review of the decisions of the private trustee would be based on the perversity standard, as outlined in *Zhang Hong En Jonathan v Private Trustee in Bankruptcy of Zhang Hong'En Jonathan*:[77]

> The [private trustee's] determination of monthly contribution and target contribution is a function of his business and commercial judgment. It is part and parcel of his administration of the Bankrupt's estate. For the [private trustee] to do so effectively, he cannot be in a position where he is constantly looking over his back. This is consonant with the exposition of the role of the private trustee in the bankruptcy regime, and is further consistent with the court's general reluctance to interfere too readily with the decisions of the private trustee.

75 [2022] SGHC 216.

76 See ss 339 and 371 of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed).

77 [2021] 4 SLR 139. See *Haotanto Anna Vanessa v Fang Ching Wen Ted* [2022] SGHC 216 at [24].

18.82 On the perversity standard, the High Court held that:[78]

> … the question to be asked is if no other private trustee would have done what the private trustee has done [in the present case]; in other words, was the [private trustee's] decision so absurd that no private trustee properly advised or properly instructing himself could have so acted …. In answering this question, reference must be had to the reasons underpinning the [private trustee's] decision.

18.83 The High Court found that:[79]

> … the assessment made by the private trustee was not so perverse that the court should interfere. [His] determination was based on the information available to him at that point. His determinations were neither unreasonable nor objectionable. Documents that were subsequently provided were also done so in a haphazard manner, suggesting that the Bankrupt [had] failed to ensure complete and candid disclosure. There [was] no absurdity on the [private trustee's] decision that [required] intervention.

18.84 However, given the manner in which information had been provided by the Bankrupt, the court directed the private trustee to require the Bankrupt to submit within three weeks all supplementary information (with all relevant documentation) in a single letter, and for the private trustee to thereafter conduct a final determination of the Bankrupt's monthly contribution and target contribution.

VII. Cross-border insolvency

A. Recognition of foreign insolvency judgment

18.85 The decision of the Singapore High Court in *Re Tantleff Alan*[80] ("*Re Tantleff*") is significant in a number of aspects. It addressed the issue of whether a trust may seek recognition of its foreign insolvency proceeding under the MLCBI, and whether conduct and activities after the commencement of the foreign insolvency proceeding are relevant in determining the location of the centre of main interest ("COMI"). Of particular note is the High Court's decision and reasoning with respect to the recognition of a foreign court order resulting from a foreign insolvency proceeding.[81]

78 *Haotanto Anna Vanessa v Fang Ching Wen Ted* [2022] SGHC 216 at [25].
79 *Haotanto Anna Vanessa v Fang Ching Wen Ted* [2022] SGHC 216 at [32].
80 [2022] SGHC 147.
81 The Singapore High Court had previously granted recognition of a US Chapter 11 plan and confirmation order in *Re CFG Peru Investments Pte Ltd* (HC/OS 665/2021), but no written grounds of decision were released.

18.86 The case concerned the collapse of the Eagle Hospitality Real Estate Investment Trust ("E-REIT"), which is listed in Singapore. E-REIT owned two Singapore incorporated subsidiaries, which in turn held a number of properties. E-REIT and the two subsidiaries filed Chapter 11 petitions with the US Bankruptcy Court for the District of Delaware. Alan Tantleff, who was appointed the foreign representative of the petitioning entities, applied to the Singapore High Court for recognition of the US Chapter 11 proceedings, and the US court order confirming the Chapter 11 plan.

18.87 The first issue was whether E-REIT was able to utilise the recognition regime under the MLCBI. The Singapore High Court held that E-REIT, being a trust and not a "corporation" as defined under Art 2(c) of the MLCBI, could not seek recognition thereunder. In the court's view, the MLCBI as adopted by Singapore only applies to corporations. This is unlike the MLCBI as adopted by the UK and the US, which appears wide enough to include a business trust. Recognition of E-REIT will need to be based on another source of power, which, in the court's view, lies in the common law.

18.88 With regard to the recognition application for the Singapore incorporated subsidiaries, the court considered whether their Chapter 11 proceeding was a foreign main or non-main proceeding. Related to that, the court had to determine location of their COMI. The court held that their COMI was in the US. The factors in this case, including the location of the subsidiaries' main business and activities in the US, rebutted the presumption of the place of registration as the COMI. The US Chapter 11 proceeding was thus a foreign main proceeding. The court observed that activities of the foreign representative after the commencement of the Chapter 11 proceeding and the control and supervision of the US court are not relevant in determining the COMI.[82] A recognising court should focus on the activities of the debtor before the commencement of the foreign insolvency proceeding.

