IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 78

Civil Appeal No 10 of 2021

Between

(1) United Securities Sdn Bhd (in receivership and liquidation)
(2) Robert Teo Keng Tuan

… *Appellants*

And

United Overseas Bank Ltd

… *Respondent*

In the matter of Originating Summons No 780 of 2020

In the matter of Section 252 of Schedules 3, Paragraphs 15, 20 and 21 of the Insolvency, Restructuring and Dissolution Act (Act 40 of 2018)

And

In the matter of United Securities Sdn Bhd (in receivership and liquidation)

(1) United Securities Sdn Bhd (in receivership and liquidation)
(2) Robert Teo Keng Tuan

… *Applicants*

GROUNDS OF DECISION

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

United Securities Sdn Bhd (in receivership and liquidation) and another
v
United Overseas Bank Ltd

[2021] SGCA 78

Court of Appeal — Civil Appeal No 10 of 2021
Judith Prakash JCA, Steven Chong JCA and Chao Hick Tin SJ
7 May 2021

10 August 2021

Judith Prakash JCA (delivering the grounds of decision of the court):

Introduction

1 This appeal arose from a set of parallel proceedings in Singapore and Malaysia which concerned the issue of the respondent's and the first appellant's respective rights and obligations under a loan agreement and deed of debenture. Whereas the respondent is seeking to have the issue determined in Singapore, the appellants seek to have it determined in Malaysia.

2 As part of the appellants' efforts to halt the Singapore proceedings, they applied to the Singapore High Court for recognition of certain Malaysian proceedings under the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency (30 May 1997) ("the Model Law"), given the force of law in Singapore via s 252 of the Insolvency, Restructuring and Dissolution Act (Act 40 of 2018) ("IRDA"). For

convenience, we shall refer to the Model Law as enacted in Singapore as "the SG Model Law". The appellants contended that upon recognition of the Malaysian Proceedings as either a "foreign main proceeding" or a "foreign non-main proceeding" pursuant to the SG Model Law there should be a stay of the Singapore proceeding. In his oral grounds of decision rendered on 12 January 2021, the High Court Judge ("the Judge") recognised one of the Malaysian proceedings as being a "foreign main proceeding" covered by the SG Model Law, but nevertheless declined to grant a stay of the Singapore proceeding. Dissatisfied, the appellants appealed against the Judge's decision.

3 We heard and dismissed the appeal on 7 May 2021. As the principles applicable to recognition of foreign proceedings under the SG Model Law and the effects of such recognition have not been fully explored in local jurisprudence, this appeal afforded us an opportunity to consider such principles, having regard to the UNCITRAL authorities, textbooks, as well as foreign case law.

The Model Law

4 Before we go on to discuss the facts and issues in this appeal, it may be helpful to make some brief comments on the Model Law. The account that follows is a paraphrase of the account in *UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective*, UN Doc A/CN.9/732 and Add 1–3 (2014) as updated in 2013 (see *UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective: Note by the Secretariat*, UN Doc A/CN.9/778 (2013)) ("*The Judicial Perspective*").

5 The Model Law was developed by UNCITRAL and endorsed by the General Assembly of the United Nations in 1997. The Model Law does not lay

down any substantive principles of insolvency law; those are governed by the domestic laws of the individual jurisdictions. Instead, it provides procedural mechanisms to facilitate more efficient disposition of cases in which the insolvent debtor has assets or debts in more than one jurisdiction. The SG Model Law therefore gives effect to four principles:

(a) the "access principle" which sets out the circumstances in which a "foreign representative" of an insolvent debtor has rights of access to the Singapore courts in order to seek recognition and relief;

(b) the "recognition" principle which deals with the Singapore courts' recognition of foreign insolvency proceedings as either a foreign "main" or "non-main" proceeding;

(c) the "relief" principle which deals with both interim and permanent relief that the Singapore court may provide after it recognises foreign proceedings as "main" or "non-main"; and

(d) the cooperation and coordination principle which obliges courts and insolvency representatives in different jurisdictions to communicate with each other and cooperate to ensure the fair administration of the debtor's estate.

6 Most relevant for present purposes are the recognition principle and the relief principle. These prescribe the circumstances in which insolvency proceedings in a foreign jurisdiction should be recognised by Singapore courts and be given effect to by the imposition of a stay of local proceedings against the debtor in question. Such recognition is only given to those proceedings which qualify as a "foreign main proceeding" or a "foreign non-main

proceeding". The definitions of these terms as set out in Art 2 of the SG Model Law are set out below:

> **Article 2. Definitions**
>
> For the purposes of this Law —
>
> …
>
> (*f*) 'foreign main proceeding' means a foreign proceeding taking place in the State where the debtor has its centre of main interests;
>
> (*g*) 'foreign non-main proceeding' means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment;
>
> (*h*) '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 or 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;
>
> …

7 Once the court holds that the relevant foreign proceeding meets either of these definitions, then the provisions of Arts 20 and 21 of the SG Model Law come into play. Articles 20 and 21 read:

> **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 (as defined in section 88(1) of this Act);

(*c*) exercisable under or by virtue of or in connection with any written law mentioned in Article 1(3)(*a*) to (*i*); 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.

Article 21. Relief that may be granted upon recognition of a foreign proceeding

1. Upon recognition of a foreign proceeding, whether a foreign main proceeding or a foreign non-main proceeding, where necessary to protect the property of the debtor or the interests of the creditors, the Court may, at the request of the foreign representative, grant any appropriate relief, including —

(*a*) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's property, rights, obligations or liabilities, to the extent they have not been stayed under Article 20(1)(*a*);

(*b*) staying execution against the debtor's property to the extent it has not been stayed under Article 20(1)(*b*);

(*c*) suspending the right to transfer, encumber or otherwise dispose of any property of the debtor to the extent this right has not been suspended under Article 20(1)(*c*);

(*d*) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's property, affairs, rights, obligations or liabilities;

(*e*) entrusting the administration or realisation of all or part of the debtor's property located in Singapore to the foreign representative or another person designated by the Court;

> (*f*) extending relief granted under Article 19(1); and
>
> (*g*) granting any additional relief that may be available to a Singapore insolvency officeholder, including any relief provided under section 96(4) of this Act.
>
> 2. Upon recognition of a foreign proceeding, whether a foreign main proceeding or a foreign non-main proceeding, the Court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's property located in Singapore to the foreign representative or another person designated by the Court, provided that the Court is satisfied that the interests of creditors in Singapore are adequately protected.
>
> 3. In granting relief under this Article to a representative of a foreign non-main proceeding, the Court must be satisfied that the relief relates to property that, under the law of Singapore, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.
>
> 4. No stay under paragraph 1(*a*) of this Article affects the right to 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.

