

**Arrest and Insolvency: the legal tensions between two regimes - the Singapore
Experience with cross-border insolvency**

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Introduction

1 The slump in the shipping industry worldwide has seen many known names in shipping buckle under the financial strain of an exceedingly dismal business outlook. In August 2016, the world woke up to Hanjin Shipping Co Ltd (“Hanjin”)’s debacle.

2 As other big names in the shipping industry engage in corporate restructuring and reorganisation that see them retreat to concentrate on narrower geographical areas of operation, the corporate failures of established international shipping names like Hanjin brings to the forefront the validity of DR Thomas’ often-quoted observations in *Maritime Liens* (Stevens & Sons, 1980) at [99]:

The law of corporate liquidation and bankruptcy seems to have developed with little regard to the Admiralty proceeding *in rem*. Certainly it is difficult to fit the Admiralty proceeding into the legislative language of the relevant statutes which regulate the winding up of companies and bankruptcy. Yet the need for the latter to accommodate the action *in rem* and the potential conflict between the two processes is plain. A *res* may concurrently be the subject of an arrest in the Admiralty Court and an asset capable of liquidation in a company winding up or personal bankruptcy. In such a circumstance

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it is important for a maritime claimant to be able to ascertain whether it is the jurisdiction of the Admiralty Court or some other court which prevails and which mode of legal process is available for the satisfaction of the claim. Most ships today are operated by commercial companies, many of which are one-ship companies, and therefore in practice the inter-relationship between an action *in rem* and a winding up is likely to be of much greater importance than the relation the Admiralty proceeding bears to a bankruptcy proceeding.

3 Thomas' observations are still accurate in the 21st century. In a prescient way, they reflect the state of affairs between two legal systems that serve to protect economic interests in different spheres and ways. We see the modern-day tension between the notions of universalism and territoriality, with each particular national insolvency framework adopted in response to political and economic exigencies and the need to protect domestic creditors. My focus here is on the continuing tension between the parallel and, at times, overlapping jurisdictions of the insolvency court and the admiralty court which is territorial in focus by the very nature of its rules and practice. As we already know, admiralty courts have over the centuries in the sphere of international commercial trade developed maritime law with its own body of maritime claims and rights and now there are a list of maritime claims and rights that have been extended by the 1952 International Convention for the Unification of Certain Rules relating to the Arrest of Sea-Going Ships, and now the 1999 International Convention on Arrest of Ships. The admiralty jurisdiction of the Singapore court is derived from the High Court Admiralty Jurisdiction Act (Cap 123, 2001 Rev Ed) ("HCAJA").

4 A well-placed striking reminder of the importance of this branch of the law came from Justice James Allsop (as he then was) who in 2007 insightfully described the space occupied by admiralty jurisdiction in modern times as:

*a body of law, and the administration of a body of law, with roots in public international law, civil law, international commerce, international agreement and the law of nations. Its history is rich and its contents are vibrant and modern. It is only an arcane or obscure branch of the law to those whose legal thinking is informed exclusively by land-based human activity.*¹

5 The position that I have taken in this paper on cross-border insolvency is that the Singapore court is not bound to recognise the foreign insolvency proceedings under common law, and after adopting the UNCITRAL Model Law on Cross-Border Insolvency (“the Model Law”) as part of Singapore insolvency law, it need not stay proceedings *in rem*. The *in rem* claimant who has filed his maritime claim here may proceed with the arrest of the ship in question.

Singapore’s Common Law on Cross-Border Insolvency

6 Under the present legislative regime, the Singapore courts can give very limited judicial cooperation to foreign courts. There is no known procedure for obtaining recognition of insolvency proceedings of foreign courts.² Neither is there a procedure for supervising the activities of a foreign insolvency administrator, nor a procedure for the coordination of

¹ “Admiralty Jurisdiction – Some Basic Consideration and Some Recent Australian Cases” (FCA) [2007] FedJSchol 5.

² Singapore Maritime Legal Association’s reply to Comite Maritime International’s Cross-Border Insolvency Questionnaire (2012), p 6.

concurrent insolvency proceedings in Singapore and abroad.³ In October 2013, the Insolvency Law Review Committee advocated the adoption of the Model Law.⁴ Then in October 2016, the Ministry of Law announced changes to reform Singapore’s debt restructuring and corporate rescue framework in the Companies (Amendment) Bill 2017 (“the Bill”). The Bill which proposes the enactment of the Model Law will align our insolvency regime to international standards.

7 From its preamble, the purpose of the Model Law is to provide effective mechanisms for dealing with cross-border insolvency to promote the objectives of:

- (a) cooperation between the courts and other competent authorities of the state and foreign states involved;
- (b) greater legal certainty for trade and investment;
- (c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
- (d) protection and maximization of the value of the debtor’s assets; and
- (e) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

8 Whilst the Model Law’s universalist approach to cross-border insolvency treats the multinational bankruptcy as a single process with other courts assisting the foreign main proceeding, it is worth noting that the Model Law is procedural in character and is not intended to bring about a change to the substantive law of the recognising court. It has been said that the central purpose of insolvency proceedings is to provide a mechanism of collective execution

³ *Ibid*, p 6-7.

⁴ Final Report of the Insolvency Law Review Committee (2013), p 230.

against the property of the debtor by creditors whose rights are admitted or established; the insolvency proceedings are not to determine or establish the existence of rights.⁵

9 In the absence of the Model Law regime, the former Chief Justice Chan Sek Keong, writing extra-judicially at a joint multinational judicial colloquium on insolvency in 2011,⁶ doubted that the principle of modified universalism expressed by Lord Hoffmann in *Re HIH Casualty and General Insurance Ltd* (“*Re HIH*”)⁷ need be seriously considered in Singapore given the express provisions of the Companies Act (Cap. 50, 2006 Rev Ed) whereby very limited cooperation can be given to foreign courts in relation to the remittance of the assets of an insolvent company⁸. Chan CJ referred to instances of limited cooperation in the past where our judges have, consistent with local statutory insolvency regime, provided assistance as is proper to foreign courts and liquidators based on what His Honour termed “the tradition of common law judges”, which is not the same thing as the principle of modified universalism, a judge-made English common law principle, that is now accepted with limitations by the Privy Council in *Singularis Holdings Limited v Pricewaterhouse Coopers* [2015] AC 1675 (“*Singularis*”). In my view, given his choice of terminology, Chan CJ must have had in mind traditional common law ancillary liquidation doctrine which is part of common law and has existed in Singapore alongside our statutory insolvency regime where no other statutory provision has been made. The Court of Appeal in *Beluga Chartering GmbH (in liquidation) v Beluga Projects (Singapore) Pte Ltd (in liquidation)* [2014] 2 SLR 815 (“*Beluga*”) aligned itself to Lord Scott’s (in *Re HIH*) enunciation of the traditional common law ancillary liquidation doctrine which gives the court a general power to order the remittal of realised

⁵ *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2007] 1 AC 508 at para 14.

⁶ (2011) 23 SAcLJ 413 at [21].

⁷ [2008] 1 WLR 852.

⁸ S 377(3)(c).

assets to the principal place of liquidation; but it does not have the power to authorise the local liquidator to ignore the statutory insolvency provisions that deprive creditors proving in a local liquidation of any vested rights under the insolvency statute or other written law.

10 In *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc and Others* [2007] 1 AC 508, Lord Hoffmann put forward what he had described as the “underlying principle of universality”, namely, that under English common law there should be a single insolvency process, both in corporate and personal bankruptcies, whereby the English court will recognise and assist a foreign insolvency representative empowered under his local law. This single insolvency process was to obviate the need for the foreign insolvency representative or creditors to start parallel proceedings and to give them the remedies which they would have been entitled to if the equivalent proceedings had taken place in the domestic forum.

11 However, from *Singularis*, two broad principles under English law emerge:

- (a) common law ancillary liquidation starts with the winding up of a foreign company and requires a sufficient connection with the forum; and
- (b) the principle of modified universalism forms the basis of the court’s common law power to assist in recognition of foreign insolvencies which is not contrary to local law and public policy.

12 As Lord Sumption there pointed out, the recognition of the foreign liquidator’s power was no more than what he was entitled to do as a matter of private international law. Furthermore, the principle of modified universalism was founded on a public interest which was based on comity. It was in the interest of every country that companies with transnational

assets and operations should be capable of being wound up on a basis that would be recognised and effective internationally.

13 Whilst the majority of the Board in *Singularis* accepted the principle of modified universalism, namely that the court has a common law power to recognise and grant assistance to foreign insolvency proceedings so far as it properly can, caution should be taken in jurisdictions where there are no statutory powers to assist foreign insolvency representatives. Notably, the principle of modified universalism is subject to local law and local public policy and the assisting court can only act within the limits of its statutory and common law powers.

14 The liquidator's question on appeal to the Privy Council was whether legislation may be extended by the judiciary to apply to cases where the legislature has not applied it; that the court should apply legislation, which *ex hypothesi* does not apply, 'as if' it applied. The Privy Council held that the Bermuda court had no common law power to assist a foreign liquidator by ordering the production of information where: (a) the Bermuda court had no power to wind up an overseas company such as *Singularis*; and (b) its statutory power to order production of information was limited to cases where the company had been wound up in Bermuda. The production of materials sought was not available under Cayman law because the Cayman court would have been limited to ordering production of materials belonging to *Singularis*. Audit working papers were not owned by *Singularis* and the majority of the Board declined to exercise the common law powers of the court in favour of the liquidator.