18.89 It is relatively uncontroversial that a domestic court may, under the MLCBI, grant recognition to a foreign insolvency proceeding and order relief such as a stay of legal and enforcement proceedings and other assistance to a foreign representative. However, the UK Supreme Court made it clear in *Rubin v Eurofinance SA*[83] ("*Rubin*") that, as a matter

82 See also *Re Zetta Jet (No 2)* [2019] 4 SLR 1343 at [101]–[103]. On this issue, the Singapore High Court departs from the approach in the US: see, *eg*, *In re Oi Brasil Holdings Coöperatief UA* 578 BR 169 (Bankr SDNY, 2017) and *In re British American Isle of Venice* (BVI) Ltd 441 BR 713 (Bankr SD Fla, 2010).

83 [2012] 3 WLR 1019.

of English law, recognition under the MLCBI is procedural in nature and does not extend to recognition of foreign insolvency judgments and orders.

18.90 The Singapore High Court declined to follow *Rubin*, and decided that Art 21(1)(g) of the MLCBI was wide enough to allow a domestic court to recognise the US Chapter 11 plan and confirmation order. The court reasoned as follows. The UK version of Art 21(1)(g) of the MLCBI (which is similar to the original version of the Model Law) states that, upon recognition of a foreign proceeding, the court may grant "any additional relief that may be available to a British insolvency office holder *under the law of [the recognising jurisdiction, that is, Great Britain]*" [emphasis added]. Chapter 15 of the US Bankruptcy Code, which enacts the MLCBI in the US, omits the words "under the law of [the recognising jurisdiction]" in its equivalent provision. Unlike the English courts, the US courts have consistently granted recognition of foreign insolvency judgments and orders under US Chapter 15. When Singapore adopted the Model Law, it deliberately chose to follow the US and not the UK approach by omitting the words "under the law of [the recognising jurisdiction]". As such, the Singapore High Court concluded that it has the power to recognise foreign insolvency orders under the MLCBI, as the US courts have done. Any recognition and enforcement of a foreign insolvency judgment should be subject to safeguards such as due process and public policy consideration.[84]

18.91 Was it the intention of the drafters of the MLCBI that the discretionary relief granted under Art 21(1)(g) should be wide enough to include recognition of a foreign insolvency judgment or order? The High Court's conclusion in *Re Tantleff* may find further support in Art X of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency related Judgments[85] ("MLREIJ"), which states as follows:

> Notwithstanding any prior interpretation to the contrary, the relief available under [*insert cross reference to the legislation of this State enacting article 21 of the UNCITRAL Model Law on Cross-border Insolvency*] includes recognition and enforcement of a judgment.

84 This is consistent with *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061, where the Court of Appeal declined to recognise a foreign bankruptcy order on the ground of breach of the rules of natural justice.

85 GA Res 73/200, adopted at the United Nations General Assembly, 73rd Session (20 January 2018).

18.92 The Guide to Enactment to the MLREIJ notes[86] that certain jurisdictions (in particular, the UK in *Rubin*) had interpreted the MLCBI such that its relief does not include recognition and enforcement of a judgment, and that:[87]

> … the purpose of article X is to make it clear to States enacting (or considering the enactment of) the MLCBI that the relief available under article 21 of the MLCBI includes recognition and enforcement of an insolvency-related judgment and such relief may be sought under article 21 …. The enactment of article X is not necessary in jurisdictions where the MLCBI is interpreted as covering recognition and enforcement of foreign insolvency related judgements.

18.93 The Guide to Enactment goes on to state that:[88]

> … pursuant to the clarification provided by article X, the discretionary relief available under the MLCBI, article 21 to support a recognized foreign proceeding (covering both main and non-main proceedings) should be interpreted as including the recognition and enforcement of a judgment, notwithstanding any interpretation to the contrary.

18.94 The MLREIJ has not yet been adopted in any state. However, the Guide to Enactment is useful in stating the intention of the drafters of the model laws. Arguably, the drafters intended for relief under Art 21 of the MLCBI to include recognition of foreign insolvency judgments, and had introduced Art X for the avoidance of doubt. To the extent that the Singapore courts have interpreted Art 21 of the MLCBI as being wide enough to allow a court to recognise and enforce a foreign insolvency related judgment, it is strictly not necessary to introduce Art X in the Singapore legislation.

18.95 The Singapore High Court in *Re Rams Challenge Pte Ltd*[89] similarly granted an application by the Japanese trustee of companies undergoing Japanese reorganisation proceedings for recognition of such proceedings as well as Japanese court orders confirming the reorganisation plans for the companies. The Singapore court remarked that the Japanese reorganisation proceeding, with a court-appointed trustee, was more akin to judicial management in Singapore and unlike the debtor-in-possession regime in US Chapter 11. In the court's view, there was no reason to differentiate recognition of the Japanese court orders simply because it was different from that in *Re Tantleff*. To be

86 See UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment (UNCITRAL, 2019) (hereinafter "Guide to Enactment") at para 2.
87 Guide to Enactment at para 126.
88 Guide to Enactment at para 41.
89 [2022] SGHC 220.

