IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC 147

Originating Summons No 203 of 2022

In the matter of Section 252 of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed)

And

In the matter of Article 15 of the UNCITRAL Model Law on Cross-Border Insolvency

And

In the matter of Eagle Hospitality Real Estate Investment Trust

And

In the matter of Eagle Hospitality Trust S1 Pte Ltd

And

In the matter of Eagle Hospitality Trust S2 Pte Ltd

Alan Tantleff

… *Applicant*

JUDGMENT

[Insolvency Law — Cross-border insolvency — Recognition of foreign insolvency proceedings]

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Aedit Abdullah J:

1 The present application is brought by Mr Alan Tantleff (the "Applicant"), in his capacity as foreign representative of three entities, for the recognition of foreign proceedings and court orders pursuant to the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency (30 May 1997) (the "Model Law"). The Model Law is given the force of law in Singapore under s 252(1) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("IRDA").

2 This application concerns three entities consisting of Eagle Hospitality Real Estate Investment Trust ("EH-REIT"), Eagle Hospitality Trust S1 Pte Ltd ("S1") and Eagle Hospitality Trust S2 Pte Ltd ("S2") (collectively, the "Singapore Chapter 11 Entities"). The Applicant was appointed by the United States Bankruptcy Court for the District of Delaware ("US Bankruptcy Court")

to be the foreign representative of the Singapore Chapter 11 Entities.[1] Prior to this, the Applicant was the chief restructuring officer of the Eagle Hospitality Group consisting of EH-REIT and its direct and indirect subsidiaries.[2]

3 The Applicant is seeking for the proceedings concerning the Singapore Chapter 11 Entities in Cases No 21-10120-CSS, No 21-10037-CSS, and No 21-10038-CSS under Chapter 11 of the United States Bankruptcy Code 11 USC (US) (1978) (the "US Bankruptcy Code") in the US Bankruptcy Court (the "Singapore Entities' Chapter 11 Proceedings") to be recognised in Singapore as foreign main proceedings within the meaning of Art 2(*f*) of the Model Law, or as foreign non-main proceedings within the meaning of Art 2(*g*) of the Model Law.[3] In addition to this, the Applicant requests for the recognition of the Chapter 11 plan of liquidation in the United States (the "US") (the "Chapter 11 Plan") and the US Bankruptcy Court's confirmation of the Chapter 11 Plan.[4]

4 Regarding the additional reliefs, the Applicant seeks the following:

(a) the Applicant to be recognised as the foreign representative of the Singapore Chapter 11 Entities within meaning of Art 2(*i*) of the Model Law;[5]

(b) the Applicant to be entrusted with the administration and realisation of all or any part of the property and assets of the Singapore

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1 Affidavit of Alan Tantleff dated 3 March 2022 ("AT") at para 1.

2 AT at para 3.

3 Applicant's submissions dated 25 April 2022 ("AS") at para 1.

4 AS at para 2(c).

5 AS at para 2(d).

Chapter 11 Entities that are located in Singapore, to effectuate and/or implement the Chapter 11 Plan and its confirmation;[6]

(c) for DBS Trustee Limited, in its capacity as trustee of EH-REIT (the "EH-REIT Trustee"), to be authorised to take all appropriate steps to wind down the Singapore Chapter 11 Entities in accordance with Singapore law and to perform other obligations set out under the Chapter 11 Plan.[7]

Background

The Eagle Hospitality Group

5 EH-REIT is a publicly held real estate investment trust in Singapore. EH-REIT is part of a stapled trust, Eagle Hospitality Trust ("EHT"), consisting of EH-REIT and Eagle Hospitality Business Trust ("EH-BT").[8] EH-REIT's trustee is DBS Trustee Limited, which is incorporated in Singapore. EH-REIT's manager was Eagle Hospitality REIT Management Pte Ltd, which was removed as manager on 30 December 2020 pursuant to a directive issued by the Monetary Authority of Singapore. EH-BT's trustee-manager is Eagle Hospitality Business Trust Management Pte Ltd, which is also incorporated in Singapore.[9]

6 The Eagle Hospitality Group, consisting of EH-REIT and its direct and indirect subsidiaries, was listed on the Singapore Exchange Securities Trading Limited ("SGX-ST") in May 2019 with the principal strategy of investing in a diversified portfolio of income-producing real estate properties which are used

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6 AS at para 2(e).

7 AS at para 2(f).

8 AT at para 8.

9 AT at para 12.

primarily for hospitality and/or hospitality-related purposes. The investments are conducted on a long-term basis and with an initial geographical focus on the US.[10] Through directly and indirectly wholly-owned companies, the Eagle Hospitality Group owned a portfolio comprising of 18 full-service hotel properties (collectively, the "Hotels" or the "Properties"), all of which are located in the US, and each of which is owned by a separate US-incorporated holding company (save for one Hotel, the Queen Mary) (each, a "Propco").[11]

7 Both S1 and S2 are Singapore-incorporated companies that are wholly owned by EH-REIT. S1 is the indirect 100% holding company of USHIL Holdco Member, LLC and CI Hospitality Investment, LLC, which are in turn, indirect 100% holding companies for each of the Propcos that own the Hotels (other than the Queen Mary) in the Eagle Hospitality Group portfolio.[12] In addition, S1 and S2 are the direct 100% holding companies of EHT US1, Inc ("the US Corp") and EHT Cayman Corp Ltd ("the Cayman Corp"), respectively.

8 As disclosed in EHT's prospectus (the "Prospectus"), EH-REIT had obtained a Tax Ruling (as defined in the Prospectus) in relation to certain Singapore income tax treatment of the distributions received by S1, S2, EH-REIT and the stapled security holders of EHT ("Stapled Security Holders"). The Tax Ruling is subject to certain terms and conditions, which include, *inter alia*, that: (a) S1 and S2 will each be a wholly-owned subsidiary of EH-REIT and (b) S2 will wholly own the Cayman Corp. The distribution policy of EHT contemplated that each of the Propcos would distribute cash upstream to the US

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10 AT at para 7.

11 AT at para 9.

12 AT at para 10.

Corp, which would then distribute cash to the Cayman Corp through interest payments and/or repayment of the principal in relation to a loan from the Cayman Corp. In turn, the Cayman Corp would distribute cash to S2, whilst S2 would then distribute dividends up to EH-REIT and the Stapled Security Holders. Thus, S1 and S2 served as important links between the ultimate controllers and owners of the Eagle Hospitality Group and the revenue-generating arm of the group.[13]

9 Securities of EHT were issued in Singapore to the public through an initial public offering on the mainboard of SGX-ST. There were 3,749 Stapled Security Holders as of 31 December 2021.[14]

The Chapter 11 Proceedings in the US

10 The Eagle Hospitality Group faced serious financial difficulties over the course of 2020 stemming from: significant defaults on the part of lessees of the Hotels (*eg*, defaulting on rental payment obligations and payment of outgoings), the onset of the global COVID-19 pandemic, and problems relating to the former EH-REIT manager's activities.[15] The defaults by the lessees continued until the termination of the leases by the Propcos in the last quarter of 2020, and this had pushed the Eagle Hospitality Group into a liquidity crisis.[16]

11 On 18 January 2021, due to the liquidity issues and potential impending actions to be taken by the creditors of the Eagle Hospitality Group, a number of EH-REIT's downstream companies (including S1 and S2, but not including EH-

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13 AT at para 10.

14 AT at para 11.

15 AT at paras 13 and 15.

16 AT at paras 15–16.

REIT) (the "Initial Chapter 11 Entities") voluntarily filed for Chapter 11 reorganisation and sought a debtor-in-possession financing facility (the "DIP Financing Facility").[17] These Initial Chapter 11 Entities entered into a commitment letter for the provision of the DIP Financing Facility with a lender to extend a US$100 million senior secured super-priority debtor-in-possession term loan facility pursuant to the US Bankruptcy Code. The Initial Chapter 11 Entities were permitted to use the proceeds of the DIP Financing Facility for working capital needs, general corporate needs, and other purposes of the Initial Chapter 11 Entities, including funding the costs of the Chapter 11 cases.[18] At a hearing on 21 January 2021, the US Bankruptcy Court, amongst other things:[19]

(a) authorised the joint administration, for procedural purposes, of the Initial Chapter 11 Entities' Chapter 11 cases;

(b) approved the DIP Financing Facility on an interim basis, allowing the Initial Chapter 11 Entities to borrow up to US$9.3 million until the next hearing to be held on 11 February 2021;

(c) authorised, on an interim basis, the Initial Chapter 11 Entities to pay certain critical vendors for the ongoing operations and maintenance of the Hotels in EH-REIT's portfolio post-Chapter 11 filings;

(d) appointed the Initial Chapter 11 Entities' chief restructuring officer to act as foreign representative in any Singapore proceedings to recognise the Chapter 11 cases as foreign proceedings; and

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17 AT at para 25.