8 With that brief introduction to set the scene, we turn to the facts of this case.

Facts

The parties

9 The first appellant is United Securities Sdn Bhd (in receivership and liquidation) ("USSB"), a Malaysian company which was wound up on 30 January 2007 by the Malaysian court. The second appellant is Robert Teo Keng Tuan, USSB's liquidator. USSB is the beneficial owner of all the issued shares in City Centre Sdn Bhd (in liquidation) ("CCSB"), a wholly-owned

subsidiary of USSB which had been wound up by the Malaysian court on 25 April 2000.

10 The respondent is United Overseas Bank Ltd ("UOB"), a Singapore bank. USSB is indebted to UOB and that debt is purportedly secured by a charge over USSB's shares in CCSB ("the CCSB Shares").

The Loan Agreement and the Debenture

11 On 17 December 1982, Overseas Union Bank Ltd ("OUB") and USSB entered into a loan agreement ("the Loan Agreement") for OUB to provide USSB with certain credit facilities. On the same date, USSB executed a deed of debenture ("the Debenture") which created a fixed charge ("the Charge") in OUB's favour over all of the CCSB Shares. The following clauses of the Loan Agreement are pertinent.

> (a) Clause 25.1 provided that the Loan Agreement and the Debenture "shall be governed by and construed in all respects in accordance with the laws of Singapore".
>
> (b) Clause 25.2 provided that USSB "irrevocably agrees that any legal action or proceedings against it with respect to [the Loan] Agreement and the Debenture may be brought in the courts of Singapore" and that USSB "irrevocably submits … to the non-exclusive jurisdiction of the [Singapore] courts".
>
> (c) Clause 25.6 provided that USSB "irrevocably waives any objection … to the venue of any suit, action or proceeding arising out of or relating to [the Loan] Agreement … selected by [UOB] and … further

irrevocably waives any claim that the venue so selected is not a convenient forum for any such suit, action or proceeding".

12 On 27 December 1982, the CCSB Shares which were then registered in the name of USSB were transferred to and registered in the sole name of OUB Nominees (Malaysia) Sdn Bhd pursuant to the Debenture. OUB Nominees (Malaysia) Sdn Bhd subsequently changed its name to UOB Nominees 2006 (Tempatan) Sdn Bhd ("UOB Nominees"). At the time of the appeal before us, UOB Nominees remained the registered holder of the CCSB Shares.

13 On 19 December 1983, USSB defaulted on the loan granted by OUB. In May 1985, pursuant to the Loan Agreement and the Debenture, receivers were appointed over the properties and assets of USSB charged to OUB. In 2002, following OUB's merger with UOB, UOB took over all of OUB's interest in the Loan Agreement and the Debenture.

The winding up of CCSB and USSB

14 A winding-up order against CCSB was made in Malaysia on 25 April 2000. Several years later, on 30 January 2007, a similar order was made against USSB in Companies Winding Up No D5286182005 ("the Malaysian Winding Up Proceeding").

15 On 12 May 2017, 16 parcels of land belonging to CCSB were sold as part of its winding up. After CCSB's debts were paid, a sum of money remained from the proceeds of sale – this formed CCSB's liquidation surplus ("the Surplus Funds"). For the purposes of distributing the Surplus Funds, CCSB's liquidators filed an application on 18 September 2017 in the High Court in

Malaya, seeking directions as to whether UOB Nominees was the sole and rightful contributory of CCSB.

16 On 12 February 2018, the Malayan High Court held that UOB Nominees was the sole and rightful contributory of CCSB and that the Surplus Funds should be distributed to it. However, this decision was set aside by the Malaysian Court of Appeal on 7 August 2019, on the basis that the form of the application had not been appropriate for the determination of the ownership of the CCSB Shares. UOB Nominees' application for leave to appeal against the Malaysian Court of Appeal's decision was subsequently dismissed by the Malaysian Federal Court. The Malaysian Federal Court then imposed an undertaking on CCSB's liquidators not to distribute the Surplus Funds pending the determination of the rights and obligations of the parties. Hence, at the time of the appeal before us, the Surplus Funds remained with CCSB.

Parallel proceedings in Malaysia and Singapore

17 Subsequently, parallel proceedings were commenced in Malaysia and Singapore concerning the issue of UOB's and USSB's rights and obligations under the Loan Agreement and the Debenture. In Malaysia, this took the form of a writ action commenced in the High Court in Malaya on 9 December 2019 by USSB against UOB, UOB Nominees, CCSB and CCSB's liquidators ("the Malaysian Writ Action"). In the Malaysian Writ Action, USSB sought, among other things, the following relief:

(a) A declaration that the Surplus Funds and any interest or benefit earned thereon did not form part of the assets or property or undertaking of CCSB subject to the Charge.

(b) A declaration that UOB and/or UOB Nominees had not established a legal entitlement to the Surplus Funds.

(c) A declaration that all such interest in the property and assets subject to the Charge as had been vested in UOB by virtue of the Charge had been extinguished, and that UOB and/or UOB Nominees had no interest in the property and assets subject to the Charge.

18 In Singapore, UOB commenced HC/OS 414/2020 ("OS 414") on 21 April 2020. In OS 414, UOB sought, among other things, the following relief:

(a) A declaration that UOB's rights under the Debenture were valid and exercisable, including UOB's security over all the rights attached to the CCSB Shares and UOB's entitlement to all the benefits derived from those rights to the extent of the outstanding debt owed by USSB to UOB.

