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18. INSOLVENCY LAW

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I. Winding up of companies

18.1 The High Court decisions in *61 Robinson Road v Viva Capital*[1] ("*61 Robinson Road*"), *Abcom Pte Ltd v Transasia Priate Capital Ltd*[2] ("*Abcom*") and *Europ Assistance Holding SA v ONB Technologies Pte Ltd*[3] ("*Europ Assistance*") deal with a debtor's attempt to resist a winding-up application and may be considered together.

18.2 These cases illustrate the burden a debtor has to discharge to successfully resist or restrain its creditor's winding-up application. In *61 Robinson Road*, the landlord applied to wind up its tenant on the basis of unpaid rent under a lease agreement. The debtor's main defence was that there was an alleged oral agreement to terminate the lease agreement. Significantly, the lease agreement contained a no-oral modification clause. Such a clause raises a rebuttable presumption that, in the absence of an agreement in writing, there would be no variation of a written contract.[4] The debtor in this case failed to rebut the presumption on the facts. In *Abcom*, the debtor tried but failed to restrain its creditor from commencing winding-up proceedings on the ground that the debt was disputed in good faith and on substantial grounds. The debtor raised a host of allegations, ranging from frustration to illegal moneylending to

1 [2023] SGHC 315.
2 [2023] SGHC 242.
3 [2023] SGHC 226.
4 *Charles Lim Teng Siang v Hong Choon Hau* [2021] 2 SLR 153.

election by waiver or estoppel, all of which were rejected. The arguments were either legally unsustainable, or unsupported by evidence.

18.3 On the other hand, the court in *Europ Assistance* dismissed a creditor's winding-up application against a debtor company. A contributory of the company, whom the court decided had the requisite standing,[5] had opposed the winding-up application. The creditor did not issue a statutory demand but alleged that the debtor was unable to pay its debt (s 125(1)(*e*) read with s 125(2)(*c*) of the Insolvency, Restructuring and Dissolution Act 2018 ("IRDA")) because, among others, the debtor's managing director acknowledged the debtor was facing solvency issues, and there were other documents suggesting the debtor was in financial difficulties. The court rightly decided that the creditor had failed to discharge its burden to prove the debtor's insolvency. On a holistic evaluation, the evidence did not conclusively demonstrate that the debtor was unable to pay its debts. In any event, the debt arose under a contract with an arbitration clause which was *prima facie* valid. The dispute fell within the arbitration clause and there was no evidence of abuse of process. The court was thus able to dismiss the winding-up application on an alternative and more straightforward ground based on the arbitration clause.[6]

A. Shareholder's standing to nominate liquidator

18.4 A shareholder was the registered holder of 50% of the shares in a company set up for the sole purpose of holding certain properties. After the properties were sold, the shareholder applied to wind up the company on just and equitable grounds under s 125(1)(*i*) of the IRDA. A party claiming to be the beneficial owner of the winding-up applicant's shares in the company challenged her right to nominate the liquidator.

18.5 That was the background of the dispute in *Rashmi Bothra v SuntecCity Thirty Pte Ltd*.[7] The private trustees of a bankrupt individual claimed that a company which he beneficially owned had paid 50% of the purchase price of the company's properties. As such, it was the bankrupt, and not the winding-up applicant, who beneficially owned the applicant's shares in the company to be wound up.

5 See *Atlas Equifin Pte Ltd v Electronic Cash and Payment Solutions (S) Pte Ltd* [2023] 3 SLR 900.

6 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158.

7 [2023] 2 SLR 535.

18.6 A key issue in the case relates to a shareholder's legal standing to apply to wind up the company, which carries with it the concomitant right to nominate a liquidator. The Court of Appeal considered that the winding-up applicant, who was a contributory and member of the company, had the requisite standing to do so. On the other hand, the bankrupt, who claimed to be a beneficial owner of the applicant's shares, had no such standing. The legislative definition of a member[8] refers to one reflected on the register of members of the company. A party claiming beneficial ownership to shares in a company is not a contributory or a member and hence has no standing to apply for a winding up or nominate a liquidator.

18.7 As a separate but related point, the High Court had decided that the winding-up applicant's nominee should not be appointed because, among other things, the liquidators would have to investigate the beneficial ownership of her shares in the company being wound up. The Court of Appeal disagreed. The High Court's reasoning would apply equally to the private trustees' nominee. Further and more importantly, it is not a liquidator's duty to investigate the true ownership of shares of members on the register of members. A liquidator has the power to investigate the company's affairs and dealings for the purpose of discharging his or her duties to steward the estate in liquidation. A liquidator should not use such power to look into matters – an example of which is the beneficial ownership of shares in the company – which do not benefit the estate in liquidation.

B. Shareholder's or contributory's standing to oppose winding-up application

18.8 Still on the issue of a shareholder's standing, the High Court in *Atlas Equifin Pte Ltd v Electronic Cash and Payment Solutions (S) Pte Ltd*[9] ("*Atlas Equifin*") had decided that a shareholder or contributory has the legal standing to oppose a winding-up application but would require leave to do. The High Court set out a list of factors a court would consider, including whether the shareholder or contributory owned a significant portion of the company's shareholding such that they had a substantial interest in opposing the winding-up application, whether the shareholder or contributory was acting *bona fide*, whether the shareholder or contributory could demonstrate that the company was

8 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) s 2(1); Companies Act 1967 (2020 Rev Ed) ss 19(6)(*b*) and 19(6A)(*b*).

9 [2023] 3 SLR 900.

solvent, and the countervailing interests of creditors, particularly where they were unpaid.[10]

18.9 The leave requirement was intended to prevent frivolous opposition by shareholders, particularly since they generally do not have any economic interests in an insolvent company. The shareholder's standing to be heard in or oppose a winding-up application is uncontroversial but there is no express statutory requirement for leave. In the later decision in *Adcrop Pte Ltd v Gokul Vegetarian Restaurant and Cafe Pte Ltd*[11] ("*Adcrop*"), the High Court had the opportunity to revisit the leave requirement, forming the view that ascribing no weight to a shareholder's view or position probably has the same practical effect as not granting leave, and sits better with the legislative framework.

18.10 The court rightly remarked that the factors set out in *Atlas Equifin* were not intended to be exhaustive. The court ultimately assesses whether a shareholder had a genuine interest in opposing the winding-up application. None of the *Atlas Equifin* factors should be determinative. In particular, a shareholder should not be denied the right to oppose a winding-up application simply because of its failure to prove the company was solvent, especially "where a company has allegedly been rendered insolvent to facilitate the takeover of its business",[12] and the company's inability to pay its debts "has been allegedly engineered".[13]

18.11 The facts in *Adcrop* illustrate the point well. The winding-up proceeding germinated from a dispute between rival shareholders (who were sisters-in-law) in the debtor company. The fairly small debt (of $20,000) which founded the winding-up application arose from a purported transaction for the debtor to issue shares to the creditor, which were eventually not issued. The court found that this debt, as well as the winding-up application, was motivated by collateral purposes and was part of an elaborate scheme by one shareholder to gain control of the debtor's business from the other. The court was persuaded that the winding-up application should be dismissed as an abuse of process. In any event, there was a substantial and *bona fide* dispute as to whether the debt was in fact due.

10 *Atlas Equifin Pte Ltd v Electronic Cash and Payment Solutions (S) Pte Ltd* [2023] 3 SLR 900 at [33].
11 [2023] 5 SLR 1435.
12 *Adcrop Pte Ltd v Gokul Vegetarian Restaurant and Cafe Pte Ltd* [2023] 5 SLR 1435 at [42].
13 *Adcrop Pte Ltd v Gokul Vegetarian Restaurant and Cafe Pte Ltd* [2023] 5 SLR 1435 at [42].

C. Standing to wind up company

18.12 A creditor's standing to commence winding-up proceedings was examined in two significant decisions in 2023.

18.13 In *Founder Group (Hong Kong) Ltd v Singapore JHC Co Pte Ltd*[14], the Court of Appeal examined the interaction between an applicant's standing as a creditor (and alternatively, as a contingent creditor) to bring a winding-up application based on debts in contracts containing arbitration agreements, and the doctrine of separability in arbitration agreements.

18.14 The respondent company disputed its liability on the basis that the contracts were never meant to be enforced, and therefore null and void. The respondent consequently argued that the disputes it raised on liability fell within the scope of contractual arbitration agreements, and should be referred to arbitration in accordance with the principles in *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)*[15] ("*AnAn*").