15 The precise limits of the court's common law powers to assist may (as the minority's views demonstrated) not be easy to define; it really depended on the assistance sought. As the majority determined, it did cover the ordering of the provision of information, this being a development of the court's established common law discovery powers. However, there were

limits to the power to order provision of information and Lord Sumption referred to three limitations. First, it was available only to assist the officers of the foreign court of insolvency jurisdiction. It would not, for example, be available to assist a voluntary winding-up or to enable the foreign liquidators to do something which they could not do under the law by which they were appointed. Second, the power was available only when it was necessary for the performance of the foreign liquidators' functions. Third, it had to be consistent with the substantive law and public policy of the assisting court. It was not available for obtaining material for use in actual or anticipated litigation. Its exercise was also conditional on the applicant being prepared to pay the third party's reasonable costs of compliance.

16 Returning to the 2014 decision of *Beluga*, the company, Beluga Chartering GmbH, had been placed in liquidation in Germany and was wound up in Singapore under s 351(1) of the Companies Act as an unregistered foreign company. The Court of Appeal upheld the fact that Beluga Chartering was an unregistered foreign company not carrying on business in Singapore, therefore s 377(3)(c) of the Companies Act (which provides for the ring-fencing of assets of foreign companies carrying on business in Singapore) did not apply. Instead, the common law ancillary liquidation doctrine applied. The liquidation of a foreign company in Singapore was regarded as the ancillary liquidation while its liquidation in the place of its incorporation was the principal liquidation. The common law took the view that worldwide creditors of the company would be treated equally and the court should generally direct that the liquidator in an ancillary liquidation transmit funds to the liquidator in the principal liquidation for *pari passu* distribution to worldwide creditors. The court, therefore, directed the Singapore liquidators to remit the realised assets of Beluga Chartering in Singapore to the German liquidator, without first satisfying the judgment debt owed to the Singapore subsidiaries.

17 Relevant to this paper is the Court of Appeal’s discussion of the side issue of recognition of the title of a foreign liquidator and the recognition of foreign winding up proceedings. The observations on the side issue were premised on the existence of local litigation, assets in the jurisdiction and the absence of local liquidation in play.

18 First, on the recognition of a foreign liquidator, it was accepted that a liquidator of a foreign company would be recognised as the representative of the company for the purposes of getting in and realising the company’s worldwide assets and there would generally be no basis for a Singapore court to decline to recognise the liquidator’s claim to assets belonging to the company under general principles of property law.

19 Second, on the recognition of a foreign winding up order, the Court of Appeal acknowledged that under common law rules in Singapore, the foreign winding up order, including any foreign order to stay proceedings in the forum, would not be recognised. The Court of Appeal did not consider the principle of modified universalism as articulated by Lord Hoffmann in *Re HIH* to be a legal rule having characterised it as an aspirational principle.⁹ Nonetheless, the Court of Appeal provisionally observed that it remained open to the Singapore courts to assist the foreign liquidation proceedings through regulating the proceedings in the local forum, but this would be on a case-by-case basis. In other words, it is possible to grant assistance through the court’s existing procedural powers, for instance, to stay a claim if Singapore was not the *forum conveniens*; to stay execution or attachment; to exercise discretion against grant of a garnishee order absolute; or to refuse leave to serve process out of the jurisdiction; or to wind up a company in Singapore. More importantly, the Court of Appeal

⁹ At [75].

clarified that it was permissible to commence legal proceedings against a defendant foreign company, or attempt to levy execution against its assets even though insolvency proceedings have been commenced against the company in another jurisdiction. The court's response would depend on the application sought.

20 Since Chan CJ's extra-judicial writing and the Court of Appeal's decision in *Beluga*, contemporary judicial attitude here has shifted beyond the traditional common law ancillary liquidation doctrine and the appellate court's provisional observations on recognition of a foreign winding up order. I now turn to the "deployment" of the English's common law power to recognise and grant assistance to foreign insolvency proceedings in two local cases in 2016.

Re Opti-Medix Ltd (in liquidation) & Anor matter [2016] 4 SLR 312 ("*Re Opti-Medix*")

21 In June 2016, the Singapore High Court in *Re Opti-Medix* was faced with the issue of recognising a foreign liquidation in a jurisdiction other than the place of incorporation. The corporate bankruptcy orders were made by the Tokyo District Court against two companies that were incorporated in the British Virgin Islands ("BVI"). The applicant who was the foreign liquidator sought recognition of his appointment as bankruptcy trustee in order to ascertain, administer and dispose of assets in Singapore. The liquidator undertook to pay all debts in Singapore before remitting any funds out of Singapore. Notably, the liquidator was not appointed by the court of the place of incorporation, and thus could not rely on established principles of private international law that recognise the dissolution of foreign companies under the law of the place of incorporation.

22 Aedit Abdullah JC recognised that Lord Collins in *Rubin v Eurofinance SA* [2013] 1 AC 236 ("*Rubin*") doubted that it was open to the courts to introduce a new basis for recognition in relation to insolvency proceedings that was not started in the place of

incorporation and that such a matter should be left to the legislature. However, the judge then opined that the development of the common law should not be so constrained and in cross-border insolvency, there had been a general movement away from the traditional territorial focus of the interest of the local creditors towards a universalist approach of cooperation between jurisdictions. This cooperation between jurisdictions was a necessary part of the contemporary world.

23 The BVI companies were possibly under an obligation to register as foreign companies conducting business in Singapore, which meant that Singapore creditors would have to be paid first before remitting the surplus out of Singapore. As Singapore’s legislative regime was silent on the recognition of foreign insolvency proceedings and the power to stay proceedings in Singapore, what the judge did was to use the “centre of main interest” or COMI test, as proffered by Lord Hoffman in *Re HIH*, as a basis for recognition at common law of the foreign insolvency proceedings.

24 The judge then adopted the “tone of the approach” in *Beluga* and the “telegraphed adoption” of the Model Law in Singapore as providing assistance, and proceeded to recognise the insolvency proceedings commenced in Japan by the two BVI companies whose businesses were primarily in Japan. These companies had assets in Singapore bank accounts and two Singapore creditors. The liquidator sought to exercise his powers under the Japanese bankruptcy order to ascertain, administer and dispose of the companies’ assets and the judge allowed his application.

25 Japan was the sole place where actual business was carried out, and that provided the basis for recognition of the Japanese bankruptcy order, even if Japan was not the place of incorporation of the companies. The judge said that on a common law adoption of the COMI

test, there need not necessarily be a presumption in favour of the registered office, as under the Model Law or EU Insolvency Regulation. In any event, the judge declared that the recognition of the Tokyo order could be justified on “practical grounds”.

26 I note that the Court of Appeal’s views in *Beluga* on the court’s power to recognise the foreign liquidator’s power was as a matter of private international law where no local liquidation proceedings had been initiated. A foreign liquidator properly appointed under the law of the place of incorporation would be recognised for the purposes of getting in and realising the company’s assets by the Singapore court. The judge nonetheless said that he “did not see anything in that judgment that precluded recognition of the liquidator on other grounds, such as COMI.”¹⁰ Another noteworthy point is that the Privy Council in *Rubin* was dealing with the question whether and in what circumstances an order of a foreign court in avoidance proceedings in insolvency would be recognised and enforced in England. The holding there was that the “Dicey rule” applied to foreign judgments in avoidance proceedings in insolvency and that if there was to be a change of this rule, it would be a matter for the legislature. The further point made in *Rubin* was that the Model Law was not designed to provide for the reciprocal enforcement of judgments and there was nothing to suggest that it applied to the recognition and enforcement of foreign judgments. As stated, the judge’s citation of Lord Collins’ remarks need not concern him for *Rubin* was a different case and clearly distinguishable. On a more relevant footing, Lord Collins touched on the four main methods under English law to assist in insolvency proceedings:

- (a) s 426 of the Insolvency Act 1986 that grants power to assist corporate and personal insolvency proceedings in countries specified in that Act or so designated *i.e.*, common law countries like Australia;

¹⁰ At [23].

- (b) EU Insolvency Regulation; Cross-Border Insolvency Act 2006 implementing the Model law; and
- (c) common law power to recognise and grant assistance to foreign insolvency proceedings.

Re Taisoo Suk (as foreign representative of Hanjin Shipping Co Ltd) [2016] SGHC 195 (“*Re Taisoo Suk*”)

27 In September 2016, Abdullah JC was faced with an ex-parte application for recognition of Hanjin’s rehabilitation proceedings in Korea and restraint of all pending, contingent or fresh proceedings, enforcement or execution against assets and a stay of all present proceedings against Hanjin *and* its Singapore subsidiaries until 25 January 2017. This time, the ex-parte application to stay proceedings was made pursuant to the inherent powers of the court to make any order as may be necessary to prevent injustice or an abuse of the process of the court (Order 92, Rule 4 of the Rules of Court (Cap 332, R 5, 2014 Rev Ed)).