(b) A declaration that UOB's security over all the rights attached to the CCSB Shares pursuant to the Debenture included the right to the Surplus Funds.

(c) A declaration that UOB was not prevented by time-bar from exercising its rights under the Debenture and taking all necessary steps to realise its security in the CCSB Shares and all the rights attached to the CCSB Shares.

(d) A declaration as to the quantum of the outstanding debt owed by USSB to UOB under the Loan Agreement.

19 Following the commencement of OS 414, UOB applied to the High Court in Malaya on 27 May 2020 for a stay of the Malaysian Writ Action. UOB argued that having regard to the jurisdiction clause in the Loan Agreement, Malaysia was not the appropriate forum in which to determine the dispute.

20 Meanwhile, back in Singapore, USSB filed HC/SUM 2635/2020 ("SUM 2635") in OS 414 on 3 July 2020. In SUM 2635, USSB sought to challenge the validity of the service of OS 414 on USSB as well as the Singapore court's jurisdiction over USSB. Alternatively, USSB sought a stay of OS 414 on the basis that Singapore was not the appropriate forum.

21 SUM 2635 was dismissed on 12 August 2020 and USSB appealed against this decision in HC/RA 211/2020 ("RA 211"). Immediately thereafter, the appellants commenced HC/OS 780/2020 ("OS 780") seeking the court's recognition of the Malaysian Winding up Proceeding and the Malaysian Writ Action as "foreign main proceedings" or "foreign non-main proceedings" under the SG Model Law. Consequent to such recognition, the appellants further sought a stay of OS 414 pursuant to Arts 20 and/or 21 of the SG Model Law.

22 Before the hearing of OS 780 and RA 211 in Singapore, further developments took place in Malaysia. UOB's application for a stay of the Malaysian Writ Action was dismissed on 1 October 2020 by the High Court in Malaya which held that Malaysia was the appropriate forum. UOB appealed against this decision to the Malaysian Court of Appeal on 13 October 2020.

23 In Singapore, on 12 January 2021, the Judge dismissed OS 780 and RA 211. USSB was refused leave to appeal against the decision in RA 211

(the stay application). As such, a notice of appeal was filed only in respect of OS 780.

24 On 26 April 2021, shortly before this appeal was heard by this court, the Malaysian Court of Appeal delivered its decision allowing UOB's appeal in respect of the appropriate forum. The Malaysian Court of Appeal held that Singapore was the more appropriate forum for the dispute. As a result, the Malaysian Writ Action was stayed. On 4 May 2021, the appellants applied for leave to appeal to the Federal Court of Malaysia against the Malaysian Court of Appeal's decision. This application for leave to appeal was still pending at the time of the hearing before us.

The decision below

25 We turn now to the reasons for the Judge's dismissal of OS 780. In the proceedings below, the Judge held that the Malaysian Winding Up Proceeding had to be recognised as a "foreign main proceeding" under the SG Model Law but that the Malaysian Writ Action was not entitled to recognition as such or even as a "foreign non-main proceeding". The Judge found that the Malaysian Writ Action was not a foreign proceeding within the meaning of the SG Model Law as it "lack[ed] the collective nature required and [was] not sufficiently connected to an insolvency or reorganization". In this regard, the Judge observed that the Malaysian Writ Action was concerned with UOB's rights to the Surplus Funds under the Loan Agreement and the Debenture. It would be determined, if at all, on the contract or agreement between the parties. The Malaysian Writ Action was not a collective proceeding under a law relating to insolvency or adjustment of debt, in which the debtor company was under the control of a foreign court for the purposes of reorganisation or liquidation.

26 Furthermore, in relation to the stay of OS 414 sought by the appellants, the Judge observed that "[w]hether or not UOB has any right in respect of [CCSB] and the related matters should be determined in the ordinary course of civil litigation, and does not impinge on the winding up in Malaysia". The Judge thus held that no stay under Art 20 of the SG Model Law operated in respect of OS 414, and declined to grant any discretionary stay under Art 21 of the SG Model Law.

Our decision

Preliminary issues

27 Before setting out our decision proper, we make two preliminary points. First, at the hearing before us, the appellants' counsel, Mr Abraham Vergis SC ("Mr Vergis"), requested that the court hold over the hearing of the appeal until the Malaysian Federal Court delivered its decision on the appropriate forum issue. In our view, this was not feasible. Although it appeared that the appellants intended to apply to expedite the proceedings in Malaysia, there was no indication as to when those proceedings would eventually be concluded. Indeed, the appellants had yet to obtain *leave* to pursue the appeal to the Federal Court, much less have the actual appeal heard and then determined. Furthermore, it had already been finally determined in RA 211 that Singapore was the appropriate forum. As such, a stay of OS 414 could only be granted on the basis that the issues therein were properly to be decided by USSB's liquidators rather than by the Singapore court. This inquiry was independent of whether the Malaysian Writ Action would be stayed or would be allowed to proceed by the Malaysian Federal Court. In other words, the appellants were asking this court to delay the hearing of the appeal, and in turn the hearing of OS 414, for an indeterminate period of time to await an uncertain outcome that was unlikely to affect the

appeal in any event. We saw no reason to do so and thus declined to hold over the hearing of the appeal as requested by Mr Vergis.

28 Second, it ought to be observed that in interpreting the various provisions of the SG Model Law, we took into consideration the texts and guides developed by UNCITRAL as well as the case law from other jurisdictions. We were cognisant of Art 8 of the SG Model Law, which provides that "regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith". As the High Court observed in *Re Zetta Jet Pte Ltd and others (Asia Aviation Holdings Pte Ltd, intervener)* [2019] 4 SLR 1343 at [38]:

> … I bear in mind the preamble to the Singapore Model Law, emphasising co-operation and efficiency between the courts of States involved in cross-border insolvency, and Art 8 of the Singapore Model Law, which requires regard to be paid to the Singapore Model Law's international origin and the promotion of uniformity in its application. I am of the view that the Singapore courts should attempt to tack as closely as possible to the general interpretive trends taken in other jurisdictions that apply the Model Law in its various enactments.