18 AT at para 30.

19 AT at para 31.

(e) confirmed the application of the worldwide automatic stay in respect of any claims against the Initial Chapter 11 Entities.

12 As EH-REIT was not yet a party to the Chapter 11 process or the DIP Financing Facility, the EH-REIT Trustee made an application to the Singapore court (*vide* HC/OS 46/2021) to be granted powers to take immediate action on behalf of EH-REIT to join the Chapter 11 process in the US and have access to the DIP Financing Facility to meet ongoing expenditures of EH-REIT itself.[20] On 22 January 2021, Vinodh Coomaraswamy J granted the EH-REIT Trustee's application by way of HC/ORC 413/2021, which allowed the EH-REIT Trustee to "step into the shoes" of the manager of EH-REIT until such time as a replacement manager was appointed.[21] Following this, on 27 January 2021, in its capacity as trustee and on behalf of EH-REIT, the EH-REIT Trustee filed a voluntary petition for relief under Chapter 11 in the US Bankruptcy Court. In conjunction with EH-REIT's Chapter 11 filing, an application was also made to jointly administer, for procedural purposes, EH-REIT's Chapter 11 case with the Initial Chapter 11 Entities (the Initial Chapter 11 Entities and EH-REIT are collectively known as the "Chapter 11 Entities"), which was granted by the US Bankruptcy Court on the same day.[22]

13 Subsequently, at a hearing on 24 February 2021, the US Bankruptcy Court, amongst others:[23]

(a) approved the DIP Financing Facility on a final basis, allowing the Chapter 11 Entities (including EH-REIT) to borrow an aggregate

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20 AT at para 26.

21 AT at para 27.

22 AT at para 33.

23 AT at para 35.

amount of up to US$100 million (which can be increased up to US$125 million under certain circumstances) and the use of such proceeds in accordance with an approved budget and subject to the terms of the order approving the DIP Financing Facility;

(b) authorised (but did not require), on a final basis, the payment of certain critical vendors for the ongoing operations and maintenance of the Hotels in EH-REIT's portfolio; and

(c) in connection with the Chapter 11 filing, confirmed the application of the worldwide automatic stay in respect of any claims against EH-REIT.

14 Concurrently, in connection with the Chapter 11 cases, the EH-REIT Trustee instructed Moelis & Company (in its capacity as financial adviser to the Chapter 11 Entities) to commence a process for the restructuring and recapitalisation of EH-REIT and/or the sale of the Properties in the portfolio of EHT that were owned by certain Chapter 11 Entities.[24] Following this, 14 of the Properties were sold off and the lease relating to the Queen Mary Property was rejected.[25]

15 After the completion of the sale process, the Chapter 11 Entities other than Urban Commons Queensway LLC (collectively, the "Liquidating Chapter 11 Entities"), the committee of unsecured creditors of the Chapter 11 Entities appointed in the Chapter 11 cases, and the Bank of America NA (as the administrative agent of a syndicated credit agreement, being EH-REIT's largest debt facility), negotiated and reached an agreement on the terms of a Chapter 11

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[24] AT at para 38.

[25] AT at paras 42–43.

plan of liquidation (*ie,* the Chapter 11 Plan).[26] On 14 October 2021, the Liquidating Chapter 11 Entities filed with the US Bankruptcy Court: (a) the Chapter 11 Plan in respect of the Liquidating Chapter 11 Entities, and (b) the proposed disclosure statement (the "Disclosure Statement") which contained information on the Chapter 11 Plan for the purpose of providing adequate information to creditors of the Liquidating Chapter 11 Entities to make a reasonably informed decision as to whether to vote to accept or reject the Chapter 11 Plan.[27]

16 Following certain revisions made to the Disclosure Statement due to objections received, a revised Disclosure Statement was made and approved by the US Bankruptcy Court on 4 November 2021.[28] The Liquidating Chapter 11 Entities then proceeded to solicit votes to accept or reject the Chapter 11 Plan from classes of creditors who were entitled to vote on the Chapter 11 Plan. Under the Chapter 11 Plan, the Stapled Security Holders were deemed to have rejected the Chapter 11 Plan, and therefore were not entitled to vote on the Chapter 11 Plan and did not receive a ballot to vote.[29] Nevertheless, copies of the relevant notices which set out further information about the process and options available were mailed to the Stapled Security Holders.[30] The relevant voting requirements under the US Bankruptcy Code in relation to the Chapter 11 Plan were satisfied, and on 20 December 2021, the US Bankruptcy Court entered an order confirming the Chapter 11 Plan for the Liquidating Chapter 11 Entities (the "Confirmation Order"). Accordingly, the Liquidating

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26 AT at para 45.

27 AT at para 46.

28 AT at para 47.

29 AT at para 48.

30 AT at para 49.

Chapter 11 Entities, their creditors and the Stapled Security Holders are bound by the terms of the confirmed Chapter 11 Plan.[31]

17 The Chapter 11 Plan contemplates, *inter alia*, (a) the allocation and distribution of the net sale proceeds from the sale of the properties that were owned by certain Chapter 11 Entities to the Chapter 11 Entities' creditors and other stakeholders, and (b) the resolution of outstanding claims against, and equity interests in, each of the Liquidating Chapter 11 Entities.[32] It is unlikely that claims of all creditors of the Liquidating Chapter 11 Entities will be satisfied in full from the sale proceeds after accounting for various secured claims.[33] In relation to the Stapled Security Holders, they would receive contingent interests in a liquidating trust that would entitle them to a distribution only if there is value available in EH-REIT and only if holders of claims against EH-REIT have been paid in full. Based on current projections, it is not expected that the Stapled Security Holders will receive any distributions.[34]

18 Additionally, under the Chapter 11 Plan, it has also been agreed that the Applicant, as the Liquidating Trustee, will be authorised to take all actions reasonably necessary to dissolve the Liquidating Chapter 11 Entities (other than the Singapore Chapter 11 Entities), Urban Commons Queensway LLC, and the non-debtor affiliates of the Chapter 11 Entities.[35] Further, and pertinently, the Chapter 11 Plan contemplates that the EH-REIT Trustee shall take all appropriate necessary steps to put into effect the termination, liquidation or

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31 AT at para 55.

32 AT at para 57.

33 AT at para 58.

34 AT at para 59.

35 AT at para 60.

dissolution of the Singapore Chapter 11 Entities in accordance with and subject to Singapore law.[36]

19 The Chapter 11 proceedings are still ongoing, and it is anticipated that these Chapter 11 cases will be closed around 31 December 2022.[37] Against this backdrop, the Applicant has filed the present application for the recognition of the foreign proceedings and court orders to implement the Chapter 11 Plan and Confirmation Order (and to dissolve the Singapore Chapter 11 Entities).

Summary of the Applicant's arguments

20 The Applicant submits that the requirements for recognition under Art 17(1) of the Model Law are satisfied. First, the Singapore Entities' Chapter 11 Proceedings are "foreign proceeding[s]" within the meaning of Art 2(*h*) as they are a form of protected reorganisation and have been stated to fall squarely within the provision in previous cases.[38] Second, the Applicant is a "foreign representative" within the meaning of Art 2(*i*) of the Model Law as he was appointed by the US Bankruptcy Court as the foreign representative for S1, S2 and EH-REIT.[39] Third, the requirements under Art 17(1)(*c*) are satisfied as the relevant documents provide sufficient evidence of the existence of the foreign proceedings and the appointment of the foreign representative.[40] The statement identifying all relevant proceedings against the Singapore Chapter 11 Entities has also been produced.[41] Fourth, the requirement under Art 17(1)(*d*) is

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36 AT at para 61.

37 AT at para 63.

38 AS at paras 41–44.

39 AS at paras 45–50.

40 AS at paras 51–54.

41 AS at para 55.

satisfied as the application was filed in the High Court of Singapore and there is jurisdiction over the Singapore Chapter 11 Entities. S1 and S2 are both incorporated and have registered offices in Singapore, while EHT had issued securities on the mainboard of SGX-ST.[42]

21 Next, the Applicant argues that the Singapore Entities' Chapter 11 Proceedings should be recognised as foreign main proceedings. While S1 and S2 have their registered offices in Singapore and EH-REIT is listed on the SGX-ST, the presumption that Singapore is the centre of main interest ("COMI") is rebutted in this case.[43] The Singapore Chapter 11 Entities are part of the Eagle Hospitality Group, which has its main business operations and assets based in the US. The portfolios of income-producing Hotels are all located in the US, and each of the Hotels is owned by a Propco that was incorporated in the US.[44] All of the larger creditors of the Singapore Chapter 11 Entities are based in the US, with US law being the governing law of the various agreements between the respective Singapore Chapter 11 Entities and their creditors.[45] Further, the Singapore Chapter 11 Entities have been subject to the control and supervision of the US Bankruptcy Court for over one year, and the Applicant, a US-based citizen, has been actively managing the Singapore Chapter 11 Entities.[46] The foreign representative's actions and activities in managing the entities abroad are relevant to the determination of the COMI, following the approach taken in