28 In urging the court to exercise its inherent powers, the applicant foreign representative of Hanjin argued that the application made was an essential part of the series of applications that Hanjin had made across the world to prevent piecemeal and haphazard resolution of the company’s difficulties. Any such disparate treatment would imperil Hanjin’s rehabilitation and there would be a disorderly scramble amongst Hanjin’s creditors to act quickly to seize and/or exercise their lien on vessels and containers which constituted Hanjin’s principal business assets. In fact, this had already taken place in various ports of the world, and the *Hanjin Rome* had already been arrested here.¹¹

¹¹ ADM 178 of 2016.

(a) Hanjin’s “substantial” connections to Singapore, were its two subsidiaries: Hanjin Shipping (Singapore) Pte Ltd – incorporated in 1993; and

(b) Hanjin Overseas Tanker Pte Ltd – incorporated in 2007.

29 The subsidiaries had some 112 employees here, and were said to have significant trade volume. Hanjin and the two subsidiaries also had assets here.

30 Pending the determination of an *inter partes* application, the court granted the application, allowing:

(a) a restraint of all pending, contingent or fresh suits, actions, proceedings, against Hanjin and its subsidiaries or any enforcement or execution against any asset of Hanjin and its subsidiaries;

(b) a stay of all present suits, action or proceedings against Hanjin and its subsidiaries; and

(c) these orders included any enforcement or execution against the vessels beneficially owned or chartered by Hanjin and its subsidiaries.

31 However, these orders were not to apply to the earlier arrest of *Hanjin Rome*; instead, liberty to apply was granted in respect of that arrest.

32 The judge was satisfied that the Korean rehabilitation orders should be recognised and assistance rendered. He was mindful of the impact on Singapore creditors, particularly the restraint of admiralty proceedings by barring the arrests of vessels. However, the need for orderly resolution and satisfaction of claims, as well as the possible benefit to all interested parties of the rehabilitation of Hanjin, were significant factors. He stated that such recognition

and assistance perhaps constituted a development of the common law in Singapore, and was satisfied that this development was principled and justified.

33 In his analysis, the judge recognised that the courts in the United Kingdom and the United States had already recognised the Korean rehabilitation proceedings on the basis of the Model Law which both jurisdictions had adopted.

34 Again, the judge relied on the provisional observations of the Court of Appeal in *Beluga*, which the judge saw as endorsement of the universalist approach in the winding up of a foreign company and was comfortable extending the approach to other forms of insolvency proceedings, including restructuring and rehabilitation.

35 Abdullah JC accepted that recognition alone was insufficient, and assistance of the domestic court was required. The inherent power of the court to restrain and stay proceedings orders were sought and the judge was satisfied that the Court should so grant these orders, cautioning that they should not be invoked or granted lightly, and O 92 r 4 was often the first resort in a “dubious claim”.¹² Nevertheless, the judge recognised that “the imperative for orderly rehabilitation and restructuring of a company running a global business across jurisdictions, and the need to ensure that the company’s assets could be marshalled or collected for such effort, [and that both of these reasons] provided sufficiently strong grounds for the exercise of the inherent powers of the Court to grant the restraint and stay orders.”¹³

¹² At [32].

¹³ *ibid.*

36 In determining whether as a matter of common law, recognition of foreign rehabilitation proceedings should be granted, the judge listed three factors the court would need to consider:

- (a) the connection of the company to the forum in which the rehabilitation proceedings are taking place and to the place of rehabilitation;
- (b) what the rehabilitation process entailed, including its impact on domestic creditors and whether it was fair and equitable in the circumstances; and
- (c) whether there were any strong countervailing reasons against recognition of the foreign rehabilitation proceedings.

37 On the first factor, the judge was satisfied that Hanjin's common law centre of main interest was in Korea and there was therefore a strong connecting factor between Hanjin and the Korean Court. On the second factor, the judge was satisfied that the proposed steps in the rehabilitation process would be fair to foreign, including Singaporean, creditors.

38 On the third factor, the possible objections were the interface with the admiralty jurisdiction, the assisting of foreign proceedings more liberal than local regimes and the adverse impact of recognition of Korean proceedings on Singaporean creditors, particularly those seeking to arrest Hanjin's vessels. The judge said that differences between territorial regimes should not be a bar to the recognition and assistance of proceedings under the foreign regime. He remarked:

If anything, a more liberal foreign approach may be a spur to changes in the domestic regime.¹⁴

¹⁴ At [27].

39 The judge was of the view that with the recognition of Korean rehabilitation proceedings, assistance should be granted even to the extent of preventing arrest of ships of the Hanjin fleet. The inability of individual creditors to obtain security was a “necessary consequence of universal collection and marshalling of assets. It was no different from the position of individual creditors constrained in relation to domestic restructuring and rehabilitation.”¹⁵

40 The judge noted that the court in *Re TPC Korea Co Ltd* [2010] 2 SLR 617 was of the view that the HCAJA was a self-contained regime for resolution of disputes where the interests or assets involved were vessels. However, he did not think the regime was to be insulated from the general powers of the court, nor was there anything in the statute that expressly excluded arrest of ships from being subject to general processes. The judge distinguished *Re TPC Korea* for the fact that it involved an application under s 210 of the Companies Act, whereas here we were dealing with the issue of recognition of foreign proceedings.

41 Restraining arrests of vessels belonging to the debtor for all types of *in rem* claims reflects universalism taken at its highest, and goes well beyond the approach of several Australian decisions (which I shall examine) and even the Model Law. The Australian courts require the application for the issue of a warrant of arrest to be heard by a judge instead of an assistant registrar, after the foreign insolvency had been recognised under the Model Law. This was in fact the alternative prayer put forward by the applicant. As the judge noted, he had before him counsel for parties in various pending admiralty matters involving other vessels in

¹⁵ At [31].

the Hanjin fleet but at the time of the hearing, there was insufficient time for counsel to take instructions.

42 That Abdullah JC's order was limited in scope to the assets of Hanjin and the two Singapore subsidiaries was argued before the duty registrar when an arrest of the *Hanjin New York* was sought on 6 October 2016. The duty registrar accepted the *in rem* claimant's argument that the registered owner of the *Hanjin New York* was a Panamanian entity and was therefore not caught by Abdullah JC's order. The vessel was released from arrest following a settlement between the parties. The proceedings have since been discontinued.

43 As for the two Singapore subsidiaries in Abdullah JC's order, the foreign representative had earlier argued that nexus with Singapore lay in its two fully owned locally incorporated subsidiaries which held assets in Singapore and had staff and operations here too. This particular kind of argument was specifically rejected by Kannan Ramesh JC in *Pacific Andes Resources Development Ltd and other matters* [2016] SGHC 210 ("*Pacific Andes*") in favour of the separate entity doctrine. The judge said at [39]:

Nexus in this context is that which enables a court to wind up a foreign company. The fact that the Subsidiaries are wholly owned by PARD does not afford a basis. Neither does the fact that they are part of PARD's business offer any foothold. The Subsidiaries are independent legal entities and the fact that they intend to present a group restructuring with a composite, inter-dependent and inter-connected restructuring plan does not have the effect of or warrant the piercing or lifting of the corporate veil such that they may be regarded as one composite entity. This, I would venture to say, is settled law.

The Bill

44 In 2017, there will be four significant amendments to the Companies Act in relation to cross-border insolvencies.¹⁶

45 First, judicial management will be made available to foreign companies.¹⁷

46 Second, the addition of specific criteria on when the Singapore court may exercise its discretion to take jurisdiction over foreign debtors, the test now codifying whether the company has a ‘substantial connection’ with Singapore, and factors to determine this include whether Singapore is the centre of main interests of the company.¹⁸

47 Third, the adoption of the Model Law as the Fourteenth Schedule to the Companies Act. The recognition of foreign insolvency proceedings under the Model Law will sit more comfortably with the concept of modified universalism as compared to the broad brush approach we have seen in *Re Opti-Medix* and *Re Taisoo Suk*.

¹⁶ Public Consultation on Proposed Amendments to the Companies Act to Strengthen Singapore as an International Centre for Debt Restructuring, para 5(c):

<https://www.mlaw.gov.sg/content/minlaw/en/news/public-consultations/public-consultation-on-proposed-amendments-to-the-companies-act-.html> (accessed on 24 October 2016).

¹⁷ Section 227A widens the definition of ‘company’ to mean ‘any corporation liable to be wound up under this Act’ and ‘property’ to include ‘money, goods, things in action and every description of property, whether real or personal, and whether in Singapore or elsewhere, and also obligations and every description of interest whether present or future or vested or contingent arising out of, or incidental to, property’.

¹⁸ Section 351(1) receives this new subsection:

(iv) if the Court is of the opinion that the company has a substantial connection with Singapore, taking into account the presence of one or more of the following factors in respect of the company:

(A) Singapore is the centre of main interests of the company;

(B) the company is carrying on business in Singapore or has a place of business in Singapore;

(C) the company is a foreign company that is registered under this Division;

(D) the company has substantial assets in Singapore;

(E) the company has chosen Singapore law as the law governing a loan or other transaction or the law governing the resolution of disputes arising out of or in connection with a loan or other transaction;

(F) the company has submitted to the jurisdiction of the Court for the resolution of disputes relating to a loan or other transaction.