29 Having addressed the preliminary issues, we now turn to our decision in the appeal proper.

Stay of OS 414

30 In our view, the single critical issue on appeal was whether a stay of OS 414 ought to be granted under the SG Model Law in the light of the Judge's holding that the Malaysian Winding Up Proceeding was a foreign main proceeding. By reason of the decision of the Malaysian Court of Appeal, the Malaysian Writ Action no longer needed to be considered.

31 As UOB had conceded from the beginning that the Malaysian Winding Up Proceeding was a foreign main proceeding and did not appeal against its recognition as such, the appellants could rely on that recognition to seek a stay of OS 414 under the SG Model Law, regardless of whether the Malaysian Writ Action was also recognised as a foreign proceeding. Accordingly, whether a stay of OS 414 ought to be granted due to the recognition of the Malaysian Winding Up Proceeding was the dispositive issue and the appeal was decided on this basis.

Article 20 of the SG Model Law

32 We turn first to the relevant provisions under Art 20 of the SG Model Law. These have been set out in full in [7] above. The starting point is Art 20(1), which provides that upon recognition of a foreign main proceeding, the following consequences arise:

> (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.

33 The above effects arise only upon the recognition of foreign *main* proceedings, which may explain their automatic nature and wider scope relative to the relief afforded under other provisions of the SG Model Law. The purpose of the automatic stay and suspension arising under Art 20(1) is explained in *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment*

and Interpretation, UN Doc A/CN.9/442 (1997) as updated in 2013 (see *Revision of the Guide to Enactment of the Model Law on Cross-Border Insolvency and part four of the Legislative Guide on Insolvency Law of the United Nations Commission on International Trade Law*, GA Res 68/107, 68th Sess (2013)) (the "*Guide*") at para 37, as follows:

> … Such stay and suspension are 'mandatory' (or 'automatic') in the sense that either they flow automatically from the recognition of a foreign main proceeding or, in the States where a court order is needed for the stay or suspension, the court is bound to issue the appropriate order. The stay of actions or of enforcement proceedings is necessary to provide 'breathing space' until appropriate measures are taken for reorganization or liquidation of the assets of the debtor. The suspension of transfers is necessary because in a modern, globalized economic system it is possible for a multinational debtor to move money and property across boundaries quickly. The mandatory moratorium triggered by the recognition of the foreign main proceeding provides a rapid 'freeze' essential to prevent fraud and to protect the legitimate interests of the parties involved until the court has an opportunity to notify all concerned and to assess the situation.

34 However, the stay and suspension arising under Art 20(1) are subject to Art 20(2) of the SG Model Law, which provides that they are "the same in scope and effect as if the debtor had been made the subject of a winding up order" under the IRDA and "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". This qualification is explained in the *Guide* at para 183 as follows:

> Notwithstanding the 'automatic' or 'mandatory' nature of the effects under article 20, it is expressly provided that the scope of those effects depends on exceptions or limitations that may exist in the law of the enacting State. Those exceptions may be, for example, the enforcement of claims by secured creditors, payments by the debtor in the ordinary course of business, initiation of court action for claims that have arisen after the commencement of the insolvency proceeding (or after

> recognition of a foreign main proceeding) or completion of open financial-market transactions.

35 Thus, Art 20(2) delineates the ambit of any stay or suspension arising under Art 20(1) by making such stay or suspension the same as what would have been available under Singapore law had the debtor been wound up in Singapore. As observed in *Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency* (2021) at p 16, Art 20(2) "grant[s] protection to those classes of people who would normally receive protection in insolvency proceedings commenced in the enacting State". In this way, recognition of a foreign proceeding "has its own effects rather than importing the consequences of the foreign law into the insolvency system of the enacting State" (see the *Guide* at para 178). This is in line with the basic approach of the Model Law, which is not to "attempt a substantive unification of insolvency law" but to provide a procedural "framework for cooperation between jurisdictions" in order to "facilitate and promote a uniform approach to cross-border insolvency" (see the *Guide* at para 3; *The Judicial Perspective* at paras 9 and 27).

36 In addition to the qualification contained in Art 20(2), Art 20(3) of the SG Model Law provides certain exceptions to the stay and suspension arising under Art 20(1). Specifically, Art 20(3) stipulates that the stay and suspension do not affect the following rights, provided that such rights would have been exercisable if the debtor had been made the subject of a winding up order under the IRDA:

> (a) any right to take any steps to enforce security over the debtor's property;
>
> (b) any right to take any steps to repossess goods in the debtor's possession under a hire-purchase agreement;

(c) any right exercisable under or by virtue of or in connection with the statutes set out in Arts 1(3)(*a*)–1(3)(*i*); and

(d) any right of a creditor to set off its claim against a claim of the debtor.

(1) Article 20(1)

37 Applying the above provisions to the present case, the first question was whether OS 414 fell within the ambit of proceedings stayed or suspended pursuant to Art 20(1). As Arts 20(1)(*b*) and 20(1)(*c*) were clearly inapplicable, the only issue was whether OS 414 was an individual action or individual proceeding "concerning the debtor's property, rights, obligations or liabilities" within the meaning of Art 20(1)(*a*). It was not seriously disputed that it was – OS 414 concerned the determination of UOB's and USSB's respective rights, obligations and liabilities under the Loan Agreement and Debenture. Therefore, OS 414 fell within the scope of the automatic stay arising under Art 20(1)(*a*) of the SG Model Law.

(2) Article 20(2)

38 That was not the end of the matter, however. As we observed above, the automatic stay is the same in scope and effect as if the debtor had been wound up in Singapore. It is also subject to the same powers of the court and the same prohibitions, limitations, exceptions and conditions as would apply under Singapore law in such a situation. The next question therefore was what the position would have been if USSB had been wound up under the IRDA.