42 AS at paras 56–61.

43 AS at para 70.

44 AS at para 71.

45 AS at para 72.

46 AS at paras 73–74.

US cases.[47] Alternatively, the Singapore Entities' Chapter 11 Proceedings should be recognised as foreign non-main proceedings.[48]

22 The Applicant also submits that the Chapter 11 Plan and Confirmation Order should be recognised as they fall within the definition of a "foreign proceeding" under Art 2(*h*) of the Model Law. This is consistent with the UNCITRAL guide materials, and the US Bankruptcy Court retains jurisdiction and supervision over the process under the Chapter 11 Plan even after the Confirmation Order has been issued.[49]

23 Further and/or in the alternative, upon recognition in Singapore of the Singapore Entities' Chapter 11 Proceedings as a "foreign proceeding", Art 21(1)(*g*) of the Model Law provides the court with the power to recognise the Chapter 11 Plan and Confirmation Order as part of the additional relief to be granted. The court has the power under that provision to recognise (and enforce) insolvency-related, non-monetary judgments as this is consistent with the interpretation based on the UNCITRAL materials.[50] The approach of US and Canadian cases which permit the recognition and enforcement of foreign insolvency-related judgments should be preferred over the more restrictive approach taken in the United Kingdom ("UK") as this is consistent with Parliament's intention.[51] As a final alternative, recognition should be granted under common law.[52]

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47 AS at paras 75–83.

48 AS at paras 85–91.

49 AS at paras 92–99.

50 AS at paras 100–109.

51 AS at paras 110–118.

52 AS at paras 119–135.

24 In relation to the other additional reliefs stated above at [4], the Applicant argues that these are necessary for the Applicant to implement the Chapter 11 Plan and Confirmation Order.[53]

Recognition of the Singapore Entities' Chapter 11 Proceedings

Whether proceedings or orders concerning the restructuring of a real estate investment trust can be recognised under the IRDA and the Model Law

25 I am doubtful about EH-REIT coming within the scope of the Model Law as implemented in Singapore. That implementation is by way of Part 11 of the IRDA, and s 252(1) of the IRDA provides that the Model Law (with certain modifications), as set out in the Third Schedule of the IRDA, has the force of law in Singapore. However, Part 11 is within that segment of the IRDA (Parts 4 to 12 of the IRDA) that deals with corporate entities. EH-REIT is clearly not a corporate entity. Rather, it is a collective investment scheme authorised under the Securities and Futures Act (Cap 289, 2006 Rev Ed) ("SFA") in which a designated trustee acts for the benefit of the unitholders.

26 I do not see anything in the IRDA or its language that would extend its application to EH-REIT. Part 4 and s 61(1) of the IRDA specify the interpretation of the terms used in Parts 4 to 12 of the IRDA, and it is clear that these are limited to corporate insolvency only – there is no mention of business trusts nor real estate investment trusts ("REITs"). This makes sense, as there is already the enactment of other legislation such as the Business Trusts Act 2004 (2020 Rev Ed) ("BTA") and the SFA that would govern aspects of a business trust or a REIT (such as the winding up of a registered business trust under the BTA by order of court).

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53 AS at para 137–140.

27 Additionally, the types of entities excluded from the scope of the Model Law, by the Minister's orders under s 252(1) of the IRDA, suggest that the Model Law only applies to corporate entities and that in a similar vein, non-corporate entities governed by the SFA (such as EH-REIT) do not fall within the scope of the Model Law. Section 252(1) of the IRDA provides that the Model Law has force of law, subject to certain modifications to adapt it for application, in Singapore. In turn, Art 1(2) of the Model Law provides that: "This Law does not apply to any proceedings concerning such entities or classes of entities which the Minister may, by order in the *Gazette*, prescribe." The list of entities which are excluded can be found under para 5(1) of the Insolvency, Restructuring and Dissolution (Prescribed Companies and Entities) Order 2020 which makes reference to a banking corporation, a finance company, *etc*. Under para 5(1)(*z*), a trustee for a collective investment scheme authorised under s 286 of the SFA (and who is approved under s 289 of the SFA) is excluded from the scope of the Model Law. For completeness, it is also provided under para 5(1)(*zf*) that "any other corporation that is licensed, approved, authorised, designated, recognised or registered under the provisions of … (ii) the Business Trusts Act; … (ix) the Securities and Futures Act …" is also excluded from the scope of the Model Law. Two observations may be made. First, the exclusion of entities relates mostly to corporate entities with a separate legal personality, unlike the present EH-REIT. Second, entities which are authorised under the SFA (or the BTA for that matter) are excluded from the scope of the Model Law, and it is logical to infer that EH-REIT itself would not come within the Model Law as well. One possible reason for the exclusion of entities under the SFA may be the need to cater for the interests of a large number of individual unitholders under the various collective investment schemes. Thus, EH-REIT does not come within the scope of the Model Law as implemented in Singapore.

28 I note that under the US Bankruptcy Code, EH-REIT could be considered as a "corporation" for the purposes of being an eligible debtor under Chapter 11. As noted by Christopher Sontchi CJ in *In re EHT US1, Inc* 630 BR 410 (Bankr D Del, 2021) at 423: "Section 109(d) of the Bankruptcy Code provides that only 'a person ... may be a debtor' under Chapter 11. The term 'person' is defined under section 101(14) as including an 'individual, partnership, and corporation...' The term 'corporation,' in turn, is defined in section 101(9) as being limited to certain business entities, including a 'business trust.'" Having determined that Singapore law governed the issue, Sontchi CJ held that EH-REIT was a business trust despite not being registered under the BTA after being persuaded by the expert testimony of Professor Hans Tjio (at 428). Thus, it was an eligible debtor under the US Bankruptcy Code. Given that Art 2(*c*) of the Model Law provides that the reference to a "debtor" means a "corporation", it may be arguable that the Model Law could apply to EH-REIT. However, the difficulty is that under our local legislation, specifically the Companies Act 1967 (2020 Rev Ed), the term "corporation" under s 4(1) is not expressly defined to include business trusts (unlike the position in the US), much less a collective investment scheme authorised under the SFA. Hence, under Singapore law, EH-REIT is not a corporation, and consequently, not a "debtor" within meaning of Art 2(*c*) of the Model Law. Further, as noted above at [27], entities relating to the BTA are also excluded from the scope of the Model Law as enacted in Singapore.

29 A contrary position has been taken in England. In *Rubin and another v Eurofinance SA and others* [2010] 1 All ER (Comm) 81 ("*Rubin (EWHC)*"), an entity known as The Consumers Trust ("TCT") was brought into proceedings under Chapter 11 of the US Bankruptcy Code, and the US court approved a plan of liquidation under Chapter 11 (at [13]). The English High Court noted that this

entity was considered as a "business trust" and that it was common ground that "bankruptcy proceedings can be brought in New York in relation to a business trust, even though it has no separate legal personality for any other purpose" (at [10]). The foreign representatives of TCT then sought recognition of the Chapter 11 case in England as a foreign main proceeding under the equivalent UK legislation enacting the Model Law. However, it was argued by the respondent that the Model Law could not apply as TCT was not a separate legal entity as a matter of English law (at [36]):

> 36. The first point taken in response to the application for recognition by Mr Staff is that, whilst it is clear that a business trust is treated in US bankruptcy law as a separate legal entity, and can be the subject of insolvency remedies—according to the applicants' United States counsel, Mr Friedman, TCT 'is an insolvent corporate entity'—it is not a separate legal entity as a matter of English law. Articles 15 and 17, read together with the definitions of 'foreign proceeding' and 'foreign representative' in art 2 require the existence of 'a debtor'. Mr Staff submits that the word 'debtor' must be given its ordinary meaning in English law, from which it follows that there is no debtor and that the Model Law cannot be applied in this case, or in any other case in which the insolvent estate in a foreign jurisdiction is not that of an individual or of a corporate entity recognised in English law as an independent legal entity.

The English High Court rejected that submission and found that the Model Law could apply to business trusts. This was on the basis that, *inter alia*, having regard to the international origins of the Model Law and the need to promote uniformity in its application under Art 8, a "parochial interpretation" of the term "debtor" and the following "refus[al] to provide any assistance in relation to a bona fide insolvency proceeding taking place in a foreign jurisdiction" should be eschewed (at [40]). The English court then held that TCT was a "debtor" under the Model Law and recognised the Chapter 11 proceedings as a foreign main proceeding (at [42]).