18.15 The Court of Appeal first clarified that the appellant was not a contingent creditor. The paradigm example of a contingent claim was a present liability that is payable upon a future event taking place. An applicant could in principle be a contingent creditor, if liability itself were not disputed and the only dispute is on whether the future event has taken place. In this case, the appellant could not be a contingent creditor, since the very existence of the liability was disputed.[16]

18.16 The Court of Appeal then held that it was inconsistent for the respondent company to invoke the arbitration agreements to resist winding up, while at the same time maintaining that the whole of the contracts were shams and thus null and void. The principle of separability would not shield an arbitration clause, if a party was also asserting that the arbitration clause was invalid. The Court of Appeal further noted that the respondent could not account for why the contracts were entered into, if parties indeed never intended to enforce them. The respondent's position was therefore an abuse of process, and the *AnAn* requirements did not apply at all.[17]

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14 [2023] 2 SLR 554.
15 [2020] 1 SLR 1158.
16 *Founder Group (Hong Kong) Ltd v Singapore JHC Co Pte Ltd* [2023] 2 SLR 554 at [38]–[46].
17 *Founder Group (Hong Kong) Ltd v Singapore JHC Co Pte Ltd* [2023] 2 SLR 554 at [61] and [62].

18.17 In *Lim How Teck v Laguna National Gold and Country Club Ltd*,[18] a note issuer resisted a noteholder's winding-up application, on the ground that noteholders have no standing as creditors.

18.18 One of the features of notes financing is the interposition of a notes trustee between the borrower and noteholders. In such structures, the terms of the trust deed typically provide that noteholders have no direct claims against the issuer. Instead, only the trustee can pursue claims on behalf of all noteholders against the issuer, unless the trustee has become bound to do so but fails to do so ("no-action clauses"). Such no-action clauses are usually intended to protect both issuers and noteholders from frivolous litigation brought by a minority of noteholders, which may not be in the collective economic interest of all stakeholders.

18.19 The High Court held that no-action clauses will not apply, if the notes trustee will be placed in a position of conflict or if the trustee has shown an unjustifiable unwillingness to act.[19] In this case, the High Court was satisfied that the trustee may potentially be conflicted if the trustee wound up the issuer. This was because the noteholders had raised allegations on the trustee's conduct and its knowledge of prior events of default under the trust deed, which did not appear to have been brought to the noteholders' attention. If so, the trustee's interest in protecting itself from such claims would potentially conflict with its duty to protect noteholders' interests in the issuer's liquidation.[20] Accordingly, the High Court found that the noteholder had requisite standing to apply to wind up the issuer.

18.20 This decision marks another step taken towards empowering noteholders as creditors in the insolvency of a bond issuer. This follows from the High Court's earlier recognition of noteholders as contingent creditors, who are allowed to vote in schemes of arrangement notwithstanding the usual "no-action clauses".[21]

D. Exercise and control of liquidators

18.21 *DB International Trust (Singapore) Ltd v Medora Xerxes Jamshid*[22] marked a relatively rare occasion in which the court removed and

18 [2023] 4 SLR 1634.
19 *Lim How Teck v Laguna National Golf and Country Club Ltd* [2023] 4 SLR 1634 at [21].
20 *Lim How Teck v Laguna National Golf and Country Club Ltd* [2023] 4 SLR 1634 at [30].
21 See *Re Swiber Holdings Ltd* [2018] 5 SLR 1358.
22 [2023] 5 SLR 773.

replaced a liquidator, upon a creditor's application under s 139(1) of the IRDA (which provides that "[a] liquidator appointed by the Court may resign or on cause shown be removed by the Court").

18.22 In that case, the High Court explained that s 139(1) of the IRDA should be approached as a two-stage sequential test. At the first stage, the court would assess the purposes for which the liquidator was appointed. At the second stage, the court would assess if the removal of the liquidator was in the real, substantial and honest interests of the liquidation, bearing in mind the purposes determined at the first stage.[23] As the case involved an insolvent liquidation, the High Court observed in particular that one of its purposes would be to enable an investigation into the company's affairs by an independent person. A liquidator in a compulsory liquidation may therefore be reasonably expected to exercise his powers of investigation, if necessary in his professional assessment.[24]

18.23 The High Court was satisfied that replacing the liquidator would be in the interests of the liquidation in this case. The High Court found that the liquidator had not displayed sufficient vigour in carrying out his duties, which contributed to a justifiable loss in the creditors' confidence in the liquidator. Among other things, the High Court found that the liquidator had allowed a former director to continue acting for the company in too broad a manner, which plausibly caused the company to suffer loss from a dilution of its assets.[25] The High Court also found that the liquidator unjustifiably failed to undertake any personal investigations into the affairs of the company. Instead, the liquidator delegated all responsibility for the investigations to an external party, while seemingly allowing the investigations to drag on for almost two years without any clear conclusion.[26]

18.24 In *Yap Cheng Ghee Bob v Envy Asset Management Pte Ltd*,[27] the High Court laid out a framework on when liquidators could seek the court's determination on questions arising in the winding-up of a company under s 145(3) of the IRDA. The High Court observed that there were two distinct issues to be determined: the first was the circumstances in

23 *DB International Trust (Singapore) Ltd v Medora Xerxes Jamshid* [2023] 5 SLR 773 at [13].
24 *DB International Trust (Singapore) Ltd v Medora Xerxes Jamshid* [2023] 5 SLR 773 at [17].
25 *DB International Trust (Singapore) Ltd v Medora Xerxes Jamshid* [2023] 5 SLR 773 at [28]–[33].
26 *DB International Trust (Singapore) Ltd v Medora Xerxes Jamshid* [2023] 5 SLR 773 at [37]–[41].
27 [2024] 4 SLR 746.

which liquidators could rely on s 145(3) of the IRDA; and the second was whether the court should make the directions sought.[28]

18.25 The High Court broadly approved of the approach taken by Australian courts. In particular, Australian courts may give directions to liquidators that provide guidance on matters of law and the reasonableness of a contemplated exercise of discretion. However, they will typically not do so where a matter relates to the making and implementation of a business or commercial decision, where no particular legal issue is raised and there is no attack on the propriety or reasonableness of the decision.[29]

18.26 Here, the High Court was satisfied that the liquidators could rely on s 145(3) of the IRDA, as the directions sought involved potentially controversial issues of law and principle, where the proposed actions might be subject to criticism by opposing creditors. Further, the High Court accepted that the directions ought to be granted, as it would be advantageous to the liquidation to do so.[30]

18.27 The High Court also remarked in *obiter* that while liquidators in voluntary liquidation could similarly seek directions under s 181(1) of the IRDA, the added statutory requirement for such determination to be "just and beneficial" should nonetheless be interpreted in the same manner as in compulsory liquidation. This was to give effect to the broad legislative intention of allowing a liquidation to proceed advantageously, whether it was a voluntary or compulsory liquidation.[31]

E. Funding

18.28 The High Court had the opportunity in 2023 to consider two modes of insolvency funding: (a) prospective orders under s 204(3) of the IRDA to give a creditor an advantage over other creditors with respect to assets recovered as a result of the creditor's funding; and (b) selling the proceeds of pre-insolvency causes of action and statutory claims under ss 144(2)(*b*) and 144(1)(*g*) of the IRDA respectively.

18.29 Prospective orders to confer an advantage under s 204(3) of the IRDA were dealt with in *Majestica Enterprises Ltd v Kams Singapore Pte Ltd*.[32] In that case, the High Court prospectively approved of a creditor

28 *Yap Cheng Ghee Bob v Envy Asset Management Pte Ltd* [2024] 4 SLR 746 at [17].
29 *Yap Cheng Ghee Bob v Envy Asset Management Pte Ltd* [2024] 4 SLR 746 at [23].
30 *Yap Cheng Ghee Bob v Envy Asset Management Pte Ltd* [2024] 4 SLR 746 at [31]–[41].
31 *Yap Cheng Ghee Bob v Envy Asset Management Pte Ltd* [2024] 4 SLR 746 at [30].
32 [2024] 3 SLR 1220.

funding a liquidator's investigations, on terms that the creditor would have priority in recovering the funded amounts and 75% of its unsecured claims, ahead of other creditors.