39 In this regard, it is well established that leave will readily be granted to secured creditors to proceed with enforcing their security, notwithstanding any

stay of proceedings that arises upon the winding up of the debtor. This was explained by this court in *SCK Serijadi Sdn Bhd v Artison Interior Pte Ltd* [2019] 1 SLR 680 ("*Artison*") at [11] as follows:

> … [*T*]*here is in some sense an 'exception' carved out for secured creditors … In general, the court will more readily grant leave to secured creditors to proceed with enforcing their security, notwithstanding the stay* … because their security is regarded as standing apart from the pool of assets available for *pari passu* distribution amongst unsecured creditors. Thus, in *Korea Asset Management Corp v Daewoo Singapore Pte Ltd* [2004] 1 SLR(R) 671 ('*Korea Asset Management*') at [49], V K Rajah JC observed that leave to proceed would readily be given to an applicant who was 'merely attempting to claim from the company, property which *prima facie* belongs to the applicant', and this expressed the law's recognition 'that the rights of a secured creditor or *in rem* rights should not be fettered as a matter of course by the initiation of insolvency proceedings' (see also *Power Knight Pte Ltd v Natural Fuel Pte Ltd* [2010] 3 SLR 82 ('*Power Knight*') at [27]). …
>
> [emphasis added]

40 Furthermore, as V K Rajah JC (as he then was) observed in *Korea Asset Management Corp v Daewoo Singapore Pte Ltd* [2004] 1 SLR(R) 671 at [41], an applicant purporting to be a creditor and seeking the court's leave to proceed with its action need only show a *prima facie* case. This refers to a case that "is brought *bona fide*, underpinned by credible facts and is, even without a serious investigation of the factual matrix, capable of succeeding if and when heard".

41 The above sets out the principles that would have applied had USSB been wound up in Singapore. In transposing these principles to the SG Model Law context via Art 20(2), we had regard to the decision of the High Court of New Zealand in *Kim and Yu v STX Pan Ocean Co Ltd* [2014] NZHC 845 ("*STX Pan Ocean*"). In that case, the respondent was the subject of an administration proceeding in Korea. The Korean administration proceeding was

recognised in New Zealand as a foreign main proceeding pursuant to the Insolvency (Cross-border) Act 2006 (New Zealand), which enacted the Model Law. Nevertheless, the claimants sought the leave of the High Court of New Zealand to continue their statutory claims *in rem* against a ship that had been demise chartered by the respondent. Gilbert J held that notwithstanding the automatic stay that arose upon recognition, the court had a discretion under Art 20(2) to allow a person to commence or continue proceedings. Art 20(2) of the Model Law as enacted in New Zealand provided as follows (see *STX Pan Ocean* at [20]):

> Paragraph (1) of this article does not prevent the Court, on the application of any creditor or person, from making an order, subject to such conditions as the Court thinks fit, that the stay or suspension does not apply in respect of any particular action or proceeding, execution, or disposal of assets.

42 In construing this provision, Gilbert J observed at [23] that:

> … The Law Commission considered that each of the consequences that flow from art 20 would occur as a result of most formal insolvency regimes in New Zealand and that the discretion reserved under art 20(2) should enable the High Court to exercise the same type of discretion to override the consequences of stay or suspension as it has under other insolvency provisions. …

43 Gilbert J found on the facts that the claimants had obtained security against the ship immediately upon issue of the admiralty proceedings, which took place prior to the commencement of the Korean administration proceeding. The respondent's rights to the ship were therefore subject to the claimants' "secured claims". Thus, "[c]onsistent with usual practice … where leave would normally be given for secured creditors to commence or continue proceedings to establish their security", the claimants were granted leave to continue their claims against the ship (see *STX Pan Ocean* at [29]–[30], [43]). In other words,

the ordinary principles and practice that applied under New Zealand insolvency law applied virtually identically to the stay or suspension arising under Art 20(1) of the Model Law.

44 In this case, it was clear that UOB was *prima facie* a secured creditor. On the face of the evidence, the Debenture created the Charge over the CCSB Shares as security for any sums disbursed under the Loan Agreement. The Malaysian companies' register also reflected UOB as being a registered chargee of USSB, with the charge status stated as "unsatisfied". Furthermore, OS 414 was directed at allowing UOB to establish its purported rights as a secured creditor against USSB. The fact that the appellants were disputing UOB's security interest was insufficient to displace this *prima facie* conclusion. Therefore, notwithstanding the recognition of the Malaysian Winding Up Proceeding and the automatic stay arising therefrom, we granted leave to UOB to proceed with OS 414.

Article 21 of the SG Model Law

45 For completeness, we consider whether, alternatively, a stay of OS 414 ought to have been granted under Art 21 of the SG Model Law. Although this point was not pursued by the appellants on appeal, it had been argued in the proceedings below and was addressed by the Judge in his oral grounds of decision.

46 The relevant provision was Art 21(1)(*a*) of the SG Model Law:

> 1. Upon recognition of a foreign proceeding, whether a foreign main proceeding or a foreign non-main proceeding, where necessary to protect the property of the debtor or the interests of the creditors, the Court may, at the request of the foreign representative, grant any appropriate relief, including —

> (*a*) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's property, rights, obligations or liabilities, to the extent that they have not been stayed under Article 20(1)(*a*);

47 In our judgment, there was no reason to grant a discretionary stay of OS 414 under Art 21 of the SG Model Law. As we concluded at [44] above, UOB was *prima facie* a secured creditor and OS 414 was directed towards enabling UOB to establish its purported security rights against USSB. Given that a secured creditor's "security is regarded as standing apart from the pool of assets available for *pari passu* distribution amongst unsecured creditors" (see *Artison* at [11], cited at [39] above), the grant of a discretionary stay of proceedings was not necessary to protect the property of the debtor or the interests of the creditors.

48 For these reasons, notwithstanding the recognition of the Malaysian Winding Up Proceeding as a foreign main proceeding, we did not order a stay of OS 414 either under Art 20 or Art 21 of the SG Model Law.

Recognition of the Malaysian Writ Action

49 As we observed at [30] above, the appeal was decided on the basis of whether OS 414 ought to be stayed following the recognition of the Malaysian Winding Up Proceeding. There was therefore no need for us to determine the issue of recognition of the Malaysian Writ Action. However, given that this was one of the first few cases concerning the requirements for recognition of a "foreign proceeding" under the SG Model Law, we consider it useful to nevertheless provide our views on the issue.