30 While one can appreciate the need to promote uniformity in the application of the Model Law under Art 8, I do not think that *Rubin (EWHC)* should be followed in Singapore. In interpreting the Model Law as enacted in Singapore, s 252(2)(*b*) of the IRDA allows us to have regard to the "Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency", UNCITRAL, 30th Sess, UN Doc A/CN.9/442 (1997) ("the UNCITRAL 1997 Guide"). Additionally, the revised guide – "UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation" (2013) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf> (accessed 19 May 2022) ("the UNCITRAL 2013 Guide") – may also be referred to as noted in *Re Zetta Jet Pte Ltd and others (Asia Aviation Holdings Pte Ltd, intervener)* [2019] 4 SLR 1343 ("*Zetta Jet (No 2)*") at [37] (where the UNCITRAL 1997 Guide is silent, the court may consider the UNCITRAL 2013 Guide but the UNCITRAL 1997 Guide prevails in the event of conflict). Neither document contains any mention that the Model Law is intended to apply to business trusts or REITs. Further, within the UNCITRAL 2013 Guide, it is provided that a contracting State to the Model Law still retains the sovereignty to decide which entities to exclude from its scope of application (at para 57):

> 57. Paragraph 2 indicates that the enacting State might decide to exclude the insolvency of entities other than banks and insurance companies; the State might do so where the policy considerations underlying the special insolvency regime for those other types of entity (e.g. public utility companies) call for special solutions in cross-border insolvency cases.

As observed above at [26]–[27], there is nothing in our domestic legislation which suggests that the Model Law could apply to EH-REIT (even if it could be described as a business trust) and on the contrary, it seems that Parliament wanted to exclude entities under the SFA from the Model Law as enacted in

Singapore. Hence, I am doubtful that EH-REIT comes within the scope of the Model Law as implemented in Singapore.

31 The restructuring of EH-REIT will probably have to proceed by way of a separate application for common law recognition and would have to involve the EH-REIT Trustee (*ie*, DBS Trustee Limited), who was not present in this application. As will be explained below at [87], I cannot see how the Applicant can have the standing to make the application on behalf of DBS Trustee Limited.

32 S1 and S2 do not run into this difficulty of falling outside the scope of the Model Law and I proceed with the analysis for these two corporate entities.

Whether the Singapore Entities' Chapter 11 Proceedings should be recognised as foreign main proceeding even though the presumptive COMI is in Singapore

33 I am persuaded by the Applicant's submissions on the requirements of Art 17 (see above at [20]) as these are relatively uncontroversial issues. The Singapore Entities' Chapter 11 Proceedings under the US Bankruptcy Code are clearly "foreign proceeding[s]" within the meaning of Art 2(*h*) as stipulated under Art 17(1)(*a*) of the Model Law, and this was previously recognised in *Re Rooftop Group International Pte Ltd and another (Triumphant Gold Ltd and another, non-parties)* [2020] 4 SLR 680 ("*Re Rooftop*") and noted in *Zetta Jet (No 2)* at [25].

34 Rather, the key issue is whether the Singapore Entities' Chapter 11 Proceedings should be recognised as foreign main proceedings or foreign non-main proceedings. Under Art 17(2)(*a*) of the Model Law, it is provided that the foreign proceeding must be recognised as a foreign main proceeding (which is

defined in Art 2(*f*) of the Model Law) if it takes place in the State where the debtor has its COMI.

35 The requirements for the determination of the COMI were considered in *Zetta Jet (No 2)*. As noted at [80], the focus is on the centre of gravity of the objectively ascertainable factors. Further, in ascertaining the COMI, there is no need to maintain the distinction between different entities within a group strictly and it is possible for the analysis to be made of the activities of an entire group of companies (at [83]).

36 The starting point is the presumption under Art 16(3) of the Model Law, which operates such that the place of the debtor-company's registered office is presumed to be its COMI (*Zetta Jet (No 2)* at [29]). Here, S1 and S2 are both incorporated in and have registered offices in Singapore. Thus, the COMI of both debtor companies is presumed to be Singapore.

37 However, this presumption may be displaced if the place of the company's central administration and various factors which are objectively ascertainable by third parties, particularly creditors and potential creditors of the debtor company, point the COMI away from the place of registration to some other location (*Zetta Jet (No 2)* at [76]; *Re Rooftop* at [12(b)]). The rebuttal of the presumption does not need to be made out on a balance of probabilities, but operates as a starting point that is subject to displacement by other factors on the presence of proof to the contrary (*Zetta Jet (No 2)* at [31]). Some factors which may be considered when determining the COMI are: the location of substantial assets, location of sales (*Re Rooftop* at [15]), the location from which control and direction were administered, the location of clients, the location of creditors, the location of operations, the governing law, *etc* (*Zetta Jet (No 2)* at [85]).

38 Here, what commercial activity there was appeared to be centred in the US, particularly as regards S1, which is the indirect 100% holding company of USHIL Holdco Member, LLC and CI Hospitality Investment, LLC, which are in turn, indirect 100% holding companies for each of the Propcos that own the revenue-generating Hotels in the Eagle Hospitality Group portfolio. I note that S2 is only concerned with a Cayman entity (*ie,* the Cayman Corp) under it. However, it is apparent that S2 plays an important role in facilitating the distribution of dividends up to EH-REIT and the Stapled Security Holders from the income generated by the US-based Propcos (see above at [8]).

39 It is clear that both S1 and S2 are not active, operational companies. Rather, they are part of the Eagle Hospitality Group, which has its main business operations and assets based in the US. The substantial assets in play, consisting of the portfolio of 18 full-service Hotels, are all located in the US where the income would be derived as well. These are immovable fixed properties and provide a good indication of the COMI, in contrast to the situation in *Zetta Jet (No 2)* (at [106]) where the location of planes was not indicative of the COMI as it was expected that assets in the business of aircraft rental and charter might be dispersed in the location most appropriate. In my view, the location of S1 and S2's operations and substantial assets are therefore relevant indicators of their COMI being the US.

40 Further, S1 and S2 did not have creditors in Singapore as of 18 January 2021 (the date of their respective voluntary petitions for relief under Chapter 11). Their only creditors were in the US (such as the debt incurred under a credit facility with the Bank of America NA) according to their respective "Global Notes and Statement of Limitations, Methodology, and Disclaimers Regarding the Debtors' Schedules of Assets and Liabilities and Statements of Financial Affairs" which were filed in the US Bankruptcy Court

on 19 March 2021.[54] S1 and S2 (along with EH-REIT) were joint borrowers under a credit facility with the Bank of America NA and the bank had an unsecured claim of US$357,968,703.28 against them. Another significant creditor was the Bank of the West, a bank headquartered in California, with an unsecured claim of US$18,448,253.94. Thus, the significant creditors of S1 and S2 are all based in the US.

41 After S1 and S2 had filed their voluntary petitions for relief under Chapter 11, there were some invoices billed to S1 and S2 from pre-petition Singapore creditors who had provided corporate secretarial services and incurred nominee director fees, but these were much smaller creditors (all of whom have been paid under the Chapter 11 process) and they do not shift the centre of gravity in determining the COMI.[55]

42 It is also noted that US law is the governing law of the various agreements between the respective Singapore Chapter 11 Entities and their creditors. In particular, both the Bank of America NA credit facility and the secured swap agreement with the Bank of the West are governed by US law.[56]

43 In the circumstances, given that the operations and assets of S1 and S2 are in the US, that the larger creditors are located in the US, and that US law governs the various agreements, I conclude that the presumption under Art 16(3) of the Model Law has been displaced and the COMI for both S1 and S2 is the US.

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[54] AT at para 74.

[55] AT at paras 73–74.

[56] AT at para 85.

The irrelevance of the ongoing Chapter 11 proceedings in the US and the foreign representative's activities

44 For completeness, I note that the Applicant also contends that the control and supervision of the US Bankruptcy Court in the Singapore Entities' Chapter 11 Proceedings, and the activities of the Applicant as the chief restructuring officer and subsequently as Liquidating Trustee, are relevant factors that point to the COMI of S1 and S2 being the US.[57] For the avoidance of doubt, I do not accept these arguments as reasons for my conclusion above at [43] that the COMI of S1 and S2 is the US.

45 To my mind, the fact that the Singapore Entities' Chapter 11 Proceedings are ongoing in the US is irrelevant in determining the COMI, as are the activities of the foreign representative. The jurisprudential basis of the COMI requirement is to determine the centre of gravity of the company's commercial activity, that is, where it was centred while it was alive and flourishing – in other words, a corporation's real home. A hospital bed, or a crypt, does not count.

46 As for the relevance of a foreign representative's actions to determining the COMI, I previously observed in *Zetta Jet (No 2)* that the foreign representative's actions are irrelevant in the ascertainment of the COMI and rejected the approach taken in the US (at [101]–[103]):

> 101 The applicants point to the fact that the US-based Trustee undertook efforts to restructure Zetta Jet Singapore from the date of his appointment to the cessation of the business of the Zetta Entities, *ie*, from 5 October 2017 to 30 November 2017.
>
> 102 However, I would not take the foreign representative's actions as being relevant in the ascertainment of COMI. The

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57 AS at para 75.