48 Fourth and finally, the abolition of the general ring-fencing rule in the winding up of foreign companies. Ring-fencing, however, will be retained for specific financial institutions, such as banks and insurance companies.

49 Despite the proposed abolishment of the ring-fencing provision, the Model Law does contain safeguards to ensure equality of treatment for local creditors when granting specific reliefs: see Articles 21 and 22 which provide that certain reliefs (including entrusting a foreign insolvency office-holder with the distribution of assets located within the jurisdiction) may only be granted where the local courts are “satisfied” that the interests of local creditors are adequately protected. Article 6 of the Model Law further allows the courts of the enacting State to refuse recognition or assistance on public policy grounds, such as in cases where there is a breach of natural justice or procedural fairness.

50 The Bill sets no limitation on the application of the Model Law to insolvency proceedings originating only from states that have themselves adopted the Model Law, *i.e.* there is no reciprocity requirement. And instead of ‘shall cooperate’, Article 25 has been amended to provide that the court ‘may cooperate’ to the maximum extent possible with foreign courts or foreign representatives.¹⁹

Effect of the Proposed Model Law on Arrest in Singapore

¹⁹ Art 25 reads:

1. In matters mentioned in Article 1(1), the Court may cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a Singapore insolvency officeholder.

2. The Court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

51 With the coming introduction of the Model Law into Singapore law, admiralty practitioners here should be conscious of the Model Law’s impact on the right to arrest, in particular, whether the mandatory stay of proceedings in Art 20 of the Model Law prevents maritime claimants from arresting ships in Singapore if the shipowner or charterer was the subject of recognised foreign insolvency proceedings (the main proceedings).

Australian perspective

52 The Australian experience in relation to the recognition of foreign insolvency and the right of arrest provides helpful insights. Australia implemented the Model Law via the Cross-Border Insolvency Act 2008 (Cth) (“CBI Act”), however, the CBI Act is not a comprehensive international insolvency statute, and cross-reference is made to provisions in the Corporations Act 2001 (Cth) (“the Corporations Act”) and Bankruptcy Act 1966.

53 In the Federal Court decision of *Yu v STX Pan Ocean Co Ltd (South Korea)*, in the matter of *STX Pan Ocean Co Ltd (Receivers appointed in South Korea)* [2013] FCA 680; (2013) 223 FCR 189 (“*Yu v STX Pan Ocean*”), the Federal Court took the opportunity to clarify that Australia’s adoption of the Model Law was indeed subject to the operation of local insolvency laws in their version of modified universalism.

54 Starting with *Yu v STX Pan Ocean* in 2013 and thereafter several cases decided in 2015 like *Kim v Daebo International Shipping Co Ltd* [2015] FCA 684; (2015) 232 FCR 275, *Hur v Samsun Logix Corporation* [2015] FCA 1154; (2015) 238 FCR 483, and *Yakushiji v Daiichi Chuo Kisen Kaisha* [2015] FCA 1170; (2015) 33 ALR 513 and *The ship “Sea Hawk” v Reiter Petroleum Inc* [2016] FCAFC 26; (2016) 335 ALR 578 (the “*Sea Hawk*”), in the insolvency context, Australian courts distinguish between proceedings to enforce an existing security right (eg. maritime lien) and proceedings to satisfy a judgment out of the proceeds of sale of a ship.

Only the former can proceed as an action by a secured creditor within the exception allowed under s 471C of the Corporations Act. Sections 471B and 471C of the Act preserved the rights of secured creditors and recognised the power of the court to grant leave to commence a proceeding or an enforcement process in appropriate circumstances. They read:

471B Stay of proceedings and suspension of enforcement process

While a company is being wound up in insolvency or by the Court, or a provisional liquidator of a company is acting, a person cannot begin or proceed with:

(a) a proceeding in a court against the company or in relation to property of the company; or

(b) enforcement process in relation to such property;

except with the leave of the Court and in accordance with such terms (if any) as the Court imposes.

471C Secured creditor's rights not affected

Nothing in section 471A or 471B affects a secured creditor's right to realise or otherwise deal with the security.

55 The question before the Full Federal Court of Australia in the *Sam Hawk* was how Australian law treated a maritime lien arising under foreign law within the regime of the Admiralty Act 1988 (Cth). Reiter Petroleum (a Canadian company) had procured a supply of bunkers to the vessel by a contract with her time charterers in Istanbul, Turkey. The owners were not privy to this contract. Reiter Petroleum included a clause permitting it to assert a maritime lien against the owner wherever the vessel was, and the law of the US would apply to determine the existence of the lien. The time charterers did not pay for the bunkers and the vessel was arrested in Western Australia on the basis of a maritime lien.

56 The Full Court overturned the first instance decision and set aside the vessel’s arrest. Allsop CJ and Edelman J, in a joint judgment, held that as the owners were not party to the bunker supply contract, that contract could not create a maritime lien in relation to the vessel which binds her owners. The *lex causae* was not US or Canadian law, but either the law of Hong Kong (where vessel was flagged or registered), Turkey (where bunkers supplied) or Australia (where vessel arrested). As there was no evidence of the former two, it was presumed they were the same as the latter, the law of the forum. However, Australian law did not recognise a maritime lien arising from the supply of necessaries, including bunkers, to a ship. Section 15 of the Admiralty Act would only characterise a foreign right as a maritime lien if it was, or was closely analogous to, a maritime lien which would be recognised by Australian law. There were reasons of construction of the Admiralty Act, principle and policy, why Australian law should follow the long established English approach in *The ‘Halycon Isle’*.

57 In *Yu v STX Pan Ocean*, the recognition of the Korean insolvency proceedings was fairly straight forward. The question before Buchanan J was whether “additional orders” should or should not be granted to supplement statutory consequences automatically arising after recognition was granted.²⁰ In particular, the question whether maritime claimants should be able to exercise their *in rem* rights by arresting a ship in Australia. Buchanan J explained that a proceeding on a maritime lien in respect of a ship or other property subject to the lien may be commenced as an action *in rem* against the ship under s 15 of the Admiralty Act and that such a claim enforces a pre-existing security that was created at the time of the occurrence of the event from which the lien arose, unlike a proceeding *in rem* on a general maritime claim. Rares J pointed out in *Kim v Daebro International Shipping* that international maritime law developed by sea trading nations over millennia protect the interests of those who trade or have encounters

²⁰ Orders under Article 19 (Relief that may be granted upon application for recognition of a foreign proceeding) had been granted but would cease once recognition was granted.

with a peripatetic ship and those interested in her which may never again call in a port of the creditor's own jurisdiction. He added that it could not be the intention of Parliament when giving the Model Law the force of law in Australia, to “supervene” or “impliedly repeal” the Admiralty Act in respect of maritime creditors' rights to proceed *in rem* on a secured or proprietary claim that pre-existed any interim or final orders recognising a foreign insolvency proceeding under Articles 19 or 20 of the Model Law. Thus, a person with a maritime lien is someone within s 471C and is thus excluded from an automatic stay in Article 20 of the Model Law.²¹

58 About two weeks after filing the application in *Re Taisoo Suk*, Mr Tai-Soo Suk applied for recognition of Hanjin's Korean rehabilitation proceedings in New South Wales, Australia. In *Tai-Soo Suk v Hanjin Shipping Co Ltd* [2016] FCA 1404, Jagot J granted, *ex-parte*, the recognition of the Korean proceedings as a “foreign main proceeding”, and Mr Tai-Soo Suk as the foreign representative as well as further consequential relief. Notably, this time the stay and suspension of enforcement and insolvency proceedings were the same as that under s 440D of the Corporations Act²² as the Korean rehabilitation proceedings were considered to most closely resemble a voluntary administration under Pt 5.3A of the Act. Art 20(2) was held to

²¹ *Hur v Samsun Logix Corporation* [2015] FCA 1154; (2015) 238 FCR 483 at 489 [32].

²² **Stay of proceedings**

(1) During the administration of a company, a proceeding in a court against the company or in relation to any of its property cannot be begun or proceeded with, except:

- (a) with the administrator's written consent; or
- (b) with the leave of [the Court](#) and in accordance with such terms (if any) as [the Court](#) imposes.

(2) Subsection (1) does not apply to:

- (a) a criminal proceeding; or
- (b) a prescribed proceeding.

impose a duty on the court to identify the type of proceedings under Chapter 5 of the Corporations Act which the foreign proceedings most closely resembled.