50 The relevant provisions of Art 17 of the SG Model Law read as follows:

> **Article 17. Decision to recognise a foreign proceeding**
>
> 1. Subject to Article 6, a proceeding must be recognised if —
>
> (*a*) it is a foreign proceeding within the meaning of Article 2(*h*);
>
> (*b*) the person or body applying for recognition is a foreign representative within the meaning of Article 2(*i*);
>
> (*c*) the application meets the requirements of Article 15(2) and 15(3); and
>
> (*d*) the application has been submitted to the Court mentioned in Article 4.
>
> 2. The foreign proceeding must be recognised —
>
> (*a*) as a foreign main proceeding if it is taking place in the State where the debtor has its centre of main interests; or
>
> (*b*) as a foreign non-main proceeding, if the debtor has an establishment within the meaning of Article 2(*d*) in the foreign State.

51 The main point of contention between the parties was Art 17(1)(*a*) – whether the Malaysian Writ Action was a *foreign proceeding* within the meaning of Art 2(*h*). Art 2(*h*) defines a "foreign proceeding" as:

> … a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, under a law relating to insolvency or adjustment or 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;

52 This definition is explained in the *Guide* at para 66 as follows:

> The attributes required for a foreign proceeding to fall within the scope of the Model Law include the following: basis in insolvency-related law of the originating State; involvement of creditors collectively; control or supervision of the assets and

> affairs of the debtor by a court or another official body; and reorganization or liquidation of the debtor as the purpose of the proceeding …

53 There are, therefore, at least four attributes required for a proceeding to constitute a "foreign proceeding" under the SG Model Law, which "are cumulative" and "should be considered as a whole" (see the *Guide* at para 68). These attributes are as follows.

(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.

54 In our view, the Malaysian Writ Action bore none of these attributes. Accordingly, it was *not* a foreign proceeding within the meaning of Art 2(*h*) of the SG Model Law. We examine each of the attributes in turn.

Collective proceeding

55 The first attribute concerns whether the proceeding involves the creditors collectively. The term "collective proceeding" was explained in the *Guide* at paras 69–70 as follows:

> 69. For a proceeding to qualify for relief under the Model Law, it must be a collective proceeding because *the Model Law is intended to provide a tool for achieving a coordinated, global solution for all stakeholders of an insolvency proceeding.* It is not

> intended that the Model Law be used merely as a collection device for a particular creditor or group of creditors who might have initiated a collection proceeding in another State. Nor is it intended that the Model Law serve as a tool for gathering up assets in a winding up or conservation proceedings that does not also include provisions for addressing the claims of creditors. …
>
> 70. *In evaluating whether a given proceeding is collective for the purpose of the Model Law, a key consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding*, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors. … Examples of the manner in which a collective proceeding … might deal with creditors include providing creditors that are adversely affected by the proceeding with a right (though not necessarily the obligation): to submit claims for determination and to receive an equitable distribution or satisfaction of those claims, to participate in the proceedings, and to receive notice of the proceedings in order to facilitate their participation. …
>
> [emphasis added]

56 *Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law* (Look Chan Ho gen ed) (Globe Law & Business, 3rd Ed, 2012) ("*Look Chan Ho*") observes at p 158 that for a proceeding to be collective, it must concern all creditors of the debtor generally. Richard Fisher and Adam Al-Attar in Richard Fisher and Adam Al-Attar, "The UNCITRAL Model Law" in *Cross-Border Insolvency* (Richard Sheldon QC gen ed) (Bloomsbury Professional, 4th Ed, 2015) provide examples of proceedings that are collective in nature – winding up or bankruptcy proceedings, and even certain forms of reorganisation proceedings (see paras 3.39, 3.42 and 3.43). At para 3.36, they explain that:

> The basic notion of a collective proceeding is aimed at identifying those cases where there is a single insolvency representative able to control the realisation or assets for the purpose of *pro rata* distribution among all creditors, as opposed to a proceeding designed to assist a particular creditor to obtain

> payment or a process designed for some purpose other than to address the insolvency of the debtor.

57 Other jurisdictions have adopted similar positions. In *Williams v Simpsons (No 5)* [2010] NZHC 1786, the High Court of New Zealand held at [5] that:

> … The term 'collective' distinguishes a formal insolvency regime (under which the debtor's assets are realised for the benefit of all creditors) from private proceedings against a debtor, in which a single creditor seeks judgment for its own benefit.

58 Similarly, in *Re Betcorp* 400 BR 266 ("*Betcorp*"), the US Bankruptcy Court observed at 281 that "[a] collective proceeding is one that considers the rights and obligations of all creditors". Applying that principle, the US Bankruptcy Court held that a voluntary liquidation commenced under Australian law was a foreign proceeding falling within the scope of chapter 15 of the US Bankruptcy Code, which implemented the Model Law (see *Betcorp* at 285).

59 *Betcorp* was cited and applied in *In Re Gold & Honey, Ltd* 410 BR 357 ("*Gold & Honey*"), where the US Bankruptcy Court declined to recognise an Israeli receivership proceeding as a foreign proceeding under chapter 15 of the US Bankruptcy Code. The US Bankruptcy Court held that the Israeli receivership proceeding was not a collective proceeding, observing that the receivership proceeding did not require the receivers to consider the rights and obligations of all creditors. Instead, it was more akin to an individual creditor's replevin or repossession action. It was primarily designed to allow the creditor to collect its debts, rather than a proceeding instituted by a debtor for the purposes of paying off all creditors with court supervision (see *Gold & Honey* at 370). It is notable that although the Israeli receivership proceeding concerned

all of the debtor's assets present in Israel (see *Gold & Honey* at 371), this was not sufficient to ground a finding that it was collective in nature. As *Look Chan Ho* observes at p 159, citing *Gold & Honey*, "[r]eceivership in consequence of enforcement of security is naturally not collective, even where the receivership covers most of the debtor's assets".