accorded recognition, it is not necessary for the foreign insolvency order to be strictly analogous with Singapore insolvency or restructuring regimes. Nevertheless, the foreign order should not "operate substantially outside what might properly be regarded as the proper purview of an insolvency or restructuring effort, though the modalities and detailed scope may differ amongst jurisdictions".[90]

B. Substantial connection and centre of main interest

18.96 The onset of the much discussed "crypto winter" provided fertile opportunity to test the boundaries in the law on cross-border insolvency. In *Re Zipmex Co Ltd*,[91] entities in the Zipmex Group ("Zipmex"), including foreign incorporated ones, applied to the Singapore High Court for relief under ss 64 and 65 of the IRDA. Foreign companies must show they have a substantial connection with Singapore in order to do so. Zipmex operated a cryptocurrency exchange platform, where customers' fiat currency was placed in a "fiat wallet" and used to purchase cryptocurrencies. Customers registered with different Zipmex entities in different jurisdictions, and the cryptocurrencies were held in "host wallets" ostensibly ascribed to each entity a customer registered with. Another "Z wallet", subject to its own terms and conditions, was offered to customers, and cryptocurrencies deposited into the Z wallet ceased to be governed by the terms and conditions of each specific entity. Singapore-incorporated Zipmex Asia Pte Ltd ("Zipmex Asia") held all the cryptocurrencies, whether in the hosted wallets or the Z wallet, and was able to use and deploy them by placing them with other parties such as cryptocurrency exchanges.

18.97 There had clearly been a significant degree of co-mingling of the crypto assets which ostensibly belonged to entities in a group and their respective customers. Based on the evidence before the High Court, Zipmex established entities in different jurisdictions in order to comply with local regulations.[92] In considering the location of the COMI of the foreign applicants, the court noted that the hub of the interlinked business of the group was ultimately in Singapore. Practically all the crypto assets of the group were held in a wallet hosted by Zipmex Asia and each of the entities authorised it to use or commit these assets for business purposes. The High Court determined that the COMI was Singapore, and that this constituted substantial connection, allowing the court to exercise its jurisdiction and grant the orders under ss 64 and 65 of the IRDA.

90 *Re Rams Challenge Pte Ltd* [2022] SGHC 220 at [10].
91 [2022] SGHC 196.
92 *Re Zipmex Co Ltd* [2022] SGHC 196 at [3].

C. Extra-territoriality of production orders under section 285 of the Companies Act 1967[93]

18.98 *Xu Wei Dong v Midas Holdings Ltd*[94] is the first reported decision in Singapore since *In the matter of Thye Nam Loong (Singapore) Pte Ltd*[95] to examine whether the court's powers in s 285 of the Companies Act may be exercised in respect of persons and documents located abroad. In this case, the court ordered a foreign-incorporated auditor to produce audit-related documents of a company in liquidation, pursuant to s 285.

18.99 In doing so, the court declined to adopt the approach in *In re Tucker (RC) (a bankrupt)*,[96] in which the English court found that the equivalent provisions in bankruptcy were limited territorially. The court noted that the English provisions gave the English court a power to order an examination out of England of "any person who if in England would be liable to be brought before [the English court] under this section".[97] This showed that a person not in England would not be liable to be brought before the English court. However, there was no such limiting language in s 285 of the Companies Act, which expressly allowed "any person" to be summoned.

18.100 The court accepted that, on its face, the presumption of territoriality for statutes would apply to s 285. It was silent on its geographical scope as compared to, for instance, s 37 of the Prevention of Corruption Act 1960,[98] which was expressed to apply to Singapore citizens "outside as well as within Singapore". However, the court noted that the language of s 285 does not restrict its operation in any way. Instead, s 285 is couched in sufficiently wide terms to cover a person or entity based in a foreign jurisdiction.

18.101 The court also observed that the strength of the presumption of territoriality is not immutable, and that there are gradations in the strength of that presumption. The proper approach is to consider the object of the rule, and then to decide whether its object would be promoted if it were interpreted to cover the situation at hand. In this case, the court held that "[t]he purpose of s 285 shows that it is meant to operate extra-territorially".[99] Specifically, its purpose is to enable a liquidator to

93 After the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("IRDA") came into effect, the equivalent provision is s 244 of the IRDA.
94 [2022] SGHC 268.
95 [1998] SGHC 27.
96 [1990] 1 Ch 148.
97 *Xu Wei Dong v Midas Holdings Ltd* [2022] SGHC 268 at [24].
98 2020 Rev Ed.
99 *Xu Wei Dong v Midas Holdings Ltd* [2022] SGHC 268 at [34].

get documents or information that would enable him to better discharge his statutory functions. The objective of s 285 would therefore be served through extra-territorial application. "Limiting the operation of s 285 to material and persons within the territory would hamper the proper operation of liquidation, whereby a liquidator's investigation into a company would be easily thwarted by the person removing himself from the jurisdiction."[100]

100 *Xu Wei Dong v Midas Holdings Ltd* [2022] SGHC 268 at [24].