18.30 Notably, the High Court departed from the approach taken in the earlier case of *Song Jianbo v Sunmax Global Capital Fund 1 Pte Ltd*[33] in two ways. First, the High Court considered that the possible emergence of other creditors after the grant of a funding order was not a relevant consideration. This was because it was not clear how the court should take into account events that may arise after the order, when deciding whether to grant the order.[34] Second, the High Court declined to impose a condition allowing other creditors who may be prejudiced to challenge the grant. The High Court explained that s 204(2) of the Insolvency, Restructuring and Dissolution Act 2018[35] was enacted to permit prospective orders because it was recognised that otherwise, at the point of providing the funds, funding creditors would have no assurance that the court would make an order giving them an advantage over other creditors. Accordingly, the High Court held that subjecting a s 204(3) order to the possibility of subsequent challenges by other creditors would be inconsistent with the purpose of prospective orders, and unfair to the funding creditor.[36]

18.31 In *Lavrentiadis, Lavrentios v Dextra Partners Pte Ltd*,[37] the liquidators of a company entered into a litigation funding agreement through which the funders stood to make a profit of up to two times the amount funded, through the assignment of proceeds of causes of action and statutory claims under ss 144(2)(*b*) and 144(1)(*g*) of the IRDA respectively. The High Court sanctioned the arrangement, noting that it was commercially unrealistic to expect funders to take the risks of funding an insolvent company's litigation, and not expect to be compensated for it.[38]

18.32 As for whether the amount of compensation was objectionable, the High Court accepted evidence that, typically, funders of liquidation or bankruptcy estates stood to gain between 0.5 and 3.5 times the total amount funded. The High Court further observed that the multiplier would be around the lower end of the scale in cases involving the funding of the pursuit of specific claims. In cases involving a more open-ended

33 [2023] 4 SLR 1575.
34 *Song Jianbo v Sunmax Global Capital Fund 1 Pte Ltd* [2023] 4 SLR 1575 at [13].
35 Act 40 of 2018.
36 *Song Jianbo v Sunmax Global Capital Fund 1 Pte Ltd* [2023] 4 SLR 1575 at [15] and [16].
37 [2023] 5 SLR 1288.
38 *Lavrentiadis, Lavrentios v Dextra Partners Pte Ltd* [2023] 5 SLR 1288 at [22].

funding of investigations and subsequent pursuit of potential causes of action, the multiplier would be at the higher end of the scale since the risk undertaken by the funder is higher. This was bearing in mind that the investigations may not result in viable claims, and the timeframe for potential recovery would be longer.[39]

F. Power to retrospectively appoint solicitors

18.33 In *Re Kirkham International Pte Ltd*[40] ("*Re Kirkham*"), the High Court held that it had no power under the IRDA to retrospectively authorise a liquidator's appointment of solicitors. The High Court observed that its powers to do so stemmed from s 144(1)(*f*) of the IRDA, which provided that "the liquidator may, *after authorisation* by either the Court or the committee of inspection … appoint a solicitor to assist the liquidator in the liquidator's duties" [emphasis added]. The High Court held that the express language strongly suggested that the liquidator could only appoint solicitors *after* authorisation was obtained. If so, the court's inherent power to grant retrospective applications must yield to statutory language which suggested otherwise.[41]

18.34 That said, the High Court also held that the absence of authorisation did not invalidate a solicitor's appointment. Instead, it only went towards whether the solicitors' costs should be borne by the estate, or personally by the liquidator.[42] On the facts, the High Court accepted that the liquidator had acted in good faith, even though he should have sought authorisation prior to appointing solicitors. Accordingly, legal costs were allowed to be borne from the estate.

18.35 This decision is also notable for being the first in a series of conflicting authorities on the same issue. In *Re Eye-Biz Pte Ltd*,[43] the court surveyed *Re Kirkham* but retrospectively authorised a liquidator's appointment of solicitors, noting that s 144(1) of the IRDA did not limit the court's power to specify the date for an appointment of solicitors to take effect. In the latest decision in *Re Mingda Holding Pte Ltd*,[44] the High Court preferred the reasoning in *Re Kirkham*, holding that the statute clearly drew a bright line between acts that can be taken with and without authorisation. The High Court also observed that there was no issue of circularity, in which liquidators would not even be able to appoint solicitors

39 *Lavrentiadis, Lavrentios v Dextra Partners Pte Ltd* [2023] 5 SLR 1288 at [23].
40 [2023] 5 SLR 635.
41 *Re Kirkham International Pte Ltd* [2023] 5 SLR 635 at [35].
42 *Re Kirkham International Pte Ltd* [2023] 5 SLR 635 at [38].
43 [2024] SGHC 60.
44 [2024] SGHC 130.

to seek court approval for appointing solicitors. Instead, a liquidator has capacity to do so, and if he does so with reasonable prudence, the court will likely allow him to charge the costs of the application to the estate.[45]

G. Transaction to put assets beyond creditors' reach

18.36 In *DDP v DDR*,[46] the High Court considered, for the first time, the contours of s 438 of the IRDA. Section 438 of the IRDA was introduced to replace s 73B of the Conveyancing and Law of Property Act[47] ("CLPA 1994"), which had provided that conveyances of property with intent to defraud creditors shall be voidable.

18.37 The court in *DDP v DDR* decided that the insolvent debtor's declaration of a trust over his property in favour of his son was a gift which constituted a transaction at an undervalue. Whilst the parties did not make full arguments on s 438 of the IRDA, the High Court made a number of helpful observations.

18.38 First, the court noted that for s 438 to apply, the transaction must be one at an undervalue[48] and intended to put assets beyond the reach of actual or potential creditors or to prejudice their interests. This may be contrasted with s 73B of the CLPA 1994 which focuses on the intention to defraud creditors. Second, whilst s 73B merely states that the impugned transaction is voidable, s 438 prescribes the relief which the court may order.

18.39 How does one prove that the transaction was intended to put assets beyond the reach of creditors? As the court said in *DDP v DDR*,[49] the objective of putting assets beyond the reach of creditors need not be the sole or dominant purpose of the transaction. It suffices to show that

45 *Re Mingda Holding Pte Ltd* [2024] SGHC 130 at [42].

46 [2024] 3 SLR 1457.

47 Cap 61, 1994 Rev Ed. Section 73B of the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed) was repealed by the Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018).

48 That is, a transaction which was: (a) a gift to the recipient or one for which the debtor received no consideration; (b) entered into for consideration of marriage; or (c) one where the value of the consideration is significantly less than the consideration received by the debtor (see also ss 224 and 361 of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed)).

49 Referring to English case law interpreting s 423 of the Insolvency Act 1986 (c 45) (UK), which is *in pari materia* with s 438 of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed).

it was "a substantial purpose".[50] Presumably, if the evidence is that the purpose was unintended or subsidiary, it may not be easy to invoke s 438.

18.40 The relief prescribed under s 438 contains language similar to that in s 227 of the IRDA, and includes ordering transferred property to be revested in the debtor, and a release or discharge of security granted by the debtor. In determining the appropriate relief, the court considers the mental state of the transferee and the degree of its involvement in the scheme to put assets out of the creditors' reach. Where the transferee had no knowledge of such scheme and simply held the asset, the court may order the return of the asset to the debtor. However, if the transferee had changed its position[51] on the basis of the receipt of the asset such that it would be unfair to compel the return of the asset (or its monetary equivalent), the court may not order so.

H. Effect of foreign confiscation or restraint order

18.41 If the assets of a company in liquidation in Singapore are subject to a foreign confiscation or restraint order, tension naturally arises between the interest in administering the assets under the Singapore liquidation regime on the one hand, and the provision of international assistance to the foreign state on the other. The High Court had the rare opportunity to consider this issue in *Re oCap Management Pte Ltd*.[52]

18.42 The case concerned criminal offences relating to the Wirecard group. Following a request by German authorities, the Attorney General applied under the Mutual Assistance in Criminal Matters Act 2000[53] ("MACMA") to restrain dealings in proceeds of such criminal offences held in a company's bank accounts in Singapore. The company was in liquidation. It was common ground between the Attorney General and the liquidators that the requirements for providing assistance under the MACMA had been met, but the liquidators sought directions to allow them to deal with part of the moneys in the company's bank accounts as part of the liquidation process, including exercising their functions as liquidators, and payment of liquidation expenses.

50 *DDP v DDR* [2024] 3 SLR 1457 at [35], citing *Inland Revenue Commissioners v Hashmi* [2002] 2 BCLC 489.

51 An analogy may be drawn with the defence of change of position in the law of unjust enrichment: see a recent statement of the defence in *Riady Tjandra v Cheng Yi Han* [2024] SGHC 59 at [122].

52 [2023] SGHC 316.

53 2020 Rev Ed.

18.43 Paragraph 14(2) of the Third Schedule to the MACMA deals with the court's power to grant a restraint order over property to assist a foreign state where such property is held by a company in liquidation. In essence, para 14(2) provides that such power must not be exercised so as to (a) inhibit the liquidators from exercising their functions for the purpose of distributing any property to the creditors, or (b) prevent the payment of expenses properly incurred in the winding up in respect of the property. In other words, the court's power to grant a restraint order over property is restricted in either of these situations.

18.44 In the court's view, para 14(2)(*a*) should not be interpreted as restricting the court's power only where a liquidator is performing the *act of distribution* of property to creditors. Such an interpretation is unduly narrow and means that the court can grant a restraint order over the company's property at all stages of a liquidation except where distribution of property to creditors is imminent. Rejecting such a narrow interpretation, the court stated that its power to grant a restraint order may also be restricted where it would inhibit other functions of a liquidator which serve the ultimate end of distribution, for instance, the liquidator's investigation, pursuit of claims, collection and realisation of assets before any distribution to creditors. Further, whether the court's power is restricted should not depend on whether the restraint order under the MACMA was made before or after the winding-up order.