60 A similar distinction was drawn in *In re ABC Learning Centres Ltd* 445 BR 318 ("*ABC Learning Centres*") between receivership proceedings concerned only with the secured creditors' interests and insolvency proceedings falling within the scope of the Model Law. In *ABC Learning Centres*, the US Bankruptcy Court was faced with an application for recognition of certain Australian liquidation proceedings. At the time, the debtor was also under a set of receivership proceedings commenced by several of the debtor's secured creditors. It was agreed that the receivership proceedings were not collective in nature as they were, by design, for the benefit of the secured creditors. The US Bankruptcy Court commented on the distinction between the liquidation proceedings and the receivership proceedings in *ABC Learning Centres* at 330, as follows:

> … Liquidators and Receivers have clearly delineated roles under the Corporations Act. Liquidators are appointed by the creditors as a whole and are responsible for winding up the affairs of a company and ultimately dissolving it; specific duties include: collecting assets; establishing deadlines for proving claims; distributing assets per the priorities set forth in the Corporations Act; convening required meetings; maintaining records; creating and distributing required reports to various parties … and conducting investigations into possibly voidable transactions. … Receivers, on the other hand, are appointed by a secured creditor and their primary role is to recover secured assets for the benefit of the secured creditor and return any surplus to the company. …

61 *Betcorp* and *Gold & Honey* were cited with approval in *In Re British American Insurance Company Limited* 425 BR 884, where the US Bankruptcy Court held at 902 that:

> For a proceeding to be collective … *it must be instituted for the benefit of creditors generally rather than for a single creditor or class of creditors*. … The Guide to Enactment suggests that a foreign proceeding must *contemplate the 'involvement of creditors collectively.'* …
>
> From the foregoing, the Court concludes that the word 'collective' … *contemplates both the consideration and eventual treatment of claims of various types of creditors, as well as the possibility that creditors may take part in the foreign action.* Notice to creditors, including general unsecured creditors, may play a role in this analysis.
>
> [emphasis added]

62 Having regard to the above principles, we were of the view that the Malaysian Writ Action was not a collective proceeding. It did not contemplate the consideration and eventual treatment of the rights, obligations and claims of USSB's creditors generally. Nor did it concern substantially all of USSB's assets and liabilities. Instead, it focused on *one particular aspect* of USSB's assets, specifically, USSB's purported entitlement to the Surplus Funds. If determined, it would address USSB's legal rights and obligations *vis-à-vis* only *one* of its creditors, namely, UOB. Furthermore, the Malaysian Writ Action was a civil action between USSB as the plaintiff, and UOB, UOB Nominees, CCSB, and CCSB's liquidators as the defendants. Out of all these parties, only UOB was USSB's creditor. Although UOB's receiver and one of USSB's creditors had been granted leave by the Malayan High Court to intervene in the Malaysian Writ Action, it bears emphasis that these parties had to seek the court's leave to intervene in the first place and had no automatic right to participate in the proceedings. Furthermore, on appeal by UOB, the Malaysian Court of Appeal eventually set aside the Malayan High Court's order allowing USSB's creditor

to intervene in the Malaysian Writ Action. All of these points indicated that the Malaysian Writ Action was not collective in nature.

Basis in a law relating to insolvency

63 The second attribute concerns whether the proceeding has its basis in a law relating to insolvency. The *Guide* explains this attribute at para 73 as follows:

> This formulation is used in the Model Law to acknowledge the fact that liquidation and reorganization might be conducted under law that is not labelled as insolvency law (e.g. company law), but which nevertheless deals with or addresses insolvency or severe financial distress. The purpose was to find a description that was sufficiently broad to encompass a range of insolvency rules irrespective of the type of statute or law in which they might be contained and irrespective of whether the law that contained the rules related exclusively to insolvency. …

64 *Look Chan Ho* opines at pp 162–163 that:

> As 'law relating to insolvency' is not a defined term, the … court ought to rely on the plain meaning of the term and its general connotation consistent with ordinary English usage:
>
> > *Insolvency law can be described as the prevention, regulation, or supervision of discontinuity in the legal relations of a person (legal entity) that is in financial difficulties, including the discontinuity of that person itself.*
>
> [emphasis in original]

65 It was apparent that the phrase "under a law relating to insolvency" had been deliberately framed in a broad manner so as to cater to the wide range of laws that were intended to fall within the scope of the Model Law. The *Guide* explains this approach at para 65 as follows:

> The definitions of proceedings or persons emanating from foreign jurisdictions avoid the use of expressions that may have

> different technical meanings in different legal systems and instead describe their purpose or function. This technique is used to avoid inadvertently narrowing the range of possible foreign proceedings that might obtain recognition and to avoid unnecessary conflict with terminology used in the laws of the enacting State. … [T]he expression 'insolvency proceedings' may have a technical meaning in some legal systems, but is intended in subparagraph *(a)* to refer broadly to proceedings involving debtors that are in severe financial distress or insolvent.

66 In light of the above, the court in determining whether a proceeding is conducted "under a law relating to insolvency" should adopt a commonsense approach which focuses on the *substance* of the relevant law. Specifically, whether the relevant law "deals with or addresses insolvency or severe financial distress". Here, although the Malaysian Writ Action, *factually speaking*, concerned insolvent companies and surplus funds arising out of a liquidation, the *law* on which the Malaysian Writ Action was based did not relate to insolvency. Rather, it was an ordinary civil action commenced under the Malayan High Court's civil jurisdiction, to be determined based on a number of different types of law, none of which dealt with insolvency or severe financial distress. We were therefore of the view that the Malaysian Writ Action did not have its basis in a law relating to insolvency.

Control or supervision by the court of the debtor's property and affairs

67 The third attribute concerns whether the proceeding involves the court's exercise of control or supervision of the debtor's property and affairs. Such control or supervision must be "formal in nature", although they "may be potential rather than actual" and may be exercised directly by the court or indirectly through an insolvency representative (see the *Guide* at para 74). It is notable that "both assets *and* affairs of the debtor should be subject to control

or supervision; it is not sufficient if only one or the other are covered by the foreign proceeding" [emphasis added] (see the *Guide* at para 76).