59 Section 440D was held not to exclude actions under a maritime lien. Therefore, what remains controversial is statutory *in rem* claims made pursuant to the Admiralty Act and *in rem* actions that have been filed. Once filed and before any stay came into effect, they are treated as a form of secured claims (or quasi security as per Allsop CJ). Whether they amount to a secured claim within the meaning of s 471C is a live issue in Australia and has to be resolved in the future. In *Yakushiji v Daiichi Chuo Kisen Kaisha* [2015] FCA 1170, a case where the Japanese civil rehabilitation proceedings were recognised as the main foreign proceedings, and the Japanese rehabilitation proceedings focused on reordering the arrangements under a number of long-term charters, secured creditors were excluded. Allsop CJ recognised the difficulty in the intersection between international insolvency law, CBI Act and the law of enforcement of maritime claims as international mechanisms for the enforcement of maritime claims vary to a degree around the world. He made the point that the protection given by the orders made under the Model Law to a shipping company should not be seen as necessarily defeating proper maritime claims that are lien claims, and the question of the status of any statutory lien claims would need to be resolved in litigation unless the matter were agreed. He went on to observe that it would be wrong to make orders now that would forestall any vindication by such claimants against the interests of the rehabilitation. Likewise, it would be wrong to prevent the rehabilitation being supported by the CBI Act on the mere possibility of the existence of these claims. Academics have taken the view that this case supports the

proposition that an admiralty claimant who proceeds *in rem* is a secured claimant for purposes of consequent insolvency proceedings.²³

Singapore Perspective

60 The Singapore position as regards a person with a right to proceed on a maritime lien *in rem* under HCAJA is expected to be the same as Australia's. As regards the statutory *in rem* claimants, three Singapore decisions are instructive. First *Lim Bock Lai v Selco (Singapore) Pte Ltd* [1987] SLR (R) 466 ("*Lim Bok Lai*"). The plaintiffs in that case had sought leave under s 262(3)²⁴ of the Companies Act to continue and pursue three *in rem* writs for unpaid bunkers which had been filed and issued, but not served, before the commencement of winding up proceedings. Lai Kew Chai J referred to the English Court of Appeal decision in *Re Aro Co Ltd* [1980] Ch 196 which stated that the plaintiffs' position immediately before the presentation of the winding up petition of an unregistered Liberian shipping company should be tested, and if

they could properly assert as against all the world that the vessel *Aro* was security for their claim, not whether they could assert that they had invoked the jurisdiction of the Admiralty Court within the meaning of section 3 of the Act of 1956. If it is correct to say, as was not challenged in the court below and is not challenged in this court, that after the issue of the writ *in rem* the plaintiffs could serve the writ on the *Aro*, and arrest the *Aro* in the hands of a transferee from the liquidator and all subsequent transferees,

²³ Martin Davies, 'Cross-border insolvency and admiralty: a middle path of reciprocal comity', presented at the MLA Committee on Maritime Bankruptcy and Insolvency, CMI Cross-border Insolvency IWG Joint Meeting in New York, May 2016.

²⁴ Actions stayed on winding up order

(3) When a winding up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except —

(a) by leave of the Court; and

(b) in accordance with such terms as the Court imposes.

it seems to us difficult to argue that the *Aro* was not effectively encumbered with the plaintiffs' claim.

61 Thus, the plaintiffs were considered as secured creditors and granted leave to continue the actions *in rem*. It was not necessary that these plaintiffs had not invoked the jurisdiction of the admiralty court prior to the winding up. Lai J stated,

the statutory right of action *in rem* has crucial consequences which enure to the benefit of such plaintiffs. Their claims are not affected by any subsequent changes of ownership
...²⁵

Given their status as secured creditors, the court would ordinarily exercise its discretion to grant leave to proceed with the action.

62 Second, the Singapore Court of Appeal decision in *The Hull 308* [1991] 2 SLR(R) 643. The *in rem* writ was issued **after** the petition for the winding up of the defendant company and no prior leave of court was obtained under s 262(3) of the Companies Act. Thean J (delivering the judgment of the Court of Appeal) accepted that the plaintiff in *Lim Bok Lai* and *In re Aro* filed the *in rem* writ against the ships before the commencement of the winding up of the respective owners, and the “plaintiffs could at that point of time ‘properly assert against all the world’ that the ships in question were a security for the claims respectively.”²⁶ Brightman LJ in *In re Aro* described the plaintiff's right of suing *in rem* to be similar with those of a legal or equitable mortgagee or charge, and such persons were entitled in appropriate circumstances to have the subject matter of the charge preserved for their benefit. Where the plaintiffs had filed the *in rem* writ **after** the commencement of the winding up of the defendant company, the plaintiffs could not effectively encumber the ship with the plaintiff's claim and they could not

²⁵ At [11].

²⁶ At [13].

be considered as secured creditors for the purpose of deciding whether or not the discretion under s262(3) should be exercised in their favour.

63 Third is another Singapore Court of Appeal decision. In *Kuo Fen Ching and anor v Dauphin Offshore Engineering & Trading Pte Ltd* [1999] 2 SLR(R) 793 (*The “Capricorn”*), the respondent arrested the ship based on their claim for materials supplied and works and services performed on the ship. The shipowner was a company incorporated in the Netherlands Antilles. The ship was released after security in the form of a letter of guarantee was provided by Citibank, and the appellant guarantors had provided counter-security in return for Citibank’s security. In fact, the owner had been dissolved after it had entered an appearance to the action and filed its defence. The guarantors appealed against the High Court decision that a judgment *in rem* could be entered despite the fact that the owner had been dissolved.

64 The High Court accepted that once the owner entered an appearance in an admiralty action *in rem*, the owner was effectively the defendant in respect of the action *in rem* as well as the action *in personam*, and the two proceedings remained separate. The judge had also found on the facts that the repairers had a possessory lien over the vessel for unpaid charges. In addition, the arrest of the ship, before the owner was wound up, created a statutory lien in favour of the respondent on the ship. Thus, the ship remained as security for the respondent’s claim and it was suitable to grant leave to proceed against the owner under s 262(3) of the Companies Act.

65 Without expressly mentioning the inapplicability of s 262(3) of the Companies Act, the Court of Appeal agreed with the judge’s finding that the *in rem* action continues to proceed against the *res* even though the real party to the action was the shipowner:

24. Otherwise, the whole purpose of the *in rem* action would be defeated in cases where the defendants turn out to be insolvent or it if proved difficult to enforce

judgment. The ship or the subsequent security provided is the *res* against which the judgment can be enforced in favour of the claimants, even if the defendants to the action in the sense that an inanimate object cannot be a defendant, are the shipowners ...

25. ... It would be preposterous for this court to hold otherwise as this would mean that a perfectly good action *in rem* would be defeated in this manner as soon as the defendant company was dissolved after having entered an appearance.

66 The Court of Appeal noted that one of the main advantages of an admiralty action *in rem* is that the plaintiff's claim is secured before judgment is obtained in an action *in rem*. More importantly, with security obtained before judgment, satisfaction of the plaintiff's claim will not be hampered by any intervening financial impecuniosity which may embarrass the shipowner. Once a vessel was arrested, the ship, or the security provided in lieu of it, represents pre-judgment security, and turns the respondent in this case into secured creditors of the owners of the vessel, as held in *In Re Aro Co Ltd*. This entitles the plaintiff to arrest and detain the ship and if the court adjudicates in his favour, to a judicial sale and satisfaction of his claim out of the proceeds of sale. Only in an admiralty court-ordered sale by the Sheriff is the ship sold free of all liens and encumbrances so that the purchaser takes a completely clean title. A sale by the liquidator does not have this effect, accordingly, a higher price is more likely to be realised by the Sheriff in a court ordered sale. The situation would of course be different if the plaintiff had taken out the writ after the commencement of winding up.

67 Even though the owner had been dissolved in the Netherlands Antilles, it did not mean that the respondent's *in rem* action had to fail. Such claims were not affected by subsequent changes of ownership once the *in rem* writ relating to the statutory lien had been issued. The respondent was able to satisfy their claim against the ship due to the special nature of the *in*

rem claim. This was so especially after the statutory lien has accrued against the vessel before the owners have been wound up or dissolved. Further, in cases such as *The Capricorn*, where release from arrest was via security provided by a third party, a bank or a P&I Club, there is no actual claim against the insolvent company's assets, therefore no reason why such secured claims cannot take full effect. This is especially since the interests of the insolvent company's creditors were not affected.

68 I mentioned earlier that the Court of Appeal in the *Beluga* had observed that commencement of foreign insolvency proceedings should not preclude the commencement of proceedings or attempt execution of a judgment in Singapore. Neither should the existence of foreign insolvency proceedings stop the issuance of *in rem* proceedings or arrest of the ship. The liberty goes further to obtaining judgment and execution. On entering of judgment, Karthigesu JA had stated in *The Capricorn*, that even the dissolution of the shipowner would not defeat the plaintiff's claim or the granting of a judgment *in rem* in the plaintiff's favour. To rule otherwise

...would result in an astounding loophole and defeat the whole purpose of the admiralty *in rem* against being a means of providing a pre-judgment security for the plaintiff with a claim against the ship.²⁷

69 In the context of Singapore admiralty law, the arrest and subsequent sale of a ship is not characterised as a process of execution. Thean J in *The Daien Maru No 18* [1983-1984] SLR(R) 787 explained that an execution proceeding is to enforce a monetary judgment *in personam*. In contrast, a judgment *in rem* is against the *res* and such a judgment can be enforced against the *res* by a remedy *in rem*. The arrest of the ship is to obtain security for the judgment.

²⁷ At [33].