18.45 With regard to para 14(2)(*b*) which focuses on liquidation expenses, again the court disagreed with a narrow interpretation of such expenses being confined to those already incurred. The court decided that its power to grant a restraint order over property should be restricted if it would prevent the payment of expenses which were, or will be, incurred in the liquidation or realisation of such property, and the incurring of such expenses were or would be proper.

18.46 The court helpfully set out a list of non-exhaustive factors for assessing such expenses, which can be past or projected, without necessarily going through taxation. A holistic assessment of whether the claimed sum is a fair, reasonable and proportionate reflection of the liquidator's services would include considering factors including the type and complexity of the work done, the value brought by the liquidator, reasonableness of the liquidator's charge out rate, access to third party funding, and the anticipated work to be done for the remainder of the liquidation.

18.47 The court in *Re oCap Management Pte Ltd* aimed to strike a balance between the objective of rendering assistance to a foreign state, and the interests of creditors in a winding up. Bearing in mind the legislative intention behind the provisions in the MACMA, and the

complexities and fluidities of a winding-up process, it makes sense for the court to have adopted a practical and flexible approach in deciding the appropriate orders and reliefs in the context of a MACMA application.

I. Whether cryptocurrency obligation is debt

18.48 For a winding-up application based on a company's inability to pay its debt,[54] can a cryptocurrency obligation constitute a *debt* for that purpose? In *Loh Cheng Lee Aaron v Hodlnaut Pte Ltd*[55] ("*Hodlnaut*"), the High Court answered the question in the affirmative. The company's obligation to pay cryptocurrencies to its creditors counts as a debt owed to them.

18.49 In considering a company's cash flow solvency,[56] a holistic review of the company's position entails looking at not only liquidated claims against it, but also claims which "might be made on the company's non-monetary assets, though which may ultimately be payable in money".[57] Even though a cryptocurrency may not generally be regarded as fiat currency, an obligation to pay cryptocurrency is relevant in determining a company's solvency.

18.50 The *Hodlnaut* decision will invariably be compared with the earlier High Court decision in *Algorand Foundation Ltd v Three Arrows Capital Pte Ltd*[58] ("*Three Arrows*") which decided that a claim denominated in cryptocurrency does not constitute a statutory demand under s 125(2)(*a*) of the IRDA. As the court in *Hodlnaut* observed, there is a key distinction between the two cases. A statutory demand under s 125(2)(*a*) of the IRDA refers to a specific sum of money (S$15,000), and the creditor in *Three Arrows* was unable to persuade the court that a demand for cryptocurrency, whose value may be uncertain, constitutes a statutory demand as defined. On the other hand, the more holistic review under s 125(2)(*c*) of the IRDA – which the court carried out in *Hodlnaut* – is broader and the court is not confined to assessing money claims or money assets in deciding whether the company is insolvent.

54 Section 125(1)(*e*) read with s 125(2)(*c*) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed).

55 [2023] SGHC 323.

56 Applying the cash flow test as stated in *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd* [[2021] 2 SLR 478, since the winding-up application is based on s 125(1)(e) IRDA.

57 *Loh Cheng Lee Aaron v Hodlnaut Pte Ltd* [2023] SGHC 323 at [8].

58 HC/CWU 246/2022 (30 March 2023) (General Division of the High Court). See also UK Jurisdiction Taskforce, *Legal Statement on Digital Assets and English Insolvency Law* at para 68.

II. Bankruptcy

18.51 A number of personal insolvency cases may be highlighted. The High Court in *Sabyasachi v Mukherjee v Pradeepto Kumar Biswas*[59] emphasised it was imperative for a bankrupt to obtain the prior sanction of the Official Assignee before he could commence any action (including an application for pre-action discovery in this case). In *Mirmohammadali Hadian v Ambika d/o Ramachandran*[60] and *Re Lim Keng Teck*,[61] the High Court considered the standard of review[62] of the Official Assignee's determination of a bankrupt's monthly and target contributions. In essence, the court considers an application to review in two stages: (a) whether the Official Assignee has shown that he has complied with the mandatory requirement of considering the factors in s 339(2) of the IRDA; and (b) if the Official Assignee has done so, whether the determination withstands review under the perversity standard – that is, whether the Official Assignee's decision is so absurd that no official assignee properly advised or properly instructing himself could have so acted.

18.52 The perversity standard is high for good reasons. The Official Assignee makes his determination based on information available to him. The court's review should not descend into a consideration of the substantive merits of the determination, and the Official Assignee should be permitted to carry out his functions without constantly being concerned about potential complaints.

18.53 *Ong Jane Rebecca v Lim Lie Hoa*[63] was the first reported decision from the High Court on a private trustee's application under s 335 of the IRDA for the production of documents relating to the bankrupt's affairs, dealings or property. Section 335 is the equivalent of s 244 of the IRDA[64] which applies to companies in liquidation. The court decided that the same "two stage" test for an application under s 244 substantially applies to an application under s 335 of the IRDA. First, the private trustee has to show that there is some reasonable basis for his belief that the person who is the subject of the application can assist him in obtaining relevant information and/or documents, and that the information and/or documents are reasonably (but not absolutely) required. At the second

59 [2023] SGHC 262.
60 [2023] 5 SLR 1153.
61 [2024] 4 SLR 245.
62 Under s 340(1) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed).
63 [2023] 5 SLR 656.
64 This was in turn derived from the more well-known s 285 of the Companies Act (Cap 50, 2006 Rev Ed).

stage, the courts balance the conflicting interests involved in deciding whether to grant the order.

18.54 As part of the balance of interests, while the court will give weight to the risk that compliance might expose the respondent to liability, that, by itself, will not be a bar. Nevertheless, a court will give weight to the risk that compliance might expose the respondent to criminal penalties in the jurisdiction in which the documents are situated. Where there is a real risk, the court will be slow to order production. In this case, the court granted the application for the production of bank statements by certain banks. Such disclosure would have been permitted under the bankers' books exception.[65] This addressed any concern on banking secrecy and was a factor in favour of making the production orders sought.

III. Schemes of arrangement

18.55 The High Court gave further guidance in a number of decisions on the requirements for moratorium protection under s 64 of the IRDA.

18.56 In *Re Aaquaverse Pte Ltd*,[66] the High Court dismissed an application to extend a moratorium under s 64 of the IRDA because, among other reasons, the company was unable to persuade the court that there was a reasonable prospect of the scheme working. The court so decided even though there was creditor support for the application. As the court rightly highlighted, creditor support is but one of the requirements under s 64 of the IRDA. Much of the proposed scheme hinged on potential recovery from litigation in the UK, but there was insufficient basis, which could have come in the form of a legal opinion from a King's Counsel or a senior practitioner, to evaluate the likelihood of the litigation succeeding and the range of potential recovery. The company also failed to satisfy the court that the value of its other assets, comprising intellectual property and shares, could support the intended scheme.

18.57 *Re All Measure Technology (S) Pte Ltd*[67] ("*Re All Measure*") was another instance where the court dismissed a s 64 application. The court first summarised the procedural and substantive requirements under s 64. The procedural requirements[68] include the identification of

65 Part 4 of the Evidence Act 1893 (2020 Rev Ed) read with s 47(2) of the Banking Act 1970 (2020 Rev Ed) and para 7 of Pt 1 of the Third Schedule to the Banking Act 1970 (2020 Rev Ed).

66 [2024] 4 SLR 149.

67 [2023] 5 SLR 1421.

68 See ss 64(2), 64(3) and 64(4) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed).

creditors and the giving of notice. Such procedural requirements further the court's assessment of the substantive requirements. The essence of the substantive requirements[69] is whether, on a broad assessment, there is a reasonable prospect of the proposed or intended scheme working and being acceptable to the general run of creditors. Such assessment includes whether the application was made in good faith, and whether there is evidence of creditor support. If a scheme has been proposed, evidence of creditor support must relate to support for the proposed scheme and come with an explanation of the importance of such support. If a scheme is intended but not yet proposed, evidence of creditor support means support for the moratorium, and must come up with a brief description of the proposed scheme.

18.58 On the facts, the applicant failed to comply with both the procedural and substantive requirements under s 64. In the court's view, the application lacked good faith. The applicant gave contradictory details on the proposed scheme. There was no support from creditors, except for a single creditor whose claim will not be subject to a significant reduction like the others under the proposed scheme. The court rightly disregarded that single creditor's position.