> work being done by the foreign representative would flow from the assumption of jurisdiction by the foreign court on whatever basis it considers appropriate.
>
> 103 I am mindful that I differ in this regard from the approach of the US courts … which held that 'any relevant activities, including liquidation activities and administrative functions, may be considered in the COMI analysis' … I am not, however, convinced that it is proper to consider such activities in determining COMI.

47 As noted in *Zetta Jet (No 2)* at [103], the US position is that the activities of the foreign representative are relevant. In *In re Fairfield Sentry Ltd* 714 F 3d 127 (2nd Cir, 2013) ("*re Fairfield*"), the United States Court of Appeals for the Second Circuit held that "any relevant activities, including liquidation activities and administrative functions, may be considered in the COMI analysis" and it was observed that the COMI should correspond to the place where the debtor "conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties" (at 137–138).

48 In the subsequent decision of *In re Oi Brasil Holdings Coöperatief UA* 578 BR 169 (Bankr SDNY, 2017), *re Fairfield* was cited for the proposition that the activities of foreign liquidators and administrators could be relevant to a COMI analysis (at 222). However, the activities of a judicial administrator must be of sufficient significance to produce a shift in the COMI (at 222) and provide a meaningful basis for the expectation of third parties (at 223).

49 That was the case in *In re British American Isle of Venice (BVI) Ltd* 441 BR 713 (Bankr SD Fla, 2010), where the work done by the liquidator of the company was significant (reviewing the company's books, taking control of company assets and undertaking the investigation of the investments, *etc*) and the extended passage of time meant that third parties necessarily considered his office in the British Virgin Islands to be the location of the debtor company's

COMI (at 723). Where a foreign representative remains in place for an extended period and relocates the primary business of the debtor to his location, thereby causing creditors and other parties to look to the foreign representative, this could lead to the conclusion that the COMI has become lodged with the foreign representative (at 723).

50 Nevertheless, I decline to follow the US authorities. As I have noted previously in *Zetta Jet (No 2)* at [102], the "work being done by the foreign representee would flow from the assumption of jurisdiction by the foreign court". Where the business activities of a company are subsequently managed in the jurisdiction where the foreign proceedings were commenced, I do not think that creditors would necessarily look to the actions of the foreign representative. The US approach appears to be a form of bootstrapping and will allow the parties to choose their COMI (so to speak) in an artificial manner. To my mind, it would be better to assess the COMI by looking at the activities of the company before the foreign restructuring takes place (even though the relevant date for determining the COMI is at the date of application for recognition). The location of the activities of the foreign representative is therefore irrelevant.

51 While I appreciate that the US cases have set a relatively high threshold before the COMI can be shifted in this manner, I remain unconvinced that the foreign representative's actions are relevant in determining the COMI. Looking to other jurisdictions, it appears that the work done and activities of the foreign representative are not usually considered by the courts around the world (in those jurisdictions which have adopted the Model Law) to be "among the most important" five factors in determining the COMI (see UNCITRAL, "Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency" (2021) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral

/en/20-06293_uncitral_mlcbi_digest_e.pdf> (accessed 22 May 2022) ("UNCITRAL Digest") at p 41). In fact, it appears to be a largely US-centric phenomenon.

52 I am therefore not persuaded by the Applicant's submission that the fact that the Singapore Entities' Chapter 11 Proceedings are ongoing in the US, or the Applicant's activities in his capacity as foreign representative, are relevant factors pointing to the COMI of S1 and S2 being the US. Nevertheless, in view of the findings above at [38]–[42] regarding the other factors applicable to the present case, the presumption that the COMI is Singapore is displaced in favour of the US. Accordingly, the Singapore Entities' Chapter 11 Proceedings are recognised as foreign main proceedings within meaning of Art 2(*f*) and pursuant to Art 17(2)(*a*) of the Model Law.

Whether the Singapore Entities' Chapter 11 Proceedings should be recognised as Foreign Non-Main Proceedings

53 Having decided that the Singapore Entities' Chapter 11 Proceedings in relation to S1 and S2 should be recognised as foreign main proceedings, the issue of whether they can be recognised as foreign non-main proceedings is now moot and does not arise on the facts. The fallback submission of the Applicant does not need to be considered.

Recognition of the Chapter 11 Plan and Confirmation Order

54 I turn to Applicant's prayer that the Chapter 11 Plan and Confirmation Order be recognised as foreign proceedings under the Model Law. The commercial objective of the recognition of the Chapter 11 Plan and Confirmation Order sought by the Applicant is apparently to allow the affairs

of the Singapore Chapter 11 Entities to be wound up as efficiently as possible.[58] The Chapter 11 Plan resolves the outstanding liabilities and contemplates the eventual winding down of the Singapore Chapter 11 Entities, including S1 and S2. It is thus necessary for the Confirmation Order, along with the Chapter 11 Plan, to first be recognised by the Singapore courts, before the Singapore Chapter 11 Entities can be properly dissolved in Singapore.[59] Given the presence of Singapore creditors, recognition would also ensure that any creditor action or potential proceedings in Singapore is prevented.[60]

55 The Applicant argues that the liabilities should be resolved in Singapore to efficiently dissolve the relevant entities as opposed to going into a parallel liquidation scenario. Certainty would be achieved, and the Chapter 11 Plan can be implemented in Singapore without any hitch. Thus, to ensure all matters are resolved smoothly, the Chapter 11 Plan and Confirmation Order should be recognised in Singapore.

Basis of recognition

Article 2(h) of the Model Law

56 Having considered the arguments before me, while I was previously amenable to taking an expanded view of Art 2(*h)* of the Model Law, considering the continued supervision and jurisdiction of the US Bankruptcy Court over the Chapter 11 Plan and Confirmation Order, I am of the view that the better course is to grant recognition of the Chapter 11 Plan and Confirmation Order as foreign orders under Art 21(1)(*g*) of the Model Law instead. Nevertheless, I set out

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58 Minute Sheet dated 25 March 2022 in HC/OS 203/2022 at p 2.

59 AS at para 4.

60 AS at para 5.

some views in passing regarding Art 2(*h)* of the Model Law and leave the issue open for future determination.

57 The Applicant submits that the court has the ability to recognise and give effect to not only the Singapore Entities' Chapter 11 Proceedings, but also the Chapter 11 Plan and Confirmation Order, as they fall within the scope of the definition of a "foreign proceeding" under Article 2(*h*) of the Model Law.

58 Article 2(*h*) reads:

> 'foreign proceeding' means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the property and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation …

59 As laid down by the Court of Appeal in *United Securities Sdn Bhd (in receivership and liquidation) and another v United Overseas Bank Ltd* [2021] 2 SLR 950 ("*United Securities*") at [53], there are at least four cumulative attributes (to be considered as a whole) required for a proceeding to constitute a "foreign proceeding" under Art 2(*h*) of the Model Law:

(a) The proceeding must involve creditors collectively.

(b) The proceeding must have its basis in a law relating to insolvency.

(c) The court must exercise control or supervision of the property and affairs of the debtor in the proceeding.

(d) The purpose of the proceeding must be the debtor's reorganisation or liquidation.

In the present circumstances, only requirement (c) is in doubt – regarding whether the court exercises control or supervision of the debtor's property and affairs post-confirmation of the Chapter 11 Plan.

60 The question that arises is whether the approval of the Chapter 11 Plan by the Confirmation Order, means that the US Bankruptcy Court no longer retains control or supervision over the matter. For this third attribute to be satisfied, the control or supervision must be "formal in nature", though it "may be potential rather than actual" and may be exercised directly by the court or indirectly through an insolvency representative (*United Securities* at [67]). Thus, it is sufficient for the foreign court to have supervision over the foreign insolvency representative who possesses direct control. One example cited by the Court of Appeal which satisfies this requirement is a proceeding in which the court has exercised control or supervision over the debtor company, but at the time of application for recognition, is no longer required to do so (*United Securities* at [69]).

61 The Applicant cites a part of the UNCITRAL 2013 Guide (at para 75) which suggests that this court could recognise the Chapter 11 Plan and Confirmation Order:

> 75 … Proceedings in which the court has exercised control or supervision, but at the time of the application for recognition is no longer required to do so should also not be excluded. An example of the latter might be cases where a reorganization plan has been approved and although the court has no continuing function with respect to its implementation, the proceedings nevertheless remain open or pending and the court retains jurisdiction until implementation is completed.

One could suggest that the Chapter 11 Plan, which has been approved by the Confirmation Order, is no different from a "reorganization plan" mentioned in the UNCITRAL 2013 Guide. This would mean that post-confirmation of the

Chapter 11 Plan, the proceeding would still fall within the definition of a foreign proceeding under Art 2(*h)* of the Model Law.

62 Indeed, other materials support this interpretation. The authors of *Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law* (Look Chan Ho gen ed) (Globe Law & Business, 4th Ed, 2017) ("*A Commentary on the UNCITRAL*") observe at p 178 that a foreign insolvency proceeding will remain as a "foreign proceeding" even after judicial confirmation of a reorganisation plan, until the proceeding is closed and the debtor's affairs are no longer subject to the foreign court's control. In the UNCITRAL Digest, it is suggested (at p 8) that where a reorganisation plan has been approved and although the court has no continuing function with respect to its implementation, the proceeding nevertheless remains open or pending and the court retains jurisdiction (*eg*, to settle any dispute over the interpretation of the plan or to oversee the debtor's performance pursuant to the plan) until implementation is completed.