Thean J held that an *in rem* claimant who sued *in rem* and obtained a judgment for his claim can still assert that the ship is security for the judgment obtained and is therefore entitled to arrest the ship provided no bail or other guarantee has been previously put up. The right to security in the ship (enforced by an arrest of the ship) is not lost or extinguished by the merger of the claim in the judgment obtained in the action. In the context of domestic insolvency proceedings, although leave of court to proceed in the admiralty jurisdiction after a winding up order is made is required, the right to proceed to arrest a ship should be forthcoming.

The Secured Creditor in Admiralty

70 In the context of Singapore admiralty law, *in rem* creditors like maritime lien holders and others whose *in rem* rights are derived from the HCAJA and have taken steps to file their *in rem* writs early enough are essentially distinguishable from the company's general body of creditors. They are regarded as secured claimants in admiralty proceedings. Generally, the Bill's amendments to the Companies Act should not change the status of the secured creditors in admiralty proceedings. Section 262(3) applies if there is a liquidation proceeding in place under Singapore's Companies Act. The Bill's implementation of the Model Law only alters the procedure by which a Singapore court extends assistance to a foreign representative or foreign office-holder; there is no change to the content of Singapore's domestic insolvency law or even our private international law which apply in cross-border insolvency.²⁸ Recognition of the foreign insolvency proceedings as "foreign main proceedings" under Art (20)(a) does not affect creditors', implicitly *in rem* creditors, rights. As Allsop CJ observed in *Aker v Deputy Commissioner of Taxation* (2014) 223 FCR 8 at [120]:

Whilst the Model Law reflects universalism, there is nothing in the Model Law or the UNICTRAL Working papers prior to its formulation, or in the CBI Act, which would

²⁸ Guide to Enactment and Interpretation of Model Law, para 3.

justify the stripping of rights of a local creditor by reason of recognition. The universalism that underpins the Model Law and CBI Act is one of the benefit of all creditors, and the protection of local creditors is expressly recognised. It is not inappropriate to call it “modified universalism” for what such an application is worth.

71 Singapore’s amendment to Article 20 of the Model Law is as follows:

Article 20. Effects of recognition of a foreign main proceeding

1. Upon recognition of a foreign proceeding that is a foreign main proceeding, subject to paragraph 2 of this Article —

(a) commencement or continuation of individual actions or individual proceedings concerning the debtor’s property, rights, obligations or liabilities is stayed;

(b) execution against the debtor’s property is stayed; and

(c) the right to transfer, encumber or otherwise dispose of any property of the debtor is suspended.

2. The stay and suspension mentioned in paragraph 1 of this Article are —

(a) the same in scope and effect as if the debtor had been made the subject of a winding-up order under this Act; and

(b) subject to the same powers of the Court and the same prohibitions, limitations, exceptions and conditions as would apply under the law of Singapore in such a case, and the provisions of paragraph 1 of this Article are to be interpreted accordingly.

3. Without prejudice to paragraph 2 of this Article, the stay and suspension mentioned in paragraph 1 of this Article do not affect any right —

- (a) to take any steps to enforce security over the debtor’s property;
- (b) to take any steps to repossess goods in the debtor’s possession under a hire-purchase agreement;
- (c) exercisable under or by virtue of or in connection with the Third Parties (Rights against Insurers) Act or Motor Vehicles (Third-Party Risks and Compensation) Act; or
- (d) of a creditor to set off its claim against a claim of the debtor, being a right which would have been exercisable if the debtor had been made the subject of a winding-up order under this Act.

4. Paragraph 1(a) of this Article does not affect the right to —

- (a) commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor; or
- (b) commence or continue any criminal proceedings or any action or proceedings by a person or body having regulatory, supervisory or investigative functions of a public nature, being an action or proceedings brought in the exercise of those functions.

5. Paragraph 1 of this Article does not affect the right to request or otherwise initiate the commencement of a proceeding under Singapore insolvency law or the right to file claims in such a proceeding.

6. In addition to and without prejudice to any powers of the Court under or by virtue of paragraph 2 of this Article, the Court may, on the application of the foreign representative or a person affected by the stay and suspension mentioned in paragraph 1 of this Article, or of its own motion, modify or terminate such stay and suspension or

any part of it, either altogether or for a limited time, on such terms and conditions as the Court thinks fit. [emphasis added]

72 Under the Model Law, the foreign representative of the COMI debtor will have to apply for recognition of the foreign insolvency proceedings including any urgent moratorium against the debtor’s assets. The Singapore insolvency court will be bound to recognise the foreign insolvency proceedings as “foreign proceedings” if the conditions in Article 17(1) are satisfied. Once the Singapore insolvency court recognises the foreign insolvency proceedings, there is within Singapore an automatic and mandatory moratorium on all proceedings against the COMI debtor under Article 20(1). The important point is that the COMI debtor is not in liquidation in Singapore simply by virtue of recognition under Article 17. There is (as yet) no domestic Singapore insolvency proceeding in place under Singapore Companies Act. However, Article 20(2)(a) may be interpreted as creating the fiction that the COMI debtor is to be treated as if it was in liquidation in Singapore, and this is for the purpose of assessing the scope of the Article 20(1) stay (albeit for no other purpose).

73 What Article 20(2) does is to expressly state that the scope and effects of the matters contemplated under Article 20(1) depends on the exceptions or limitations of the law of the enacting state. In particular, Article 20(2)(b) stipulates that the stay under Article 20(1) subjects the COMI debtor to the same protection and the same disabilities as apply to a company undergoing liquidation in Singapore. The point is that the Model Law does not go beyond domestic law in interfering with security. Article 2(j) defines security as “any mortgage, charge, lien or other security”. What this can mean as a matter of construction is that the stay under Article 20(1) effectively applies to unsecured creditors (as in the general body of creditors) because of the right granted to secured creditors under Articles 20(2) and (3) read

with Article 20(1). In this sense, secured creditors including *in rem* creditors remain outside of and are unaffected by the stay under Article 20(1).

74 In my view, despite the Bill's implementation of the Model Law, its effect on the admiralty law of arrest based on the current legal position is probably none. If ever leave of court is required to continue with the *in rem* action, the application is made under Article 20(6) and the same principles governing an application under s 262(3) of the Companies Act are likely to apply. There may also be considerations which are unique in a cross-border situation, for example, the fact that there may not be any actual liquidation under the domestic legislation.

75 Arguably, a carve-out of *in rem* claims should logically follow having regard to the special features that inure to the advantage of the maritime lien holder and *in rem* creditors with protective *in rem* writs. A carve-out of *in rem* claims as described is a matter of admiralty jurisdiction rather than discretion and provides simplicity, clarity and predictability and promotes coherence between the laws of admiralty and insolvency. There is no confusion that such rights *in rem* are protected from any moratorium which may arise under the main foreign proceedings. Their right of security and priority can only be enforced by maritime proceedings and not the insolvency court. There is also a close relationship between the jurisdiction to arrest and priorities of *in rem* claims. Both matters are governed by Singapore law as the *lex fori*. In principle, for such cases, there is no unfairness in further tweaking the principle of modified universalism.

76 I now discuss another controversial decision in Singapore law more as a lead up to reinforce the jurisdictional argument that *in rem* claimants are essentially outside the scope of the Model Law. Interestingly, the group owner obtained a bankruptcy order from the Seoul Central District Court on 7 June 2013 which pre-dates the arrest of the Vessel on 14 June

2013.²⁹ The point of controversy in the decision is the proposition that the foreign insolvency of a group owner could amount to an anticipatory breach to give rise to a cause of action against the registered ship owner. The jurisdictional argument here has to do with the principle of separate legal entity and the absence of provisions in the Model Law that extend to subsidiaries, affiliates and associates. In the context of admiralty jurisprudence, the separate legal entity regime is almost inextricably linked to the special purpose vehicles set up to own individual ships.

The “STX Mumbai” [2014] 3 SLR 1116; [2015] 5 SLR 194

77 In 2014, the arrest of *The “STX Mumbai,”* a casualty of the STX Pan Ocean Pte Ltd (“STX Pan Ocean”) collapse, challenged the application of the traditional rules of contract and company law in the context of admiralty and insolvency principles.

78 The respondent, POS Maritime VX SA, a Panamanian incorporated company, was the registered owner of the vessel STX Mumbai (the “Vessel”). The appellant, Transocean Oil Pte Ltd, had claimed the price of bunkers supplied to the Vessel pursuant to a bunker supply agreement concluded by STX Corporation, acting as agent for the respondent. Three days before payment was due, the appellant via an email after office hours demanded immediate payment of the bunker invoices and addressed it to STX Corporation and the respondent but only sent it to STX Corporation in Seoul. The bunker supply agreement did not provide for an acceleration of the payment obligation. No payment was received, so the very next morning, the appellant issued *in rem* proceedings and arrested the *Vessel* that very afternoon. The Vessel was released eight days later, after security was provided. The demand for accelerated payment was founded on the basis that the bunker supply contract had been repudiated by the

²⁹ [2015] 5 SLR 1 at [14].

respondent's anticipatory breach, namely, the respondent evinced clear intention to renounce the contract by refusing to comply with the letter of demand. Alternatively, with STX Pan Ocean filing for bankruptcy protection in South Korea, circumstances were such that it was impossible for the respondent to make payment on the due date. The appellant primarily relied on the poor financial health of the STX group of companies that the respondent was part of, in particular, the insolvency of STX Pan Ocean, which was named as the "group owner" of the Vessel.