18.59 *Re Aaquaverse* and *Re All Measure* illustrate how the court assesses the grounds of an application under s 64 of the IRDA for an extension of the moratorium. It is insufficient for the applicant to make bare assertions pertaining to, for example, a potential source of funds or investment, or the valuation of assets. There need not be absolute certainty at this stage, but the applicant will be expected to provide the support or basis for its assertions and the court will see if it can withstand scrutiny.

18.60 The automatic interim moratorium of 30 days is generally insufficient, and most companies seek an extension of the moratorium under s 64 of the IRDA. In deciding the duration of the moratorium, the practical consideration that a scheme process takes time must be balanced against the need to prevent abuse and unwarranted delay. In *Re Lemarc Agromond Pte Ltd*[70] ("*Re Lemarc Agromond*"), the High Court had first granted the moratorium in February 2023 for four months, and then subsequently extended it to the end of July 2023. The company's application to extend it further to 15 September 2023 was dismissed.

18.61 In this case, the proposed scheme was premised on income that may be generated from a new business. The court was of the view that the details of such business were lacking, and the company was unable to

69 See *Re IM Skaugen SE* [2019] 3 SLR 979.
70 [2023] SGHC 236.

furnish further details notwithstanding the time that had been given. It appeared to the court that the restructuring efforts, including those for the proposed new business which the proposed scheme hinged on, had stalled. Further, the company was unable to give a satisfactory explanation for failing to apply to extend the moratorium before it expired.

18.62 It is clear from the decision in *Re Lemarc Agromond* that a company seeking an extension of the moratorium cannot simply claim it needs more time. The company should update the court on the progress of the restructuring efforts, whether timelines previously set have been met and if not, why. In addition, the company has to satisfy the court that there continues to be reasonable grounds to believe that the proposed debt restructuring remains viable, and explain what it plans to achieve within the extended timeline. In all, the moratorium in *Re Lemarc Agromond* lasted around 6½ months (from the time of the application on 12 January 2023 to end July 2023). This should not be regarded as a fixed benchmark. The scale and complexity of the proposed debt restructuring, the progress of such efforts thus far, the projected timelines and the likelihood of complying with them are all factors a court considers in deciding whether to extend a moratorium and if so for how long. As was done in *Re Lemarc Agromond*, the court can extend a moratorium subject to periodic updates from the company before the expiry of the moratorium.

18.63 *Re Babel Holding Ltd*[71] was a case where the court allowed the application to extend the moratorium as it was satisfied that the requirements under s 64 of the IRDA were satisfied. The applicants were part of the Babel Finance group whose business activities were related to cryptocurrencies. The proposed scheme contemplated a pooling or substantive consolidation of the assets and liabilities of companies in the group, and a deed poll structure under which one of the Singapore subsidiaries in the group would assume the liabilities of other members of the group and propose a single scheme for the group. The proposed scheme also envisaged the conversion of customers' deficits into tokens pegged to certain cryptocurrencies, and new investments into the group.

18.64 Although it allowed the s 64 application, the court said that the six-month moratorium extension as applied for would have left the matter out of the court's supervision for too long.[72] Instead, the court granted a three-month extension[73] and remarked that it would be

71 [2023] 5 SLR 900.
72 *Re Babel Holding Ltd* [2023] 5 SLR 900 at [24].
73 See also *Re Logistics Construction Pte Ltd* [2023] SGHC 231 where the court ordered an extension of the moratorium for three months.

open to consider a further extension depending on the progress of the proposed scheme.

18.65 The careful scrutiny of the grounds for an application under s 64 of the IRDA, twinned with a close monitoring of the duration of the moratorium, serves to instill discipline in the scheme of arrangement process. The rationale for a disciplined approach is clear. A moratorium restrains the exercise and enforcement of legal rights and a company which seeks to enjoy the benefits of a debtor-in-possession regime should not be allowed to abuse it by making unmeritorious applications for moratorium protection and extension. Moreover, a financially distressed company's assets and resources should not be further depleted by such applications.

18.66 The follow-up decision in *Re Babel Holding Ltd*[74] ("*Re Babel Holding*") concerned the application for leave under s 210(1) of the Companies Act 1967.[75] The court considers, among other things, the classification of creditors at this stage. The opposing creditor argued that it should have been placed in a different class from the other unsecured creditors because it had a secured claim for breach of trust and also a separate claim against a director in the group for accessory liability. The court rejected the arguments. It was undisputed that the alleged trust asset was no longer with the companies. The creditor's claim would at best be for equitable compensation or damages and would rank unsecured. The creditor's separate claim against the director did not place it in a different class.

18.67 What was more noteworthy in *Re Babel Holding* was the court's consideration of the use of a deed poll structure pursuant to which the liabilities of the entities in the group, along with their assets, were proposed to be consolidated, so that a single company in the group would propose one scheme of arrangement for the entities in the entire group.

18.68 The court formed the view that there was nothing objectionable in principle to such a structure, and set out some factors in deciding whether it would be appropriate. They include whether the affairs of the group companies were so hopelessly intertwined that a pooling of their assets, with a distribution enabling a like dividend to be paid to the creditors, was the only sensible way to proceed; whether the structure unfairly overrides the legitimate expectations of the creditors pursuant to their contracts with the primary obligor companies; and whether the terms of the proposed scheme demonstrably benefited the affected creditors.

74 [2024] 4 SLR 1087.
75 2020 Rev Ed.

18.69 On the facts in *Re Babel Holding*, the court decided that a deed poll structure and substantive consolidation were appropriate. The cash and cryptoassets of entities in the group were so intertwined that substantial time and expenses would be needed to distinguish them. There was evidence on savings of costs in the proposed structure, and that the estimated returns to creditors from a proposed scheme on a consolidated basis would exceed those in an insolvent liquidation.

A. Administrative convenience

18.70 The court in *Re Zipmex Pte Ltd*[76] considered a novel application for the creation of an "administrative convenience" class of creditors. Generally, an administrative convenience class[77] comprises a large number of creditors with small claims below a certain amount. In exchange for receiving the benefits under the scheme, this class of creditors is by default excluded from voting unless they indicate their wish to do so. Deciding that s 210(3AB) of the Companies Act 1967[78] provided the jurisdiction to do so, the court in *Re Zipmex* allowed the application to create an administrative convenience class for tens of thousands of creditors each with a claim less than US$5,000. The court noted the benefits of reducing the burden in dealing with a large number of creditors, but was mindful that the creation of an administrative convenience class would not cause undue prejudice to the creditors in it. They were given the full benefits under the scheme and had the option to participate.

IV. Judicial management

18.71 The decisions in relation to judicial management covered various issues: the test for achieving one or more of the purposes of judicial management under s 91(1)(*b*) of the IRDA; the applicable principles in considering opposition to a judicial management application and the appointment of a judicial manager; the standing of an interim judicial manager to bring a winding-up application; the test for the court's interference with the judicial manager's decision on proofs of debt; and the application of insolvency set-off to a company under judicial management under the Companies Act[79] ("Companies Act") which is subsequently wound up.

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76 [2024] 3 SLR 724.

77 This term comes from § 1122(b) of the US Bankruptcy Code 11 USC (2012) (US).

78 Read with s 71(1) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) in the context of a pre-pack scheme. In particular, see the phrase "unless the Court orders otherwise" in s 210(3AB)(*a*) of the Companies Act 1967 (2020 Rev Ed). See also *Re Zipmex Pte Ltd* [2024] 3 SLR 724 at [13] and [14].

79 Cap 50, 2006 Rev Ed.

A. Real prospect of achieving purposes of judicial management

18.72 Section 91(1)(*b*)[80] of the IRDA uses the term "would be likely" to describe the prospect that a judicial management order might achieve one or more of the purposes of judicial management set out in s 89(1) of the IRDA.

18.73 In *Re X Diamond Capital Pte Ltd*,[81] *Yap Sze Kam v Yang Kee Logistics Pte Ltd*[82] and *Point72 Ventures Investments LLC v FinLync Pte Ltd*,[83] the High Court affirmed that the test to be applied under s 91(1)(*b*) of the IRDA is that of a "real prospect". This is a lower threshold than the balance of probabilities test, and the applicant need not establish that the purpose in question will more probably than not be achieved if a judicial management order is made.[84]

B. Opposing judicial management and appointment of judicial manager

18.74 In *Re X Diamond Capital Pte Ltd*, the court considered the test for opposing a judicial management application and the appointment of a judicial manager.

18.75 Metech International Ltd ("Metech") had served a statutory demand on X Diamond Capital Pte Ltd ("X Diamond") for a sum that was allegedly 23.58% of the total debt owed by X Diamond to all of its creditors. X Diamond did not satisfy the statutory demand.

18.76 X Diamond applied for a judicial management order ("JM Order"). In particular, X Diamond said that the making of a JM Order would likely achieve two of the purposes set out in s 89(1) of the IRDA, namely: (a) the survival of X Diamond, or the whole or part of its undertaking, as a going concern; and (b) the interests of the creditors would be better served otherwise than by resorting to a winding up as X Diamond's creditors will be able to realise a more advantageous realisation of X Diamond's assets or property than on a winding up.