63 To better understand whether a court will still retain supervision and control, what happens after a Chapter 11 plan of liquidation has been confirmed is relevant. In *In re Oversight and Control Commission of Avanzit, SA* 385 BR 525 (Bankr SDNY, 2008) ("*Oversight & Control*"), this situation was summarised (at 535) as such:

> … Under the Bankruptcy Code, and unless the confirmation order or the plan states otherwise, confirmation revests the property of the estate in the debtor, free and clear of all claims and interests, 11 U.S.C. § 1141(b), (c), and discharges the debtor. 11 U.S.C. § 1141(d). The reorganized debtor goes about its business, free of the constraints placed on trustees under the Bankruptcy Code. When the case has been fully administered, a final decree is entered closing the case. …
>
> Between confirmation and the final decree, the bankruptcy court continues to exercise jurisdiction over the case, albeit in a more limited fashion. Thus, although the jurisdiction 'shrinks,' … it does not end. The bankruptcy court retains

> jurisdiction under 11 U.S.C. § 1142(b) to direct the debtor or any necessary party to execute an act necessary for the consummation of the plan and it has 'continuing responsibilities to satisfy itself that the [p]lan is being properly implemented.' …

Thus, even after confirmation of a Chapter 11 plan of liquidation and up until the final decree closing the case, the US bankruptcy court continues to maintain control or supervision necessary to implement the Chapter 11 plan even if this is in a more limited fashion. Case law under Chapter 15 of the US Bankruptcy Code (which encapsulates the Model Law as enacted in the US) also suggests that a "foreign proceeding" under Article 2(*h*) of the Model Law is not restricted to the approval of a restructuring or repayment plan, but can extend to the implementation of the plan (see Look Chan Ho, *Cross-Border Insolvency: Principles and Practice* (Sweet & Maxwell, 2016) ("*Principles and Practice*") at p 98). Further, leaving a foreign representative in control of the business and operations is not necessarily inconsistent with supervision by a foreign court (see *In re Ashapura Minechem Ltd* 480 BR 129 (Bankr SDNY, 2012) at 138).

64 In *Oversight & Control*, a petition was filed for recognition of Spanish proceedings under Chapter 15 of the US Bankruptcy Code. The equivalent of a Chapter 11 plan or a repayment agreement, known in Spain as a "convenio", had been negotiated with the creditors and the convenio had been approved by the Spanish court. The issue was whether the control and supervision of the Spanish court ceased upon approving the convenio, such that the Spanish proceedings were no longer a "foreign proceeding" capable of recognition. It was undisputed by the parties (at 535) that the debtor company's status was "similar to a chapter 11 debtor after confirmation". The US court held that even though the management and daily control of the debtor company had been returned, the Spanish insolvency court had not surrendered all supervision and control as it continued to oversee the payment of claims to creditors and to settle

any disagreement concerning the "interpretation, enforcement and/or performance" of the convenio (at 534). It may have been the case that the Spanish court's level of control or supervision was reduced, but it had not entirely ceased. Hence, even after the "convenio" received final approval, the Spanish insolvency proceedings did not lose their status as a "foreign proceeding" as the Spanish court still exercised control and supervision over the debtor company's assets and affairs, to the extent necessary to ensure compliance with and consummation of the convenio (at 536).

65 Some parallels may be drawn to the present circumstances. While the Chapter 11 Plan has been confirmed, it is provided in paragraph 40 of the Confirmation Order that the US Bankruptcy Court "shall retain and have exclusive jurisdiction of all matters" relating to the Chapter 11 Plan.[61] Article XIII of the Chapter 11 Plan then sets out a list of matters which the US Bankruptcy Court continues to have jurisdiction over, which includes, *inter alia*,[62] hearing any disputes arising in connection with the "interpretation, implementation or enforcement" of the Chapter 11 Plan and recovering all assets of the debtor companies wherever located. In the circumstances, it would appear that the US Bankruptcy Court still retains some jurisdiction over the process under the Chapter 11 Plan, even after the Confirmation Order has been issued. Thus, the Chapter 11 Plan and Confirmation Order could fall within the scope of "foreign proceeding[s]" as defined in Art 2(*h*) of the Model Law.

66 However, as explained above at [56], my preference would be to give recognition to the Chapter 11 Plan and the Confirmation Order pursuant to Art 21(1)(*g*) of the Model Law instead. At this juncture, it is relevant to point

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61 AS, Exhibit AT-13 at p 41.

62 AS, Exhibit AT-13 at p 1458.

out that *Oversight & Control* is perhaps one of the only few cases in which a post-confirmation repayment plan was recognised under Art 2(*h*) of the Model Law. As will be seen below, it is more orthodox to recognise the Chapter 11 Plan and the Confirmation Order under Art 21(1)(*g*) of the Model Law as a form of additional relief, and the cases in that regard are much more numerous. Hence, I make no pronouncement on whether a Singapore court has the ability to recognise a post-confirmation plan of liquidation (or other foreign insolvency judgments) under Art 2(*h*) of the Model Law, and leave this issue open for future determination.

Article 21(1)(g) of the Model Law

67 Article 21(1) of the Model Law provides that upon the recognition of a foreign proceeding, the court may grant any appropriate relief. Specifically, under Art 21(1)(*g*), this includes granting any additional relief that may be available to a Singapore insolvency officeholder, including any relief provided under s 96(4) of the IRDA. The Applicant submits that upon the recognition of the Singapore Entities' Chapter 11 Proceedings as "foreign proceedings", the court is empowered to grant recognition and enforcement of the Chapter 11 Plan and Confirmation Order.

68 It is pertinent to note that the Model Law does not explicitly provide for the recognition and enforcement of foreign insolvency orders and judgments. Nevertheless, as proposed by the UNCITRAL 2013 Guide (at para 189), the list of reliefs in Art 21 should be regarded as non-exhaustive in nature and the court is not restricted unnecessarily in its ability to grant any type of relief that is required in the circumstances of the case. Hence, it is said that "[i]t is in the nature of discretionary relief that the court may tailor it to the case at hand" (the UNCITRAL 2013 Guide at para 191).

69 In some States, it has been suggested that the recognising court can give effect to the position in the foreign main proceeding, which might mean the relief that can be ordered in the recognising State is not limited to the relief that would be available in a hypothetical domestic insolvency proceeding (*In re Sino–Forest Corporation* 501 BR 655 (Bankr SDNY, 2013) at 665–666). In contrast, in other States, courts have held that the words "any appropriate relief" do not allow the court to grant relief that would not be available when dealing with a domestic insolvency (*Fibria Celulose S/A v Pan Ocean Co Ltd and another* [2014] Bus LR 1041 at [107]–[108]). I had previously commented in *Re Rooftop* (at [27]) that assistance of a particular form may not be granted if in the same circumstances it may be denied or is not available to a local representative. However, as explained below at [77]–[78], I am satisfied on the material before me that the court may, in appropriate circumstances, apply foreign insolvency law when granting discretionary relief under Art 21(1)(*g*) of the Model Law as the phrase "under the law of Singapore" has been deliberately omitted. The circumstances and degree of discretion can only be specified incrementally.

70 Looking to the US cases, it is well-established in Chapter 15 jurisprudence that foreign insolvency orders and judgments may be recognised and enforced locally, subject to limited exceptions such as public policy considerations (*A Commentary on the UNCITRAL* at p 249; *Principles and Practice* at p 167).

71 The US equivalent of Art 21 of the Model Law is § 1521(a) of the US Bankruptcy Code, which reads:

> **§1521. Relief that may be granted upon recognition**
>
> (a) Upon recognition of a foreign proceeding, whether main or nonmain, where necessary to effectuate the purpose of this

> chapter and to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including—
>
> …
>
> (7) granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a).

§ 1521(a) of the US Bankruptcy Code has been interpreted to extend to the recognition and enforcement of foreign insolvency-related orders and judgments confirming foreign reorganisation plans. For instance, in *In re Lupatech SA* 611 BR 496 (Bankr SDNY, 2020), it was noted (at 502) that "appropriate relief" under § 1521 includes "enforcing a foreign order confirming a debtor's plan", but that the relief will only be granted if the interests of the creditors and other interested entities are sufficiently protected.

72 Consistent with this position, the US courts have recognised and enforced foreign insolvency-related court orders from abroad. In *In re Salvati,* 2009 Bankr LEXIS 5722 (Bankr SDNY, 7 May 2009), an English company had commenced proceedings before the English High Court for a scheme of arrangement pursuant to s 895 of the Companies Act 2006 (c 46) (UK). The scheme was approved at the sanction hearing, and a sanction order was granted. The US court held that the sanction order was entitled to recognition and enforcement in the US. Other English schemes of arrangement and the accompanying sanction orders have also been recognised and enforced in the US (see *In re Magyar Telecom BV* 2013 Bankr LEXIS 5716 (Bankr SDNY, 11 December 2013)).