79 The respondent applied to strike out the *in rem* action and set aside the warrant of arrest, and succeeded before the assistant registrar, whose decision was upheld on appeal to the High Court. The appellant's action was found to be legally unsustainable as there was no valid cause of action at the time the *in rem* writ was filed. Without an acceleration clause bringing forward the time of payment, insolvency per se, especially the insolvency of a separate legal entity, did not automatically amount to a repudiatory breach in law. The appellant was relying on the insolvency of STX Pan Ocean rather than the respondent, who was in fact the party who would be liable in an action *in personam* and the beneficial owner of the Vessel within the meaning of s 4(4) of the HCAJA. The appellant had not sought to lift the corporate veil to impute liability for the unpaid bunkers and beneficial ownership of the Vessel to another separate legal entity; STX Pan Ocean's insolvency constituted evidence of its repudiatory breach. Neither was there any legal basis for issuing the letter of demand as the sum was not due. Further, the letter of demand was sent after office hours, yet payment was demanded the same day, and it was sent to STX Corporation.

80 The five-member Court of Appeal sat to hear an admiralty case for the first time and allowed the appellant's appeal against the setting aside of the arrest. New arguments and fresh

evidence on the appellant's standard terms and conditions was adduced as the respondent's counsel did not object to it. The appellant submitted that on a true interpretation of the relevant clause in its standard terms and conditions, they were in fact entitled to receive payment on the date of the arrest itself and so, in the absence of contrary evidence, it was virtually impossible for timely payment to have been made. While the crux of the appellant's case remained premised on the doctrine of anticipatory breach, the focus now shifted to the ground of impossibility of performance by the respondent.

81 Two key issues were before the Court of Appeal. On the first, Phang JA found that it was just and fair for the doctrine of anticipatory breach to apply to both executory and executed contracts. A key consideration had to be the conduct of the defendant. If the defendant had evinced a clear intention that it will not perform its obligations under the contract, then it was only just and fair that the plaintiff be permitted, in law, to rescind the contract and/or claim damages on the basis of an anticipatory breach of contract, regardless of whether the contract was executed or executory.

82 The second issue was whether the insolvency of the “group owner” could amount to an anticipatory breach, though insolvency, of itself, could not amount to an anticipatory breach. Phang JA held that everything would ultimately fall to be determined on the precise facts of each case. The defendant's insolvency, viewed in its proper context, may well be found to constitute an anticipatory breach.

83 Adopting a “practical sphere of application”,³⁰ Phang JA found that the evidence the appellant relied on pointed to “some plausible connection between STX Pan Ocean and the respondent” such that, at the striking out stage, it was arguable that the former's insolvency

³⁰ At [85].

could make it impossible for the latter to make timely payments under the bunker supply contract.³¹ The evidence included the following—:

- (a) STX Pan Ocean was listed as the "group owner", operator, and manager of the Vessel suggesting that the respondent — who had not furnished evidence of any independent bank account or funds — was essentially a one-ship company;
- (b) STX Pan Ocean and the respondent shared the same office address in South Korea as reflected in the disputed bareboat charter;
- (c) The person affirming the affidavits in these proceedings on the respondent's behalf, *viz*, one Mr Lee, was the same person who had signed the alleged bareboat charter on behalf of STX Pan Ocean; and
- (d) In an affidavit filed in support of STX Pan Ocean's application to be placed under a scheme of arrangement, STX Pan Ocean's representative had described the Vessel as its vessel and identified the appellant as "a creditor of STX Pan Ocean".

84 However, Phang JA noted that ultimately, this would be a finding of fact by the trial judge. At this striking out stage, the appellate court was satisfied that the appellant's case as based on the insolvency of STX Pan Ocean was legally sustainable when considered in light of the factual assertions made.

Legitimacy of one-ship companies

85 The Court of Appeal's decision presents uncertainties as it was willing to consider evidence pointing to a single economic entity, and in the process side-step the traditional and fundamental one-ship company business model. The use of the single purpose entity for tax,

³¹ At [86].

governance or limitation of liability reasons is a legitimate way to conduct business in multiple jurisdictions as a single entity. In *The Skaw Prince* [1994] 3 SLR (R) 146, the High Court stated:

It is well known that businesses engaged in shipping set up and utilise one-ship companies within their corporate structure for the purpose of limiting liability. The device has been around and recognised by the courts as a legitimate one and the court's view has been that the court will not lift the corporate veil unless the circumstances are exceptional.³²

86 One-ship companies may be incorporated in 'flag of convenience' states and centrally managed from the true place of business for fiscal or other reasons. The fact that a one-ship company is being managed by its ultimate parent is not evidence that it has no separate existence. It is quite normal for companies in a group to use inter-group finance or even a central treasury. Further, the fact that intra-group loans were interest free and unsecured is unsurprising and would not be the basis for piercing the corporate veil.³³ In *PP v Lew Syn Pau* [2006] 4 SLR(R) 210, Sundaresh Menon JC (as he then was) held that the separate entity principle was not displaced even if the companies within a group are organised as a single economic entity.

87 In the admiralty court, piercing of the corporate veil is rare, and permitted only in exceptional cases where justice requires the court to do so and this is where there is cogent evidence of fraud or dishonesty, nominee holding, trust or agency relationship.³⁴

³² At [19].

³³ Aleka Mandaraka-Sheppard (2013). *Modern Maritime Law (Volume 1): Jurisdiction and Risks*, 3rd edn, Oxford: Informa Law from Routledge, p. 135.

³⁴ *ibid.*

88 Nevertheless, the Court of Appeal’s decision in *STX Mumbai* effectively states that without lifting the corporate veil, evidence of the poor financial health of a group of companies, in particular, the evidence of the insolvency of the “group owner”, was sufficient to ground an assertion of anticipatory breach, namely, the inability to make good a debt, of a *separate* entity within the group. The question of when insolvency may form a basis for repudiation is now dependent on a proper appreciation of the factual matrix within which the insolvency occurs.

89 To some, Phang JA’s decision perhaps represents judicial innovation in accepting commercial realities when dealing with the insolvency of cross-border corporate groups, a step towards achieving a global solution for cross-border corporate group insolvencies. In the Australian Hanjin recognition proceedings, Jagot J also extended her earlier prohibition of enforcement or recovery actions against the Hanjin Milano without leave of court, until the determination of the recognition application. My understanding is that the registered owner of the Hanjin Milano is Dalby Navigation Limited and not Hanjin.

Issues in Cross-border Multiple Enterprise Group Insolvencies

90 One school of thought is that judicial incursion into the separate entity doctrine in fact reduces inefficiencies in the form of transactional costs in the case of multinational group insolvencies.³⁵ This dovetails with the universalist view that the insolvency of global multinational enterprises should be subject to a single proceeding responsible for disbursing assets to all claimants. There have been calls to look at the economic realities and to treat the multinational COMI debtor with overseas subsidiaries, associates and affiliates as one single entity. At present, there are no global laws to regulate the insolvency of such groups of corporations where one or more entities within the group are situated in different countries.

³⁵ Sandeep Gopalan & Michael Guihot, ‘Cross-Border Insolvency Law and Multinational Enterprise Groups: Judicial Innovation as an International Solution,’ *The Geo. Wash. Int’l L. Rev.* [Vol 48] 549, 555.

91 While we have global efforts to resolve cross-border insolvencies of *single* entities through the Model Law, the Model Law has no provisions dealing with cross-border enterprises comprised of multiple entities, as is typical with shipowners. The decision of *Re Taisoo Suk* suffers from this overreach.

92 Some countries have attempted to address these issues. In Australia, responses to group insolvency include amendments to the Corporations Act 2001 to make parent companies liable for the debts of subsidiaries in certain circumstances³⁶ and for the group assets to be pooled³⁷ to pay creditors of one subsidiary where “satisfied that it was just”.³⁸ Similarly, New Zealand legislation allows the court to make a contribution order on broad grounds in the case of the insolvency of a related company and also provides for pooling orders in respect of insolvent related companies, where the court is satisfied that it is “just and equitable to do so”.³⁹

93 The United States has substantive consolidation which is driven by the courts based on the Bankruptcy Court’s general powers in s 105 of the Bankruptcy Code. That power is derived from an equitable background and the court is therefore guided by what is just and equitable in the circumstances.⁴⁰ The European Union Insolvency Regulation addresses the issue of insolvent group of companies with group members in various member states via modest first steps in coordinating and communicating insolvencies, but not yet takes the next step to regulate the consolidating of group insolvencies.⁴¹

³⁶ S 588V makes the holding company liable for the subsidiary’s insolvent trading if the company was aware or should have been aware that the subsidiary was trading while insolvent.

³⁷ S 579E.

³⁸ S 579E(1).

³⁹ ss 271/272 of the Companies Act 1993.