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80 The predecessor provision found in s 227B(1)(*b*) of the Companies Act (Cap 50, 2006 Rev Ed) used the same term.

81 [2024] 3 SLR 1228.

82 [2023] SGHC 43.

83 [2023] SGHC 122.

84 *Re X Diamond Capital Pte Ltd* [2024] 3 SLR 1228 at [15]; *Yap Sze Kam v Yang Kee Logistics Pte Ltd* [2023] SGHC 43 at [28] and [37]; *Point72 Ventures Investments LLC v FinLync Pte Ltd* [2023] SGHC 122 at [36].

18.77 Metech opposed the application in its capacity as one of X Diamond's creditors. The High Court was satisfied that the requirements for the grant of a JM Order were satisfied on the basis that X Diamond was unable to pay its debts,[85] there was a real prospect that one or more of the purposes of judicial management would be achieved with the making of the JM Order,[86] there was clear support from the majority of creditors[87] and X Diamond had not brought the application in bad faith.

18.78 In assessing whether there was clear support from the majority of creditors, the High Court rejected Metech's submission that certain debts should not be taken into consideration on the basis that they were not valid and had not been admitted by X Diamond. The High Court held that there was a *prima facie* claim by the relevant creditors against X Diamond.[88] The High Court also admitted evidence demonstrating the alleged creditor support in the form of e-mail correspondence between the solicitors of X Diamond and the solicitors of the alleged creditors. In doing so, the High Court made a principled expansion of the common law business statement exception to match the scope of s 32(1)(*b*)(iv) of the Evidence Act 1893.[89]

18.79 In an earlier decision,[90] the High Court considered an application by Metech to expunge certain documents in an affidavit in support of X Diamond's application for judicial management pursuant to r 21 of the Insolvency, Restructuring and Dissolution (Corporate Insolvency and Restructuring) Rules 2020. The court held that the documents should be expunged because they were irrelevant to the issues in the judicial management application. In doing so, the court disagreed with X Diamond's submission that the applicable threshold for offending matter to be expunged is a "high one" that is analogous to a striking-out application. That being said, a court should be slow to expunge parts of an affidavit on the ground that it is scandalous, irrelevant, or otherwise oppressive. Rather, a court should only do so if it can be shown that the impugned materials are clearly irrelevant or relate to unsustainable allegations.[91]

85 *Re X Diamond Capital Pte Ltd* [2024] 3 SLR 1228 at [12] and [13].
86 *Re X Diamond Capital Pte Ltd* [2024] 3 SLR 1228 at [14]–[23]. See *Re X Diamond Capital Pte Ltd* [2024] 3 SLR 1228 at [15], citing *Yap Sze Kam v Yang Kee Logistics Pte Ltd* [2023] SGHC 43 at [28] and [37] and *Point72 Ventures Investments LLC v FinLync Pte Ltd* [2023] SGHC 122 at [36] for the application of the "real prospect" threshold.
87 *Re X Diamond Capital Pte Ltd* [2024] 3 SLR 1228 at [24]–[34].
88 *Re X Diamond Capital Pte Ltd* [2024] 3 SLR 1228 at [25]–[27].
89 2020 Rev Ed; *Re X Diamond Capital Pte Ltd* [2024] 3 SLR 1228 at [28]–[32].
90 *Re X Diamond Capital Pte Ltd* [2024] 3 SLR 913.
91 *Re X Diamond Capital Pte Ltd* [2024] 3 SLR 913 at [14].

18.80 As for the choice of a judicial manager, the High Court held that a court will consider three factors when making the appointment, namely: (a) the choice of the largest creditor; (b) the independence or perceived independence of the nominees; and (c) the skill and expertise of the judicial managers.[92]

18.81 The High Court also clarified the proper interpretation of s 91(3)(*d*) of the IRDA. As a starting point, a company applying for judicial management may nominate a judicial manager. If there is a majority in number and value of the creditors opposing this nomination, they may suggest another nominee. The court may consider this nominee but is not bound to approve of him or her. However, the converse is not true, such that even if there is no majority in number and value of the creditors opposing the company's nomination, the court need not automatically approve of the company's nominee. The court will still consider factors such as the independence of the nominee, as well as the skill and expertise of the nominee.[93]

18.82 In this case, because Metech was not a majority creditor of X Diamond either in number or in value, the High Court held that Metech could not rely on s 91(3)(*d*) of the IRDA to oppose X Diamond's nomination. Section 91(3)(*c*) of the IRDA did not give Metech the standing to oppose X Diamond's proposed nominee. Instead, all it did was to provide that the court may exercise its own discretion in considering X Diamond's proposed nominee and, if necessary, appoint an alternative judicial manager.[94]

18.83 Here, the court accepted X Diamond's proposed nominee, finding that Metech had not cast any valid aspersions on his actual or perceived independence, nor provided a more appropriate nominee.[95]

C. Winding up by interim judicial manager

18.84 In *Re AAX Asia Pte Ltd*,[96] the court considered the standing of an interim judicial manager to bring a winding-up application, as well as the enhanced investigations rationale for ordering the winding-up of a company.

92 *Re X Diamond Capital Pte Ltd* [2024] 3 SLR 1228 at [40].
93 *Re X Diamond Capital Pte Ltd* [2024] 3 SLR 1228 at [45].
94 *Re X Diamond Capital Pte Ltd* [2024] 3 SLR 1228 at [46] and [47].
95 *Re X Diamond Capital Pte Ltd* [2024] 3 SLR 1228 at [48] and [51].
96 [2023] SGHC 324.

18.85 The companies ("Companies") were part of the AAX group, which operated a cryptocurrency business. The directors passed board resolutions to place the Companies under interim judicial management pursuant to s 94(3) of the IRDA, with Luke Furler ("Mr Furler") appointed as the interim judicial manager. As Mr Furler was of the view that none of the purposes of judicial management could be achieved, he applied to wind up the Companies in his capacity either as an agent for the Companies and/or as the interim judicial manager. A preliminary issue was whether the claimants making these applications were the Companies or the interim judicial manager, and whether they had standing to bring the applications to wind up the Companies.

18.86 The High Court held that, under ss 124(1)(*a*) and 124(1)(*h*) of the IRDA, both the company itself and a judicial manager appointed under the IRDA may apply for an order of the court to wind up a company.[97] Here, the court was satisfied that the sole member of each of the two Companies could authorise the interim judicial manager to make a winding-up application through an ordinary resolution. Accordingly, the Companies, acting through the interim judicial manager whom they had entrusted authority to act with under an ordinary resolution, therefore had standing to make the winding-up application. Thus, the court was satisfied that the Companies were the appropriate claimants in these applications.[98]

18.87 In any event, the High Court was of the view that the reference to "judicial manager" in s 124(1)(*h*) of the IRDA should include an interim judicial manager. This interpretation is also supported by the legislative purpose for introducing the framework under s 94 of the IRDA. Mr Furler therefore had the standing to bring these applications as the interim judicial manager. For clarity, as the court found earlier that Mr Furler was acting as the Companies when he brought these applications, this finding of the interim judicial manager's standing was *obiter*.[99]

18.88 With respect to whether the Companies should be wound up, the court was satisfied that the Companies were unable to pay their debts, taking into account the contingent and prospective liabilities of the Companies, under s 125(2)I of the IRDA. The court also found that the companies had satisfied s 125(1)(*i*) of the IRDA that it was just and equitable that the Companies be wound up.[100]

97 *Re AAX Asia Pte Ltd* [2023] SGHC 324 at [11].
98 *Re AAX Asia Pte Ltd* [2023] SGHC 324 at [12] and [13].
99 *Re AAX Asia Pte Ltd* [2023] SGHC 324 at [14]–[20].
100 *Re AAX Asia Pte Ltd* [2023] SGHC 324 at [31]–[43].

18.89 In particular, the court considered the novel argument that it was in the interest of the unsecured creditors for the Companies to be wound up, such that Mr Furler could conduct investigations into the Companies' affairs, recover assets to be distributed, and identify the creditors. The court accepted this argument, finding that the enhanced investigations rationale has been found to be relevant to whether a company should be wound up, and how such liquidations should take effect.[101]

D. Stay of judicial management

18.90 In *Gulf International Holding Pte Ltd v Delta Offshore Energy Pte Ltd*,[102] a number of related applications were put before the court: (a) applications by Gulf International Holding Pte Ltd ("Gulf International") to place Delta Offshore Energy Pte Ltd ("Delta Offshore") under judicial management and interim judicial management; (b) Delta Offshore's appeal against the dismissal of its application for a stay of the judicial management application pursuant to s 6 of the International Arbitration Act 1994;[103] and (c) Delta Offshore's application for a dismissal or stay of the judicial management application.