73 In *In re CGG SA* 579 BR 716 (Bankr SDNY, 2017) ("*re CGG SA*"), the applicant sought the recognition and enforcement of an order entered by a French court sanctioning a French safeguard plan (which restructured the debts

of the company). The French court had given a sanctioning order after the safeguard plan had obtained the requisite approval from creditors. The US court held (at 720) that "the recognition and enforcement of the [s]anctioning [o]rder [was] 'appropriate relief' under section 1521(a) of the Bankruptcy Code" and gave the sought-after relief. However, the US court did not do so blindly, but also took notice that (a) the interests of the creditors and shareholders were sufficiently protected under the safeguard plan; (b) the interested parties had been given the opportunity to be heard in the French court; and (c) the safeguard plan might not be fully implemented if relief were not granted, to the detriment of the parties who fully supported it.

74 In addition to the foregoing brief survey of authorities, other authorities demonstrating that the US courts are open to recognising and enforcing foreign insolvency-related orders and judgments from various jurisdictions include: *In re Oi SA* 587 BR 253 (Bankr SDNY, 2018) ("*re Oi SA*") (concerning a Brazilian reorganisation plan); *In re Metcalfe & Mansfield Alternative Investments* 421 BR 685 (Bankr SDNY, 2010) (a Canadian plan of compromise and arrangement); and *In re Energy Coal SPA* 582 BR 619 (Bankr D Del, 2018) (an Italian debt restructuring plan).

75 In contrast, the position in the UK is much more conservative and circumscribed with regard to interpreting the UK equivalent of Art 21 of the Model Law. The relevant provision is found in Schedule 1 to the Cross-Border Insolvency Regulations 2006 (SI 2006 No 1030) (UK), and provides as such:

> *Article 21. Relief that may be granted upon recognition of a foreign proceeding*
>
> 1. Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request

> of the foreign representative, grant any appropriate relief, including—
>
> …
>
> (g) granting any additional relief that may be available to a British insolvency officeholder under the law of Great Britain, including any relief provided under paragraph 43 of Schedule B1 to the Insolvency Act 1986.

Coming back to the case of *Rubin (EWHC)* (mentioned above at [29]), an appeal against the English High Court's decision was subsequently heard by the English Court of Appeal. The English Court of Appeal's decision was then, in turn, appealed against and heard by the UK Supreme Court in *Rubin v Eurofinance SA* [2012] 3 WLR 1019 ("*Rubin (UKSC)*"), though the issue of whether the Model Law as enacted in the UK (the "UK Model Law") could apply to business trusts was no longer in play. In *Rubin (UKSC)*, it was argued by the respondent that the recognition and enforcement of foreign-insolvency judgments was one of the reliefs available under Art 21 of the UK Model Law, and the fact that "recognition and enforcement of foreign judgments is not specifically mentioned in article 21 as one of the forms of relief available, does not mean that such relief cannot be granted" (at [141]). Thus, the foreign representatives of TCT sought enforcement of a judgment by the US bankruptcy court in respect of fraudulent conveyances and transfers against Eurofinance SA and others. However, the UK Supreme Court rejected that submission on the basis that the UK Model Law "say[s] nothing about the enforcement of foreign judgments" and it "would be surprising if the Model Law was intended to deal with judgments in insolvency matters" when no consensus could even be reached regarding the recognition and enforcement of judgments in civil and commercial matters which had been the subject of intense international negotiations at the Hague Conference on Private International Law (at [142]–

[143]). It was concluded that "the Model Law is not designed to provide for the reciprocal enforcement of judgments" (at [144]).

76 *Rubin (UKSC)* has not been well received: see for example, academic critique noting that "the Supreme Court's reasoning in respect of Article 21 is unconvincing" (*A Commentary on the UNCITRAL* at p 248; *Principles and Practice* at p 165). It is also observed that in an attempt to get around the decision of the UK Supreme Court in *Rubin (UKSC)*, the UNCITRAL Working Group V drafted a proposed model law to allow for the recognition of foreign insolvency judgments, especially if the judgment comes from the jurisdiction of the debtor's COMI (Neil Hannan, *Cross-Border Insolvency: The Enactment and Interpretation of the UNCITRAL Model Law* (Springer, 2017) at p 244).

77 In this regard, the Applicant submits that the UK's position should not be adopted. The Singapore Ministry of Law has expressed its preference for the US approach in relation to Art 21(1)(*g*) over the UK approach.[63] In the draft Companies (Amendment) Bill 2017 that the Ministry of Law sought public consultation on, the draft Art 21(1)(*g*) of the Model Law provided that the reliefs available included "any additional relief that may be available to a Singapore insolvency officeholder *under the law of Singapore*" [emphasis added]. However, in the final version of the Model Law, the italicised phrase was deleted. This was intentionally done in order to align the Singapore position with that of the US, rather than the UK, as observed from the Ministry's Response to Feedback from Public Consultation on the Draft Companies (Amendment) Bill 2017 to Strengthen Singapore as an International Centre for Debt Restructuring <https://www.mlaw.gov.sg/files/Annex_A-Goverment_

[63] AS at para 116.

Response_to_Public%20Consult_Feedback_for_Companies_Act_Amendments.pdf/> (accessed 24 May 2022):

> 11.2.1 In respect of Art 21(1)(g), we received a comment that despite similar wording in their respective provisions, the UK and US differ in their approaches on the scope of relief that may be granted. It was therefore suggested that Singapore should signal whether the US or UK approach should be adopted in respect of relief that may be granted under Art 21(1)(g).
>
> 11.2.2 After consideration of this issue, the suggestion has been noted and accepted. Thus, this provision has been amended to align the wording with the US provision in Chapter 15 of the US Bankruptcy Code.

The language of the Model Law as enacted in Singapore (the "Singapore Model Law") is distinct from that of the UK Model Law, as it removes the qualifier that the relief granted must be available "under the laws of [the State]". From the above passage, it is clear that the Ministry of Law was concerned with the "scope of relief that may be granted" under Art 21(1)(*g*) of the Singapore Model Law, and has expressly chosen to align the language of the provision with that under Chapter 15 of the US Bankruptcy Code.

78 In the circumstances, the US approach should be preferred and it is the US jurisprudence which should be persuasive in determining the scope of relief to be granted. The holding in *Rubin (UKSC)* is not endorsed in Singapore and I decline to follow the English authorities that depart from the US position. I accept the Applicant's arguments that the Singapore court is empowered under Art 21(1)(*g*) of the Model Law to grant recognition of the Chapter 11 Plan and Confirmation Order as foreign orders, following the proposition found in the US authorities. I do not consider that the difference in the language of the enacting provisions in the US and Singapore makes a substantial difference. While § 1521(a) of the US Bankruptcy Code contains the additional phrase "to effectuate the purpose of this chapter" (see above at [71]), the difference is not

material. This is because the purpose of Chapter 15 is *in pari materia* with the objectives stated in the preamble to our Model Law. Additionally, while the version of Art 21(1)(*g*) enacted in Singapore contains the modifier "available to a Singapore insolvency officeholder" after "any additional relief" (see above at [77]), I do not read Art 21(1)(*g*) to be so restricted, in line with the Ministry of Law's comments that the scope of relief that may be granted should follow the US approach and the US provisions contain a similar modifier. This also follows from the fact that the phrase "under the law of Singapore" was eventually removed, which signifies that an expansive view is to be taken.

79 The section heading of Art 21(1) of the Model Law contains the phrase "any appropriate relief". Invoking the section heading alone would circumvent the issue that the enforcement of a foreign rehabilitation plan is not ordinarily "relief that may be available to a Singapore insolvency officeholder" under Art 21(1)(*g*) of the Model Law. I do note that in the unreported case of *Re CFG Peru Investments Pte Ltd and another* HC/OS 665/2021 (21 September 2021), the Singapore High Court recognised a US Chapter 11 plan and the accompanying confirmation order under the Model Law but did not specify whether the relief was granted under the section heading of Art 21(1) or Art 21(1)(*g*) of the Model Law.[64]

80 Nevertheless, Art 21(1)(*g*) of the Model Law can be read as an extension of Art 21(1) and the principles governing the reliefs available apply equally to both. Little distinction is made by the US courts. In *re Oi SA* (at 265), the US Bankruptcy Court for the Southern District of New York considered that the reliefs available under § 1521(a) of the US Bankruptcy Code (the equivalent of

[64] See HC/ORC 5320/2021 in HC/OS 665/2021 at para 2.