⁴⁰ What the court will order is ‘substantive consolidation’ which is that the assets and liabilities of different entities are consolidated and treated as one entity. The consolidated assets create one fund from which all of the claims against the consolidated debtors are satisfied.

⁴¹ (EIR 2015) (848/2015): Art 56 to 77 (Recast Insolvency Regulations apply from June 2017).

94 Whilst Phang JA had opened a portal for pragmatic incursion into the separate entity doctrine, this may have been an aberration. In so far as Singapore is concerned, the separate entity doctrine still applies in insolvencies, with the likelihood that multiple courts will administer the assets of enterprises based on their locations. In *Manuchar Steel Hong Kong Limited v Star Pacific Line Pte Ltd* [2014] 4 SLR 832 (“*Manuchar*”) Lee Kim Shin JC stated that the single economic entity concept had no place in Singapore as:

133 If the single economic entity concept were accepted, all such one-ship companies would be considered as part of the same single economic entity with the corollary that the liability of a one-ship company may be visited on several (or all) of its other one-ship sister companies. The existence of abusive conduct becomes irrelevant because liability can be established by the mere fact of the existence of a group structure; the piercing of the corporate veil exception would not even be needed. In short, there would be no place for the survival of the one-ship companies practice and doctrine which has long existed and recognised as a legitimate tool for limiting liability.

95 Given the state of the law, a bare statement in the affidavit that the ship, *STX Mumbai*, belonged to STX Pan Ocean would not do. In *Manuchar*, reliance was placed on the single economic entity concept to canvass the multi-directional argument that the law recognises an overarching indivisible group corporate legal personality that transcends and supersedes all individual members’ separate corporate legal personalities, and upon which rights and liabilities of each member of the group can be attached, with the consequence that the liabilities (and also rights) of a member of the group are shared by other members of the group because of the shared group corporate legal personality. This multi-directional argument was rejected by Lee JC. Thus, the settled rule is that each entity is responsible for its own debts in insolvency proceedings, and any change is a matter for the legislature. The Bill has not attempted any such

change. If anything, an indirect change in the scheme of arrangement regime is in the form of the court's power to restrain proceedings against the subsidiary of the company in the new section 211C. The purpose is to extend the scope of the moratorium available to related entities of the debtor company. There is no "pooling of assets" as such.

96 The Bill introduces new rescue financing provisions (s 211E for schemes of arrangement and s 227HA for judicial management) which allow the court to grant the rescue financier priority over other creditors' claims. In particular, this new financing may become a security interest subordinate to existing security or secured as a super priority security interest. In the latter scenario, given the definition of "security interest" in s 211E(6), such super-priority financing may take priority over the rights of the *in rem* creditor, while in the former scenario, there may not be any excess left for the rescue financier. We will have to wait and see how these provisions work out in practice.

97 It cannot be disputed that cooperation and coordination are important goals for any effective and successful rehabilitation proceedings, however, the doctrine of separate entity is the bedrock of corporate law. Hence, the tension between the two will have to be managed pragmatically, founded on initiatives taken outside of the Model Law. I will return to this point later.

COMI Debtor Unlikely to be Admiralty's "Beneficial Owner"

98 Overlaying the notion of lifting the corporate veil in order to look behind the separate entity is the other unique concept of the "beneficial owner of all the shares in the ship" in the HCAJA. This "beneficial owner" is usually the person who would be liable on the statutory maritime claim. In admiralty law, ownership of a ship is denoted by the concept of the owner of the shares in a ship and this is a statutory jurisdictional requirement that is important to an

arrest of the offending ship or sister ship. A statutory *in rem* creditor cannot ignore the reality of separate corporate entities. A subsidiary company and a parent company are two separate entities and even the full control of the subsidiary by the parent company does not lead to the conclusion that the asset of the subsidiary belongs to the parent company. A right of control is insufficient to prove beneficial ownership in the shares of the ship, and despite the difficulty faced by an arresting party in cases of one ship companies, the court will not ordinarily lift the corporate veil. Neither is proof that the COMI debtor, through its control of the one-ship companies, the “beneficial owner of all the shares in the ship”. A shareholder of a company does not have property, legal or equitable, in the assets of the company. He is not the beneficial owner of the ship who can be a separate and distinct legal entity or person from the shareholder-owner of the company. The recognition of the insolvency of the COMI debtor should therefore not affect the status of the one-ship companies.

99 In *The Min Rui* [2016] SGHC 183, the High Court accepted that the entity registered as owner of a ship is not necessarily the beneficial owner of the ship. Whilst, there is no rule in Singapore that the registered owner of a ship is always co-extensive with beneficial ownership for the purpose of arrest under s 4(4) of the HCAJA, the ship’s register is a useful starting point, but cogent evidence is needed to show that someone else is the beneficial owner within the meaning of s 4(4) of the HCAJA.

Communication and cooperation in a cross-border insolvency

100 In the single restructuring of a large single entity, Professor Martin Davies in his article entitled “Cross-border insolvency and admiralty: a middle path of reciprocal comity”, argued that the conflict between insolvency law and admiralty law need not result in one body of law prevailing over the other. He advocates for a middle path that achieves the main goal of universalism which means recognising the primacy of the insolvency proceedings while also

preserving the rights of maritime claimants to secure their claims by proceeding against the debtor's assets. This middle-path is grounded on notions of comity and it demands that the country where the ship is arrested under its *lex fori* must recognise the primacy of insolvency proceedings in the debtor's COMI. Reciprocity demands that the country of the insolvency proceedings recognise and respect the legitimacy of the admiralty arrest. Reciprocity would require the debtor's COMI to grant the admiralty claimants the same secured status in the insolvency proceedings. In Singapore, there would be no need for this middle path since the view I hold is that the Model Law has no material impact on *in rem* claims here.

101 This cooperation outlined above is really not different from a group plan involving inter-related plans because of multiple companies in the restructuring. It is apposite here that I mention the recent initiative of the Judicial Insolvency Network (JIN) in 2016.

102 Whether there is a single company restructuring or a group plan where various satellite proceedings may happen, the JIN Cross-Border Cooperation Guidelines ("JIN Guidelines") are intended to facilitate communication and cooperation in a cross-border restructuring. If the main restructuring is in Singapore, the master restructuring plan would be developed here and the Singapore court would coordinate the various satellite proceedings involving the inter-related satellite plans.

103 These Guidelines were the fruits of the inaugural meeting of the JIN in Singapore in October 2016 attended by judges from Australia, the British Virgin Islands, Canada, Cayman Islands, Hong Kong, Singapore and the US. They cover a wide range of matters including joint case management of cross-border insolvencies, the use of protocols and even the conduct of joint hearings. In short, the JIN Guidelines are intended to help supervising courts and parties

by suggesting issues that should be addressed and procedures that could be implemented to make parallel insolvency proceedings more effective.

104 Members are encouraged to implement the JIN Guidelines. On Singapore's part, this will be done via a Registrar's Circular with an accompanying User Guide by the first quarter of 2017. In the pipeline is a portal for the sharing of information amongst JIN members.

Conclusion

105 In summary, in Singapore:

- (a) The Court of Appeal decision of *Beluga* states that under common law, foreign winding up orders (including any foreign winding up orders to stay proceedings in the forum) will not be recognised. However, the Singapore courts could assist foreign liquidation proceedings through the courts' existing procedural powers. this was to be on a case-by-case basis;
- (b) The enactment of the Model Law will not affect the rights of secured *in rem* creditors by virtue of Arts 20(2) and (3);
- (c) The Model Law does not deal with the single economic entity like subsidiaries, associate and affiliates of the COMI debtor, so the separate entity doctrine prevails;
- (d) Through the cooperation envisaged by global initiatives such as the JIN network, insolvencies of cross-border single economic entities will be more efficiently and effectively handled.

106 The conflict lies essentially between the need for uniform administration of insolvency proceedings and the fundamental principle of insolvency law that each entity has distinct legal status, creditors and assets, is treated as a separate debtor and cannot be routinely consolidated

with subsidiaries, affiliates and associated companies. The use of the Model Law to recognise foreign proceedings embodying subsidiaries and affiliates in the moratorium overreaches beyond the scope of the Model Law and the legislative changes proposed in the Bill. Singapore courts have made the territorialist snip of the golden thread of universalism and confirmed that one-ship companies legitimately lie at the heart of ship ownership. Corporate veils cannot simply be lifted in the event of an insolvency.

107 What is needed is a clear statement to clarify that the usual legal issues concerning insolvency simply do not have any impact when ships are arrested or are capable of arrest within Singapore's jurisdiction. This idea is unsurprising since the maritime law that governs international maritime commerce and credit has existed long before "universalism" emerged in cross-border insolvency. The need for predictability and uniformity in the maritime world has been so strong that even the common law courts, ever protective of their own ways, have ceded jurisdiction to specialised admiralty courts. As Professor Tetley wrote:

[M]aritime law as we know it today is civilian in nature, finding its source in the *lex maritima* (the law maritime) which is a part of the *lex mercatoria* (the law merchant). Maritime law was codified, international law and, in England, it was apart from, and opposed to, its nearly mortal enemy, the common law.⁴²

⁴² W. Tetley, *Maritime Liens and Claims* (2nd ed. 1998), p 56.