18.91 The court allowed the judicial management application and dismissed Delta Offshore's appeal and application for a dismissal or stay of the judicial management application on the basis that, amongst others, Delta Offshore had admitted its debt to Gulf International by seeking and obtaining the extensions of time to repay loans extended by Gulf International,[104] Delta Offshore was unable to pay its debts,[105] placing Delta Offshore in judicial management would best ensure its survival as a going concern and the viability of a project to develop a gas-to-power facility in Vietnam and there was thus a real prospect that the purpose of judicial management would be achieved.[106]

18.92 The court held that the principle set out in *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)*[107] which provided that the court should, save in wholly exceptional circumstances, stay or dismiss a winding-up application premised on a disputed debt governed by an arbitration

101 *Re AAX Asia Pte Ltd* [2023] SGHC 324 at [34]–[40].
102 [2023] 5 SLR 1455.
103 2020 Rev Ed.
104 *Gulf International Holding Pte Ltd v Delta Offshore Energy Pte Ltd* [2023] 5 SLR 1455 at [32], [33] and [35].
105 *Gulf International Holding Pte Ltd v Delta Offshore Energy Pte Ltd* [2023] 5 SLR 1455 at [79] and [81].
106 *Gulf International Holding Pte Ltd v Delta Offshore Energy Pte Ltd* [2023] 5 SLR 1455 at [87], [88], [91] and [95].
107 [2015] Ch 589.

agreement, should apply less rigidly in judicial management applications. Instead, the court should make a holistic assessment of the facts and consider, *inter alia*, the interests of the other stakeholders of the debtor company and the wider public interest.[108]

E. Court's interference with judicial manager's decision

18.93 In *PT Bank Negara Indonesia (Persero) TBK, Singapore Branch v Farooq Ahmad Mann*,[109] the court had to determine the test for when it would interfere with the decision of a judicial manager, and the standard by which to assess a judicial manager's decision on proofs of debt.

18.94 The first respondent, Mr Farooq Ahmad Mann ("Mr Mann"), was the interim judicial manager of the second respondent company, Golden Mountain Textile and Trading Pte Ltd (in judicial management) ("GMTT"). PT Bank Negara Indonesia (Persero) TBK, Singapore Branch ("BNI") and Emirates NBD Bank (PJSC), Singapore Branch ("Emirates") were creditors of GMTT.

18.95 HC/OA 130/2023 ("OA 130") and HC/OA 184/2023 ("OA 184") were BNI's and Emirates' applications pursuant to s 115 of the IRDA. In these applications, BNI and Emirates sought several orders relating to the decision of the first respondent to admit the proof of debts filed by Golden Legacy Pte Ltd ("GL") and AJCapital Advisory Pte Ltd ("AJCapital") for the purpose of voting at a meeting of creditors convened under s 94(7) of the IRDA (the "Pre-Appointment Meeting").

18.96 HC/OA 448/2023 ("OA 448") was an application brought by Mr Mann in his capacity as the judicial manager of GMTT pursuant to s 107(3)(*a*) of the IRDA, seeking an extension of time for him to put forward his statement of proposals for GMTT.

18.97 In essence, BNI and Emirates argued that Mr Mann's acts and omissions caused them to suffer unfair harm in their capacities as GMTT's creditors. In particular, they argued that Mr Mann's approach to the adjudication of GL's and AJCapital's proofs of debt was fundamentally flawed. This was because there was a complete absence of legal or commercial justification for the first respondent to admit GL and

108 *Gulf International Holding Pte Ltd v Delta Offshore Energy Pte Ltd* [2023] 5 SLR 1455 at [63], [65]–[67] and [69].

109 [2024] 3 SLR 1199.

AJCapital as creditors for the purposes of attending and voting at the Pre-Appointment Meeting.[110]

18.98 The court dismissed OA 130 and OA 184 but allowed OA 448. The court held that, for an applicant to establish the ground in s 115(1)(*a*) of the IRDA, he must show that: (a) the act complained of has caused prejudice (or harm) to the interests of the creditors or members in the manner provided for in ss 115(1)(*a*)(i), 115(1)(*a*)(ii), and 115(1)(*a*)(iii) of the IRDA; and (b) this prejudice (or harm) must be "unfair", so as to go beyond mere prejudice.[111] Further, as a general rule, the court will not interfere with the decisions of the judicial manager unless it is shown that the judicial manager has committed plainly wrongful conduct, has been conspicuously unfair or has been perverse.[112] The court did not consider s 115(1)(*c*) of the IRDA independently; given the manner in which BNI's and Emirates' reliance on s 115(1)(*c*) was framed, it was clearly dependent on them making out the grounds in ss 115(1)(*a*) and 115(1)(*b*).[113]

18.99 In determining the standard by which to assess Mr Mann's decision to admit proofs of debt, the court held that a less exacting standard should apply to an interim judicial manager who is adjudicating on a creditor's proof of debt for the limited purpose of voting at a pre-appointment meeting, in contrast to his adjudication of such a proof of debt in other situations.[114]

18.100 Applying the less exacting standard of assessment to Mr Mann's decision to admit GL's and AJCapital's proofs of debt for the limited purposes of voting at the Pre-Appointment Meeting, the court found that his decision could not be impugned.[115]

18.101 Finally, the court allowed OA 448 and granted Mr Mann an extension of two months, from the date of the decision, to put forward his statement of proposal. The court was satisfied that Mr Mann had

110 *PT Bank Negara Indonesia (Persero) TBK, Singapore Branch v Farooq Ahmad Mann* [2024] 3 SLR 1199 at [21].

111 *PT Bank Negara Indonesia (Persero) TBK, Singapore Branch v Farooq Ahmad Mann* [2024] 3 SLR 1199 at [25]–[27].

112 *PT Bank Negara Indonesia (Persero) TBK, Singapore Branch v Farooq Ahmad Mann* [2024] 3 SLR 1199 at [29].

113 *PT Bank Negara Indonesia (Persero) TBK, Singapore Branch v Farooq Ahmad Mann* [2024] 3 SLR 1199 at [30].

114 *PT Bank Negara Indonesia (Persero) TBK, Singapore Branch v Farooq Ahmad Mann* [2024] 3 SLR 1199 at [35]–[40].

115 *PT Bank Negara Indonesia (Persero) TBK, Singapore Branch v Farooq Ahmad Mann* [2024] 3 SLR 1199 at [41]–[49].

not been able to effectively engage with BNI and Emirates due to their applications against him.[116]

F. Application of insolvency set-off

18.102 In *Re Ocean Tankers (Pte) Ltd*,[117] the court had to consider two applications made by the judicial managers of Ocean Tankers (Pte) Ltd ("OTPL") (which was subsequently wound up) regarding two assignments of claims obtained by an alleged debtor of OTPL. The judicial managers accused the debtor of trafficking in claims in an effort to reduce its liabilities to the company by way of set-off.

18.103 One of the issues on which the judicial managers sought the court's guidance was whether legal or independent set-off, or insolvency set-off, can be asserted by the debtor for the value of a claim against OTPL that is acquired by way of assignment, after the date on which an order is made to appoint judicial managers to the company in the event that the company is discharged from judicial management and wound up under the IRDA.

18.104 The judicial managers asserted that insolvency set-off cannot be asserted because: (a) there was no mutuality in respect of the assigned claims at the time when the judicial management application was made on 6 May 2020; (b) there was never any mutuality because the company's assets were impressed with a statutory trust; and (c) the assigned claims fall within the exceptions in s 219(3) of the IRDA.[118]

18.105 The court answered the question in the affirmative but only in so far as it is addressed to insolvency set-off and on the basis that: (a) the appropriate time for determining mutuality where a company is in judicial management under the Companies Act and subsequently wound up is the date of the commencement of the winding up because s 219 of the IRDA does not apply to the company in so far as the provision relates to judicial management;[119] (b) the assets of a company in judicial management under the Companies Act are not impressed with a statutory trust;[120] and (c) the exclusions in s 219(3) of the IRDA are not applicable.[121]

116 *PT Bank Negara Indonesia (Persero) TBK, Singapore Branch v Farooq Ahmad Mann* [2024] 3 SLR 1199 at [58]–[60].
117 [2023] SGHC 330.
118 *Re Ocean Tankers (Pte) Ltd* [2023] SGHC 330 at [109].
119 *Re Ocean Tankers (Pte) Ltd* [2023] SGHC 330 at [111]–[126].
120 *Re Ocean Tankers (Pte) Ltd* [2023] SGHC 330 at [129]–[138].
121 *Re Ocean Tankers (Pte) Ltd* [2023] SGHC 330 at [140]–[145].