68 A straightforward example of a proceeding that involves the court's control or supervision of the debtor's property and affairs is a liquidation proceeding. In *Betcorp*, the US Bankruptcy Court found that an Australian voluntary liquidation proceeding was subject to the supervision of the Australian court. In reaching this decision, the US Bankruptcy Court considered that the liquidators and creditors could request the Australian court to determine any question arising in the winding up of a company, and that the Australian court had a broad mandate to review the actions of liquidators (see *Betcorp* at 22). Similarly, the US Bankruptcy Court found in *ABC Learning Centres* at 331–332 that the Australian court had control of and played a supervisory role in the Australian liquidation proceedings, as provided for by numerous sections of the Corporations Act 2001 (Australia).

69 Further examples of proceedings that involve the requisite control and supervision by the court are provided in the *Guide* at paras 74–75: a debtor-in-possession; expedited proceedings in which the court exercises control or supervision at a late stage of the insolvency process; and 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.

70 In this case, it was clear that the Malaysian Writ Action did not involve the Malayan High Court's control or supervision of USSB's property and affairs. The court's role in the Malaysian Writ Action was simply to determine the issues disputed between the parties, as it would do in any ordinary civil action. Although USSB's property and affairs *were* subject to the control and

supervision of the Malaysian courts, this was by virtue of the Malaysian Winding Up Proceeding, rather than the Malaysian Writ Action.

Purpose of reorganisation or liquidation

71 The fourth and final attribute concerns whether the purpose of the proceeding is the reorganisation or liquidation of the debtor. The *Guide* provides several examples of proceedings that *do not* satisfy this requirement at paras 77–78:

> (a) proceedings that are designed to prevent dissipation and waste, rather than to liquidate or reorganise the insolvent estate;
>
> (b) proceedings designed to prevent detriment to investors rather than to all creditors;
>
> (c) proceedings in which the powers conferred and the duties imposed upon the foreign representative are more limited than the powers or duties typically associated with liquidation or reorganisation (*eg*, the power to do no more than preserve assets); and
>
> (d) financial adjustment measures or arrangements undertaken between the debtor and some of its creditors on a purely contractual basis concerning some debt, where the negotiations do not lead to the commencement of an insolvency proceeding conducted under the insolvency law.

72 At this juncture, we address the appellants' reliance on the English Court of Appeal's decision in *Rubin and another v Eurofinance SA and others* [2011] 2 WLR 121 ("*Rubin*"). In *Rubin*, the English Court of Appeal held that

adversary proceedings – the equivalent of undervalue transaction and preference claims – formed "part and parcel" of the insolvency proceedings and thus could be given the same recognition under the Model Law as set out in the Cross-Border Insolvency Regulations 2006 (SI 2006 No 1030) (UK). This was because such adversary proceedings were "part of collecting the bankrupt's assets with a view to distributing them to creditors", as well as "part of the plan which the bankruptcy court approved" and "an integral part" of the insolvency proceedings (see *Rubin* at [25] and [60]). By analogy to such adversary proceedings, the appellants sought to argue that the Malaysian Writ Action should similarly be recognised under the SG Model Law.

73 In our view, however, the appellants' reliance on *Rubin* was misplaced. Even if *Rubin* was correct in concluding that adversary proceedings may be recognised as foreign proceedings under the Model Law, the Malaysian Writ Action was clearly distinguishable from adversary proceedings. The proceedings recognised in *Rubin* arose from the use of mechanisms specially available in the insolvency regime to allow the debtor's legal representative to bring actions against third parties for the collective benefit of all creditors. Such proceedings were therefore central to the collective nature of bankruptcy (see *Rubin* at [61]). In contrast, the Malaysian Writ Action was not part of any insolvency plan approved by the Malaysian court nor an integral part of the Malaysian Winding Up Proceeding. Nor did the Malaysian Writ Action arise from any mechanism specially available in the insolvency regime. In this regard, we agreed with Judge's observations:

> …
>
> (b) I was referred to the example of adversary proceedings in US cases, but these were, in contrast, quite different. I note most adversary proceedings are similar to unfair preference or clawback proceedings under Commonwealth insolvency law:

> they are actions by the estate to recover assets or proceeds of the estate which were unlawfully taken away to avoid being caught by the insolvency.
>
> (c) In contrast, the Malaysian [W]rit [A]ction was the determination of issues of property or ownership rights and obligations that are no different from any that could arise in any civil proceeding. The only thing possibly colouring it with the nature of an insolvency or collective claim was that it involved the foreign insolvency representative. It is true that the determination by the Malaysian courts would affect the size of the estate in the end, but it does so through the operation not of insolvency or reorganization law. Extending the operation of Model Law recognition to this extent could effectively extend recognition to all manner of foreign civil judgments, beyond the ambit of the [IRDA].
>
> …

74 For completeness, we note that *Rubin* was subsequently overturned on appeal by the UK Supreme Court in *Rubin and another v Eurofinance SA and others (Picard and others intervening); In re New Cap Reinsurance Corpn Ltd (in liquidation; New Cap Reinsurance Corpn Ltd and another v Grant and others* [2012] 3 WLR 1019, although on a different point of law. On appeal, as it was no longer disputed that the adversary proceedings should be recognised under the Model Law, the point was not specifically considered by the UK Supreme Court.

75 The purpose of the Malaysian Writ Action was *not* USSB's reorganisation or liquidation. Instead, it was to determine the parties' rights, obligations and liabilities under the Loan Agreement and Debenture, which would in turn affect the parties' entitlement to the Surplus Funds.

76 In light of the above analysis, we took the view that the Malaysian Writ Action did not possess any of the cumulative attributes required for it to constitute a "foreign proceeding" within the meaning of Art 2(*h*) of the

SG Model Law. Accordingly, we agreed with the Judge's decision not to recognise the Malaysian Writ Action as a foreign proceeding under Art 17 of the SG Model Law, whether as a foreign main proceeding or a foreign non-main proceeding.

Conclusion

77 For all of the above reasons, we dismissed the appeal.

Judith Prakash
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Chao Hick Tin
Senior Judge

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