Art 21(1) of the Singapore Model law) encompass the reliefs available under § 1521(a)(7) (the equivalent of Art 21(1)(*g*) of the Singapore Model Law):

> Section 1521(a) of the Bankruptcy Code provides that '[u]pon recognition of a foreign proceeding, … where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief….' 11 U.S.C. § 1521(a). Such 'appropriate relief' includes a non-exhaustive list of certain types of relief that is enumerated by the statute, including 'any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a).' 11 U.S.C. § 1521(a)(7). …

Hence, in *re Oi SA* (at 266), the recognition of the Brazilian reorganisation plan (known as the "recuperação judicial plan") and the Brazilian court order confirming the plan was granted as "'appropriate relief' under Section 1521(a)(7)", even though the language of "appropriate relief" is found only in the chapeau of § 1521(a) of the US Bankruptcy Code. Following the reasoning in that case, the relief in the present application can be granted pursuant to Art 21(1)(*g*) of the Model Law.

81 However, in granting recognition and enforcement of foreign insolvency judgments and orders, the Singapore court is not merely acting as a rubber stamp. Following the guidance laid down in *re CGG SA* (see above at [73]), the Singapore court must carefully scrutinise the circumstances in which the foreign order was granted and ensure that interested parties were given an opportunity to be heard and that the relevant creditors and shareholders are adequately protected. This requirement is encapsulated in Art 22(1) of the Model Law which provides that in granting relief under Art 21, the court must be satisfied that the interests of the creditors and other interested persons, including if appropriate the debtor, are "adequately protected". As elaborated upon in the UNCITRAL 2013 Guide (at para 196), the "idea underlying article 22 is that

there should be a balance between relief that may be granted to the foreign representative and the interests of the persons that may be affected by such relief". Adequate protection must be afforded to interested parties.

82 Turning to the present circumstances, I note that the Chapter 11 process, leading up to the approval of the Confirmation Order endorsing the Chapter 11 Plan, was conducted under the supervision of and with the approval of the US Bankruptcy Court.[65] The requisite voting requirements for the confirmation of the Chapter 11 Plan were properly satisfied.[66] There was opportunity provided for creditors to appear and be heard before the US Bankruptcy Court. Further, the Singapore creditors had been duly notified about the developments in the Singapore Entities' Chapter 11 Proceedings and the Chapter 11 Plan via public announcements on SGXNet and the Eagle Hospitality Trust website.[67] In relation to the Stapled Security Holders, they had been informed via announcements and the revised Disclosure Statement that it is not expected that they will receive any distributions.[68] Copies of the relevant notices (including the notice of the hearing on confirmation of the Chapter 11 Plan), which set out further information on the process and the options that the Stapled Security Holders may take in connection with the Chapter 11 Plan, were also mailed out to them.

83 Specifically, in relation to the present recognition application, the Applicant has given notice of the application to all creditors by way of announcement on the SGXNet, the EH-REIT website and the Donlin, Recano

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65 AT at para 76.

66 AT at para 55.

67 AS at para 145.

68 AT at para 59 and Exhibit AT-11.

& Company, Inc website (the claims and noticing agent engaged in providing public access to the court papers filed in the Singapore Entities' Chapter 11 Proceedings).[69] The Applicant informs that he has not received any notice from any creditor of any objection to this present application. Thus, I find that the interests of relevant parties are adequately protected. The recognition of the Chapter 11 Plan and Confirmation Order is therefore granted as appropriate additional relief under Art 21(1)(*g*) of the Model Law in relation to S1 and S2.

Common law

84 As has been noted in a number of instances, I am reluctant to invoke common law recognition where it would seem to have been contemplated that the Model Law would govern the proceedings, either by allowing or prohibiting a particular result. Where the Model Law is applicable to the subject matter, the court would be slow to allow common law recognition to be invoked as an alternative basis as the existence of a detailed recognition regime created by legislation displaces the need for the common law doctrine to apply (*Re Rooftop* at [58]). In the present case, the Applicant's request for recognition of the Chapter 11 Plan and Confirmation, at least in relation to S1 and S2, is governed by the Model Law, as is apparent from my conclusion above at [83]. Thus, in relation to S1 and S2, common law recognition would not be available. I do not deal with the alternate submissions made by the Applicant on this front.

85 As regards EH-REIT, some form of common law recognition would probably be required, given my finding at [30] above that the Model Law does *not* apply to entities such as EH-REIT. However, I am doubtful whether any

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69 AT at paras 89–90.

application for common law recognition can be pursued without the joining of the EH-REIT Trustee, as I elaborate below.

Relief in respect of the EH-REIT Trustee and common law recognition

86 What is sought by the Applicant is authorisation for the EH-REIT Trustee (namely, DBS Trustee Limited) to take steps to wind down the entity. In my judgment, this should be done in a separate application with the relevant supporting affidavit. The recognition of the Applicant as the foreign representative and the recognition of the Singapore Entities' Chapter 11 Proceedings does not absolve DBS Trustee Limited from exercising its duties and responsibilities as the EH-REIT Trustee.

87 I cannot see how the Applicant could also have the standing to make an application on behalf of DBS Trustee Limited. If obligations are owed under Singapore law, which presumably they are, DBS Trustee Limited should satisfy the Singapore court that the winding down and other steps contemplated are in accordance with Singapore law, and that it is satisfied, as the EH-REIT Trustee, that these are appropriate under the terms of the trust deed. DBS Trustee Limited must also demonstrate to the court that no prejudice will be occasioned to the Stapled Security Holders.

88 Furthermore, I cannot see how any matters affecting the winding down of EH-REIT could be brought in this summons: the winding down of a trust is not covered by the empowering act, *ie,* the IRDA, and is outside the scope of the Model Law as enacted in Singapore. While there is express provision made for business trusts to be wound up in Singapore under the BTA (*eg*, by order of court), there is no such equivalent provision under the SFA for collective investment schemes, such as EH-REIT, that are authorised under it. The

dissolution of EH-REIT would have to be done in accordance with the terms of the trust deed, which would specify details such as the manner in which the assets are to be sold and how the remaining assets (if any) are to be distributed to the various unitholders.

89 It may be that a separate application will add to the complexity of the process of implementing the Chapter 11 Plan and Confirmation Order, but that is what our legal framework requires. I cannot give orders for DBS Trustee Limited to liquidate EH-REIT in these proceedings.

90 Common law recognition may possibly be available for the recognition of the Singapore Entities' Chapter 11 Proceedings in relation to EH-REIT. The common law test may have to be applied instead (see *Re Opti-Medix Ltd (in liquidation) and another matter* [2016] 4 SLR 312). But no comment is made on whether such an application would succeed under common law recognition, and this issue will be determined at the appropriate juncture.

Other reliefs sought

91 In relation to the additional relief sought above at [4(a)]–[4(b)], I do not find that controversial issues are raised and will grant them, save that these are limited to S1 and S2 only (instead of all the Singapore Chapter 11 Entities including EH-REIT).

92 The prayer at [4(a)] is sought so that the Applicant can be properly authorised by the Singapore courts as a "foreign representative" under Art 2(*i*) of the Model Law to perform his duties and obligations set out under the Chapter 11 Plan and Confirmation Order. The UNCITRAL 2013 Guide provides (at para 86) that the "fact of appointment of the foreign representative in the foreign proceeding … is sufficient for the purposes of the Model Law"

and the definition of a "foreign representative" is "sufficiently broad to include debtors who remain in possession after the commencement of insolvency proceedings". The Applicant was duly appointed by the US Bankruptcy Court to be the foreign representative of S1 and S2 on 21 January 2021 in relation to the Singapore Entities' Chapter 11 Proceedings.[70] Certified copies of the US Bankruptcy Court orders expressly appointing the Applicant as foreign representative of the respective entities have been provided to the court.[71] Thus, this prayer is granted. The prayer at [4(b)] is also granted to enable the Applicant to administer the assets located in Singapore arising out of any investigations pursuant to the Chapter 11 Plan.

93 However, there should be no expatriation of funds or proceedings to be instituted without obtaining the leave of court.

Conclusion

94 For the abovementioned reasons, the court grants recognition for the Singapore Entities' Chapter 11 Proceedings, the Chapter 11 Plan and the Confirmation Order under the Model Law as enacted in Singapore. However, these are only in respect of S1 and S2. Should there be any intention to repatriate the assets of S1 and S2 from Singapore, the Applicant is required to obtain the leave of the court before proceeding to do so.

95 In respect of EH-REIT, a separate application should be made. In principle, I would think that this should be made by the EH-REIT Trustee, DBS Trustee Limited. However, I will consider arguments if the application can be made by the Applicant with at least the participation of the EH-REIT Trustee.

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70 AT at para 1.

71 AT at Exhibits AT-8 and AT-12.

It would also be fair and appropriate for the Stapled Security Holders to be given an opportunity to come before the court as well.

Aedit Abdullah
Judge of the High Court

Ong Tun Wei Danny, Ng Hui Ping Sheila and Chen Lixin (Rajah & Tann Singapore LLP) for the applicant.