18.106 Given that insolvency set-off takes effect automatically and in this case had taken effect, it was not necessary for the court to answer the question in so far as it related to legal or independent set-off.

V. Cross-border insolvency

18.107 The year under review saw a significant number of court decisions on the UNCITRAL Model Law on Cross-Border Insolvency[122] ("Model Law"), which augurs well for the development of Singapore jurisprudence on cross-border insolvency.

A. Corporate debtor as foreign representative

18.108 In *Re Genesis Asia Pacific Pte Ltd*,[123] the High Court considered whether a corporate debtor can be a foreign representative as defined under the Model Law. The debtors, which had been placed under a US Chapter 11 proceeding, applied to the High Court under the Model Law for, among other things, the US proceeding to be recognised as a foreign main or alternatively non-main proceeding and for one of the corporate debtors to be appointed the foreign representative.

18.109 Although generally only individuals are appointed as insolvency practitioners in Singapore, the court did not consider that as a reason by itself to refuse appointing a corporate entity as a foreign representative under the Model Law. The definition of "foreign representative" under Art 2(*i*) of the Model Law refers to a "person or a body", and nothing suggests that the phrase only refers to natural persons. The court found further support for its view in para (c) of the Preamble and Art 22(1) of the Model Law, both of which referred to "persons" as including the debtor.

18.110 In addition, the UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation[124] ("Guide to Enactment") states that a foreign representative can be the debtor in possession itself, which, in case of corporate entities, include legal persons. The Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency also suggests that a foreign representative might be a firm of accountants on the basis that a firm can constitute a "person" and

122 UN Doc A/CN.9/442.

123 [2024] 4 SLR 570.

124 United Nations Commission on International Trade Law, "UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation" (2014) at para 86, as noted at [14] of *Re Genesis Asia Pacific Pte Ltd* [2024] 4 SLR 570.

a "body" has been interpreted as meaning "an artificial person created by a legal authority".[125]

18.111 The court then went on to consider the issue whether a debtor in possession could be recognised as foreign representative and be expected to act in the interests of the creditors across jurisdictions. Referring to the Guide to Enactment and US case law, the court was satisfied that a corporate entity, including a debtor in possession, can be appointed as a foreign representative and granted the applications.

18.112 In that regard, the court observed that, compared with individuals, corporate entities may be less readily accountable for improper conduct. It may be possible to mitigate the risk of improper conduct by close monitoring and readiness to intervene by the recognising courts. In the court's view, where a debtor is appointed as a foreign representative, it may be necessary to manage the risk of conflicting interests. These risks can be addressed by having an appropriate reporting regime. The foreign representative should periodically update the recognising court on the progress of its restructuring activities and disclose any developments that have affected, or have a real prospect of affecting, the interests of the creditors in Singapore. This will enable the court to monitor and consider whether any intervention or restriction is necessary.

B. Recognition of foreign proceeding involving solvent companies

18.113 Can a foreign solvent winding up be recognised under the Model Law and does "foreign proceeding" under the Model Law include a solvent winding up? The Singapore High Court and Court of Appeal addressed these issues in *Re Ascentra Holdings Inc*[126] and *Ascentra Holdings v SPGK Pte Ltd*[127] ("*Ascentra (CA)*").

18.114 Ascentra Holdings Inc ("Ascentra") was placed in voluntary liquidation in the Cayman Islands, under Cayman Islands legislation relating to the dissolution of solvent companies. Ascentra and the liquidators then applied to the High Court under the Model Law for, among other things, recognition of the Cayman liquidation proceeding as a foreign main proceeding.

18.115 In order to be recognised under the Model Law, a foreign proceeding must be: (a) collective in nature; (b) a judicial or administrative

125 United Nations Commission on International Trade Law, "Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency" (2021) at para 39.
126 [2023] SGHC 82.
127 [2023] 2 SLR 421.

proceeding in a foreign state; (c) conducted under a law relating to insolvency or adjustment of debt; (d) one where the property and affairs of the debtor company must be subject to control or supervision by a foreign court in that proceeding; and (e) for the purpose of liquidation or reorganisation.[128]

18.116 The key issue was whether the Cayman liquidation proceeding was conducted "under a law relating to insolvency or adjustment of debt".[129] The High Court had declined to grant the recognition application because, among other reasons, "law relating to insolvency" referred to rules which governed insolvent companies. The Cayman liquidation proceeding was a solvent liquidation and not a foreign proceeding as defined in the Model Law.

18.117 The Court of Appeal took a different view and allowed the appeal against the High Court's decision. There was no requirement under the Model Law for a company to be insolvent or in severe financial distress before a proceeding relating to such company may be recognised as a foreign proceeding. The requirement that a proceeding be conducted "under a law relating to insolvency or adjustment of debt" within the meaning of Art 2(*h*) would be satisfied as long as the law or the relevant part of the law under which the relevant proceeding was conducted includes provisions dealing with the insolvency of a company or the adjustment of its debts. It would generally be irrelevant that the company concerned in the relevant proceeding was not insolvent or in severe financial distress.

18.118 The Court of Appeal was satisfied that the Cayman liquidation, commenced as a voluntary winding up for solvent companies pursuant to Cayman legislation which also contained provisions dealing with insolvency and adjustment of debt, was a proceeding conducted under "a law relating to insolvency or adjustment of debt" as defined in Art 2(*h*) of the Model Law.

18.119 After the Court of Appeal's decision in *Ascentra (CA)*, the question whether a solvent winding up can be recognised under the Model Law came before the Singapore court again in *Re Thresh, Charles.*[130] An insurer company, incorporated and licensed in Bermuda, was wound up in Bermuda pursuant to a petition by the Bermuda Monetary Authority ("BMA"). The provisional liquidators appointed in Bermuda applied to the Singapore High Court under the Model Law for, among other things,

128 UNCITRAL Model Law on Cross-Border Insolvency (30 May 1997) Art 2(*h*).
129 UNCITRAL Model Law on Cross-Border Insolvency (30 May 1997) Art 2(*h*).
130 [2023] SGHC 337.

recognition of the Bermudan proceeding. The non-parties, in essence the sole shareholder and director of the company, opposed the application on the basis that the Bermudan proceeding was not an insolvency proceeding under Art 2(*h*) of the Model Law, that recognition was contrary to public policy under Art 6 of the Model Law, and that Bermuda was neither the debtor's centre of main interests ("COMI") nor its establishment.

18.120 The court noted that the company was not wound up because it was insolvent but because of its failure to meet Bermudan statutory requirements governing insurance companies. Applying the reasoning of the Court of Appeal's decision in *Ascentra (CA)* on the interpretation of Art 2(*h*), the court was satisfied that Bermudan legislation in this case contained other provisions for winding up a company based on its insolvency, and decided that the Bermudan proceeding was conducted under "a law relating to insolvency or adjustment of debt".

18.121 The court also found that the Bermudan proceeding was collective in nature. The BMA commenced the proceeding not just for its benefit but presumably as part of its duties to protect the public interest by ensuring that licensed insurers comply with the requirements under the governing legislation. Further, the Bermudan winding up would proceed as any winding up for companies and the liquidators would have the same powers and follow the same process as that for the winding up of companies. Any alleged lack of notice to or participation by creditors thus far was irrelevant to the question of whether the proceeding was collective.

18.122 With regard to public policy as a ground for refusing recognition, the court noted that the omission of the word "manifestly" from Art 6 of the Model Law suggested that Parliament intended that the public policy ground may be invoked for reasons less stringent than those concerning matters of fundamental importance for Singapore.[131] The court also remarked that the alleged public policy must be shown to be attributable to a constitutionally authoritative source (such as legislation, statements made by cabinet ministers, and judicial decisions) which clearly expressed the policy.

18.123 The non-parties argued that recognition should be refused on public policy grounds as there was a breach of the rules of natural justice. The BMA had served the winding-up petition on the office of the personal representative of the company even though the personal representative had resigned. The non-parties argued that such service was improper and the company and its directors had no notice of the Bermudan proceeding

131 *Re Zetta Jet Pte Ltd* [2018] 4 SLR 801 at [23].

until after the winding-up order was made. The court rejected the public policy argument. There was no evidence that the BMA's mode of service of the winding-up petition was impermissible. No application has been made to set aside the Bermudan winding-up order.

18.124 On the issue of whether Bermuda was the COMI, the non-parties referred to the company's business being conducted in other countries but were unable to show that there was another jurisdiction which was the COMI based on objectively ascertainable and permanent factors. The court noted that the company had run an insurance business which was licensed in Bermuda and regulated by the BMA. The centre of gravity of its commercial activity was therefore Bermuda. Further, the company's statutory books and records, including its minute books and share register, were in Bermuda, and its last known business address was in Bermuda. The presumption under Art 16(3) of the place of incorporation being the company's COMI was not rebutted on the evidence.